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## Diversity of Cultural Expressions

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#### Vulnerability and Threat: Insights for the Future Implementation of Art. 8\*

This paper, commissioned by UNESCO Secretariat, offers an overview of the evolution of the draft of the Convention with regard to cultural expressions under threat and provides insights for the interpretation and implementation of Article 8 of the Convention (Measures to protect cultural expressions).

\* This study was drawn up at the request of the Secretariat by David Throsby, Professor of Economics, Macquarie University, Sydney, Australia. The opinions expressed herein are not necessarily those of the UNESCO Secretariat.

## **Article 8 – Measures to protect cultural expressions**

“1. Without prejudice to the provisions of Articles 5 and 6, a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

2. Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.

3. Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations.”

### **1. Background**

The origins of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereafter “the Convention”) lie in the Universal Declaration on Cultural Diversity, adopted by Member States of UNESCO in 2001. One of the important influences motivating Member States to adopt the Declaration can be seen in retrospect to have been the proposition that there are threats to the diversity of cultural expressions in the contemporary world. Although the text of the Declaration itself does not say so in so many words, the Action Plan arising from it mentions “safeguarding” no less than four times (paragraphs 2, 5, 12, 19), implying that culture and cultural expressions were thought to be at risk and in need of protection or preservation. Insofar as any specific source of danger was identified, it was globalisation that was interpreted as potentially threatening, especially to the culture of developing countries and to “localized and historically vulnerable cultural forms”.<sup>1</sup>

These arguments concerning threats to cultural diversity were taken up more pointedly by the UNESCO Executive Board at its 166th session in April 2003, when it discussed the possibility of a new standard-setting instrument in this area. The Board noted that “cultural content and artistic expressions ... appear to be particularly threatened by globalization”,<sup>2</sup> a theme that was carried through to become one of the principal justifications for setting in train a process to establish a convention, as was agreed at the 32nd session of the UNESCO General Conference in October 2003. Indeed the working title that was by this time in place for the proposed instrument incorporated the word “protection” specifically, reflecting the underlying view that cultural expressions indeed needed to be protected, and that the provision of such protection would constitute a primary purpose of the convention.

In his opening address to the first meeting of Experts (Category VI) on the first draft of an international convention on the protection of the diversity of cultural contents and artistic expressions (17-20 December 2003), the Director-General of UNESCO again repeated the “threat of globalisation” as one of the reasons for establishing the Convention, pointing out that Member States, whilst applauding the spirit of the Universal Declaration, regarded it as an inadequate response to the specific threats to cultural diversity.

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<sup>1</sup> *Universal Declaration on Cultural Diversity: a vision, a conceptual platform, a pool of ideas for implementation, a new paradigm*, Cultural Diversity Series n°1, Paris: UNESCO, 2002, p. 14.

<sup>2</sup> Document 166 EX/28, paragraph 23.

Thus it is not surprising that the protective functions anticipated for the convention were very much in the minds of the Experts as they set about their task of producing a First Draft.

## **2. The Experts' Meetings of 17–20 December 2003, 30 March–3 April 2004, and 28–31 May 2004**

Discussion at the first Experts' meeting ranged widely over the intentions and coverage of the Convention and drew attention to some problem areas in its potential application. In regard to the issue of protection, it was stressed that this term did not mean simply preservation. Indeed a fundamental distinction emerged between "protection" and "protectionism", the latter meaning an automatic resort to trade restrictions in order to preserve otherwise uncompetitive industries. There was agreement that the treaty should in no way support protectionism of this sort, nor should protection be interpreted as cultural isolationism or cultural nationalism, but rather that it should aim at creating the conditions for culture to grow and flourish. The Experts were nevertheless alert to the possibility of inconsistency between any proposed protective measures and the principle of free circulation of cultural goods and services, though it was acknowledged that the General Agreement on Trade in Services (GATS) provides for liberalisation to take place with due respect for national policy objectives and levels of development. Overall the Experts were concerned to stress in these early discussions that a basic intention of the Convention would be to provide a balance between economic and cultural dimensions in the protection of the diversity of cultural expressions.

In the period between the first and second Experts' meetings, several Experts made comments and proposed formulations for consideration at the next meeting. One Expert elaborated the argument that protective measures such as quotas actually reduce cultural diversity. Another distinguished between cultural expressions that were economically strong and those that were weak, a proposition that was supported in a contribution from another Expert who noted the capacity of global markets in cultural goods to "impose" the cultural products of one society or region on those of another. An appropriate policy response to this situation, according to one member of the group of Experts, would be for a country to "preserve a proportion of space" for national cultural goods and services.<sup>3</sup>

Discussion at the second meeting sharpened the issue of protection considerably. Under the heading of "Cultural Policies",<sup>4</sup> draft text on the table specified protection as being warranted "in conditions where valuable cultural expressions are regarded as vulnerable to external pressures of whatever sort", and went on to identify the measures that States Parties may take, including reserving a proportion of their space to national cultural goods. Attention was thus focussed on two significant issues:

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<sup>3</sup> This proposition recurred through several drafts of relevant articles of the Convention. In this process a difficulty was noted in rendering the French term "*espace*" in English, since the English word "space" did not adequately capture the intended meaning. In the final text of the Convention as adopted this word has been replaced by the phrase "measures that ... provide *opportunities* for ...".

<sup>4</sup> Working Document, Chapter III. 1, Section A of the then-current draft, 2004.

- the fact that cultural expressions may be *vulnerable*;
- the proposal that protection should only be considered in the case of expressions regarded as *valuable*.

The first of these issues enabled a distinction to be drawn between general support for cultural expressions, and support or protection in cases of vulnerability.

These matters were elaborated further in submissions from Experts in the period between the second and third meetings. One Expert proposed text for what was by then Art. 7, para 3 on the protection of vulnerable forms of cultural expression that added the phrase “threatened by the possibility of extinction or serious curtailment”. The group discussed the wording of this article in detail, including its relationship with the rights of social groups, in particular minorities and indigenous peoples. There was also consideration of follow-up mechanisms if a case for protection were identified in particular instances. In the end a wording was agreed to split the reference to vulnerability between Arts. 6 and 8. The former referred to the *right* of States Parties to adopt protective measures under conditions of threat or vulnerability, while Art. 8 spelt out an *obligation* to take such measures if cultural expressions were “deemed to be vulnerable to or threatened by the possibility of extinction or serious curtailment”.

### 3. Towards the adoption of the Convention

Following completion of the Experts’ meetings, a consolidated final version of the Draft Convention was prepared and released for discussion.<sup>5</sup> At the First Intergovernmental Meeting on the Draft Convention held in Paris on 20–24 September 2004, delegations considered the vulnerability provisions and questioned the mechanisms for dealing with these issues as contained in Art. 8. Subsequently the Drafting Committee received comments on the Draft from a number of Member States as well as from other interested parties. Although the NGOs who contributed comments did not raise any problems with Art. 8,<sup>6</sup> some Member States mentioned the need to clarify the meaning of terms such as “vulnerability” and “threat” and asked who would define these concepts, what resources might be available, and whether reservation of “space” for domestic cultural goods was practicable.<sup>7</sup> At its meeting in Paris on 14–17 December 2004, the Drafting Committee considered various options for revising the text of Art. 8, but decided to postpone discussion of this Article in order to enable the Plenary to address: (1) the criterion of vulnerability; (2) the competent authority for determining this criterion; and (3) the follow-up mechanism.<sup>8</sup>

After considerable further deliberation, the final draft of the Convention was put to the UNESCO General Conference in October 2005 and was adopted by 148 votes for, 2 against, with 4 abstentions. The wording of Art. 8 in the text as adopted was softened over that originally contained in the Experts’ draft of July 2004, insofar as the requirement that States Parties “shall” take appropriate measures in cases of serious threat was replaced with a provision that Parties “may” take such measures, if they determined a “special situation” existed. Furthermore, although the word “vulnerable” had disappeared from both Arts. 6 and 8, the idea of vulnerability was still implied by the wording of Art. 8, para 1, with its reference to “serious threat” and “need of urgent safeguarding”.

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<sup>5</sup> CLT/CPD/2004/CONF.201/2, (July 2004).

<sup>6</sup> CLT/CPD/2004/CONF.607/1, Part V (December 2004), pp. 41–42.

<sup>7</sup> CTT/CPD/2004/CONF.607/1, Part II (December 2004), pp. 55, 61–64.

<sup>8</sup> CLT/CPD/2004/CONF.607/6, (23 December 2004), p. 64.

#### 4. Interpretation

How is the finally agreed wording of Art. 8 to be interpreted for purposes of implementation of the Convention? Three terms require attention:

- risk of extinction;
- under serious threat; and
- in need of urgent safeguarding.

It is appropriate to discuss the interpretation of these terms in stages.

(i) *What is being protected?* It is important in the first instance to distinguish between cultural expressions that arise as a service provided by a cultural asset of some kind, and an expression that is itself a cultural good, service or activity. In the former case, cultural expressions are generated by tangible items of cultural capital such as heritage buildings, sites, artefacts and artworks and by intangible cultural capital such as languages, traditions, rituals, etc. In such cases the protection required is directed at the asset itself. On the other hand, in the case of cultural expressions experienced by means of the production and consumption of cultural goods, services and activities such as the performing and visual arts, music, literature, films, television programs, video games, etc., the protection required will be of the production and consumption processes of the goods, services and activities involved.

(ii) *Threat.* The literal meaning of the verb “to threaten” is “to be likely to injure”, or “to be a source of danger to” someone or something. In the case of cultural expressions, threats may be classified as external or internal to a State, and as arising from economic, cultural and/or physical sources. The types of threat that may affect the diversity of cultural expressions according to this scheme are shown in Table 1.

**Table 1: Possible threats to the diversity of cultural expressions**

	<b>Economic</b>	<b>Cultural</b>	<b>Physical</b>
<b>External</b>	Competition from global markets; “dumping” of cultural product	Imposition of cultural symbols or messages from imported product	Weather damage to heritage buildings and sites
<b>Internal</b>	Insufficient demand; market failure; high cost of production	Consumer indifference towards local cultural expressions	Neglect, failure to maintain fabric of tangible cultural capital

The most obvious illustrations of threats to local cultural expressions arising from *economic* sources can be found in the competitive pressures affecting the production and consumption of film, television programs, music and other audiovisual product. Domestic production of these cultural goods and services in many countries has

difficulty competing with major global producers, and as a result the output and diversity of local cultural expressions suffers. An example of a *cultural* threat is the possible crowding-out of minority languages by a dominant national or international language.

It is apparent that economic and cultural threats and consequences are closely interconnected. Economic threats might have purely economic consequences, seen in loss of domestic incomes, loss of export earnings and loss of jobs. Economic threats may also have cultural effects through loss of cultural identity or diminution in the diversity of cultural expressions. Similarly cultural threats might have economic consequences if, for example, the dominance of foreign cultural symbols influences consumer tastes away from domestically-produced product, whilst cultural threats could have cultural effects, for instance if living cultures are transformed into Disneyland experiences aimed particularly at tourists.

(iii) *In need of urgent safeguarding*: This phrase implies vulnerability, which may be defined as being susceptible to injury. Safeguarding, in turn, may be defined as keeping secure or protecting from the danger of such injury. Vulnerability might arise from the same three sources that were identified in Table 1. Firstly, *economic* susceptibility might occur:

- if the scale of domestic cultural production is too small and/or costs of production are too high in comparison with international competitors;
- if domestic markets are too thin and/or demand for local cultural product is insufficient; or
- if the infrastructure to support domestic cultural industry is inadequate - such infrastructure might relate to the supply of managerial or entrepreneurial skills, the provision of financial services, the existence of efficient marketing and distribution channels, etc.

Secondly, *cultural* vulnerability could arise, for example, if there is insufficient community interest in maintaining a particular cultural expression, or if the holders of traditional knowledge are dying out without being replaced. Thirdly, *physical* susceptibility of tangible cultural items might arise simply through processes of decay and the ravages of time.

How should the word “urgent” be interpreted? Some degree of exposure to threat and even some curtailment of the extent or diversity of output of cultural expressions may be both expected and tolerated as part of the normal economic and cultural dynamics of national and international affairs. However, such effects would be regarded as serious, and remedial actions seen to be urgently required, if the injury being caused was likely to be long-lasting or permanent, and/or if the harm was going to be difficult to repair. For example, the absorption of a traditional music genre into the world-music sphere might seriously undermine a country’s long-term capacity to maintain the skills and talents of artists in this genre in production.

(iv) *Risk of extinction*: The extreme case of the circumstances described above is where a cultural expression may die out altogether. The word “extinction” implies that, as with species in the biological sphere, the disappearance would be permanent and irrevocable. In such circumstances the so-called precautionary principle should be invoked, which requires that decisions with irreversible consequences should be taken with extreme caution. The possibility of extinction is most obviously illustrated when applied to tangible and intangible cultural capital, as in the destruction of a heritage

building or the dying out of a traditional language, but it is also relevant to cultural goods, services and activities of other sorts whose disappearance would reduce cultural diversity.

## 5. Criteria for implementation

Because of the varied conditions under which Art. 8 of the Convention might be invoked, it is difficult to draw up a standard one-size-fits-all set of criteria for assessing its application. Rather, a more pragmatic approach is to set up a staged assessment procedure, providing a checklist against which particular cases might be judged. Such a checklist can be specified as a sequence of questions or requirements that need to be met, as follows:

**Step 1.** Given that Art. 8 specifies that it relates to “special situations”, the first requirement is to ensure that the case under consideration is indeed “special”. This can be done by reference to the nature of the threat and susceptibility. It needs to be understood that the Convention is primarily a cultural instrument, and as such cultural rather than economic arguments should prevail. In other words, an economic case (relating, for example, to loss of jobs or reduction in export income for the cultural industries) would be regarded as insufficient on its own as a basis for invoking the Convention; rather the adverse cultural consequences of the economic threat would need to be identified as the primary motivation.

**Step 2.** Action to protect vulnerable cultural expressions will be potentially warranted only if the expressions concerned are regarded as valuable. The question of valuable to whom, and the means of demonstrating value, are matters that Parties must judge for themselves, but it would be expected, for example, that some empirical evidence of community valuation might be brought forward.

**Step 3.** The existence of threat should be articulated, with documented evidence of whatever economic/cultural/physical sources of threat are considered relevant, and why they are likely to cause harm to the cultural expression(s) under consideration. Such evidence may comprise (a) economic data relating to the source of the threat; (b) economic or other data demonstrating the capacity or incapacity of domestic cultural production/distribution/consumption to meet the threat; and (c) cultural indicators showing whatever cultural values or trends are relevant.

**Step 4.** The likely or forecast consequences of not taking action need to be spelt out as a justification for the adoption of protective measures. Although the consequences might be represented in terms of economic variables such as output or employment levels, it is the cultural consequences that are most relevant as a basis for action. For example, whilst preservation of levels of employment in the cultural industries would not *per se* constitute a valid justification, the protection of the jobs of artists or people with particular cultural skills may provide an appropriate rationale.

**Step 5.** The proposed interventions to remedy the special situation should be spelt out. These may comprise short-term or emergency measures designed to have immediate effect, or longer-term policy strategies involving fiscal or regulatory instruments, or appeal to international cooperation.

It should be remembered that Art. 8, para 3 requires Parties to report all measures taken to meet the exigencies of the special situation to the Intergovernmental Committee. In this context it is worth recalling that at various times in the original Experts' meetings, the role of an Intergovernmental Committee to oversee the ongoing implementation of the Convention was discussed; the Experts expressed the view that the orientation of such a Committee should not be punitive but facilitating, encouraging international cooperation as an important avenue towards dealing with the sorts of problems that Art. 8 addresses.

Finally, it might also be noted that this Convention is not the only international instrument that affects the sorts of issues raised by Art. 8. Of course Art. 20 provides for "mutual supportiveness" between this Convention and other treaties, and such mutuality will certainly be expected to apply to the interpretation of Art. 8. Other conventions or treaties that touch upon the application of protective or special measures to recognise the specific nature of cultural goods and services include such instruments as the Florence Agreement (1950) and the Nairobi Protocol (1976), various cultural exceptions allowed within the architecture of the world trading system, several heritage conventions, and agreements dealing with the status of the artist. It is apparent that the application of Art. 8 of the present Convention should be seen as complementary to the intentions of these other instruments.

## **6. Concluding remarks**

The importance of Art. 8 in the overall framework of the Convention is clear. It arose in response to one of the primary motivations for establishing the Convention in the first place, namely the threat of globalisation to the output and diversity of cultural expressions, especially in the developing world. Although the implementation of protective measures in accordance with this Article is a right rather than an obligation on Parties to the Convention, the treaty is still strong in its assertion of the need for alertness to the dangers posed by different types of threat to cultural diversity in the contemporary world. The Convention's underlying support for the concept of protection rather than protectionism remains one of the key characteristics of its approach to cultural policy formulation in both developed and developing countries.