



## UK Coalition for Cultural Diversity

### A Magna Carta for International Cultural Policy: The Scope of the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions 2005

by Holly Aylett

Culture is like the air we breathe: in today's world it needs to be defended. Cultural rights are included with the framework of the international human rights regime but, in terms of policy, cultural activity has always been the poor relative. From a governmental point of view this reflects the difficulty of converting its benefits into a quantifiable, economic return. Additionally, where policy for development is concerned, though culture may have a recognised place with regard to tradition and heritage, its transformational and catalytic potential is largely overlooked, not least by developing countries themselves.

An international instrument now exists which recognises the need to safeguard and affirm the value of cultural expressions. In October 2005 the 32<sup>nd</sup> General Conference of UNESCO, adopted the text of a new Convention: The Convention for the Protection and the Promotion of the Diversity of Cultural Expressions. Two years later, on March 18th 2007, it entered into effect with fifty six states and one region (Europe) having deposited their instruments. One year later the number had increased to eighty, representing well over half the world's population.

The rapidity with which this Convention has progressed from vision, to draft, and to actuality is remarkable. It expresses the concern shared by cultural ministers, parliamentarians, creators and civil society organizations in the 1990s, that diversity and identity should not be threatened by the impact of globalisation. With the increasing internationalisation of legal processes governing areas as varied as the economy, the environment and agriculture it was felt that an instrument was needed to affirm cultural values.

With the Convention, a legal instrument now exists to safeguard the right of nation states to create cultural policy in defence of their own diversity of cultural expressions and heritage. It also prioritises the needs of developing countries where creative industries are often weak, and cultural traditions are threatened by rapid globalisation and increased social conflict. Effectively, this Convention gives international recognition that diversity of cultural expressions should become the fourth pillar of development,

alongside agendas of economic prosperity, social justice and environmental balance and sustainability.

## Contexts informing the Convention

This Convention addresses creative activity in a production and distribution environment transformed by the opportunities brought by new digital technologies. The impact of this technology, particularly in telecommunications, has played a major part in the acceleration of global trade in the 1980s and 90s which has necessitated a re-evaluation of the role played by cultural works and their contribution to social cohesion and to development. Debate on strategy informed by these concerns was ongoing in the 1980s and included, for example, discussions at the World Conference on Cultural Policies (MONDIACULT) held by UNESCO in 1982 in Mexico City and at the United Nations World Decade for Cultural Development from 1988-1997. The establishment of the World Commission for Culture and Development (WCCD) led to a report, 'Our Creative Diversity' published in 1995 which became a landmark document and largely defined subsequent debates on culture and development (Kredler, 2007:1).

Concern was focussed on the impact of the World Trade Organisation (WTO) set up in 1995 whose objective has been to enable commodity trading and to facilitate agreements between countries for the liberalisation of exchange of goods. The WTO absorbed the main corpus of rules from the earlier General Agreement on Tariffs and Trade (GATT) and using its own principal instrument (GATS) General Agreement on Trade of Services, has developed a negotiating framework through which nation states can offer up to other trading partners, service sectors which they wish to liberalize according to the logic of supply and demand.

One of the WTO's new functions was to settle disputes through the creation of the Dispute Settlement Body, and in 1998 two rulings clearly signalled the challenge it posed to national cultural policy. It found in favour of the United States against Canada and Turkey in a dispute over foreign periodicals, and film quotas in which Canada had sought to protect its publications sector and Turkey its film production sector by imposing a tax on foreign periodicals and foreign film receipts respectively. In 1988 Canada had signed a Free Trade Agreement with the United States designed to remove several trade restrictions over ten years in recognition that they were each others' most important trading partners. However, it had thus far managed to protect its cultural industries by insisting on a cultural exemption clause. Given the strength of its main competitors, the unimpeded proliferation of American titles on the newsstands was a major threat to a more diverse range of titles which might express the voice from Canada's multiple communities. The ruling was a major setback.

More generally, the ruling demonstrated how the status quo with regard to understandings on the 'cultural exception'<sup>1</sup> was coming under pressure from within the WTO itself. Previous to the existence of this principle, during the Uruguay Round of trade negotiations at the ministerial summit held in Marakesh, the European Union had reasserted that it would "guarantee the

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<sup>1</sup> The principle developed by European countries to keep cultural products out of the jurisdiction of the GATS exempting certain goods and services from the offers process.

possibility for the Union and its member states to maintain and develop their capacity to determine and see through their audiovisual and cultural policy and to safeguard their cultural diversity", Farchy (2004: 74). Thus far, according to the supply logic of the GATS nothing had made it compulsory for the Union to liberalize its cultural and audiovisual services, but this defeat signalled the weakness of earlier understandings and the importance of keeping cultural works out of the GATS in a more definitive way.

There had also been a significant shift in US strategy as evidenced by the free trade agreements concluded by the United States with Chile (December 2002), Singapore, (February 2003), Central American States (December 2003), Australia (February 2004) and Morocco (March 2004). What this activity reflected was a new way of treating cultural goods and services within trade agreements. The change was informed by a recognition expressed in a communication from the United States to the WTO, that the audiovisual sector in 2000 was "significantly different from the audiovisual sector of the Uruguay Round period when negotiations focused primarily on film production, film distribution, and terrestrial broadcasting of audiovisual goods and services". It goes on to say that "especially in light of the quantum increase in exhibition possibilities available in today's digital environment, it is quite possible to enhance one's cultural identity and to make trade in audiovisual service more transparent, predictable and open", WTO Council for Trade in Services (2000: Para 9).

Whilst a difference is being acknowledged in this document, contrary to earlier positions, that cultural products in general, including audiovisual products were in some respects not equivalent to other goods and services, it was also stating that given the impact of digital technologies dissemination was so transformed that former approaches to policy in these areas should be revised.

This view was picked up and expressed by the Motion Picture Association of America in a presentation made before the US Congress in May 2001, where the argument was developed as follows:

"Many countries around the world have a reasonable desire to ensure that their citizens can see films and TV programs that reflect their history, their cultures, and their languages. In the past, when their towns might have had only one local cinema and received only one or two TV broadcast signals, the motivation for foreign governments to set aside some time for local entertainment products was understandable. In today's world, with multiplex cinemas and multi-channel television, the justification for local content quotas is much diminished, and in the e-commerce world, the scarcity problem has completely disappeared. There is room on the Internet for films and video from every country on the globe in every genre imaginable. There is no "shelf-space" problem on the net" (Richardson, 2001)

This identification of digital technologies as providing a rationale for change in liberalising trade in cultural services led to an act in the USA, the Bipartisan Trade Promotion Authority Act (2002), which "gave fast track

authority to the Executive to conclude free trade agreements with the instruction, among other things, to conclude trade agreements that anticipate and prevent the creation of new trade barriers that may surface in the digital age environment", Wunsch-Vincent (2003: p7).

These developments informed a new United States negotiating strategy with regard to cultural goods and services which adopts the most liberal approach to schedule trade commitments, those offered by countries under the 'negative list' approach, where all trade and services are considered included in negotiation unless an exception, or an opt out, is negotiated. It allows for some acceptance that existing financial support for cultural works will continue and even that local content requirements may be set up particularly in the audiovisual sectors where traditional technologies are concerned. However, the new aspect of this strategy is that states must commit themselves to keeping digital networks free of cultural protectionism. With the speed of convergence, and when digital technologies were in the process of transforming the music, audiovisual and publishing industries, this aimed to transfer control to what was already mapped as the commercial future whilst seeming to make concessions by withdrawing objections to markets regarded as having limited relevance, Bernier, (2004)

Given the slowness with which such trade agreements can be put in place, there has also been a growing tendency to substitute bilateral or regional agreements as faster ways to achieve market liberalisation. This has been particularly true of the United States which has sought bilateral free trade agreements which have included the audiovisual sector in particular.

In Morocco, where an agreement was signed on June 6, 2003, the agreement forbids regulatory measures such as broadcasting quotas. Morocco is one of the most advanced countries in Africa as far as its cultural policy is concerned, and although it kept its rights with regard to investments and national subsidies in the fields of radio and television, both public and cable, the restriction on quotas represented a major change in cultural policy which gave the United States greater access to build audiences for their audiovisual products in the Moroccan market place.

In Australia, where an agreement was signed on May 18, 2004, the extent of the United States' claim to have obtained unprecedented access to the market for cinema and television productions is still disputed, but pressure from the United States was in part responsible for the country's abstention in the vote taken by UNESCO to adopt the Convention. Likewise in Chile, an agreement signed with the United States, March 2 2004, guarantees a free hand to safeguard its cultural identity particularly with regard to national subsidies, but restricts regulatory-type measures which had previously formed an important part of their cultural policy, L'ARP (2005a: 3).

In the absence of progress in the Doha Round of talks on trade, with lack of consensus on talks ranging from agricultural tariffs to intellectual property

rights and privatisation of public industries, the challenge presented by the Convention was seen by the United States as a threat to their economic interests. Their position is made explicit in the text of a letter sent out to various ministers in October 2005 by US Secretary of State, Condoleezza Rice and widely circulated. It urged governments in no uncertain terms, that the administration should not vote in favour of adopting the Convention at UNESCO's forthcoming General Conference: "I am writing to you to express my deep concern with the draft UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Due to its extraordinary reach and the ambiguity of some of its language, the convention, if adopted, could be misread to impair rights under existing trade agreements and derail progress toward global trade liberalization at the WTO. We believe this convention could also be misused by some governments to justify efforts to restrict the free flow of information and to suppress minority viewpoints or minority cultural practices. This convention invites abuse by forces opposed to freedom of expression and free trade" Rice (2005).

By 2005 the value of the global information and audiovisual entertainment markets was larger than that of steel and textiles combined and the potential of these new industries was being recognised by western governments as a key resource, and area for expansion. Included in this expansion were the markets of the developing countries and for the larger corporations, the WTO represented the opportunity not only to build bigger national markets but crucially to remove public policy roadblocks to enable consolidation of international markets through the global south.

The example of Hollywood is indicative. In the years 2002-2004, the domestic market for Hollywood films had levelled and audience attendance dropped to 9 million. Internationally, however, the market was growing for the five major companies, MPAA (2004-6: 3). Twenty years before the average budget for a feature film was about \$25 million and the five companies would produce around 200 movies per year. By 2005 the average cost of production had soared to \$100 million, approximately \$65 million of which was spent on production and \$35 million on marketing and promotion. Whereas previously only 30% used to be recouped from the foreign market, by 2005 62% of returns were coming from foreign markets and the industry's growth depended on them.

By 2005 only sixty three propositions had been made under GATS to liberalise services, a limited number. However, from the cultural point of view it was significant that six states had offered to liberalise their audiovisual sectors, reflecting the fact that to many governments, culture was merely seen as a pawn in the negotiations over larger sectors of the economy, L'ARP(2005b:8). For developing countries in particular, the import of foreign productions, further enabled by these agreements, made it difficult for local production or distribution to thrive, and facilitated larger commercial groups to play a disproportionate role.

This situation was made worse by the increasing market exploitation of content and intellectual property rights resulting from the convergence of material from sectors previously organised and regulated separately, such as print media, publishing, television, music and film. Convergence brought about by digital technology also rendered the separation of services and products for trade purposes increasingly anachronistic particularly in key creative sectors such as music and the audiovisual. In these creative industries, new technologies were enabling telecoms to deliver content individually and on-line bi-passing quotas and other regulatory devices which had previously governed trade. Significantly, the Marakesh Agreement which established the WTO in April 1994, had also included an annex, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which specifically related to copyright provision in the new era. In the years that followed the exercise of intellectual property rights began to impact progressively on diversity of cultural expressions.

It may be argued that copyright law, insofar as it delivers Article 15c of the United Nations Covenant of Economic Social and Cultural Rights, can be characterised as supporting human rights. However, it has developed far beyond the simple principle expressed in this article, of allowing the author to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production”, UN (1976:Art 15c). Whilst it may still serve the creator in a small way, and does not affect all forms of creative activity or to the same extent, copyright law with regard to the cultural industries has led to a commodification of cultural works, and the development of dominant players and ‘copyright facilitated aggregation’, Macmillan (2008a:5). It has further resulted in the progressive integration of ownership in rights over content, with rights to distribution and also rights over content-carrying technology. It has therefore become open to the dominant players interested in trading cultural works to use international trade law to open up and acquire markets and to manipulate interests by operating as a form of cultural oligarchy. In the music sector for example the position of big record labels and music majors has become even stronger through the trading of copyrights and licenses making it difficult for small labels and regional musicians to compete. Without strong support from institutions financed through public funds the cultural infrastructure for musical diversity is therefore inevitably weakened.

Ironically, what is referenced to article 15c as an individual right for cultural self-determination and individual freedom of expression has thereby developed into a system whereby through their control of markets for cultural products “multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read”, Macmillan (2008b: 6).

### Achieving the Convention

It was in response to the dynamics of this changing trade environment, and in anticipation of the radical changes being brought about by the new

technologies that in 1998 the Minister of Canadian Heritage convened a meeting of sixteen cultural ministers sympathetic to the need to develop an instrument to support cultural interests. This resulted in the formation of the International Network on Cultural Diversity, (INCP). It was supported by the work of national coalitions of creators and cultural activists many of which were based in countries of the South and of the developing world which, with the least legal, economic and political resources to resist, were most vulnerable. It was at a meeting of the INCP hosted by South Africa in 2002 that the decision to develop a fully-fledged Convention with the power to address these agendas was finally taken. UNESCO's Declaration on Cultural Diversity in 2001 provided a framework on which to build and bringing the initiative under the umbrella of UNESCO recognised its role as standard-setter and as "a laboratory of ideas in anticipating and identifying appropriate cultural strategies and policies: as a clearing house for collecting transmitting, disseminating and sharing information knowledge and best practices and as a builder of the human and institutional capacities of Member States", UNESCO (2005:3). So in 2003 the INCP met with the Head of UNESCO to propose that this new initiative should be placed on the agenda of the next annual conference.

It was at the 31<sup>st</sup> UNESCO Assembly in 2003 that it was agreed to adopt the initiative to draft a Convention. There were one hundred and forty eight votes in favour, four abstentions (Australia, Nicaragua, Honduras and Liberia) and two votes against, (the United States and Israel). "There was an insistence that the debate should take place in the largest chamber. It left an indelible mark but it was only the first step", Wilczynski (2006). Ahead lay thousands of options to be discussed and huge differences to be negotiated, clause by clause, before arriving at the thirty four principal articles of the treaty. The achievement of this task was a huge act of political will, advanced between governments and between civil society organisations, coalitions of creators and cultural organisations, and governments in a complimentary approach which has come to inform one of the distinctive features of the Convention – the active role which is ascribed to civil society in achieving its goals, (Clause 11). In this respect it is not only the text of the final document which marks the achievement of the Convention, but also the radical process through which it came into being.<sup>2</sup>

In spite of the rapid ratification of 82 state signatories, and one regional signatory, the European Union, the Convention will need to attain nearer one hundred and fifty ratifications in order to achieve equivalent status with other international treaties such as the Kyoto Treaty on the environment. This will also ensure greater balance in the spread of countries and regions which are represented. Currently, the number of signatories from the Middle East, IndoChina and Anglophone Africa is low. So long as the United States

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<sup>2</sup> In September 2007, the coalitions of creators and cultural organisations involved in this process founded the International Federation of Coalitions for Cultural Diversity, representing over 600 creators' organisations and with observer status at the Intergovernmental Committee administering the Convention.

remains outside the Convention, and given the economic strength of this principal detractor, it will be equally important to raise awareness of the Convention in America and to build up lobbies to urge ratification in the new, presidential order.

In addressing the needs of cultural expression as shared and circulated through cultural activities, goods and services, The Convention for the Protection and Promotion of the Diversity of Cultural Expressions stands out among heritage-related conventions. It builds in particular on Articles 8 - 11 of the Declaration on Cultural Diversity, 2001. Article 8 states that "particular attention must be paid to the diversity of creative works taking into account the rights of authors and artists as well as the specificity of their goods and services as carriers of identity". It goes on to state that the value of cultural works should be considered as distinct from the profits associated with other consumer products. Article 9 goes further in stating that each state should ensure an environment which promotes production and circulation of cultural works and that "with respect to their international obligations each state should define its cultural politics and implement them in the manner they consider best suited", UNESCO (2001:Art 9).

For the purposes of the Convention 'Cultural Expressions' refers to " the various ways in which the creativity of individuals and social groups takes shape and manifests itself. These manifestations include expressions transmitted by words (literature, tales...), sound (music...) images (photos, films...) – in any format (printed, audiovisual, digital etc) – or by activities (dance, theatre...) or objects (sculptures, paintings...), UNESCO(2005a: questions2: 2).

It is significant that the Convention not only covers the many forms of cultural expression that result from the creativity of individuals, groups and societies, but also considers these in whatever form and/or technology used in their production or transmission. In this way the Convention is committed to strengthening the five links which it distinguishes as part of an inseparable chain: creation, production, distribution/dissemination, access and enjoyment of cultural expressions conveyed by cultural activities, goods and services - particularly in developing countries", UNESCO(2005a:Keynotes: 4).

Responding to the challenge of an environment where new technologies are drivers in the globalisation of markets, the Convention establishes a major shift in perspective by recognising in Article 1 of its Objectives and Guiding Principles "the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning", UNESCO(2005a:art1:p3). It thereby lays the basis for asserting the dual value of cultural works in our communities as economic and cultural assets, and stressing the complementarity of these facets of creative activity.

Its title also affirms the inseparable relation between policies of protection and promotion. The term protection refers to the adoption of measures aimed at preservation, safeguarding and enhancement in the way it is used

in various of the legal instruments referred to above, but is distinct from the connotations of the term when used in the commercial sphere. "Promotion" calls for perpetual regeneration of cultural expressions so that they are not confined to museums, "folklorised" or reified, and combined with the measures for protection "implies the need to keep alive cultural expressions imperilled by the quickening pace of globalization", UNESCO (2005b:Key Notes: 5).

### The Convention and Strategies for Development

A third and determining aspect of this Convention is the objective expressed in Article 1 of its guiding principles "to strengthen international cooperation and solidarity in a spirit of partnership with a view, in particular, to enhancing the capacities of developing countries, in order to protect and promote the diversity of cultural expressions", UNESCO(2005b: Art 1:3). Cooperation for development is included as part of an extended article, Article 14, which is included under title IV of the Convention, which deals with "Rights and Obligations of Parties". It is thereby given the status not of an objective or goal but of an obligation. Together with the strategies outlined in the full text of the Convention (Articles 12 , 14, 16, 17 ) it implies a major shift in strategy towards development and one which places culture at its centre, Thiec (2006: 10). Accordingly, the three pillars of development policy - economy, social justice and the environment - are now complimented by culture: culture squares the triangle.

This emphasis is consistent with the work carried out in other international forums, in particular the work carried out with the United Nations Conference on Trade and Development, which in 2004 identified the significance of exploiting the economic potential of cultural industries in developing countries and is continuing this commitment, UN (2004). Nurturing this process and safeguarding a thriving diversity of expressions is central to people's empowerment and to their ability to realise development objectives, not least in the context of the United Nations Millennium Development Goals, and their commitment to eradicate poverty by 2015, UN Millennium (2005).

The centrality of culture informs a concept of development which has evolved to recognise that human development has the aim of "enhancing human capabilities – to expand choices and opportunities so that each person can lead a life of respect and value", UNDP (2002).Choice in this context is not construed as the right of the consumer to be a stakeholder in society, but addresses each individual's right to play an active role as a citizen in the world community. Poverty in this context is defined as "capability deprivation", and the exclusion of a majority from their rights of free expression, the means to communicate, as well as the material benefits of the contemporary world they live in.

Some development agencies, such as the Danish International Development Agency, DANIDA, are already based on a consideration of cultural practices as the precondition for development cooperation, involving specific forms of cultural and artistic expression as means of communication as well as through the support of multilateral activities such as the improvement of intellectual property rights, DANIDA (2002). However, it is only recently that the scope of this approach has been understood. For example, in the Organisation for African Unity's New Partnership for Africa's Development, (NEPAD) policy document, adopted in 2001 and intended to provide an integrated socio-economic development framework for Africa, cultural agendas are dispatched in fifteen lines with a general reference to the need to nurture and protect indigenous knowledge and traditions.<sup>3</sup> However in its later Strategic Framework, the 2004-2007 Plan of Action NEPAD's thinking and strategies have shifted. Culture is listed as one of six key areas of prioritisation, and a special programme is included to support film production, to run festivals and exhibitions and to disseminate the artistic works of Africans.

This shift is also picked up in Tony Blair's Commission for Africa which endorses the NEPAD support for culture and states that "We want culture to become an inherent component of all development strategies – not just in terms of cultural products, but also in defining the terms of the development debate and the actions that follow. Culture becomes a way of working as well as an end in itself", UKGovt (2005a: 3.6:48). It also goes on to signal the danger in the "lack of attention to culture in policy-making", UK Govt (2005b:3.6:49). in sustaining family and social networks for the future and the intergenerational transmission of values and education which underpin society's survival.

The scope of the Convention takes these agendas much further affirming the role to be played by the creative industries in enabling diversity of expression, thereby furthering a sense of identity, and building the understanding through which objectives such as social cohesion, conflict resolution and good governance may be advanced. In doing so it indicates a substantive shift in focus from other approaches to development. Cultural tourism for instance, has long been recognised as a powerful catalyst for economic development not least in providing employment and supplementary income for rurally based, small-scale craft producers, Robinson & Picard (2006). Many project-based initiatives have also used creative practices to achieve development goals<sup>4</sup>. However, what the Convention achieves is to put in place a framework to enable developing countries to harness the economic potential of their own creative industries,

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<sup>3</sup> NEPAD was initiated by 5 heads of State (Algeria, Egypt, Nigeria, Senegal and South Africa) and adopted by 37<sup>th</sup> Summit of OAU in July 2001

<sup>4</sup> There are a plethora of such projects in the Middle East, for example The "Eye to Eye" project coordinated by Save the Children UK using photography and multi-media activities, or Daniel Barenboim & Edward Said's West-Eastern Divan Orchestra involving young Israeli and Palestinian musicians in the same orchestra.

and to facilitate a systematic building of infrastructure, resources and capacitation on a national and international level. The distinctiveness of this strategy might be compared to the fundamental difference in perspective and scope between the Free Trade philosophy, more significant as an awareness-raising project for western consumers than in the monies it transfers to the producers, and the approach of strategies informed by the aims of Trade Not Aid, which seek to increase processing and manufacturing capacity locally so that the benefits of employment and the value-added on staple products remains in the country of origin. In trade just as in culture, this is a challenge which requires restructuring the terms of trade, ending tariff rigging and barriers to travel and committing to an increase in exchange and circulation from the South to enable the rest of the world to come in.

In trade negotiations, developing countries are often in the weakest position to achieve favourable terms for their creative industries in economic partnership agreements because their cultural policy is often ill-defined or non-existent, their dependency on donor countries is critical to economic stability, and/or, more simply, the existing market practices are heavily stacked against them. The absence thus far of a coherent strategy to support the developing countries has not only led to the clear motivational principles embodied in the Convention, but also to the urgent plea that it include an international fund so that "diversity of cultural expressions (is not) limited de facto to the diversity of developed country cultural expressions", Bernier(2007a: 17).

The strategies for development cooperation envisaged in the Convention include, Thiec (2006: 10):

- Creating and strengthening cultural production and distribution capacities in developing countries;
- Facilitating wider access to the global market and international distribution networks for their cultural activities, goods and services;
- Enabling the emergence of viable local and regional markets;
- Adopting , where possible, appropriate measures in developed countries with a view to facilitating access to their territory for the cultural activities, goods and services of developing countries;
- Providing support for creative work an facilitating the mobility of artists from the developing world
- Encouraging appropriate collaboration between developed and developing countries in the areas, interalia, of music and film.

In addition two possibilities for cooperation are referred to

- Partnerships between the public and private sectors and associations concerning infrastructures, human resources in general, cultural policies and exchanges of activities, cultural goods and services (Art 15)

- Preferential treatment accorded to developing countries (Art 16) both to cultural goods and services , and artists and other cultural professionals.

The Legal Status of the Convention in the context of Human Rights  
 Principled discussion on culture and cultural value has never been enough to contest or safeguard its importance whether in economic, social or political spheres. This Convention, however, is the first international treaty of its kind to set up rights and obligations in the field of culture. It has the classic structure of an instrument of international law, incorporating in a logical sequence the objectives (1), the scope (11), the provisions (111), the rights and obligations of the parties(1V), relationships to other instruments (V), the organs of the Convention(V1) and the final provisions (V11). Under Rights and Obligations of Parties, Article 6 affirms the rights of parties at the national level, to adopt policies to protect and promote the development of cultural expressions in their territory, further affirming the principle of sovereignty and the need for policy and international agreement if the Convention's objectives are to be achieved. Amongst the measures listed exemplifying the kinds of regulatory, cultural toolkit which could be developed are: regulation to provide opportunities for domestic, cultural activities to boost domestic, independent cultural industries and production; to provide public financial assistance; to encourage non-profit making organisations alongside public and private institutions, and to enhance diversity of the media including through public service broadcasting.

Should two or more parties disagree over the implementation of the articles of the Convention, an annex provides for a Conciliation Procedure, whereby a conciliation Commission would be created at the request of one of the Parties to the dispute and would be composed of five members, two appointed by each Party concerned and a President chosen jointly by those members. It is a weakness of the Conciliation provision however, that there is no clear role for the UNESCO Secretariat in administering the mechanism. This is something which might usefully be addressed both by the Intergovernmental Committee and the Council of Parties in 2009, Macmillan(2008c:14).

Beyond the national sphere, and given the extent of existing international law governing areas of concern to the Convention, it is also significant that in Article 20 the Convention affirms the principle of non-subordination with other International Treaties, affirming its equivalent legal status with other international treaties (20.1). At the same time it urges mutual supportiveness and complimentarity in consideration of measures taken under its articles where there is a link or relationship with those of other international treaties (article 20.2). "The Convention stresses that the Parties shall perform in good faith their obligations under this Convention and under all other treaties to which they are parties, without subordinating the Convention to any other treaty", UNESCO(2005b:Keynotes: 5).

Whilst it is the first time that such a principle of subsidiarity (non-subordination) should be in place in defence of culture, the practicality, and indeed the legitimacy of this Article has yet to be tested and proven. The positive value is that there is agreement by signatory states that the aims and provisions of the Convention should now be taken into consideration with regard to any other legal instruments which the parties engage with. However, even in its own terms the claim to equal status in the event of dispute would seem to be contradictory. Alongside affirming the need for states to take into account the provisions of the Convention when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, in the second part of this article the Convention also states (Article 20.2 ) that “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties”, UNESCO(2005c:Art 20:11) .

The reference to “other treaties” is essentially directed at the relationship between the Convention and international trade agreements particularly those of the WTO. This apparently contradictory reference reflects the ongoing concern by certain countries throughout the drafting stage that protocols regarding culture should not prevail over trading regulation within the frame of international relations. Given that the United States has been the principal opponent of this treaty, that it voted against its adoption and that it remains committed to extending trade law through the process of WTO, the strength of the Convention may ultimately be seen as relative to the position taken by its strongest opponent.

Unlike the treaties of the World Trade Organisation pertaining to trade, this Convention has no provisions on judicial or arbitral settlement of disputes and its effectiveness in the event of a conflict of interests with regard to a trade issue is open to challenge. The Annex to the Convention which contains the Conciliation Procedure has been described as “worth mentioning only as being reminiscent of the very early days of modern international law”, Hanh (2006:533), and it is likely in the event of serious dispute that the likely forum would be a WTO dispute settlement proceeding primarily because “the WTO has become the pre-eminent system for international dispute resolution”, Macmillan d (2008:14). In this case clause 20.2 would provide significant leverage in a case where the provisions of GATS are seen to be contravened in the upholding of the principles of diversity of cultural expressions, particularly where cultural policy is being cited which has been in existence prior to the Convention.

The legal bearing of the Convention with regard to trade law raises a more systemic consideration which goes beyond diversity of cultural expressions, although this is central to it. How does human rights law, of which rights regarding cultural self-determination and freedom of expression are part, engage with WTO law. At present in international legal governance there

would seem to be “a no-man’s land on which the clash – unregarded by the eyes of the law – between human rights and WTO law is taking place”, Macmillan(2008e:16). The challenge which this represents will need diverse approaches, both to the normative frameworks and the details of laws regarding particular areas such as copyright law or international trade law, and depends on a political willingness and diplomatic negotiation.

Whilst “cultural rights are often neglected in the cataloguing of human rights in favour of the more succinct ‘economic and social rights’”, Marks(2003a:293), they do constitute a complex web across various international instruments, and are anchored in Article 15 of the Covenant of the International Covenant on Economic, Social and Cultural Rights (ICESCR). To establish culture more strongly in the scheme of international human rights, these provisions now need to be read in relation to the Convention (2005) which is the most elaborate UNESCO treaty to date in addressing contemporary creative activity. This will be a consensus building process over years. However, the Convention is a huge step forward, a legal instrument to enable its stakeholders to argue their case and build juridical norms in recognition that cultural rights provide “the grounding of the aesthetic, cognitive, spiritual, and emotional bonds of all humans to their society and, for many, to the cosmos”, Marks(2003b:324) and that it is through safeguarding these rights that these bonds can find expression.

#### Implementing the Convention

Governance of the Convention is managed through the meeting of the Council of Parties on a two year basis. Initiatives from this Conference are then administered by the Intergovernmental Committee (IGC). The IGC meets bi-annually with the possibility of extraordinary sessions if needed to cope with the volume of business required. Members of the IGC number twenty four and are reselected on a four yearly basis.

Critical to the implementation of the Convention will be the level of state contribution to the Cultural Fund. Under Article 18, contributions are not compulsory, and signatories can opt out before signing. To date India, Canada and France have committed to the fund. Guidelines on the level of contributions, priorities for the fund, and factors governing accountability are being now prepared. It is likely that the level of payment might be 1% of the state’s national contribution to UNESCO treaties in line with the level set for the Convention for Safeguarding the Intangible Cultural Heritage. Clearly, with regard to the criteria listed in Article 4.1, which inform action on behalf of developing countries, a tangible contribution to infrastructure, policy, and human resources development on the part of the wealthier partner countries will be essential if the Convention is to be effective, Bernier(2007b: 7).

Equally, without consistency of funding it will be very difficult to have a strategic and consistent approach to the projects which should be supported, or to guarantee their implementation on a sustainable basis.

In a move to bring the Convention to life, in April 2007 under the term of the German Presidency of the European Union, the German, national UNESCO commission hosted the first major, international gathering of stakeholders in the Convention since it had come into being. It was held in the northern city of Essen, once an industrial anvil of Europe, and now extensively redeveloped through investment in urban and cultural regeneration. Realisable strategies for implementation emerged through broad-based debate at eight thematic fora on film, music, the role and place of civil society, urban public spaces, North-South cooperation, media politics/media economy, public awareness and education, and a forum addressed and organised by the Under 40s entitled "Cultural Diversity 2030". These strategies included short and long term policy goals, realisable through economic collaboration by the public and private sectors and can be viewed in the full, on-line report from the conference, UNESCO-de (2007:102).

Beyond individual state policy, regional organisations will also have a key role to play in implementing the Convention. The European Union,(EU), is the first regional signatory, and building on article 151 of the Maastricht Treaty, EU Maastricht (1992: art 151), it is expected that the articles of the Convention will be mainstreamed across all policy areas, leading to both new policy and the re-enforcement of existing policy. Jan Figel, EU Commissioner, recently stated that the EU would be duty bound to implement it "when exercising the competences it enjoys in various policy areas: free movement of goods, persons, property, services and capital, competition, internal market including intellectual property rights", Jan Figel (2007).

The EU has recently acted on a strategy for cultural accords to be included in trade agreements. At the Cariforum meeting with the European Union, (December 2007), it was agreed for the first time that a cultural protocol would be included in economic partnership agreements between Caribbean countries and the EU in respect of the Convention<sup>5</sup>, and it is expected that this will form a model for future economic partnership agreements with other countries. However, there is also recognition that the tension between diversity of cultural expressions and the provisions for an internal market and competition might lead to contradiction in the enlarged European community.

Evidence of the impact of the Convention is also coming through the Commonwealth. In November 2007, over one thousand five hundred delegates from six hundred organisations in fifty nine countries came together at the Commonwealth People's Forum in Kampala, 'Realising People's Potential', in the run up to the Commonwealth Heads of Government Meeting, CHOGM. From this assembly came the Kampala Civil

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<sup>5</sup> It provides horizontal (development of cultural policies, cultural exchanges, artists mobility, technical assistance) and sectoral (audiovisual and cinema, performing arts, books and heritage) provision and builds on principles of cultural cooperation rather than trade liberalization

Society Statement, "a snapshot of Commonwealth civil society's most pressing concerns and a manifesto for action", Mark Collins (2008:1). Included in paragraph 116 is a recommendation that Commonwealth member states should ratify the Convention and "meaningfully involve and support civil society in its implementation at national, regional and international levels, notably in the development and application of cultural policies and strategies" Commonwealth(2007a: 9).

The Commonwealth claims to be a club, a family where small states can assist larger states, where north and south can cooperate. In matters ranging from distribution, trade advice, support in developing public policy, and strengthening of its members' creative industries it could play a leading, proactive role. Culture to date has had marginal status in relation to the development of other aspects of Commonwealth policy. However, in Kampala, for the first time the assembly included a forum dedicated to the discussion of issues of Culture and Development.<sup>6</sup> In its final statement it calls on the Commonwealth member states to "recognise and support the increasing role of the creative industries, cultural heritage, and other forms of cultural creativity in contributing to economic development, while protecting creators' rights of ownership to enable local communities to realise their potential". It also calls for a rise in the status and budgets of member government ministries carrying the brief for these agendas and for greater support to ensure Commonwealth-level networking between culture ministers and senior officials, to include both civil society and the private sector, Commonwealth(2007b: 9 – 10). Critical to the success of these strategies, policy makers will have to overcome post-colonial and post-cold war tendencies and spheres of influence so that existing and new policies can maximise the potential of North-South and South-South cooperation, Aylett & Tongue (2007: 136-147).

Internationally, although the thinking is advanced around the Convention, the project is still only in its planning stage. What will deliver vitality, innovation and structural change will be input from civil society, not only from the creative sectors, but also from the breadth of organisations whose work recognises the role creative works play in matters of social cohesion, of social conflict, of understanding of science, international relations and more. Facilitating structures which can sustain this input, and ensure the transfer of knowledge and best practice from the diversity of stakeholders to individual governments at local, national and regional level, and to the Council of Parties, will be essential in delivering the complexity of the instrument and its objectives.

An important first step was taken at UNESCO, Paris, June 23<sup>rd</sup> 2008, in anticipation of an extraordinary session of the Convention's Intergovernmental Committee. Two hundred NGOs, representing thousands of creators' and cultural organisations, were granted an official audience and

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<sup>6</sup> Convened by the Commonwealth Foundation's Diversity unit, set up in 2005 to focus on agendas of culture and diversity, and aiming to promote the link between cultural approaches, development and good governance

exchange with governments, the first in UNESCO's history, and one which has set a new precedent .

By extending dialogue and harnessing the expertise of civil organisations, especially in developing countries, the Convention may also address the challenge implicit in the way the term, 'development', has been abused, and used to refer largely to economic growth leading to the imposition and replication of failed, Western development models. These models might be seen as "creating a discourse on development, which establishes a hierarchy of knowledge and legitimises a particular cultural standpoint...(and) suggests that the 'West' knows what is best for the 'rest'", Nurse (2007:3). Thus far the combination of new technology and market forces in an era of globalisation has not enabled humankind to circumvent natural scarcity and from the point of view of the developing world, whose interests lie at the heart of this Convention, the absence of diversity of expressions and the understanding which they communicate, has only accelerated today's human rights and environmental disasters.

END

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