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**Amsterdam Center for International Law**

**THE CULTURAL DIVERSITY CONVENTION AND  
CULTURAL RIGHTS: INCLUDED OR IGNORED?**

**YVONNE DONDERS**

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UNIVERSITY OF AMSTERDAM

# THE CULTURAL DIVERSITY CONVENTION AND CULTURAL RIGHTS

## Included or Ignored?

Yvonne DONDERS\*

### 1. INTRODUCTION

In 2001, the Universal Declaration on Cultural Diversity (Cultural Diversity Declaration)<sup>1</sup> was adopted by the Member States of UNESCO. In this Declaration, cultural human rights were commended as an enabling environment for cultural diversity. After the Cultural Diversity Declaration, the Member States wished to adopt a legally binding instrument on cultural diversity. One of the options discussed was a new instrument on cultural rights. The Member States, however, opted for an instrument on cultural expressions and on 20 October 2005, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Cultural Diversity Convention)<sup>2</sup> was adopted. Support for the Cultural Diversity Convention was widespread: 148 States voted in favor, only 2 States voted against (the United States of America (USA) and Israel) and 4 States abstained (Australia, Honduras, Liberia and Nicaragua). The Cultural Diversity Convention entered into force in March 2007 and currently has 118 State Parties.<sup>3</sup>

The link between cultural diversity and human rights is clearly established in the Cultural Diversity Convention. In Article 2(1) Cultural Diversity Convention, it is stated that "...cultural diversity can be protected and promoted only if human rights and fundamental freedoms...are guaranteed." It is interesting to note that the Convention speaks of human rights in general, not of cultural rights. What happened to the important role of cultural rights as an 'enabling environment' for cultural diversity? What, if any at all, is the place of cultural rights in the Convention?

This Chapter will explore the role of cultural rights in the Cultural Diversity Convention. In Section 2, it will first briefly outline what is meant by cultural rights, which is quite a discussion in itself. Then, in Section 3, several UNESCO instruments will be discussed to shed some light on the evolution of the debate on cultural rights in UNESCO. Finally, in Section 4, the drafting and adoption of the Cultural Diversity Convention will be discussed in relation to the promotion and protection of cultural rights.

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<sup>1</sup> See Universal Declaration on Cultural Diversity, 2 November 2001, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited on 4 December 2008) [hereinafter "Cultural Diversity Declaration"]

<sup>2</sup> See Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, *U.N. Doc. CLT-2005/CONVENTION DIVERSITE-CULT REV.* [hereinafter "Cultural Diversity Convention"].

<sup>3</sup> See UNESCO, "Diversity of Cultural Expressions", available at [www.unesco.org/culture/en/diversity/convention](http://www.unesco.org/culture/en/diversity/convention) (last visited 25 November 2011) (containing background information and information related to the status of ratifications).

## 2. CULTURAL RIGHTS AS HUMAN RIGHTS

Although the division between the different categories of human rights – civil, political, economic, social and cultural – does not imply that one category of human rights is more important than another, practice shows that the different categories of human rights have not developed at an equal pace. Cultural rights have received less attention and are, therefore, less developed than civil, political, economic and social rights.<sup>4</sup> One of the main reasons for the underdevelopment of cultural rights and the lack of conceptualization of the field is the vagueness of the term ‘culture’. Culture can refer to different things, varying from cultural products, such as arts and literature, to the cultural process or culture as a way of life. In between are the cultural institutions established to transfer culture, such as museums, educational institutions and the media. Accordingly, cultural rights can refer to various human rights and freedoms.

No international human rights instrument defines cultural rights as such and therefore different lists have been drawn up of legal provisions in international instruments that could be labeled ‘cultural rights’. Which rights are included in a list of cultural rights depends on how broadly ‘culture’ is defined. As argued above, the concept of culture can vary from intellectual and artistic achievements, such as arts and literature, to culture in the anthropological sense, being the way of life of individuals and communities, as reflected in shared beliefs, language, traditions and customs. Accordingly, cultural rights could be rights concerning creativity, such as the rights to freedom of expression and artistic and intellectual freedom, as well as the rights related to the protection of producers of cultural products, including copyright. Cultural rights could also refer to the protection of cultural products and cultural expressions, including cultural heritage. Cultural rights in relation to the process of cultural development could include the right to self-determination, the rights to freedom of thought, religion and assembly and the right to education. Cultural rights can also concern ‘the right to culture’, in the sense of the right to preserve, develop and have access to culture.<sup>5</sup> In other words, the category of cultural rights could be very broad, and this means a more systematic approach is required.

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<sup>4</sup> See, e.g., “Cultural Rights: An Underdeveloped Category of Human Rights. Conclusions of the Eighth Interdisciplinary Colloquium on Human Rights, organised by the University of Fribourg, 28-30 November 1991”, 49 *The Review of the International Commission of Jurists* 51, at 51-3 (1992); See also J. SYMONIDES, “Cultural Rights”, in J. SYMONIDES (ed.), *Human Rights – Concepts and Standards*, 2000, 175, 175-6.

<sup>5</sup> See, generally, L. PROTT, “Cultural Rights as Peoples’ Rights in International Law”, in J. CRAWFORD (ed.), *The Rights of Peoples*, 1998, 93; P. MEYER-BISCH, *Les Droits Culturels, Forment-Ils une Catégorie Spécifique de Droits de L’Homme?*”, in P. Meyer-Bisch (ed.), *Les Droits Culturels, une Catégorie Sous-Développée de Droits de L’Homme, Actes du VIIIe Colloque interdisciplinaire sur les droits de l’homme*, 1993, 18, 24; S. MARKS, “Defining Cultural Rights”, in M. BERGSMO (ed.), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjorn Eide*, 2003, 293, 295.

## 2.1 CULTURAL RIGHTS IN THE NARROW AND IN THE BROAD SENSE

Drawing from universal human rights instruments,<sup>6</sup> a general distinction can be made between cultural rights in the narrow sense and cultural rights in the broad sense. The *group of cultural rights in the narrow sense* contains those provisions that explicitly refer to ‘culture’, such as the right to participate in cultural life,<sup>7</sup> or the right to equal participation in cultural activities.<sup>8</sup> Other cultural rights in the narrow sense include the right to enjoy culture for members of minorities,<sup>9</sup> the right to education for children with due respect for their cultural identity,<sup>10</sup> or the right of migrant workers to respect for their cultural identity and their right to maintain cultural links with their country of origin.<sup>11</sup>

The *group of cultural rights in the broad sense* includes the above-mentioned rights, but also other civil, economic, political or social rights that have a link with culture. It might be defensible to say that almost every human right has a link with culture, but the rights specifically meant here are: the right to self-determination,<sup>12</sup> the rights to freedom of thought and religion,<sup>13</sup> freedom of expression<sup>14</sup> and freedom of association<sup>15</sup> and the right to education<sup>16, 17</sup>.

## 2.2 THE CULTURAL DIMENSION OF HUMAN RIGHTS

Cultural rights may also refer to the cultural ‘dimension’ of human rights. Although some human rights, at first glance, may not have a direct link with culture, most of them have important cultural implications. The Committee on Economic, Social and Cultural Rights (Committee), supervising the implementation of the ICESCR, has acknowledged the cultural elements of, for instance, the rights to food, health and housing. For instance, it has determined that the right to adequate housing implies that the construction of houses, the building materials and the supporting policies “...must appropriately enable the expression of cultural identity and diversity of housing.”<sup>18</sup> With regard to the right to health, the Committee

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<sup>6</sup> The core UN human rights treaties are (in chronological order of adoption): Universal Declaration of Human Rights, 10 December 1948, GA Res. 217A (III), *UN Doc. A/810*, at 71 [hereinafter “UDHR”]; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 *UNTS* 195 [hereinafter “ICERD”]; International Covenant on Civil and Political Rights, 16 December 1966, 999 *UNTS* 171 [hereinafter “ICCPR”]; Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S. 3 [hereinafter “ICESCR”]; International Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 *UNTS* 13 [hereinafter “CEDAW”]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 *UNTS* 85; Convention on the Rights of the Child, 20 November 1989, *UN Doc. A/44/49* [hereinafter “CRC”]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, GA Res. 45/158, *A/RES/45/158* [hereinafter “ICRMW”].

<sup>7</sup> See ICESCR, *supra* note 6, Article 15 (1) (a); CEDAW, *supra* note 6, Article 13; CRC, *supra* note 6, Article 31 and ICRMV, *supra* note 6, Article 43.

<sup>8</sup> See ICERD, *supra* note 6, Article 5.

<sup>9</sup> See ICCPR, *supra* note 6, Article 27.

<sup>10</sup> See CRC, *supra* note 6, Article 29.

<sup>11</sup> See ICRMW, *supra* note 6, Article 31.

<sup>12</sup> See ICCPR, *supra* note 6, Article 1 and ICESCR, *supra* note 6, Article 1.

<sup>13</sup> See ICCPR, *supra* note 6, Article 18 and ICRMV, *supra* note 6, Article 12.

<sup>14</sup> See ICCPR, *supra* note 6, Article 19 and ICRMV, *supra* note 6, Article 13.

<sup>15</sup> See ICCPR, *supra* note 6, Article 22 and ICRMV, *supra* note 6, Article 40.

<sup>16</sup> See Article 13 and 14 ICESCR; Article 10 CEDAW and Article 30 ICRMW.

<sup>17</sup> See Y.M. DONDERS, *Towards a Right to Cultural Identity?*, 2002, 65-92; Y. Donders, “The legal framework of the right to take part in cultural life”, in Y. DONDERS AND VL. VOLODIN (eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges*, 2007, 231, 232-6.

<sup>18</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, “General Comment No. 4, The Right to Adequate Housing”, *E/1992/23*, § 8 (g) (1991).

has determined that “...all health facilities, goods and services must be...culturally appropriate, *i.e.*, respectful of the culture of individuals, minorities, peoples and communities...”<sup>19</sup> With regard to the right to adequate food, the Committee has stated that the guarantees provided should be culturally appropriate and acceptable.<sup>20</sup>

Several international judicial bodies, including the European Court of Human Rights (European Court) and the Inter-American Court on Human Rights (Inter-American Court), have acknowledged the cultural dimension of ‘classic’ human rights provisions. The European Court has, for example, decided that the right to freedom of association<sup>21</sup> also protects cultural organizations.<sup>22</sup> It has further addressed the cultural dimension of the right to private life,<sup>23</sup> when it recognized that living in caravans is part of the traditional lifestyle of gypsies, and to be protected under this right.<sup>24</sup> The Inter-American Commission has issued several judgments on indigenous peoples and the protection of their culture under the right to life and the right to health.<sup>25</sup> It has also acknowledged the specific interpretation of the right to property to reflect the culture of indigenous peoples.<sup>26</sup>

In short, cultural rights include rights explicitly referring to culture, as well as rights that have a link with culture in the broad sense of the term. Apart from these cultural rights in the narrow and broad sense, the cultural dimension of human rights should be taken into account. The discussion below concerns other UNESCO instruments that have a link with cultural rights, followed by analysis as to which of these cultural rights can be found in the Cultural Diversity Convention.

### 3. UNESCO AND CULTURAL RIGHTS

How have cultural rights been incorporated in UNESCO instruments? UNESCO is the prime international intergovernmental organization dealing with culture. UNESCO was set up in November 1945 as an autonomous UN organization or specialized agency under Article 57 of the UN Charter. Its main purpose is described in Article 1 of its Constitution: ‘...to contribute to peace and security by promoting collaboration among nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms...without distinction of race, sex, language or religion...’

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<sup>19</sup> COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, “General Comment No. 14, The Right to the Highest Attainable Standard of Health”, *E/C.12/2000/4*, § 12 (c) (2000).

<sup>20</sup> See COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, “General Comment No. 12, The Right to Adequate Food”, *E/C.12/1999/5*, § 7, 8 and 11 (1999).

<sup>21</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, *ETS* No. 5, Article 11 [hereinafter “ECHR”].

<sup>22</sup> See European Court of Human Rights, *Sidiropoulos and others v. Greece*, 10 July 1998, no. 26695/95; European Court of Human Rights, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, 2 October 2001, nos. 29221/95 and 29225/95; European Court of Human Rights, *Gorzelik and others v. Poland*, 20 December 2001, no. 44158/98.

<sup>23</sup> See ECHR, *supra* note 21, Article 8.

<sup>24</sup> See European Court of Human Rights, *Chapman v. the United Kingdom*, 18 January 2001, no. 27238/95.

<sup>25</sup> See Inter-American Court on Human Rights, *Yanomami Indians in OAS*, Inter-Am C.H. Res. No. 12/85, Case No. 7615 and in Annual Report of the Inter-American Commission of Human Rights (1984–85) OEA/Ser.L/V/II.66, doc. 10, rev. 1.

<sup>26</sup> See Inter-American Court on Human Rights, *The Mayagna (Sumo) Indigenous Community of Awas Tingi v. the Republic of Nicaragua*, 31 August 2001, Inter-Am. C.H.R., Series C, No. 79; Inter-American Commission on Human Rights, *Maya Indigenous Communities and their Members v. Belize*, 5 October 2000, IACHR Report No. 78/00, case No. 12.053; Inter-American Commission on Human Rights, *Maya Indigenous Communities of the Toledo District Belize*, 12 October 2004, IACHR Report No. 40-04, case No. 12.053.

One of the tasks of UNESCO is the promotion and protection of human rights within its sphere of competence. These rights include the right to education,<sup>27</sup> the right to participate freely in cultural life and share in scientific advancement,<sup>28</sup> and the right to freedom of opinion and expression, including the right to seek, receive and impart information.<sup>29</sup> The Member States of UNESCO can, according to Article IV(4) of its Constitution, adopt conventions, which are binding upon the Member States, and recommendations, which are not legally binding, but do have a legal effect in that they should be implemented by States.<sup>30</sup> The possibility of adopting declarations and other non-binding instruments was added later by an amendment of the General Conference at its seventh session in 1952. It should be mentioned that in addition to standard-setting, UNESCO has played an important role in facilitating discussion and exchange between States and experts in order to improve cultural policies.

Although cultural rights are not specifically mentioned in the Constitution, the preparation of normative instruments in the field of culture is an important task of UNESCO. This is shown by the large number of instruments adopted by the Member States of UNESCO in the field of culture.<sup>31</sup> Some of these instruments are dealt below in order to demonstrate the development of the link between culture and human rights in UNESCO's instruments, leading up to the adoption of the Cultural Diversity Declaration and the Cultural Diversity Convention.

One of the first instruments adopted in the field of culture was the *Universal Copyright Convention*, adopted in 1952 and revised in 1971.<sup>32</sup> This Convention contains author's rights and the corresponding obligations of States to protect these rights. In this Convention, copyright was not addressed from a human rights, or cultural rights, perspective.

In November 1966 the General Conference of UNESCO adopted the *Declaration of Principles of International Cultural Co-operation* (Cultural Cooperation Declaration).<sup>33</sup> The Cultural Cooperation Declaration focuses on cooperation between States in the field of culture and the importance of such cooperation to maintain peace. Article 1 of the Cultural Cooperation Declaration reads as follows:

1. Each culture has a dignity and value which must be respected and preserved.

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<sup>27</sup> See UDHR, *supra* note 6, Article 26 and ICESCR, *supra* note 6, Articles 13 and 14.

<sup>28</sup> See UDHR, *supra* note 6, Article 27 and ICESCR, *supra* note 6, Article 15.

<sup>29</sup> See UDHR, *supra* note 6, Article 19 and ICCPR, *supra* note 6, Article 19.

<sup>30</sup> See Constitution of the United Nations Educational, Scientific and Cultural Organisation, 16 November 1945, 52 *UNTS* 275.

<sup>31</sup> See, generally, Agreement on the Importation of Educational, Scientific and Cultural Materials, 17 June 1950, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=12074&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=12074&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 25 November 2011) (known as the *Florence Agreement*) and its *Nairobi Protocol* of 26 November 1976; Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 *UNTS* 240 (known as the *Hague Convention*) and its Protocol (1954); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property, 14 November 1970, 823 *UNTS* 231; the Convention on the Exchange of Official Publications (1958); Universal Copyright Convention, 6 September 1952, 216 *UNTS* 133; the Recommendation on the Status of Scientific Researchers, 20 November 1974, available at <http://unesdoc.unesco.org/images/0011/001140/114040e.pdf#page=166> [last visited 25 November 2011]; Recommendation concerning the Status of the Artist, 27 October 1980, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13138&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13138&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 25 November 2011); Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 25 November 2011).

<sup>32</sup> See Universal Copyright Convention, 6 September 1952, 216 *UNTS* 133.

<sup>33</sup> See Declaration of Principles of International Cultural Co-operation, 4 November 1966, available at <http://unesdoc.unesco.org/images/0011/001140/114048e.pdf#page=82> (last visited 25 November 2011).

2. Every people has the right and the duty to develop its culture...

While the first paragraph shows that the Member States consider culture to be a value that must be preserved and respected, the second paragraph contains a collective right and duty for peoples to develop cultures. No further clarification was given of the concepts 'people' and 'culture', which leaves their scope rather ambiguous. Since the Declaration was meant to encourage cooperation *between* States, it seems likely that it referred mainly to national cultures, probably in a narrow sense. The Cultural Cooperation Declaration is not legally binding. It therefore does not imply concrete State obligations, but reflects principles to be respected by States.

In November 1976 the General Conference adopted the *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It* (Recommendation).<sup>34</sup> The Recommendation is addressed to States and does not contain rights directly applicable to individuals or communities. In the Recommendation, however, participation in cultural life is clearly placed in a human rights framework, including references to universal human rights instruments.<sup>35</sup>

The Recommendation urges States to adopt legislation and regulations to ensure free access to national and world cultures without any form of discrimination, as well as encouraging free participation by all in the process of creating cultural values.<sup>36</sup> The States should also recognize the equality of cultures, including those of minorities and "...ensure that national minorities and foreign minorities have full opportunities for gaining access to and participating in the cultural life of the countries in which they find themselves in order to enrich it with their specific contributions, while safeguarding their right to preserve their cultural identity."<sup>37</sup> States should further protect and enhance all forms of cultural expressions, including national and regional languages and dialects.<sup>38</sup> Article 4 of the Recommendation also contains provisions concerning access to education, freedom of expression and communication, freedom of creation, the protection of cultural heritage and the role of the mass media in fostering mutual understanding. Attention is also paid to the possible negative aspects of cultural participation. It is stated that States should "...reject concepts which, under the guise of cultural action, are based on violence and aggression, domination, contempt and racial prejudice, as well as on debasing ideas or practices."<sup>39</sup>

The Recommendation emphasizes the broad meaning of culture, corresponding not only to cultural products and arts, but also to the way of life of communities and individuals, including issues such as education and communication. The Recommendation was developed to give communities and individuals the opportunity to have access to culture and to also actively participate in cultural life. This would imply that specific cultural policies are to be integrated in other policies in the fields of economics, social matters and education. Although individuals cannot invoke the Recommendation directly, because it is addressed to States, the instrument is a clear sign of the recognition of the importance of advancing cultural rights in the broad sense.

UNESCO is perhaps most famous for its activities concerning cultural heritage. The Member States of UNESCO have adopted several instruments on the protection of cultural

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<sup>34</sup> See Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, 26 November 1976, available at <http://unesdoc.unesco.org/images/0011/001140/114038e.pdf#page=145> (last visited 25 November 2011) [hereinafter "Recommendation"].

<sup>35</sup> The ICESCR, which includes in article 15(1) the right to take part in cultural life, came into force in the same year as the adoption of the Cultural Participation Recommendation. See MARKS, *supra* note 3, at 304-6.

<sup>36</sup> See Recommendation, *supra* note 34, Article 4 (b).

<sup>37</sup> *Id.*, Article 4 (f).

<sup>38</sup> See *id.*, Article 4 (g).

<sup>39</sup> *Id.*, Article 4 (s).



heritage. The *Convention on the Protection of Natural and Cultural Heritage*, adopted in 1972, focuses on ways and means to protect cultural and natural heritage for future generations, but does not link cultural heritage to human rights or cultural rights.<sup>40</sup> The *Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted in 2003, mentions human rights several times.<sup>41</sup> It is interesting to note that human rights are not referred to as rights to be enjoyed by individuals or communities, but as a safeguard against potentially harmful cultural practices. In the definition of ‘intangible cultural heritage’ it is stated that “[f]or the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.”<sup>42</sup>

In 1978, the General Conference of UNESCO adopted the *Declaration on Race and Racial Prejudice* (Declaration on Race), which emphasizes the value of differences.<sup>43</sup> Accordingly, the Declaration includes the right of individuals and groups to be different,<sup>44</sup> which, according to the Preamble, concerns the right not to be excluded, humiliated, exploited or forcibly assimilated. The Declaration on Race further contains a right for human beings to maintain cultural identity,<sup>45</sup> as well as the right of groups to their own cultural identity and the development of their distinctive cultural life.<sup>46</sup> With the Declaration on Race, States wished to recognize the diversity of cultures and to reaffirm that different communities should be able to decide on the development and expression of their cultures, thereby denouncing policies of forced assimilation of cultural communities.<sup>47</sup> The Declaration on Race contains several cultural rights in both the narrow and broad senses and reaffirms their significance. These rights cannot, however, be directly invoked by individuals and communities and the Declaration on Race is not legally-binding upon States.

The above-mentioned instruments show that many UNESCO instruments on culture reaffirm the importance of cultural rights, in both the narrow and broad senses. At the same time, only seldom do these instruments include cultural rights to be invoked by individuals or communities and those that do are not legally binding. Moreover, the concepts used in these instruments, such as ‘culture’ and ‘participation’ are not further clarified, thereby leaving concrete State measures or obligations rather vague. This shows that, although the promotion of human rights is included in its Constitution, UNESCO does not primarily adopt human rights instruments. UNESCO standards are generally not meant to directly provide substantive cultural rights to individuals or communities. Instead, the UNESCO instruments on culture aim to act as a catalyst for the cultural policies of States. The question is to what extent this is different for the UNESCO instruments on cultural diversity.

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<sup>40</sup> See Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13055&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13055&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 25 November 2011).

<sup>41</sup> See Convention for the Safeguarding of the Intangible Cultural Heritage, 17 October 2003, *U.N. Doc. MISC/2003/CLT/CH/14*.

<sup>42</sup> *Id.*, Article 2 (1).

<sup>43</sup> See Declaration on Race and Racial Prejudice, 27 November 1978, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13161&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13161&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 25 November 2011).

<sup>44</sup> See *id.*, Article 1 (2).

<sup>45</sup> See *id.*, Article 1 (3).

<sup>46</sup> See *id.*, Article 5 (1).

<sup>47</sup> UNESCO, GENERAL CONFERENCE (20<sup>th</sup> session), “Draft Declaration on Race and Judicial Prejudice”, *Doc. 20 C/18*, Annex, Explanatory Report, § 5 (25 September 1978); UNESCO, “Working Paper of the Meeting of Government Representatives to Prepare a Draft Declaration on Race and Racial Prejudice”, *Doc. SS-77/CONF.201/1*, at 18-9 (18 August 1977).

#### 4. UNESCO UNIVERSAL DECLARATION ON CULTURAL DIVERSITY

The Member States of UNESCO adopted the Cultural Diversity Declaration at the General Conference in November 2001.<sup>48</sup> The Cultural Diversity Declaration aims to promote cultural diversity in the context of respect for human rights. It includes sections on identity, diversity and pluralism; cultural diversity and human rights; cultural diversity and creativity; and cultural diversity and international solidarity. The various provisions reflect the broad range of issues related to cultural diversity, among which are cultural rights.

Article 5 of the Cultural Diversity Declaration is entitled *cultural rights as an enabling environment for cultural diversity*. It reads as follows:

Cultural rights are an integral part of human rights, which are universal, indivisible and interdependent. The flourishing of creative diversity requires the full implementation of cultural rights as defined in Article 27 of the Universal Declaration of Human Rights and in Articles 13 and 15 of the International Covenant on Economic, Social and Cultural Rights. All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.

This provision stresses the importance of cultural rights for the promotion and protection of cultural diversity. It confirms that cultural diversity can only thrive if cultural rights are respected and implemented. It furthermore enumerates several cultural rights provisions from international human rights instruments, including cultural rights in the narrow sense (the right to participate in cultural life) and in the broad sense (freedom of expression and the right to education). No reference is made to the right to freedom of religion or other human rights that form part of the category of cultural rights. The provision further deals with the limits to the enjoyment of cultural rights, in terms of the conduct of cultural practices that should be respectful to human rights. This provision, while confirming the importance of cultural rights, does not further clarify them in terms of normative content and State obligations.

The Cultural Diversity Declaration was adopted by consensus. It is not a legally binding instrument and mainly includes principles to be respected by the Member States. The States did, however, express their interest in elaborating further standard-setting instruments in the field of cultural diversity. In Article 12(c) of the Cultural Diversity Declaration it is stipulated that UNESCO should “pursue its activities in standard-setting... in the areas related to the present Declaration...” The *Main Lines of an Action Plan* (Action Plan) for the implementation of the Cultural Diversity Declaration confirm that Member States should deepen the international debate on cultural diversity. One of the recommendations was to make “...further headway in understanding and clarifying the content of cultural rights as an integral part of human rights.”<sup>49</sup>

#### 5. THE CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS

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<sup>48</sup> See *supra* note 1.

<sup>49</sup> UNESCO, “Main Lines of an Action Plan for the Implementation of the UNESCO Declaration on Cultural Diversity”, §§ 1 and 4 (2001), available at <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf> (last visited 25 November 2011).

Following the adoption of the Cultural Diversity Declaration the Member States discussed four possible instruments on cultural diversity, ranging from a new comprehensive instrument on cultural rights, over an instrument on the status of the artist, to a new Protocol to the Florence Agreement on Educational, Scientific and Cultural Materials or a new instrument on the protection of the diversity of cultural goods and artistic expressions.<sup>50</sup>

During the debate, two main approaches could be distinguished: some Member States approached cultural diversity from a human rights, or more specifically a cultural rights, perspective, while others approached it from a trade perspective. The Member States generally agreed on the importance of an international instrument on cultural rights, as this would improve consistency and understanding between States. It was maintained that cultural rights were not the subject of a single international instrument and were not as extensively promoted as other human rights. It was stressed that “[g]iven the abundance of issues entailed by culture – issues that differ according to the approach adopted, whether anthropological or artistic – international law has yet to reach a clear-cut definition of cultural rights and their content.”<sup>51</sup>

It was further maintained that international law does not determine exactly which rights fall into this category and provisions pertaining to cultural rights are dispersed in different international instruments.<sup>52</sup> In the end, however, Member States found the prospect of an international instrument on cultural rights “very remote,”<sup>53</sup> despite the Action Plan of the Cultural Diversity Declaration encouraging them to elaborate and clarify cultural rights. Instead the majority of Member States opted for the fourth option.<sup>54</sup> They preferred to draft a convention on cultural goods and expressions and to draft a culture-friendly trade agreement to overcome the negative effects of economic globalization on culture.<sup>55</sup>

After only two years of drafting and negotiations, the General Assembly of UNESCO adopted, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in October 2005, with a very large majority.

## 5.1 CULTURAL RIGHTS IN THE CULTURAL DIVERSITY CONVENTION

The basic idea behind the Cultural Diversity Convention is that “...cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value...”<sup>56</sup> The purpose of the Cultural Diversity Convention, as stipulated in Article 1, is to protect and promote the diversity of cultural expressions and “...to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory.”<sup>57</sup>

As explained above, the Member States did not want to draft a cultural rights instrument. Accordingly, the Cultural Diversity Convention is not – and was not meant to be – a cultural

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<sup>50</sup> See UNESCO, EXECUTIVE BOARD, “Preliminary Study on the Technical and Legal Aspects relating to the Desirability of a Standard-setting Instrument on Cultural Diversity”, 166 EX/28, §§ 20-23 (12 March 2003).

<sup>51</sup> Id., § 13.

<sup>52</sup> See id., § 20.

<sup>53</sup> Id., § 20.

<sup>54</sup> UNESCO, “Preliminary Study on the Technical and Legal Aspects Relating to the Desirability of a Standard-Setting Instrument on Cultural Diversity,” 32 C/52 No. 34, at 64 (18 July 2003).

<sup>55</sup> See UNESCO, EXECUTIVE BOARD, *supra* note 52, § 11; See also N. OBULJEN, “From Our Creative Diversity to the Convention on Cultural Diversity”, in N. OBULJEN AND J. SMIERS (eds.), *UNESCO’s Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making It Work*, 2006, 17, 19-20.

<sup>56</sup> Cultural Diversity Convention, *supra* note 2, Preamble § 18.

<sup>57</sup> Id., Article 1 (h).

rights instrument as such. It focuses on cultural goods and expressions and does not specifically aim at the promotion and protection of human rights or cultural rights by giving rights to States to develop their own policies. This is almost opposite to a human rights or cultural rights instrument, which would give rights to individuals and communities to be guaranteed by States. At the same time, however, several general references to human rights can be found in the Cultural Diversity Convention. In the Preamble, for example, it is stated that cultural diversity is important for the full realization of human rights as proclaimed in the Cultural Diversity Declaration and other universal instruments. The Cultural Diversity Convention further contains several ‘guiding principles’, among which Principle 1 concerns respect for human rights and fundamental freedoms.<sup>58</sup> It reads as follows:

Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law or to limit the scope thereof.

This provision mainly confirms the importance of respect for human rights for the promotion and protection of cultural diversity. It enumerates several human rights specifically, although much less broadly than in the Cultural Diversity Declaration. Where this Declaration specifically mentions cultural rights in the narrow sense, such as the right to participate in cultural life and respect for cultural identity in education, the Cultural Diversity Convention focuses on freedom of expression, including the right to information, two rights that belong to the broad meaning of cultural rights.

The drafting process shows that the issue of human rights was part of the debates on the Cultural Diversity Convention from the very beginning. As argued above, some Member States wished to focus on the human rights dimension of cultural diversity. It is interesting to note that the Cultural Diversity Convention speaks of ‘human rights’ and does not refer to ‘cultural rights’, as the Cultural Diversity Declaration does. Various persons involved in the drafting process explained that it was felt by many Member States that ‘cultural rights’ could be interpreted too narrowly, as referring mainly to the protection of cultural products or artists. The broader term was used because Member States preferred to place the Cultural Diversity Convention in a broader human rights framework.

While this may be a disappointment for those who would like the Cultural Diversity Convention to contribute to the promotion of cultural rights, the choice to focus not only on cultural rights, but to opt for the more general approach using ‘human rights’, is not necessarily problematic. Although, as shown above, cultural rights is a very broad category of rights, if not clarified, the use of the term ‘cultural rights’ may indeed have been misleading or unnecessarily restrictive. The broad scope of cultural rights may not have been understood, or accepted, by all Member States.

There were, however, also States that actually feared that the Cultural Diversity Convention could be misinterpreted as lacking respect for basic human rights. The main reason why the right to freedom of expression and information were specifically mentioned was because the United States, one of the crucial players in the negotiations, insisted on the importance of these rights for the Cultural Diversity Convention. From the beginning of the negotiations the US was strongly opposed to the adoption of the Cultural Diversity Convention. It disagreed with the idea of the dual nature - cultural and economic - of cultural

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<sup>58</sup> See *id.*, Article 2 (1).

goods and services. It was concerned that the definition of the word ‘protection’ would cause the Cultural Diversity Convention to be a protectionist instrument, creating obstacles for the free exchange of goods and services, contrary to the idea of liberal trade at the bilateral or multilateral level. The US considered the sovereign right of States to take measures and formulate policies to promote and protect cultural diversity as an open invitation to violate other agreements and obligations, such as human rights and trade instruments.<sup>59</sup> The US continuously emphasized that UNESCO should promote the free flow of ideas by word and image.<sup>60</sup> It therefore insisted on the inclusion of freedom of expression and the free flow of information in the text of the Cultural Diversity Convention. One cannot help but wonder, however, to what extent the US truly wished to protect these human rights, and whether it used these arguments as a pretext to protect its trade interests.

The Cultural Diversity Convention also pays attention to the situation of minorities and indigenous peoples. For example, the Preamble refers to the importance of traditional knowledge systems, in particular of indigenous peoples, as a source of wealth. It also states that the vitality of cultures is taken into account, “...including for persons belonging to minorities and indigenous peoples, manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit from them for their own development.”<sup>61</sup> Furthermore, Principle 3 as laid down in Article 2(1) Cultural Diversity Convention recognizes the equal dignity of and respect for all cultures, including the cultures of persons belonging to minorities and indigenous peoples.

This leads to the question of the definition of cultural diversity. The title “Cultural Diversity Convention” is in fact misleading. Although often referred to as such, including in this volume, in fact it is not, and was not meant to be a convention on the promotion and protection of cultural diversity in the broad and holistic sense of the concept. Draft texts proposed by networks outside UNESCO spoke of the promotion and protection of cultural diversity as such.<sup>62</sup> However, from the start of the negotiations, States deliberately chose to speak of the diversity of cultural expressions, not of cultural diversity as such, thereby narrowing the scope of the Cultural Diversity Convention.

The Cultural Diversity Convention includes a definition of cultural diversity in Article 4(1), which is “...the many ways in which the cultures of groups and societies find expression.” This definition refers to the cultures of groups and societies. The Cultural Diversity Convention further allows States to take measures to promote and protect the diversity of cultural expressions ‘on their territory’.<sup>63</sup> The question is which cultural diversity it is that the Cultural Diversity Convention tries to promote and protect. Is it merely the diversity *among* States, searching for a balance in the exchange of goods and services between States? Or would it also imply the diversity *within* States, which would imply the promotion and protection of the cultures of different communities within a society?

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<sup>59</sup> UNESCO, “Preliminary Report By the Director-General Setting Out the Situation to be Regulated and the Possible Scope of the Regulating Action Proposed, Accompanied by the Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions”, *Doc. 33 C/23*, at 5-16 (4 August 2005); *See also* R.J. NEUWIRTH, “‘United in Divergence’: A Commentary on the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions”, 66/4 *Heidelberg Journal of International Law* 819, at 838-839 and 849 (2006).

<sup>60</sup> UNESCO, “Draft Resolution submitted by the United States of America on the Desirability of drawing up an international standard-setting instrument on cultural diversity”, *Doc. 32 C/COM.iv/DR.5 Paris* (2003).

<sup>61</sup> Cultural Diversity Convention, *supra* note 2, Preamble § 8.

<sup>62</sup> *See, e.g.*, INCD, “Proposed Convention on Cultural Diversity” (2003), *available at* [www.indc.net](http://www.indc.net) (last visited 8 December 2008); INCP, “Draft International Convention on Cultural Diversity by the Working Group on Cultural Diversity” (2003), *available at* [www.incp-ripc.org](http://www.incp-ripc.org) (last visited 25 November 2011).

<sup>63</sup> *See* Cultural Diversity Convention, *supra* note 2, Articles 5 (2), 6 (1), 7 (1), and 8 (1).

The Cultural Diversity Convention leaves room for both perceptions. On the one hand, references can be found to national cultures as well as to cultures of minorities and indigenous peoples. On the other hand, however, the Cultural Diversity Convention places a significant emphasis on the principle of the sovereignty of States through the sovereign right of States to take measures to promote and protect the diversity of cultural expressions. The emphasis on sovereignty may give the impression that mainly *national* cultures are to be promoted and protected. In this respect, it is interesting to note that one of the main supporters of the Cultural Diversity Convention, namely France, does not officially recognize the existence of minorities on its territory.<sup>64</sup>

Although the Cultural Diversity Convention does not contain substantive cultural rights for individuals or communities, several provisions speak of measures that *may* be taken by States to protect cultural diversity. These measures show significant similarities with measures that might possibly flow from cultural rights. For example, according to the Cultural Diversity Convention, States may take measures that "...provide opportunities for...the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, including provisions relating to the language used for such activities, goods and services."<sup>65</sup> This provision furthermore speaks of measures to establish and support public institutions, to support artists and others involved in the creation of cultural expressions, as well as measures to enhance the diversity of the media, including through public service broadcasting.<sup>66</sup> Such measures could also include public financial assistance.<sup>67</sup> States should furthermore encourage individuals and groups to create, produce, disseminate, distribute and have access to their own cultural expressions, "...paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples."<sup>68</sup>

## 6. CONCLUSION

The Cultural Diversity Convention has encouraged an intense debate at the international level on the issue of cultural diversity. It codifies the right of States to implement cultural policies and it establishes a new foundation for future cooperation in the area of cultural diversity, with special attention for the needs of developing countries.

The importance of the Cultural Diversity Convention lies in the fact that it confirms the value of cultural diversity and incorporates this concept in international law. Consequently, the Cultural Diversity Convention has to be taken into account when States undertake new commitments in the cultural and other sectors at the bilateral or multilateral level. It may not imply many concrete commitments by States, but it is clearly an incentive for States to develop internal and international cultural policies. In developing these policies, States are to take human rights into account.

As argued above, the Cultural Diversity Convention was not meant to be an instrument on human rights or cultural rights. In fact, it is an instrument containing mainly the rights of

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<sup>64</sup> France has, for example, submitted a declaration under Article 27 ICCPR protecting the rights of members of minorities to enjoy their culture. The Declaration implies that, since the French Constitution prohibits all distinctions between citizens based on grounds of origin, race or religion, no minorities exist in France. Consequently, Article 27 is not regarded as being applicable to France. The French Constitutional Court has further declared that the Charter on Regional and Minority Languages (1992) and the Framework Convention on National Minorities (1995) of the Council of Europe are incompatible with the French Constitution on the basis of the same argument (Conseil d'Etat, avis No. 357466, 6 July 1995 and avis No. 359461, 24 September 1996).

<sup>65</sup> Cultural Diversity Convention, *supra* note 2, Article 6 (b).

<sup>66</sup> *See id.*, Article 6 (f), (g) and (h).

<sup>67</sup> *See id.*, Article 6 (d).

<sup>68</sup> *Id.*, Article 7 (a).

States, the very opposite of the idea of human rights, which are supposed to ensure that States guarantee human rights to be enjoyed by individuals and communities. In this regard, the Cultural Diversity Convention confirms the position taken by the other UNESCO instruments on culture: they touch upon or even incorporate cultural rights, but are not primarily meant to promote and protect cultural rights as such.

In other words, for those who expected a new international instrument promoting and protecting cultural rights, the Cultural Diversity Convention is clearly a disappointment. Although the human rights framework in relation to cultural diversity is recognized, cultural rights are not reaffirmed as the enabling environment for cultural diversity and are not further advanced. At the same time, the Cultural Diversity Convention, together with the other UNESCO instruments on culture, confirms the importance of cultural rights as human rights. In this respect, the Cultural Diversity Convention adds to the recent developments in the field of cultural rights. While for a number of years cultural rights formed a neglected category of human rights, they now have the full attention of scholars and States. There is an increasing number of studies conducted on cultural rights or on culture and human rights. Cultural rights are no longer seen as 'luxury rights' or rights that only matter after other human rights are implemented. Culture is recognized as an important aspect of human dignity that needs to be protected by human rights.

The political climate was, however, not ready to go further in adopting an international legal instrument on cultural rights. The question is whether this is so disappointing. An international instrument on cultural rights would improve their visibility and make them more well-known.<sup>69</sup> The fact is, however, that cultural rights provisions have been incorporated in existing international human rights instruments. Attention should be focused on further clarifying the normative content of these provisions, and on elaborating the cultural dimension of human rights. This could improve their advancement and implementation. Instruments such as the Cultural Diversity Convention and other UNESCO instruments could certainly be helpful in this respect.

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<sup>69</sup> A group of scholars, united in the Fribourg Group, has made a solid achievement in this respect in adopting a Declaration on Cultural Rights (May 2007). The aim of the Declaration was not to adopt a new legal instrument including a new set of rights, but to collect cultural rights provisions from existing international human rights instruments in order to enhance their visibility and coherence and to advance their realization. The Fribourg Declaration on Cultural Rights has been translated in several languages, which can be found on <http://www.unifr.ch/iiedh/fr/publications/declaration-de-fribourg> (last visited 25 November 2011)