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BACKGROUND PAPER (updated version)

RATIFICATION AND IMPLEMENTATION OF THE CONVENTION ON THE PROTECTION AND PROMOTION OF DIVERSITY OF CULTURAL EXPRESSIONS

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"Any man may persecute if he cannot convince others.
This can be remedied by culture, which makes diversity adorable"
Alain

Introduction

The role of culture in emerging countries is becoming a fundamental issue, for three reasons:

- globalisation, accelerated by electronic means of communication which are unprecedented in the history of the world, is leading paradoxically to an immense intermingling of cultures, languages and ideas; the geocultural dimension of the world has never been so apparent ;
- cultural industries are one component of human activity. They also constitute a considerable economic resource in the national wealth of States, and an instrument for development ;
- a world structured by rules of international law laying down rights and obligations enables countries to escape the unilateral or multilateral practices of great powers. From this viewpoint, the introduction of rules on cultural diversity is an opportunity for the most disadvantaged countries.

I. What does the Convention adopted recently by UNESCO consist of?

In the opinion of the International Cultural Diversity Network (INCD), the Convention on the Protection and Promotion of Diversity of Cultural Expression (subsequently referred to as the Convention on Cultural Diversity), adopted by the UNESCO General Assembly on 20 October 2005 is a great success.

To understand the importance of this Convention, it is necessary to bear a number of things in mind. The challenges of globalisation encouraged UNESCO to adopt a universal declaration on cultural diversity in 2001. The Stockholm Intergovernmental Conference on Cultural Policy for Development (1998) and the report by the World Commission on Culture and Development (1995) entitled "Our Creative Diversity" (Perez de Cuellar report) had opened the way, as did the establishment of the International Network for Cultural Policies (INCP), bringing together the Culture Ministers of around 40 countries, as well as the Declaration on Cultural Diversity of the Council of Europe (December 2000).

Nevertheless, these initiatives taken by the international organisations and the ministerial culture network were, by definition, political, and were not legally binding in any way. For many people, it appeared difficult to do more than make declarations of a political nature. However, a growing number of representatives of cultural circles around the world were working in favour of a binding international instrument for the protection and promotion of cultural diversity.

For this purpose, they created accurate organisations to defend this cause, such as national coalitions for cultural diversity and the International Network for Cultural Diversity (INCD - RIDC).

When it was decided by a consensus at its 32nd session that the treatment of cultural diversity needed to be the subject of an international convention, the UNESCO General Conference opened the way for a normative process which resulted in the current Convention.

When the Convention was given final approval by the General Assembly on 20 October 2005, only two states - Israel and the United States - voted against, and four abstained - Australia, Honduras, Liberia and Nicaragua – it is estimated that the Convention on cultural diversity enjoys broad support and a consensus that is quite rare within international bodies.

Some of the ACP member states were crucial for the Convention, since they not only supported it, but also made a very substantial contribution to the drafting. This led to another fundamental aspect, culture, being added to international law, as this text constitutes the first international treaty which lays down rights and duties in the field of culture.

On that respect, this is the road towards the universal State, advocated by Ernest Jünger; it will only be truly achieved once the architecture of rights is fully attained at international level (human rights, social rights, economic and cultural rights).

The UNESCO Convention has the classic structure of an instrument of international law, incorporating in a logical sequence the objectives (I), the scope (II), the provisions (III), the rights and obligations of the parties (IV), relationships to other instruments (V), the organs of the Convention (VI) and the final provisions (VII).

The Convention is based on certain key principles, in particular:

1. the signatory countries recognise that they must protect and promote cultural diversity in their territory, which implies that they must take measures not only in favour of their citizens, but also be open to cultural goods and services from other countries;
2. in order to guarantee that people and organisations have the right to develop their ideas and cultural creations, it is perfectly legitimate for countries to implement policies to protect and promote the diversity of cultural expression in their territory;
3. the processes of globalisation, facilitated by the rapid development of information and communication technologies, while they do create the conditions for enhanced interaction between cultures, also represent a challenge for cultural diversity, particularly by accentuating the imbalances between rich and poor countries;
4. since the cultures which are most under threat are those of developing countries and countries in transition, it is necessary for the international community to cooperate in a spirit of solidarity, in order to assist these countries in developing their cultural industries;
5. cultural diversity is an essential component of sustainable development. The Convention confirms the importance of the link between culture and development, in particular for developing countries, and encourages actions to ensure that the real value of this link is recognised;
6. the Convention should enable arbitration in disputes between signatory states, by referral to the mechanisms provided by the Convention.

Article 2, paragraph 2 of the Convention expressly recognises the sovereign right of states to adopt policies to protect and promote the development of cultural expressions in their territory (principle of sovereignty).

Nevertheless, such a principle cannot affect the full realisation of the human rights and basic freedoms proclaimed in the Universal Declaration of Human Rights, and other universally recognised instruments.

Article 4 of the Convention defines the term "cultural diversity" as the manifold ways in which the cultures of groups and societies find expression. This is a broad definition, which is confirmed by the Convention: "Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment".

The preamble emphasises the importance of intellectual property rights for giving a livelihood to people involved in cultural creativity. Although this Convention (rightly) does not affect the general principles of copyright, this provision creates a link with international treaties on the protection of intellectual property rights, specifically the WIPO treaties, and emphasises to the signatories the importance of such agreements in protecting creation.

Paragraph 4 of this Article emphasizes that cultural goods and services embody or convey cultural expressions, regardless of the commercial value that they may possess. In other words, there are not two types of cultural goods and services (for example commercial films and art or trial films): the Convention acknowledges that these two genres contribute fully to cultural expressions. Likewise for books or music, which cannot be divided into art music or books and commercial music and books. In this way, the temptation to dissociate certain cultural goods and services from the scope of this Convention, and only consider their commercial value is ruled out.

Article 6 formulates the rights of the parties with regard to cultural policy. The implementation of the protection and promotion provisions arising out of the principle of sovereignty (Article 2, 2 described earlier) can be carried out both at national and international level. The measures that could be applied are very varied: they range from incentives to public financial aids. In general, measures are intended to contribute to the development of national cultural production, by offering national products and services a role in the national market. The role of these measures must be to protect media diversity, support public services and creatives, and promote free trade and free movement of ideas and cultural expressions.

Article 7, paragraph 2 also acknowledges "the important contribution of artists"... and their central role in nurturing the diversity of cultural expressions. This article also includes the cultural industries ("others involved in the creative process..."). Cultural policies relating to books and publishing and production of music, films and television are thus formally recognised as beneficiaries of protection and promotion measures which could be implemented under this Convention.

This makes it clear that global trade in cultural goods and services is not only provided by artists, but also by the cultural industries as a whole, and these industries form a growing proportion of the economy, particularly in developed countries.

The Convention devotes an extended article to cooperation for development. This is Article 14 which is part of title IV of the Convention, entitled "Rights and Obligations of Parties". Therefore, the provisions of this article should be read as rights and obligations. So, the recognition of the growing role of cultural industries in the context of development policies is increased, which is consistent with the work carried out in other international forums, in particular the work carried out within CNUSED.

In recent years, CNUSED has emphasised the appeal of helping developing countries to exploit the economic potential of cultural industries¹.

¹ See CNUSED, 11^{ème} Session, Sao Paulo (13-18 juin 2004) – High Level Panel on Creative Industries and Development, http://www.unctad.org/en/docs/tdximisc1_en.pdf (28 November 2005)

The objectives of development cooperation are as follows:

- 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 and facilitating the mobility of artists from the developing world;
- encouraging appropriate collaboration between developed and developing countries in the areas, inter alia, of music and film.

Two possibilities for cooperation are open:

- 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.

In parallel, the Convention takes account of the need to improve, through exchange of information, expertise, experience, and through training of human resources, the capacities of the public and private sectors in managing cultural competencies. A transfer of know-how and new technologies is also provided (Article 19).

In the context of development cooperation and international cooperation, the Convention provides for the creation of an International Fund for Cultural Development (Art. 18). The resources of this fund would consist of voluntary contributions by the States parties to the Convention. These aids could be allocated to management of public services, and to the conditions of production and dissemination, and the development of enterprises.

The allocation of the resources of the fund will be decided by the organs of the Convention (Intergovernmental Committee) based on the policy directions established by the Conference of States parties to the Convention. The ACP countries can play a real part in the decisions, as they are represented in the Intergovernmental Committee.

International cooperation is also planned if one of the Parties to the Convention observes the existence of a serious threat to cultural diversity on its territory. This international intervention could be carried out both on a bilateral and multilateral level (Article 8).

Article 20 governs the relationships between the Convention and other international treaties. It declares equality of status between this Convention and other international treaties (WTO, WIPO, etc.), stipulating that there is "mutual supportiveness between this Convention and all other treaties", and "when interpreting and applying the other treaties to which they are parties ... parties shall take into account the relevant provisions of this Convention".

Article 25 provides for a disputes settlement mechanism, while Articles 22, 23 and 24 make provisions relating to the organs of the Convention (Conference of Parties, Intergovernmental Committee – 18 members then 24).

Finally, it should be noted that the provisions of the Convention constitute a reference framework. The list of measures under consideration is not exhaustive. The measures taken under the Convention will depend on the legal documents adopted subsequently by the States Parties, and the policies implemented by governments.

II. Specific aspects for ACPs

a) A geocultural issue open to developing countries

Western countries, which are behind this Convention, are particularly interested in the protection that could be granted for them. This is true for Canada (which lost a panel at WTO, Sports Illustrated against the measures intended to protect its magazine press from the invasion of US periodicals). The same applies to France, which has constantly promoted the cultural exception, and then cultural diversity.

But these countries have understood that the best protection for cultural diversity was its propagation, making it universal. As a consequence, while upholding the principles of protection of cultural diversity, the Convention also guarantees the principles of promotion.

Article 14, mentioned above, is a very important article regarding the needs and aspirations of ACP countries, emphasising specifically under the rights and obligations of this Convention, the means of cooperation for development. We shall return later to the practical means of implementing these provisions.

b) Ratification, precondition for implementation of the Convention

As the Convention offers an objective context and benefits for these countries, it is very much in the interest of the ACP countries to ratify the Convention as soon as possible.

This will be able to enter into force as soon as the 30th State Party signatory is reached. If this happens by October 2007, this would enable the organs of the Convention – particularly the Conference of Parties – to meet for the first time at the next UNESCO General Conference scheduled for October 2007. This would imply the 30 ratification instruments being deposited with UNESCO by 30 June 2007.

Moreover, the intergovernmental committee, an emanation of the Conference of Parties, will consist of 18 States Party, widened to 24 when the number of ratifications has reached 50 States Parties. It is in the interest of ACP countries to obtain wide ratification enabling the number of participants in the Conference of Parties to be increased, if possible, benefiting groups of African and Latin American countries.

Furthermore, it should be added that only States that have ratified the Convention can take part in the Conference of Parties. The Conference will elect the Intergovernmental Committee of 18 States Parties (then 24) charged with drawing up the operational mechanisms of the Convention. The members of the Intergovernmental Committee will have a major role to play in the policy directions set by the Convention.

Until August 2006, 5 countries have deposited their ratification instruments (Canada, Mauritius, Mexico, Romania, Monaco).

Ten other countries have completed their internal ratification processes, and should deposit their ratification instruments shortly with UNESCO (Togo, Peru, Senegal, Mali, Burkina Faso, Cambodia, Croatia, France, Finland, Austria).

The ratification processes are under way in Belgium, Moldavia, Republic of Congo, Norway, Spain, Brazil, China and Madagascar.

c) After ratification, implementation.

From the strategic viewpoint, it appears imperative that the ACP countries should have a strong presence in the first bloc of ratifications. But it also appears necessary to propose right now concrete policy directions for the implementation of the Convention.

The Convention provides very interesting mechanisms for implementing the promotion of cultural diversity.

Article 14 on cooperation for development;

Art. 15 public-private partnerships.

Art. 16 on preferential treatment for developing countries;

Art. 18 on the International Fund for Cultural Diversity;

The States Parties could consider participating separately in the implementation and in receiving benefits of these measures.

But as it happens in other international bodies (WTO, WIPO, etc.) States derive great benefits from structuring themselves into "blocs" or regional groupings. Regional solidarity is a powerful factor for organisation and decision-making.

It is important to consider that the ACP States could use the mechanisms of the UNESCO Convention as a group, and also in concert with the EU, the ACP and the EU could submit a common agenda to UNESCO, in the context of the Convention, aiming to implement measures to promote and possibly protect cultural diversity.

For its part, the European commission has declared itself in favour of the objective aimed at giving special assistance to developing countries to support their cultural industries in terms of exports.

On the adoption of the Convention by the UNESCO General Assembly, the European Commission emphasised that Article 151 of the European Commission Treaty already obliged the Community to promote cultural diversity, not only internally, but also in its foreign policy². The European Commission has pointed out in this regard that its policy in favour of development for certain regions, including the ACP countries, as well as Mediterranean countries and "neighbouring" countries (partnership between oriental Europe and Central Asia) already includes "cultural aspects" (implementation of an exchange of good practices in the sector of cultural creation and cultural industries – identification and dissemination of good practices).

If an ACP-EU partnership became true, in the context of the Cultural Diversity Convention and based on a properly formulated and negotiated agenda, such a development would be of a nature to "bring to life" the Cultural Diversity Convention, while intensifying the nature of the partnership and the cooperation between Europe and the ACP countries, and there is nothing to prevent the European Union from developing a partnership, and with regard to Mediterranean and "neighbouring" countries, to consolidate it using the Convention as a foundation for it.

Nothing prevents the ACP member countries from enhancing other partnerships, such as a South-South cultural aspect, which would balance, supplement and improve the scope of the North-South cooperation, so that the divide between North-South and South-South could be mitigated. The Convention allows a lot of flexibility in future link-ups and future actions that it could lead to. By outlining an agenda, it would be a matter of determining the characteristics

² European Commission, press release MEMO/05/387, 20 October 2005

of an action in favour of cultural diversity, bringing together the 77 ACP countries, which already represent a great diversity of cultures and peoples, and on the other hand, the 25 (soon to be 27) member states of the EU.

III. Proposals and recommendations

What directions could this cultural diversity agenda take?

1. Culture relies on work done by cultural industries, on the one hand (CDs, DVDs, books), but it also relies on the skills (talent) of the individuals themselves (artists, producers, technicians).

In other words, the promotion of cultural diversity depends largely on the physical presence on the territory of the promotion. One priority should be the full recognition of a right to free movement and free provision of services for artists and professionals working in the cultural and artistic sphere.

As a priority, the agenda should lead to the recognition of a cultural passport. This cultural passport, granted to artists and technicians on the sector of cultural creation, from ACP countries travelling to the European Union, would be intended to facilitate access to the EU territory, and guarantee identical rights to Community citizens in terms of contracts and remuneration for artistic work done.

2. Public policy instruments in culture in favour of the ACP countries should be enhanced by exchanges of expertise with countries of the European Union, with special attention to.
 - The widespread use of statistical instruments in developing countries enabling them to measure the share of cultural creation in national wealth. Such instruments, which are indispensable to the good governance of cultural industries and the culture sector, could be implemented by providing EU countries with human resources (experts) and technical resources enabling these statistics to be drawn up. These are measures with reasonable cost.
 - Regulation of cultural industries is a necessity. The single price of books, content quotas on the radio and television, for example, enable the supply of national content to be stimulated.

Similar measures should be considered in countries where market deficiencies are identified in the development of certain cultural industries (books, audiovisual, music). The EU member states could contribute to the exchange and knowledge effective public policy measures.

The positive effect would be that, the more the public policy measures taken by ACP member states are convergent with measures taken in Europe to promote cultural industries, the greater the convergence will be between the two zones in the cultural field.

A European task force charged with advising on regulation and management of ACP public policies should be considered.

3. The development of public/private partnerships in the sector of cultural industries should be strengthened. This involves situations where private enterprise makes available resources (infrastructure, sponsorship, human resources) with a view to carrying out a public service mission in the field of culture, with these facilities compensating the lack of resources on the part of the public authorities.

Such possibilities should be developed more, and European companies with offices or a subsidiary in ACP countries should be contacted more frequently about participating in cultural initiatives.

4. Artists in residence should be more commonplace, involving all cultural activities (music, cinema, books, drawing) so as to increase the potential of resources and artistic talents within a short space of time.
5. Partnerships between cultural professionals and cultural industries in EU countries and developing countries should be structured by medium-term actions, over five years, in the following fields:
 - development of micro-credit in the sector of cultural SMEs,
 - technological innovation and creation of cultural content (online content, for example);
 - development of structures suited to the needs of managing copyright and related rights of creators, artists and local producers;
 - pooling of resources with a view to promoting, in a common action, literacy and the promotion of cultural diversity.
6. The International Fund for Cultural Diversity, created by the UNESCO Convention, constitutes *inter alia* a test of the will of States Parties to implement, in a sustainable and operational way, the rights and obligations adopted by the Convention. The European Union should offer to put XXX million euro into the fund for specific actions to promote cultural diversity in developing countries.
7. Provide means of access and sharing in the sector of new information technologies. It should be pointed out that the European Commission took the initiative of broadening the scope of the Television Without Frontiers Directive, currently undergoing revision, in order to include film and television co-productions by non-member states, thus taking concrete action under Article 12 of the Convention, before it is even ratified. Article 12 of the Convention aims to "encourage the conclusion of co-production and co-distribution agreements".
8. The evaluation of best practices in training and management of the cultural sector and cultural industries, and the dissemination of good practices should be the subject of regular monitoring.
9. The promotion of cultural diversity cannot be a unilateral action in the broad sense. It is important that the specific creations of developing countries, particularly traditional know-how and cultures – elements of social cohesion and collective consciousness – should be fully exploited, not only in their country of origin, but also in other countries. A plan aiming to promote this traditional knowledge and cultures within the countries of the European Union should be envisaged.

These are outlines of few actions for this agenda, in order to bring the Convention on the Protection and Promotion of Cultural Diversity of Cultural Expressions to life.

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