

# INTERNATIONAL MUSIC COUNCIL 3RD WORLD FORUM ON MUSIC

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## Cultural Diversity – On the UNESCO Convention and about its Implementation

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### INTRODUCTION

It is a great honour and privilege for me to contribute to the Third World Forum on Music organised by the International Music Council. The purpose of this session is to discuss the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions<sup>2</sup> (hereinafter "the Convention"), and its implementation to support musical diversity.

In this exposé I will try to make an overview of the most important features of the Convention, its operative provisions and their practical implementation. To provide, in a short presentation, a comprehensive survey and assessment of the Convention and the broad fields it covers would, of course, be an impossible task. In the presentation that follows I have necessarily had to make choices, and some emphases and choices reflect my personal taste or interest, and in some cases they also reflect the views my government adopted in the process that led to the conclusion of the Convention.

The adoption of the Convention was a landmark in the development of international cultural policy. It was prepared and adopted under the auspices of UNESCO at a historically record speed.

Before the Convention, there were no binding international instruments on cultural diversity or cultural policy in general. In the field of culture, multilateral instruments, albeit important in their respective fields, existed only on defined measures and forms of cooperation.

Until the adoption of the Convention, cultural policy had not been addressed at the international level in a comprehensive manner. Many other inherently international policies that have an impact on cultural policies and measures already existed. Such policies were recognized in their dedicated

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<sup>2</sup> The Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted at the 33rd General Conference of UNESCO in Paris on 20 October 2005. The Convention entered into force on 18 March 2007, and on the date of the finalizing of this exposé (October 2009) there were 101 parties to the Convention, 100 States and the European Community.

instruments. The most prominent example of such policies, equipped with its own international treaty regime, is trade policy. Another example is the field of intellectual property rights, which is an area of law most relevant to culture and cultural policy.

Cultural policy has always been national by nature. The new Convention opened an avenue towards a new, more global dimension. The Convention has become the basic treaty for international and multilateral cultural policy.

## **BIRTH OF THE CONVENTION**

### ***Cultural Diversity – Focus of the Convention***

The adoption of the Convention was preceded by a march of the concepts of "diversity" and "cultural diversity" to the political forefront. Notes on some of the key steps should be made.

Earlier, ten and twenty years ago, there were no conventions, established practises on the use of the concept "cultural diversity". It was often connected only to international differences in national cultures; and the other use of the concept, namely putting emphasis on ethnic differences and similar phenomena, has left its traces in the debates.

An example outside UNESCO that may illustrate the evolution of the political use of the "diversity language" towards the present maturity may be found in Europe. In 1992, provisions on cultural cooperation were added into the Treaty establishing the European Community, extending the competence of the Community to the field of culture. The way the expression "diversity" was used already recognises the two main approaches to cultural diversity, the provisions refer to the "national and regional diversity" as well as to the "diversity of its (namely the Community's) cultures".<sup>3</sup>

The Report "Our Creative Diversity" submitted 1995 by the World Commission on Culture and Development represents a milestone within UNESCO in further cultivating the doctrine of cultural diversity. The report was based on a new and broader vision of cultural policy and development of culture, stressing the importance of cultural freedom, and recognising the potential of creativity and the role of cultural diversity in sustainable development, and as a source of creativity.

The establishment of "cultural diversity" as the most basic concept, the dogma, of cultural policy continued when UNESCO adopted in 2001 a Universal Declaration on Cultural Diversity. The Declaration tells a lot of cultural diversity as now seen by the draftsmen and representatives of the Member States of UNESCO, and the core of the definition of the Declaration centres around "the uniqueness and plurality of the identities of the groups and societies making up humankind". On the level of principles and argumentation the Declaration proclaims that "cultural diversity is as necessary for humankind as biodiversity is for nature".

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<sup>3</sup> As concerns the European Community and its Member States, provisions on culture / cultural cooperation were added to the Treaty establishing the European Community by the Maastricht Treaty in 1992. The chapeau of Article 151 (then 128) contains the following provision: "The Community shall 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." The Article continues in a noteworthy way in paragraph (4) developing further the use of the expression "diversity": "Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."

On regional level in Europe, the Council of Europe, just one year before UNESCO, adopted in 2000 a Declaration on Cultural Diversity of its own.<sup>4</sup> The definition of cultural diversity of this political document expresses in concrete terms additional relevant dimensions of the notion: "Cultural diversity is expressed in the co-existence and exchange of culturally different practises and in the provision and consumption of culturally different services and products". Later, some of these assumed global dimension in the Convention.

The Convention defines cultural diversity "for the purposes of this Convention". The definition represents the peak of the evolution so far.<sup>5</sup> Its core sentences embrace "cultures of groups and societies", and expressly state that "these expressions are passed on within and among groups and societies".<sup>6</sup>

To reflect the subject matter of the Convention, the expression "diversity of cultural expressions" was chosen in the title of the Convention. The "diversity of cultural expressions" is obviously a part, but only a part, of the larger concept of "cultural diversity"<sup>7</sup>, defined in the Convention.

Finally, the Convention is thus not intended to be an instrument on cultural diversity in general terms but, for many good reasons and practical purposes, it is limited to the "diversity of cultural expressions".

### ***Emergence of the Convention – connected to Trade***

The Convention undeniably has its origins in trade considerations – but the result is far from being only a response to the possible impact of trade policy on culture.

The initiative that eventually led to the preparation of the Convention came from Canada. In 1999 a task force (Cultural Industries Sectoral Advisory Group on International Trade (SAGIT)) set up by the Government gave a report titled "New Strategies for Culture and Trade. Canadian Culture in a Global World". The report called for the development of a new international instrument that would clarify the "grey area" at the intersection between culture and trade by laying out the ground rules for cultural policies and trade, and allow governments to maintain policies that promote their cultural industries. This instrument would acknowledge the importance of cultural diversity and introduce rules on measures that would be permitted to protect the diversity.

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<sup>4</sup> Council of Europe, Declaration on Cultural Diversity adopted by the Committee of Ministers at the 733rd meeting on 7 September 2000.

<sup>5</sup> Nina Obuljen has ably explained the emergence of the topic of cultural diversity on the global cultural policy agenda in her article, "From Our Creative Diversity to the Convention on Cultural Diversity", in Nina Obuljen and Joost Smiers (eds.), UNESCO's Convention on the Protection of the Diversity of Cultural Expressions: Making it Work. Institute for International Relations, Zagreb, 2006, 19 ff. Obuljen sees cultural diversity primarily as a political concept.

<sup>6</sup> The full definition in Article 4.1 reads as follows:

"'Cultural diversity' refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used."

<sup>7</sup> The expression "cultural diversity" is used in nine paragraphs in the Preamble and in paragraphs 6 and 7 of Article 2 on guiding principles, as well as in the heading and paragraph 1 of Article 18 establishing the International Fund for Cultural Diversity. Interestingly, the expression "cultural diversity" is not used in any other (operative or substantive) clauses of the Convention.

Before this Canadian initiative, during 1990's, both before and after the conclusion of the WTO Agreements, there had been an intensive debate on allowing special treatment for culture in the trade agreements. One part of the discussion was based on an alleged, already existing cultural exception in the WTO regime, and the other part was intended to introduce provisions on the special treatment of culture into that regime.<sup>8</sup>

In my home country, Finland, the positions on a new instrument dealing with cultural diversity were formulated in 1998 first when the discussion on a possible instrument on cultural diversity began. From the first Finnish Presidency of the European Union (1999) onwards, the Finnish Government considered the idea of such an instrument to be positive rather than negative. From 2001, the position was unambiguously positive and based on the stance that such a universal convention should be negotiated within UNESCO once the United States had reactivated its participation in the activities of the organization.<sup>9</sup>

After the political masterpiece of Canada, all who understood what had happened, soon realized that the debate had found a new track outside the WTO, and that this move had put an end to any credible continuation of a discussion on a cultural exception. For ages, trade in cultural goods had been covered, and continued to be covered by the GATT Agreement. All services, including cultural services, were already under the coverage of the recently concluded GATS Agreement.

The input of Canada was not limited to pointing out the direction but it also made sure that others came along. The minister of Canadian heritage, Sheila Copps, convened and established the International Network on Cultural Policy (INCP), an informal international platform for ministers of culture. Other Canadian initiatives were to establish the International Network for Cultural Diversity (INCD) and the Coalition for Cultural Diversity, which became forums of professionals and academics for analytic and political debates. The idea of a convention matured in these networks, and in 2003 a number of participating ministers conveyed to the Director General of UNESCO a draft text developed within the network, and requested that the matter be taken on UNESCO's agenda.<sup>10</sup>

The intergovernmental negotiations on the Convention started in September 2004.<sup>11</sup>

The implications of trade policy in the field of culture continued to be the main concern for some participants in the preparatory process. For them, the convention project was intended to provide, in a binding way, such a special treatment of culture or an extended room for manoeuvre for cultural policy for which there would be no space under the existing trade regime.

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<sup>8</sup> This is the situation that prevailed until the end of 1999. It is well illustrated in the conclusions adopted on 26 October 1999 by the Council of the European Union concerning the preparation of the Third WTO Ministerial Conference, which was held in Seattle. The conclusions contained an important element on cultural policy and cultural diversity: *"During the forthcoming WTO negotiations the Union will ensure, as in the Uruguay Round, that the Community and its Member States maintain the possibility to preserve and develop their capacity to define and implement their cultural and audiovisual policies for the purpose of preserving their cultural diversity"*.

<sup>9</sup> In the international discussion, there was serious deliberation as to where to place the instrument, outside the UN system, within the UN system, in an existing organisation, in a new organisation "World Culture Organisation", or in UNESCO. Hesitations were caused by the relative inefficiency of the organisation.

<sup>10</sup> The preparatory steps by UNESCO have been well documented on the UNESCO web site, including the preparation of feasibility or desirability assessments, convening a group of independent experts to prepare a preliminary draft of a convention, as well as the convening of an intergovernmental meeting to three sessions in 2004 and 2005. The emergence of the convention prior to this has been described by Nina Obuljen, op. cit.

<sup>11</sup> Garry Neil offers a comprehensive picture of the origins, and especially of the trade considerations that had an impact on the emergence of the Convention. "The Convention as a response to the cultural challenges of economic globalisation", op. cit. by Nina Obuljen and Joost Smiers (eds.), p. 41 ff.

For others, the objective of the effort to prepare a convention was to secure the necessary policy space within the framework of existing treaties. Both approaches were subject to defining the relationship between treaties.

At the same time, among all participants in the negotiations, there was a growing support for a genuine cultural policy objective to strengthen international cooperation for cultural diversity, and to celebrate culture in general, independently of trade concerns.

Many considered that in the universe of treaties there was a gap for a new convention, for an instrument on international cultural policy, and this vacuum should be filled in an elevated way.<sup>12</sup>

There were, however, and there still may be, illusions about the possible function of the Convention in relation to trade agreements.

In the negotiations on the Convention, concerns were signalled from corners where the integrity and immunity of international trade rules were considered to be sacrosanct. This was also manifested at the time of the adoption of the Convention.<sup>13</sup>

One reason for concerns of some delegations during the preparatory process was that the preliminary draft of the Convention, including subsequent texts, used terms that they felt belonged to "trade language", such as cultural "goods" and "services". In order to include a more holistic cultural approach to the Convention and to relieve the trade concerns, the dimension of "activities" was added to the definition of "goods and services". This is most relevant in terms of the scope and function of the Convention.

During the negotiations, probably many forgot that trade may also be beneficial for cultural diversity. Trade builds bridges between peoples and may act as a strong cohesive factor, and it adds to the cultural diversity by enhancing cultural exchange and promoting access to goods and services carrying cultural expressions. It also provides a basis for the economy of culture, and income for creators, producers, distributors and investors.

The adverse effect of trade on cultural diversity may be a result from an overly dominant position of some goods and services on the market. One possible repercussion of a non-diverse supply of cultural expressions might be a unifying or homogenising effect on cultures. These belong to the reasons why some defenders of culture take the view that trade liberalisation should have its limits. To the representatives of this philosophy, obligations and commitments should be specifically designed so as not to compromise the interests of culture.

This brings us to the question of values.

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<sup>12</sup> About the "filling a lacuna function" of the Convention, see *e.g.* Christoph Beat Graber, "The New UNESCO Convention on Cultural Diversity: a Counterbalance to the WTO", *Journal of International Economic Law* 9(3), 553-574.

<sup>13</sup> The Convention was adopted at the UNESCO General Conference by a majority of 148 to two, the United States and Israel. Four states abstained, namely Australia, Honduras, Nicaragua and Liberia. In connection with the adoption of the Convention, at the proposal of Japan, the General Conference adopted a Resolution containing the following recital: "Aware that this Convention pertains to the field of culture, UNESCO being the unique agency with responsibility within the United Nation system, anticipating the entry into force of the Convention, and looking forward to its effective and appropriate implementation forming a coherent part within the system international instruments,...". The obvious intended effect of this resolution was to distance the Convention from the instruments belonging to the international trade regime. It was acceptable to all.

Basic cultural policy principles like the promotion of creativity, strengthening cultural identity and participation in the cultural life are integral parts of general public good. It is difficult, if not impossible, to conceive a democratic society which would not somehow incorporate them as goals in its policy.

Cultural policy aims at promoting public good and values that are as crucial and as profoundly justified as are the values promoted by trade policy (fair and open competition, competitiveness, economic welfare), and ultimately, at least for an idealistic mind, the two policies share the same goal of facilitating the attainment of good life for all.

The UNESCO cultural Convention and the treaties on trade policy are on the same high level.

## CHARACTERISATION OF THE CONVENTION

### *Legal Nature and Content of the Convention*

The Convention provides a binding legal framework for its field of operation. It recognises that cultural activities, goods and services are at the same time objects for economic activities and carriers of cultural expressions.

The Convention reaffirms the right of the contracting parties to their cultural policies and measures and it acknowledges the distinctive nature of cultural goods and services. The aims of the Convention include encouraging dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace. In the operative provisions, this is transformed into clauses on access to diverse cultural expressions, i.e. internal and cross-border circulation of cultural goods and services.

Before and during the preparatory process the expectation in my own country was that the new convention should clearly define the rights and obligations of the parties in the promotion of cultural diversity. It was thought that an instrument to this effect should, at least somehow, be enforceable in the interest of preserving and developing cultural diversity. This would have been subject to setting standards and requirements concerning the application of the convention. As such, our approach corresponded largely with that put forward by the SAGIT report.

The end result was, however, quite different. The provisions on the rights of the parties of the Convention are normally permissive clauses that reiterate or reaffirm something that is already in their discretion. Most of these acts and measures are activities that the parties may take irrespective of the Convention. The permissive clauses use the form "may"<sup>14</sup>. Many of the provisions stipulating the obligations of the parties are soft best-endeavour clauses using the form "shall endeavour to".<sup>15</sup> What these provision require, is just to make an effort to fulfil the obligation.

There are also provisions implying strict obligations and using the obligatory form "shall".<sup>16</sup> The material content of the obligations, however, often reduce the level of obligations.

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<sup>14</sup> Articles 6, 8.1 and 8.2,

<sup>15</sup> Articles 7, 10 (c), and 12, 13 and 14.

<sup>16</sup> Articles 8.2, 9, 10(a) and 19(b), 15, 16 and 17.

Many provisions are such in nature that the parties are intended to assume obligations only in regard of themselves and their own territory. They are in a context, in a treaty, that implies commitments towards others but in fact they are quasi-unilateral promises by nature.

The substantive international obligations of the parties towards each other may be located in the areas of international cooperation and development cooperation, the integration of culture into development policies, access to cultural expressions, the protection of cultural expressions, collaborative arrangements and a preferential treatment for developing countries<sup>17</sup>.

The Convention is not intended to grant subjective rights or obligations to individuals. The Convention is applicable between parties who are states, or regional economic integration organisations ("REIO"). Thus, the Convention operates on a government-to-government level, and its obligations and commitments imply binding effects only for governments and REIOs.

The Convention does not contain any provisions that would deal with the level of obligations in qualitative or quantitative terms, or defining what should be done in order to fulfil an obligation. This means that there is no required standard of commitment in the Convention.

Such standards would only be meaningful if the convention contained clearly defined rights and obligations in an obligatory form, and in such a case there could also be a mechanism for a dispute settlement leading to binding resolutions. In the Convention, there are provisions on dispute settlement in the articles and in an annex but they do not lead to a binding resolution. Only another party may invoke dispute settlement, but considering the nature of the obligations it may be assumed that such need would not arise.

The fact that the Convention is "soft" in the legal sense by no means diminishes its value as a multi-purpose tool for international cooperation and cultural policy. The Convention is what was politically possible to achieve in a short time. The present nature of the Convention makes it much easier for governments to consider its ratification than the dream earlier envisioned by my own delegation. Sometimes flexibility becomes an element of strength.

The Convention is intended to be applied both by countries which have highly developed cultural policies and cultural industries, and by countries whose policies and industries are not so developed. For the former, the Convention's function is mainly to act as a platform for development cooperation. For the latter the Convention provides a contact forum as well as a vehicle for exchange of information, transfer of knowledge and knowhow, models and patterns, and assistance for the development of cultural policies and measures.

The needs of developing countries are subject to specific attention throughout the Convention, notably in the provisions on cooperation for development and in the provisions establishing the International Fund for Cultural Diversity.

To the transversal themes of the Convention belongs the position of cultural industries, as well as the position of artists and other cultural professionals.

The characterisation of the Convention will be continued below in the context of the description of the operative provisions and their implementation.

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<sup>17</sup> Articles 7(b), 8 and 17, 10(b), 12, 13, 14, 15, 16.

## *Scope of the Convention*

The provisions on the scope of any international instrument are of utmost importance and decisive for the role, function, and practical application of the instrument. The provisions on the scope govern the application of the operative provisions of the instrument.

Well-crafted provisions on the scope, when such provisions are needed, serve greatly the objective of good international law making. In the case of this Convention, such provisions were deemed to be necessary, and they serve both very important legal purposes and very important political purposes.

The most decisive provisions in this respect are those in a dedicated article on the scope, and a number of definitions that were agreed upon and laid down as part of the legally binding text.

To determine whether everything is in its right place in the Convention, we should first take a look at the provisions on the scope of the instrument in Article 3 which reads as follows:

*"This Convention shall apply to the policies and measures adopted by the Parties related to the protection and promotion of the diversity of cultural expressions."*

From the wording it may be deduced that the Convention applies to *any kind of* policies and measures adopted by the parties that are *"related to"* the protection and promotion of the diversity of cultural expressions.

In the first draft, in the preparatory process, this provision was drastically different. The Convention would have been applied "to the cultural policies and measures that States Parties take for the protection and promotion of the diversity of cultural expressions". The scope of the instrument would have been narrow, and confined to policies and measures intended to address ("are taken for the protection and promotion of...") the diversity of cultural expressions.

The expression "cultural policies", which was crucial for the reading of the preliminary draft, was defined – in broad terms – as referring to policies which "address or affect any aspect of the cultural expressions".<sup>18</sup> At that stage, the intention was to attach a non-exhaustive list of cultural policies to the Convention.

In the preparatory process, the provisions in Article 3 on the scope, as well as the definition of "cultural policies and measures", were refined. For a policy or a measure to fall under the scope of the Convention according to Article 3, it is not necessary that it pertains to "cultural policies and measures". What is necessary is that the policy or measure, of whatever kind, "relates to" the principal subject matter of the Convention, namely the diversity of cultural expressions. The interpretation of the expression "relate to" is virtually the same as that of the expression "address or affect".

As a result of this, the scope of the Convention is very broad.

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<sup>18</sup> The full broad definition of cultural policies in the preliminary draft was as follows: " 'Cultural policies' refer to policies, whether at the local, regional, national or international level, which address or affect any aspect of the cultural expressions of an individual, community, or society, including the creation, production, distribution, dissemination of, and access to, cultural goods and services".



As to the definition of "cultural policies and measures", just the contrary happened. It was narrowed down to a definition in Article 4.6 which reads as follows:

*" 'Cultural policies and measures' refers to those policies and measures relating to culture, whether at the local, national, regional or international level that are either focused on culture as such or are designed to have a direct effect on cultural expressions of individuals, groups or societies, including on the creation, production, dissemination, distribution of and access to cultural activities, goods and services".*

Now, what is said in the Convention about "cultural policies and measures" is applicable to dedicated policies and measures, confined to the field of culture. This is a logical and more than well-grounded solution. The broad scope of the Convention and an honest and genuine definition of cultural policies and measures signify a victory for culture.

Having arrived at this point, the main questions concerning the scope of the Convention might already be well covered. The picture could, however, be complemented by presenting a series of other key definitions important for the scope. They form a remarkable series of interlinked definitions, a focused chain, without resulting in a circular argument.

"Cultural activities, goods and services", as defined in Article 4.4 refer to "those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have."

"Cultural expressions", which is the defining factor for the foregoing, are defined in Article 4.3 as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content".

"Cultural content", which is the defining factor for the foregoing, according to Article 4.2, "refers to the symbolic meaning, artistic dimension and cultural values that originate from or express cultural identities".

For a still more profound understanding of the scope of the Convention, we do well to briefly examine the "protection and promotion" part of Article 3 on the scope, and of the title of the Convention. While "promotion" is not defined in the Convention, its Article 4.7 contains definitions of "protection" and "to protect".

*" 'Protection' means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions. 'Protect' means to adopt such measures."*

These two definitions were added to the Convention for the purpose of clarifying its role and function in relation to international instruments in the field of trade, and to allay the fears that some parties might interpret the term "protection" in the same way as it is sometimes understood in the context of trade instruments, and thus attempt to use the Convention to justify protectionist measures.<sup>19</sup>

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<sup>19</sup> The possible interference of the Convention with the principles and instruments in the field of international trade has been subject to a thorough consideration of its own. In the preparatory process, several definitions and operative provisions were carefully formulated in order to avoid a conflict between the Convention and other instruments. Article 20 of the Convention on the relationship with other instruments is the most important in this respect. Another example of various careful formulations is the definition of "cultural goods and services". It was pointed out by some delegations

### ***Relation of the Convention to Intellectual Property***

Before the adoption of the Convention there were high expectations on how the Convention could clarify the role of intellectual property rights, and especially of copyright and related rights in its field of application, and bring added value for the copyright system in general. Therefore there is good reason to shed light on what happened.

In the preparatory process, explicit references to intellectual property rights were deleted from the operative provisions of the Convention. A paragraph on the importance of intellectual property rights was inserted in paragraph 17 of the Preamble:

*"Recognizing the importance of intellectual property rights in sustaining those involved in cultural creativity,"*

There were two main reasons for dropping the clauses on intellectual property rights. First, several delegations were of the opinion that the provisions in the preliminary draft were not comprehensive and strong enough. In the negotiations, however, it became clear that it was far from easy to reach consensus on additional or clarified language. Second, in the judgement of a number of delegations, a mere reference to the existing international instruments did not bring much added value to what already existed. Such clauses would have been redundant in view of the existing regime of intellectual property rights treaties and, if formulated deficiently or inadequately, their status and significance would have been questionable.

It was clear that the Convention was, in any case, not intended to become a dedicated intellectual property treaty but a treaty to protect and promote the diversity of cultural expressions.

Even if there are no direct references to intellectual property rights in the operative provisions of the Convention, a closer look at the definitions shows that these rights reside in the substance of the Convention. "Cultural expressions", whose diversity is its focus, are defined as "those expressions that result from the creativity of individuals, groups and societies". The expressions that result from creativity normally are works, results of their authors' intellectual efforts, which are the very objects of copyright.

"Cultural activities, goods and services", for their part, are defined as "those activities, goods and services, which at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have". Such activities include events, the content of which may be a public performance of a musical or other kind of work protected by copyright. The most typical cultural goods and services which embody or convey cultural expressions are probably goods and services the content of which is subject matter protected by copyright or related rights, such as books, musical and video recordings, and on-demand offerings of cultural content.

As copyright grants the author the power of control over the use of a manifestation of cultural expression – a work – it may in some instances also be conceived as an obstacle to cultural

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that the terms "goods and services" are "trade language", and that their use in this Convention might cause problems. In order to emphasize the holistic dimension of the Convention, the word "activities" was added in the definition, which now refers to an entity of "cultural activities, goods and services". The elements of this entity are not separately defined.

diversity.<sup>20</sup> A certain cultural expression may not flow freely without the conditions of its flowing having been met in copyright terms. Copyright, if respected, may have an impact on access, distribution, or communication to the public of protected materials. This effect is, however, balanced by some factors that are inherent elements of the copyright system. Copyright is limited in time; when the term has elapsed, the object of protection falls into public domain, and can be freely used by everybody.

The economic significance and potential of copyright for creative industries which are dependent on it and related rights is generally recognized. Their contribution to the national economies has been a surprise to many. Creative industries or copyright-based industries provide jobs and opportunities for employment in regions and areas where the availability of financial and natural resources may be scarce. In this way, these industries may contribute to the Millennium Goals of the United Nations and to poverty eradication.

The copyright system is considered to be one of the most important preconditions for the creative economy. Copyright not only enhances but also generates economy, and is part of a meaningful economic organization of society. It allows different economic models from strict reliance on exclusive rights in protected subject matter to more open models including invoking rights in case of commercial uses and permitting free use in social media.

An important part of the implementation of the Convention can be done by promoting the functioning of the copyright system and business models based on licensing.

A methodology for measuring the contribution of copyright-based industries to the national economy already exists, prepared under the auspices of WIPO and implemented by the creative industries sector of that organization.<sup>21</sup> It has already been applied in several study projects in both developed and developing countries.

### ***Music and the Convention***

There are no or few music specific provisions in the Convention<sup>22</sup>. Practically the whole Convention is applicable to music or music-related activities. This is true as concerns the provisions on both the rights and obligations of parties, including the provisions on international cooperation and cooperation for development. All these provisions allow policies or measures to promote and protect cultural expressions or set obligations to parties concerning the introduction of such measures in the field of music.

The operative provisions are applicable to the creation of music and to musical performances, the position of artists in the field of music, the mobility of artists across borders, and the conditions of their work. The applicability extends to the musical production and access to means of production, dissemination and distribution of musical productions in the form of cultural goods and services,

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<sup>20</sup> See e.g. Christophe Germann, "Towards a *Global Cultural Contract* to counter trade related cultural discrimination", op. cit by Nina Obuljen and Joost Smiers (eds.), 317 ff. Germann extends his exposé beyond copyright and discusses in broad terms the WTO agreements.

<sup>21</sup> WIPO Guide on Surveying the Economic Contribution of the Copyright-based Industries. WIPO Publication Number: 893, 2003.

<sup>22</sup> The only direct reference to music in the Convention is in Article 14(a)(vi). The parties shall endeavour to support cooperation, by strengthening cultural industries in developing countries through: "encouraging appropriate collaboration between developed and developing countries in the areas, *inter alia*, of music and film". There are many other articles that tacitly touch music but are directly applicable.

including commercial distribution, *i.e.* trade. The provisions on access are applicable to access to musical cultural expressions, and entry to the market. The Convention is quite articulate in its objectives concerning the strengthening of cultural industries, and thus the position of enterprises. In addition, the Convention is applicable to enhancing financial support, developing public and private institutions in the field of music, as well as different genres of capacity building and education. Finally the provisions on collaborative arrangements and promotion of the use of new technology are applicable to different activities that involve music.

Music is a fantastic test area for the application of the Convention and the implementation of it in concrete terms. Music is a universal form of cultural expression that crosses the borders more easily than most other expressions. It takes the form of living music, as a hobby and as a profession, and as non-commercial and commercial activity, and also as an industry. Musical expressions in the form of goods and services are object of trade and cultural exchange to a high degree.

Furthermore, music is strong and present in all countries, both in developed and developing countries. It touches everybody, it is present everywhere, and it has an important role in virtually every culture. To a degree, the understanding of music is independent of languages and cultural traditions.

Concerning the future implementation of the Convention, music is a most promising case of application because it boosts a lot of professionals capable of international cooperation, including national, regional and international organisations and professional institutions.

Capacity, professionalism and international contact networks already exist in the international arena of music.

Finally, music is historically, in good and in bad, a pioneering branch of culture. Technological development has always had immediate impact on music, both in expanding its potential and giving rise to problems. Music has always been the part of culture that has been one of the first test laboratories for new technologies.

This is especially true also as regards copyright and related rights, which are the backbone of music industry economy and income for creators and artists.

### ***Portal to the Convention - Preamble, Objectives and Principles***

The Convention contains a Preamble and, in the customary UNESCO style, the first two articles are two sets of introductory clauses, provisions on objectives and on guiding principles.

These parts of the Convention function as a portal into it.

The Preamble to the Convention explains the rationale behind the adoption of the instrument. It takes the form of a longer series of statements which have the quality of political declarations on the state of will. The Preamble supports the general understanding of the Convention, and especially its political context.

The provisions on objectives are more focussed on the substance of the Convention than the Preamble. The objectives are a summary of the goals set for the Convention on a very high level.

Some of these provisions are redundant, overlapping with the operative provisions of the Convention, but some of them have an independent value as statements. One of the most important of the latter type is Article 1(g) which declares, politically, that one of the objectives of the Convention is “to give recognition to the distinctive nature of cultural activities, goods and services”.

The provisions on guiding principles are a different chapter. These provisions are a memory list of certain relevant principles that exist outside of the Convention, and because of their material connection to the substantive area of the Convention, are included in it. Some of them refer to legal principles (human rights, sovereignty), others refer to principles that are monuments of the human condition (equal dignity, international solidarity, sustainable development, equitable access and the principle of openness and balance).

As the first guiding principle for the protection and promotion of cultural expressions, the Convention takes on board human rights, anchored to the principle of human rights and fundamental freedoms, including freedom of expression, information and communication, and the freedom of individuals to choose cultural expressions.<sup>23 24</sup>

Two sides of human rights are covered. First it is made clear that cultural diversity may be protected and promoted only if human rights are guaranteed. This principle reminds that the human rights set limits on what can be done to achieve the goals of the Convention. The other side of the coin is that the Convention makes clear that no one may invoke the provisions of this Convention in order to infringe human rights. These human rights are enshrined *i.a.* in the Universal Declaration of Human Rights. The human rights are established in the international law, and even without laying down these principles the Convention could not violate them.

The provisions on objectives and principles cannot be directly, in a self-standing way, implemented as such. They are a guide and a tool for interpreting, understanding and implementing the material, operative provisions, and to be taken into account when the parties plan and introduce their measures to implement the Convention.

The objectives and principles take on an independent role in the Convention in one sense. According to Article 21 on international consultation and coordination, the parties have an obligation to promote the objectives and principles of the Convention in other international forums. This obligation of the parties is under the chapter “Relationship to other Instruments”, and it must be understood to be applicable when parties engage in negotiations on new obligations. The second half of this Article contains an obligation of parties to consult each others in such situations.

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<sup>23</sup> The Convention, in Article 2.1, refers to the “human rights and fundamental freedoms” “as enshrined in the Universal Declaration of Human Rights or guaranteed by international law”. Article 5.1 of the Convention refers to “the principles of international law and universally recognised human rights instruments”. Clauses on “the protection of moral and material interests resulting of any scientific, literary or artistic production of which he is the author”, are found in Article 27.2 of the Universal Declaration of Human Rights of 1948, and Article 15.1(c) of the International Covenant on Economic, Social and Cultural Rights of 1976.

<sup>24</sup> See Hannu Wager, “Copyright and the Promotion of Cultural Diversity”, in Hildegard Schneider and Peter van den Bossche (eds.), *Protection of Cultural Diversity from an International and European Perspective*. Intersentia, November 2008, 197 ff.

## OPERATIVE PROVISIONS OF THE CONVENTION

In this chapter an overview is made of the operative parts of the Convention with a view to its Implementation.

Within UNESCO, the Convention forms a micro-cosmos of its own. It is part of UNESCO, but it operates on the basis of its own “book”, and it has its own mechanisms of operation. The Secretariat of UNESCO has a crucial role in guaranteeing its functioning and implementation.

In the case of some provisions of the Convention referred to in the following, it is sometimes a matter of taste as to what elements constitute rights or obligations.

### *Operational Guidelines*

At its second session in June 2009 the Conference of Parties approved a set of operative guidelines for implementation<sup>25</sup>. The Guidelines had been under preparation for two years in the Intergovernmental Committee and the approved set covers a major part of the operative provisions of the Convention. The adopted guidelines cover the following provisions:

- Measures to promote and protect cultural expressions (Articles 7, 8 and 17)
- The role and participation of civil society (Article 11)
- The integration of culture in sustainable development (Article 13)
- Cooperation for development (Article 14)
- Partnerships (Article 15)
- Preferential treatment for developing countries (Article 16)
- The use of the resources on the International Fund for Cultural Diversity (Article 18)

The preparation of operational guidelines continues. At its June 2009 session the Conference of Parties considered that Article 12 (Promotion of international cooperation) is already of an operational character and needs no further explanation. It was decided that draft operational guidelines concerning Articles 9, 10 and 19 (Information sharing and transparency, education and public awareness, exchange, and analysis and dissemination of information) will be presented to the next session.

Presently, there are no operational guidelines on Articles 5 and 6, and 20 – 21 (General rule regarding rights and obligation, rights of parties at the national level, relation to other treaties (etc), and international consultation and coordination).

The operational guidelines have been subject to hard professional work by the UNESCO Secretariat as well as detailed considerations and negotiations by the parties of the Convention during the first years of its existence. The adopted operational guidelines represent an added value to the text of the Convention, as they explain how to understand the ways of implementation, and they may also reflect the form and level of commitment of the parties that have actively participated in their preparation.

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<sup>25</sup> The Resolution on the approval of the operational guidelines is found in document CE/09/2.CP/210/Res., Paris, 17 June 2009. The texts of the adopted operational guidelines are published on the UNESCO web site.

### ***Rights of the Parties***

The provisions on the general principles regarding the rights of the parties of the Convention in Article 5 are the most central provisions of the whole Convention.

The Convention, in Article 5, reaffirms the sovereign right of the parties to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions. The provisions include, as a framework condition, a detailed reference to the human rights principles and instruments.<sup>26</sup>

In cultural policies themselves, there are many objectives that correspond to each aspect of cultural diversity, such as linguistic policy objectives, objectives to promote arts and artistic expression, objectives to safeguard and enhance cultural heritage.

The general rule in Article 5 is followed by Article 6 on rights of parties at the national level. Article 6 includes an exemplification of what the concrete actions could be.

The provisions in Article 6 are of a permissive nature, formulated in “may-language”. As said before, they reiterate or reaffirm what the states may do, being measures that states might also be permitted to do irrespective of the Convention.

Among the measures aimed at protecting and promoting the diversity of cultural expressions, provisions in Article 6 offer a list that includes the following:

- regulatory measures for protecting and promoting the diversity of cultural expressions
- providing opportunities for domestic cultural activities, goods and services, for the creation, dissemination, and enjoyment of these,
- providing domestic access to means of production and dissemination,
- providing public financial assistance,
- encouraging non-profit organizations, public and private institutions and artists, to develop the circulation of cultural goods and services
- establishing and supporting public institutions
- nurturing and supporting artists, and
- enhancing the diversity of the media.

An extended exemplification of the tools, policies and measures might include positive measures, such as subsidies, grants and other direct financial support for individual creators, subsidies for cultural enterprises, preferential tax rules, restrictions on foreign ownership of domestic cultural companies, content quotas, production subsidies, regulatory measures, support of cultural industries, and exemptions of competition policy rules.

The measures may also take the form of commitments to certain treatment, e.g. national treatment according to co-production agreements between governments.

Cultural policy embraces also maintaining of public institutions, infrastructures and systems, like the system of libraries and museums, and the system of training and education in the fields of arts, heritage and culture

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<sup>26</sup> See also footnote 23. Article 5 refers, in addition to "the principles of international law and universally recognised human rights instruments" to the Charter of the United Nations.

## ***Obligations of the Parties***

*Measures to promote cultural expressions.* According to Article 7, the parties shall endeavour to create in their territory an environment which encourages individuals and groups to create, produce, disseminate, distribute and have access to their own cultural expressions, to have access to cultural expressions from within their territory as well as from other countries of the world. Parties shall also endeavour to recognize the important contribution of artists and others involved in the creative process, as well as cultural communities and organisations.

In this area, the *operational guidelines* place emphasis on policy instruments, training instruments and best practices. The instrument could be related to different fields, legislative, creation/production/distribution, financial support, advocacy and promotion, export and import strategies, and access strategies.

Furthermore, the operative guidelines attach attention to the technological changes and stress that policy measures and instruments should, whenever possible, be based on existing structures and networks. These structures could be developed into strategic platforms.

*Information sharing and transparency.* According to the provisions of Article 9 an information sharing mechanism, reporting at four years' interval on measures taken, and a network of contact points for information sharing is established.

*Education and public awareness.* According to Article 10 the parties shall promote understanding of the importance of cultural diversity through educational and public awareness programmes. They shall also encourage creativity and strengthen production capacities by setting up educational and exchange programmes in the field of cultural industries.

*Participation of civil society.* Article 11 acknowledges the fundamental role of civil society, and it invites the parties to encourage participation of civil society in the implementation of the Convention. The *operational guidelines* state that the civil society has a potential to act as an innovator and change agent in the implementation of the Convention. The civil society may have a role *i.a.* in the capacity-building, carrying out data collection, promotion of specific cultural expressions, and advocating the widespread ratification of the Convention.

*Promotion of international cooperation.* Article 12 invites the parties into bilateral, regional and international cooperation in several fields. Such areas include dialogue on cultural policy, enhancement of the public sector's management capacities, reinforcement of partnerships with civil society and the private sector, promotion of the use of new technologies, and conclusion of co-production and co-distribution agreements.

*Integration of culture in sustainable development.* Parties should, according to Article 13, integrate culture in their development policies, to create conditions conducive to sustainable development.

The operative guidelines start from the statement that "sustainable development is the result of a collection of policies and measures suited to national and local contexts that maintain the harmony of the local cultural ecosystem." The guidelines stress the importance of the role of education, the recognition of the role of women, and the use of new technologies. The parties are encouraged to



facilitate the elaboration of statistical indicators in order to better evaluate the role of culture in sustainable development.

*Collaborative arrangements.* Articles 15 invites parties to the development of partnerships between and within the public and private sectors, in order to cooperate with developing countries.

*Measures to protect cultural expressions.* Articles 8 and 17 of the Convention a mechanism according to which situations where cultural expressions are at risk of extinction or under a serious threat, or other wise in need of urgent safeguarding, may be handled. A party may determine the existence of such situations its territory, and take all appropriate measures. The measures shall be reported to the Intergovernmental Committee, which may issue appropriate recommendations. According to Article 17 all parties shall cooperate in providing assistance, in particular to developing countries.

According to the *operative guidelines* the nature of the threats to cultural expressions can be *inter alia* cultural, physical or economic. When reporting to the Intergovernmental Committee about a special situation a party may, if necessary, appeal for international cooperation and assistance.

### ***Cooperation for Development***

The provisions of Article 14 on cooperation for development concentrate on the strengthening of the cultural industries in developing countries, capacity-building through the exchange of information and expertise, technology transfer, and financial support through the International Fund for Cultural Diversity, as well in the form of official development assistance, and *i.a.* low interest loans and grants. The provisions refer among other things to the collaboration between developed and developing countries in, *inter alia*, the areas of music and film.

The implementation of the Convention belongs to a large extent to the realm of development cooperation, and especially that for the benefit of the least-developed countries.

The *operative guidelines* stress that the developing countries should endeavour to identify their priorities, specific needs and interests with regard to the protection and promotion of the diversity of cultural expressions, and to produce an operational action plan to optimise international cooperation. The parties are invited to integrate cultural sector within framework plans for official development assistance. The Secretariat of UNESCO will support this cooperation by collecting information on best practices regarding cooperation for development to the benefit of the parties.

### ***Preferential Treatment for Developing Countries***

Article 16 of the Convention contains an obligation to the developed countries:

*"Developed countries shall facilitate cultural exchanges with developing countries by granting, through the appropriate institutional and legal frameworks, preferential treatment to artists and other cultural professionals and practitioners, as well as cultural goods and services from developing countries."*

The provisions are connected to one of the written objectives of the Convention, manifesting the goal to ensure wider and balanced cultural exchanges. The required treatment shall be accorded to

artists and other cultural professionals and practitioners, and cultural goods and services from developing countries. "Preferential treatment" seemingly refers to trade, and the substantive content of the provisions is about market access. Evidently, this treatment means "positive discrimination" in developed countries of artists as well as cultural goods and services from developing countries.

The Secretariat of UNESCO undertook, according to the decisions of the Intergovernmental Committee, an exceptionally detailed and careful preparation of the operational guidelines on this article. A detailed questionnaire was sent to Member States and civil society organisations. The Secretariat selected six qualified experts to offer factual information, analysis, case studies and conclusions concerning preferential treatment.<sup>27</sup> Many of the findings and evaluations of the experts were taken on board in the operative guidelines.

There was a consensus that preferential treatment under the Convention "is not about multilateral trade liberalisation", and is not something that deviates from the general trade law. It is a novelty and in the cultural sector, and a new rule for the international cultural arena. The preferential treatment can be a set of coordinated tools from different policy fields, like trade, development, cultural policy. There was a reference made to the Cultural Protocol attached to the EU – Cariforum Economic Partnership Agreement.<sup>28</sup> In the admirable work of experts there was a multi-disciplinary essay to define the phenomenon, in a specified way, or in a more holistic way.<sup>29</sup>

The operational guidelines confirm that preferential treatment under Article 16 is wider than the narrow trade meaning. It is to be understood as having both a cultural and a trade component.

The measures of implementation may include facilitating movement, including temporary stay, of artists and other professionals, through improved access to visas, avoidance of double taxation, organising residences etc. Access of goods and services to developed countries may be facilitated by different mechanisms, including co-production and co-distribution agreements and content promotion measures.

One of the interpretations, sympathetic for a broad notion of implementation of the Convention is, that the very existence of specific measures or mechanisms in developed countries for the benefit of developing countries, may amount to preferential treatment of culture.

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<sup>27</sup> Experts' reports on preferential treatment for developing countries (Article 16 of the Convention) are found in document CE/08/2.IGC/8, 17 September, 2008, on the UNESCO web site. The experts were Mr Bilel Aboudi, Deputy Director, International Cooperation and Cultural Industries Development, Ministry of Culture and Heritage Safeguard, Tunisia, Mr Edouard Bourcieu, Directorate General Trade, European Commission, European Community, Prof. Mandlenkosi Stanley Makhanya, Pro-Vice-Chancellor, University of South Africa, South Africa, Dr Keith Nurse, Director of the Shridath Ramphal Centre for International Trade Law, Policy and Services, University of the West Indies, Barbados, Prof. Madhukar Sinha, Center for WTO Studies, New Delhi, India, and Ms Vera Helena Thorstensen, Economic Advisor to the Mission of Brazil in Geneva, WTO negotiations on trade policy issues, Brazil.

<sup>28</sup> As a step in implementation of the Convention, the European Community and its Member States have started to include Protocols on Cultural Cooperation in its Economic Partnership Agreement (EPA) and Free Trade Agreements. An example of such protocols may be found in EPA between the CARIFORUM States and the European Community and its Member States.

<sup>29</sup> E.g., Bilel Aboudi developed a "cultural sphere definition" for preferential treatment, as follows: "any explicit cultural policy objective, of measures, or mechanisms, expressed by a developed country, targeting capacity building for the cultural sector of developing countries, and the access of their goods, services and artists and cultural professionals to its cultural sphere (market or activities) is a preferential treatment."

### *Fund for Cultural Diversity*

An International Fund for Cultural Diversity was established by the Convention. The provisions on the Fund were added to the Convention in the course of the negotiating process. The Fund, if successful in channelling resources, could be one of the most important instruments for the implementation of the Convention.

The Fund may receive resources from different sources but as far as the parties are concerned the Fund is based on voluntary contributions. In this form the constitution of the Fund matches up for instance with my personal opinion. In the course of preparatory work there was an intensive discussion on whether the fund should be based on the principle of obligatory contributions. The principle of obligatory contributions would in practice have implied the introduction of a “glass roof” for the total amount of funds to be collected. In addition, an obligatory participation in financing the fund would be a political factor slowing down the pace of ratifications.

The financing of a voluntary fund is based on the willingness and possibilities of each contributor. The expectation and the message is that the minimum contribution should be one per cent of a Member State's contribution to the general budget of the organisation.

According to the decision of the first Conference of Parties in June 2007, the Fund will be operated as a “special account” according to the Financial Regulations of the organisation. This decision is not a mere technicality. Article 18.1 of the Convention stipulates the following:

*“The Fund shall consist of funds-in-trust established in accordance with the Financial Regulations of UNESCO.”*

A “funds-in-trust” and a “special account” are different instruments under the Financial Regulations of UNESCO. A special account is a mechanism that does not allow specific conditions to be attached to the financial contribution. A funds-in-trust is a vehicle that can be used also by those donors who, for different reasons want to “ earmark” their contribution. The operational guidelines refer to the reason of this choice to rely on the model of a special account by indicating that the Fund “given its multi-donor nature, cannot receive tied or earmarked contributions”.

Article 18.6 of the Convention lays down as a principle to the contributions that: “No political, economic or other conditions that are incompatible with the objectives of this Convention may be attached to contributions made to the Fund.” This provision is clearly intended to indicate that conditions that make a contribution counterproductive to the achievement of the objectives of the Convention are not acceptable. Consequently, according to the Convention, all conditions that are in accordance with the objectives of the Convention, as these are laid down in Article 1, should be acceptable.

The decision to use the model of a special account precludes contributions to the Fund which are tied to specific purposes in the implementation of the Convention. A minor point is that the model of a special account would, in principle, even preclude contributions that are equipped with conditions that make them acceptable under the Criteria of Official Development Assistance of OECD. This matter has been solved in the discussions in the Intergovernmental Committee.

It seems that a Fund respecting the freedom of the donors in accordance with the provisions of the Convention, and envisaged in the text of the Convention, does not yet exist in the strict sense. For the success of the Convention it would be beneficial if the obstacles of financing from parties that

might have specific targets and objectives in mind would be removed. This could take place by establishing another fund in accordance with Article 18 of the Convention, or still reconsidering the principles underlying the present Fund.

The UNESCO Secretariat has started, on the basis of the discussions in the Intergovernmental Committee, the planning of a fundraising strategy.<sup>30</sup>

The operational guidelines adopted in June 2009 stress a number of important general aspects, including the need to meet the needs and priorities of the beneficiary developing countries, the importance to achieve concrete and sustainable results and structural impacts, the principle of ownership by the beneficiaries, the need to focus on programmes and ensure minimum costs, and to avoid spreading resources too thinly or supporting sporadic activities.

For the support from the Fund, the guidelines furthermore list the desired fields of activity, beneficiaries, the procedures for the submission of funding requests, decision making, and evaluation and reporting of the results.

### *Organs of the Convention*

The Conference of Parties is the plenary and supreme body of the Convention. Two sessions of the Conference have been held so far, in June 2007 and in June 2009. The Conference elects the members of the Intergovernmental Committee and ratifies the most important decisions on the functioning of the Convention. The Conference convenes on a biannual basis.

The Intergovernmental Committee is composed of representatives of 24 parties of the Convention, and this body meets annually. The composition of the Committee is based on an equitable geographical representation and rotation. The Committee takes care of monitoring the implementation of the Convention, and of the other preparatory and executive tasks defined in the Convention.

The participation of civil society in the work of the organs of the Convention is governed in accordance with the principles adopted in the June session of the Conference of Parties. The civil society representatives may participate in a capacity of observers in the meetings of the organs of the Convention. According to the criteria set in June, civil society organisations or groups could be admitted to attend the sessions of the organs of the Convention, if they "have interests and activities in one or more fields covered by the Convention, have a legal status under the rules of their countries of registration, and are representative in their respective fields of activities".

The Director General and the Secretariat of UNESCO assist the organs of the Convention. The Secretariat prepares the documents of the organs.

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<sup>30</sup> A decision to this effect was made in the June 2009 meeting of the Conference of Parties. See document referred to in footnote 25.

## RELATION OF THE CONVENTION TO OTHER INSTRUMENTS

An international instrument may contain clauses on its relationship with other instruments, or it can be silent on the matter. In the case of the present Convention, the group of independent experts that prepared the preliminary draft were of the view that explicit provisions determining the relationship between the instrument and other instruments would be desirable.<sup>31</sup>

There is a dense fabric of treaties to which the Convention may have links through the subject matter. In the preparatory process, it was considered that the relationship between the forthcoming convention and other treaties was probably politically the most difficult question and legally a most intricate issue. The reason for this was that there were different expectations concerning the function of the convention. The question of its relationship to the existing international instruments governing intellectual property rights was identified as an issue by the independent experts already in their preliminary draft.

During the final stages of the negotiations, it was still felt that explicit provisions were necessary. The provisions in Article 20 of the Convention deal not only with the relationship with existing treaties but also with possible future treaties. The provisions govern the way the rights and obligations are reconciled when the Convention and another instrument, which the same parties contract to or will contract to, are applicable to the same subject matter.<sup>32</sup>

The Convention was placed in the galaxy of treaties in a peaceful and non-aggressive way. The Convention, in the space between other treaties, provides a level playing field and policy space for the parties – without violating existing treaties.<sup>33</sup> The provisions of Article 20 were prepared in an informal working group established by the Intergovernmental Meeting of Experts at the suggestion of the Chairman of the plenary.<sup>34</sup> After consultations, the draft Article was presented to, and endorsed by, the Plenary with two linguistic modifications.

Article 20 contains five main elements and is built on five principles. Because of the great attention attracted by the Convention, these provisions also have an informative and pedagogic purpose in addition to their legal function. Already the title of the Article "Relationship to other treaties: mutual supportiveness, complementarity and non-subordination" serves this informative purpose.

As set out in the Convention, the elements and principles are the following. An explanatory note follows each element.

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<sup>31</sup> The view that such provisions were necessary in this instrument is widely shared. See *e.g.* Hélène Ruiz Fabri, "Relations on possible future legal implications of the Convention", in Nina Obuljen and Joost Smiers (eds.), UNESCO's Convention on the Protection of the Diversity of Cultural Expressions: Making it Work. Institute for International Relations, Zagreb, 2006, 83 ff.

<sup>32</sup> In the context of the First Session of the Intergovernmental Meeting of Experts, 20 to 24 September, 2004, Mr Abdulqawi A. Yusuf, Director of the Office of International Standards and Legal Affairs of UNESCO, gave a presentation on "Possible Ways of Dealing with the Question of the Relationship between Successive Conventions Relating to the Same Subject Matter and Article 19 (Relationship to other instruments) of the Preliminary Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions".

<sup>33</sup> On the relationship of the Convention to the international trade instruments, see *e.g.* Michael Hahn, "A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law", *Journal of International Economic Law* 9(3), 515 ff.

<sup>34</sup> The Co-Chairs of the working group were Mr. Jukka Liedes, the Chairman of the Drafting Committee, and Mr. Jacques Paquette, the Head of the Canadian Delegation. Advice in the preparation of the provisions was taken from the end of the presentation by Mr. Yusuf, referred to in note 32. The provisions relate to the Vienna Convention on the Law of Treaties of 1969, and cultivate further the objective to avoid conflicts and the principle of mutual supportiveness.

*"1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties."*

*Pacta sunt servanda.* The introductory clause of paragraph 1 of this Article begins with a reaffirmation of the principle "*pacta sunt servanda*", which is the most fundamental principle of international law, manifested in Article 26 of the Vienna Convention on the Law of Treaties of 1969. This part of the set of clauses paraphrases this principle. It means that all parties continue to uphold the obligations they have under pre-existing treaties.

*"Accordingly, without subordinating this Convention to any other treaty,"*

The *Principle of non-subordination* is, in fact, a continuation of the same theme, *pacta sunt servanda*. It implies that this new treaty is not on another, lower level in the sea of treaties than pre-existing other treaties.<sup>35</sup> It is, in fact, a "clause of resistance". According to it, it should not be easy to interpret the Convention to "bend" in any direction pointed out by other instruments.

*"(a) they shall foster mutual supportiveness between this Convention and other treaties to which they are parties;"*

*Mutual supportiveness.* The idea and ideal of mutual supportiveness belongs to the modern doctrines of interpretation and application of international instruments. The approach in interpretation is to espouse meanings that are conciliatory, non-offensive, respectful, and allow avoidance of conflicts, and thus permit the principal goals of each instrument to be achieved.

*"(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention."*

*Complementarity.* This element concerns the negotiation and conclusion of future instruments in the area covered by the Convention. This set of clauses is future-oriented. It has the nature of an obligation, and it is clearly more robust than a simple "best endeavour" clause. The principle guides the parties in their future international negotiations.

*"2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."*

*Safeguard clause relating to pre-existing treaties.* The clause in paragraph 2 is intended to develop further, in concrete terms, the principle of *pacta sunt servanda*, concerning any other international instrument between the parties. The earlier obligations shall remain intact. The rights or obligations under an earlier treaty may be modified only if parties to it so agree in express terms in a subsequent treaty.

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<sup>35</sup> In the Convention it is understood that the principles and the respect of human rights and fundamental freedoms always prevail. This is manifested in Article 2.1 and 5.1.

As concerns have been expressed on the role of the Convention in relation to international trade instruments and the pre-existing intellectual property conventions, it should be said categorically that the Convention cannot be used as a means of challenging the obligations of contracting parties under existing treaties.

It is clear that Article 20 could be a subject of a more detailed analysis, responding to the need for clarification as regards the interpretation and implementation of the Convention. The parties could follow such a need, taking into account the analyses of the academic community and interested parties.

The need for clarifications would principally depend on the experience gained from life under the regime of the Convention.

## CONCLUSIONS

### *Nature of the Convention*

As it transpires from the description above, the Convention is mostly soft in the formal sense. Many commentators have stated that the instrument does not really impose firm obligations on the parties<sup>36</sup>. It has also been said that there are no real rights in the Convention and only soft obligations. There are few standard-setting rules in the text.

Despite this, to my mind, the Convention is a robust instrument. In political terms it may be one of the strongest in recent years.

The launching of the convention project and the subsequent preparation were filled with high expectations and enthusiasm, on the one hand, and with concerns, on the other.

The enthusiasm prevailed. The Convention was a response to an aspiration to internationally manifest the importance of culture. It demonstrates the firm and structured will of a large part of the world community convening in UNESCO.

The Convention clearly fills a lacuna between the contiguous international instruments. It provides a legal, binding framework for its field of operation. Softness does not mean that the obligations would not be legally binding.

### *Birth of International Cultural Policy*

The Convention has a function, several functions, in fact. In short, it establishes international cultural policy. It describes cultural policy and provides a benchmark. It offers a tool for cultural development. The Convention provides directions and models for designing cultural policies and devising cultural policy measures.

This Convention will probably function and be implemented even without enforceable obligations, and without any binding dispute settlement mechanisms.

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<sup>36</sup> See e.g. a policy brief "The Implementation by the European Community of the UNESCO Convention on Cultural Diversity. *European Parliament, Brussels, 27 February 2008*. Prof. Dr. Jan Wouters and Bart De Meester.

In this way the main significance of the treaty is not in its content, but in its very existence.

There is strong emphasis on global development in the Convention, and it takes on board the necessity to think in terms of sustainable development, which is a matter for the whole humanity. The Convention talks about creation, dissemination, access, and cultural industries, and all this is under the umbrella of the diversity of cultural expressions.

Most of the governments of the world, are mainly concerned with the hard economy, direct concrete needs of society, and employment.

Nowadays, in fact, the understanding is growing that culture, in addition to being a bearer of identity, is in a crucial sense a basis for economic activities, a basis for labour and employment and industrial activities, a basis for the economy, and a source of income. Hence the widespread use of terms like immaterial or creative economy.

Policies on the creative economy and creative industries are being established everywhere for a good reason.<sup>37</sup>

One of the foremost functions of the Convention might be that it will strengthen international cooperation and bring together parties that had not earlier cooperated in this field.

### *Evidence-based Policy making*

The Convention both functions as an incentive for and necessitates mapping, monitoring, and measuring the situation of the creative professions and the creative and cultural industries in the territories of the parties.

Methodologically guided observation and measuring allows the assessment of needs, the prioritising of the steps to be taken, and the assessment of the assistance needed, especially in the developing countries.

A methodological approach supports benchmarking and impact analysis of the activities, projects etc. for the implementation of the Convention. The UNESCO Statistical Institute is instrumental in developing a methodology for the statistical measurement of the diversity of cultural expressions.

The role of statistical measuring and the use of indicators should be recognised. This includes the initiation of research and study programmes. Development of indicators could extend to the difficult terrain of measuring cultural diversity, or at least the diversity of cultural expressions itself.

The expressed interest of my Government to participate in the implementation of the Convention is confined to the aforementioned basics, the prerequisites of designing measures and setting priorities, including measures that support policy development in the developing countries. This does not exclude promotion of project based, down-to-earth activities.

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<sup>37</sup> The UNCTAD Creative Economy Report 2008: The challenge of assessing the creative economy towards informed policy-making, UNCTAD/DITC/2008/2), 20/04/08.



But how could we capitalise on the full potential of the Convention? The Convention is so far a success story. How to make the Convention an even more global success?

### *Trade considerations*

One of the primary goals for the international community is to welcome back the United States, and others, who in the preparatory process took a cautious position on the Convention, and also to bring the Convention into force in their countries. This would considerably strengthen and broaden practical and concrete cooperation to promote the diversity of cultural expressions.

The importance of cultural diversity was never, as such, disputed by the United States and others who took a reserved position<sup>38</sup>. Time may help in the assessment of those who so far remain outside of the Convention.

If there were trade problems, it would be possible to assess the actual level of them by looking at the present 100 plus one parties to the Convention who are acting as its test bed in relation to trade. The present parties to the Convention are trading nations, and many of them have a genuine interest in liberalising international trade.

The Convention will, when implemented in a structured way, lead to a conciliatory development, and provide a possibility to find conscious, responsible and well-informed solutions when the interest of principles of trade policy and the interest of cultural policy come into a seeming conflict.

Resolving such tensions between interests in negotiations is normal, if not commonplace, in both trade negotiations and in the formulation of cultural policies. In cultural policies, trade concerns, competition policy and many other concerns must already be taken into consideration.

### *Implementation and Promotion of further Ratifications*

The process of implementing the Convention is still in its genesis. How things will evolve depends on commitment and concrete engagement, as well as on the wisdom and analysis of the parties. One of the crucial factors bearing on the success of the Convention is the availability of both human and financial resources.

Most important in this evolution will be needs assessment in countries with less established cultural policies and less strong creative industries, especially developing countries.

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<sup>38</sup> Letters concerning the Convention were exchanged, before and after its conclusion, at a high political level by the Secretary of State of the United States and the Foreign Secretary of the United Kingdom, representing the Presidency of the European Union. In the beginning of October 2005 the US Secretary of State Condoleezza Rice expressed concerns especially about the possible misuse of the Convention for trade-restrictive action or protectionism, and for undermining the freedom of expression, the freedom of self-identification of indigenous or minority cultures and human rights. On behalf of the European Community, the Foreign Secretary Jack Straw replied in November 2005: "The European Union is strongly committed to the protection of human rights and fundamental freedoms and does not agree that this Convention would have a negative impact upon such rights and freedoms...On the contrary the Convention seeks to protect and promote the diversity of all cultural expressions, including those of minorities and indigenous peoples." "The European Union is fully committed to the success of the World Trade Organisation's ... Ministerial Conference at the end of this year..." "Our support for the UNESCO Convention is wholly consistent with this commitment."

The needs assessment should be the basis for all activities. It should start with the mapping of one's own strengths and weaknesses and potentials.

A continued success is subject to how the message is passed on. The promotion of implementation has already taken the form of establishing operational guidelines for the Convention.

It is still important to encourage ratification. It appears, however, that most of the states who were willing to accede to the Convention at this early stage have already done it. In order to reach the next stage in ratification, the current Parties will need to be able to bring the Convention to life and show its usefulness. This, inevitably, will be assessed in terms of concrete development cooperation programmes and outcomes.

The interest of the governments is crucial.

The role of the civil society is indispensable, including international specialised NGO's in UNESCO.

The UNESCO Secretariat will have a decisive importance in this. The Secretariat has taken many steps to promote the implementation of the Convention. Among the more recent ones is a consultation on the elaboration of operational guidelines for measures to increase the visibility and promotion of the Convention itself.

Culture is a very strong cohesive factor between nations, which supports conviviality and tolerance.

All Member States of UNESCO and all others concerned should participate in the implementation of this UNESCO Convention which embraces culturally sustainable development as one of the great goals of humankind.