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**The EU ratification of the UNESCO  
Convention on the protection and  
promotion of Cultural Diversity:  
What cultural diversity is at stake?**

**(EUI Working Paper)**

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## INTRODUCTION

In our globalized world, the debate on the need to respect and ensure the survival of cultural diversity is becoming a crucial one, both at national and international stages. As an answer to the international need for a stronger protection of cultural diversity, on 20 October 2005 the UNESCO General Conference adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The Convention intends to fill a legal *lacuna* by establishing a series of rights and obligations at both national and international levels, with a view to the real protection and promotion of cultural diversity as a value and providing answers to the challenges of globalization. It is the first of its kind in international relations, as it enshrines a consensus that the world community has never before reached on a variety of guiding principles and concepts related to cultural diversity.

Surprisingly enough, the 2005 UNESCO Convention was jointly negotiated by the European Commission, on behalf of the Community, and the Council Presidency, on behalf of the Member States. Within the European Union, cultural matters are particularly relevant, not only upon the last and coming enlargements, but also for their connection with economic, social, and political issues of the European construction. However, culture was not one of the priorities of the founders of the European Community and the main EU initiatives in the field of culture have been linked to economic or trade issues. Nevertheless, the strong support showed by the EU towards the adoption of the 2005 UNESCO Convention seems to be significant of a growing and stronger interests of the Union towards cultural issues.

The EU participation to the UNESCO Convention has raised the attention of scholars, as well as of the main stakeholders involved in the implementation of the Convention. From a pure European legal perspective, main questions refer to the competence of the EU as a negotiator: most of the Member States have envisaged in the EU participation an attempt to undermine their national competence and expand the EU cultural competence. Certainly, the EU acquired greater visibility as an international actor on the global scene. On the other hand, this ratification has been welcomed as a step forward towards a stronger integration of cultural diversity issues in all the EU internal and external policies.

The aim of this paper is to explore the interaction between the UNESCO Convention for the Protection and Promotion of Cultural Diversity and the EU legal system. The paper will try to provide a picture of what challenges and commitments the EU undertook under the Convention and to evaluate the

benefits deriving from it to the promotion of cultural diversity expressions. The paper is composed of three sections. In the first section I will try to define the notion of culture and cultural diversity and analyze cultural issues in a globalized world. In the second section I will clarify the notion of cultural diversity adopted by the 2005 UNESCO Convention and in the European Union. Then, the third section will focus on the rights and obligations arising under the Convention and will try to figure out their impact within the EU legal order, in order to evaluate if the ratification of the Convention can bring an added values to the protection and promotion of cultural diversity in the Union.

## Section 1 Cultural diversity in a globalized world

### 1.1) The notions of culture and cultural diversity

*“The notion of culture is everywhere invoked  
and virtually nowhere explained”<sup>1</sup>*

Providing a well-defined and univocal definition of “culture” is not an easy task. “Culture” is *per se* a dynamic process, which continuously changes and does not have precise boundaries. Furthermore, “culture” is also a cross-cutting subject, which interacts with other disciplines, such as law and economics, and plays different role in our complex societies. For instance, culture is both the source of education and the product of the educational process; culture is, at the same time, a structural element of the human development paradigm and the result to be achieved through human development policies<sup>2</sup>. Therefore, a unified definition of the word “culture” would not only be difficult, but rather inappropriate because of the manifold ways in which culture manifests itself and it is understood. Nevertheless, an historical excursus dealing with the origin of the word “culture” and the evolution of the concept through time can be helpful in order to have a comprehensive understanding of the notion<sup>3</sup>.

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<sup>1</sup> MEZEY N., “Law as Culture”, in SARAT A. and SIMON J. eds., *Cultural Analysis, Cultural Studies and the Law*, p. 37

<sup>2</sup> WELZEL C., INGLEHART R. and KLINGEMANN H.C. “*The Theory of Human Development: A Cross-Cultural Analysis*”, Paper for the Center for the Study of Democracy, University of California of Irvine, 2002, available at <http://repositories.cdlib.org/csd/02-01>. More generally, on the interaction between culture and development and the ambiguity of the role of culture in societies, see: VITANYI I., “Development and Culture: the New Concepts”, pp. 3-17 and LASZLO E. “The Role of Culture in Development” pp. 19-32, both in LASZLO E. and VITANYI I. (eds.), *European Culture and World Development*, Pergamon Press, 1985.

<sup>3</sup> The concept of culture is still a widely discussed and contested topic in social and legal sciences. See: ROSSI P. (ed.), *Il Concetto di cultura*, Einaudi, Torino, 1970.

The Latin etymology of the word “culture” derives from the agricultural context and referred to the action of “taking care of lands to make them fertile and grow plants”<sup>4</sup>. The word was metaphorically used by Latin authors, such as Horace and Cicerone, to refer to the development and exercise of intellectual capabilities of human beings. Instead, the analogue Greek word “culture” had a broader meaning and referred to both intellectual and physical exercise, as well as to education. Over the centuries, the broad Greek knowledge of “culture” was dismissed and the classic notion mainly came to refer to the “highest intellectual achievements of human beings”<sup>5</sup>. Indeed, this is the most traditional understanding of culture and, in modern times, it refers to literacy and artistic productions, including fine arts, literature, music and all those works inspired and produced by creative activities.

This common concept of culture implies, at least, two other understandings of the word: “culture as heritage” and “culture as creativity”. The first concept indicates the material cultural heritage of humankind, which is commonly used to refer to the entirety of historical monuments, artifacts and traditional handicrafts<sup>6</sup> that embed cultural values and contribute to shape the identity of nations. The second idea refers to the process of artistic creation and production.<sup>7</sup> In both cases, we can notice that the notions are shaped on the

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<sup>4</sup> FABBRI EDITORI, *Nuova Enciclopedia Universale*, Vol. V, 1984, p. 2611.

<sup>5</sup> *Ibidem*, p. 2611. See also: PROTTO L. V., “Cultural Rights as Peoples Rights in International Law”, in CRAWFORD J. (ed.), *The Rights of Peoples*, Clarendon Press, Oxford, 1998, p. 94.

<sup>6</sup> Nowadays, the adoption of new technology and the evolutions deriving from human creativity have contributed to wide also the idea of what cultural products and art are. Today, for example, television and radio broadcastings are considered as cultural services. In Western countries, debates over this broad understanding of cultural goods and services lead to a distinction between “high” and “low” culture: the latter refers to popular culture as the results of modern cultural industries (pop-music, pop-stars, etc.); the first refers to “culture d’ élite”. See, for example: STAVENHAGEN R., “Cultural Rights: a Social Science Perspective”, in Institute for Art and Law (ed.) *Cultural Rights and Wrongs*, UNESCO Publishing, Paris, 1998, p. 5.

<sup>7</sup> The concepts of “culture as heritage” and “culture as creativity” have inspired most of the activity of UNESCO, the UN agency for education, science and culture founded in Paris on 16th November 1945, aiming, in particular, at universalizing the concept of cultural heritage as a common good and value for humankind. We cite here, as samples, some conventions adopted under the UNESCO aegis and a: the Convention on the Protection of the World Cultural and Natural Heritage in 1972; the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol (1954); the Convention on the Protection of the World Cultural and Natural Heritage (1972); the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995); the Convention on the Protection of the Underwater Cultural Heritage (2001); the Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

material element of culture: the focus is on the externalization (or the objectification) of cultural manifestations.

Over the last century, this concept of culture has tremendously evolved under the influence of social sciences, in particular ethnology and anthropology. During the XIX century, anthropologists focused their research on primitive societies and their habits, techniques of exchange and traditional customs, with the aim to reconcile the material dimension of culture with the intangible one. The final scope was to reach a unitary concept of culture. Under this view, “culture” means the sum of all material and spiritual activities and products of a given society, all the beliefs, knowledge, rites, customs, laws and arts that distinguish a social group from other similar groups<sup>8</sup>. Therefore, culture is perceived as a total way of life. This understanding of “culture as way of life”, which relies on the social role of culture as a symbolic element of continuity for communities, has re-shaped the concept of “culture as heritage”<sup>9</sup>. Indeed, it has introduced the idea of “living culture” as a notion comprehensive of all those traditions, values, religions, symbols and practices which contribute to express and manifest the identity of a society. Today, cultural heritage encompasses the material dimension of culture (cultural goods and services), as well as the intangible dimension (traditional knowledge, customs, popular cultural manifestations, folk music and dances, traditional agricultural ways, languages, religion, etc.)<sup>10</sup>.

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<sup>8</sup> Among the rich number of authors on this concept, we remind here: TYLOR E.B., *Primitive Culture: Researches in the Development of Mythology, Philosophy, Religion, Language, Art and Custom*, London, 1920; LEVI-STRAUSS C., *La pensée sauvage*, Paris, 1962.

<sup>9</sup> FRANCONI F., “Culture, Heritage and Human Rights: An Introduction”, in FRANCONI F. and SCHEININ M. (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, 2008, p. 14.

<sup>10</sup> Some author, such as Stavenhagen, when refers to “cultural heritage” as “culture as capital”, only takes into account the material dimension of heritage. See, e.g., *supra* at 8, p. 4. In my view, this definition is not properly correct. Bearing in mind that the concept of “culture as capital” is strictly related to the idea of right to cultural development and, more generally, it refers to culture as an element of development, such a limited notion cuts off all the background of traditional knowledge, techniques and social structures which are transmitted through time and are fundamental for progress and development of societies. I think that a concept of “culture as capital” including both dimension of culture, tangible and intangible, as well as the idea of “culture as creativity” would better suits the most current concept of human development, which lays down on the interplay between economic, social and cultural elements. In my opinion, without past, there cannot be future and inspiration for new creativity; without creativity, there cannot be progress and development.

The influence of anthropologists work lead to a shift from a rather elitist concept of culture to a more pluralist idea<sup>11</sup>, which takes into account the individual and collective dimension of culture, as well as the subjective dimension given by feelings, behaviors and ways of thinking. This broad knowledge of “culture”, based on the observation of different cultural manifestations in social groups and societies, brought to the assumption that there is not one culture, but more cultures. According to Lévi Strauss structuralism, this plurality of cultures is the way through which social groups and communities evolve and develop: it is a natural phenomenon deriving from the direct or indirect interactions between societies<sup>12</sup>. This concept implies the idea of cultural change as an endemic element of societies: culture is not static, yet is a dynamic process intimately linked to the social space in which social actors interact. This interaction brings cultures to exist, adapt, change or disappear in the course of time. Finally, it can be observed that the modern debate on “what is culture” does not longer aim at achieving an homogenous idea of culture, but rather ascertain that it is a complex and constantly evolving process which results in a plurality of cultures.

Culture is, therefore, a social phenomenon which interplays with many other disciplines, such as economics, law, sociological and political sciences. Thus, the evolution of the notion of culture has lead to consequences also in other fields and, nowadays, cultural preoccupations seem to be more relevant for sociologists, economists and lawyers than anthropologists<sup>13</sup>. In international law, for instance, the different meanings of culture play an important role in

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<sup>11</sup> O'KEEFE, R. “*The Right to Take Part in Cultural Life under Article 15 of the ICESCR*”, 47 International and Comparative Law Quarterly, October 1998, p. 905, 913.

<sup>12</sup> LEVI-STRAUSS, *Race et Histoire*, Edition Gonthier, Paris, 1961. Discussing about the concepts of race and civilization , he writes: “[...] la vie de l'humanité [...] ne se développe pas sous le régime d'une uniforme monotonie, mais à travers des mode extraordinairement diversifiés de sociétés et de civilisations; cette diversité intellectuelle, esthétique, sociologique, n'est unie par aucune relation de cause à effet à celle qui existe sur le plan biologique [...] elle lui est seulement parallèle sur un autre terrain”, at p. 11 of the above reported edition.

<sup>13</sup> COOMBE R.J., “*Legal claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*”, in 1 Law, Culture and the Humanities, 2005, pp.35-37.



order to define the content of cultural rights<sup>14</sup>. When we refer to culture as material heritage, cultural rights are mainly identified as the right to access to cultural goods, services and cultural life; they are also strictly connected with the right to development. On the other hand, if we consider culture as creativity, cultural rights centre on freedom of artistic expression and free access to culture of artists and cultural workers. When culture is meant as identity and way of life, cultural rights are mainly connected to the right to enjoy its own culture and the protection of diverse identities, such as the right to freedom of religion and the right to use minority's languages.

In today's globalized world, the increasing circulation of people, goods and services, the massive migration flows, the technological revolution of means of communication have result in increased cultural exchanges. This uncontrolled and accelerated cross-cultural fertilization has put in evidence several tensions in different areas, such as culture and trade, culture and development and cultural identity claims in multiethnic societies. Cultural threats like the homogenization of cultures or the clash of civilizations are very debated topics of our time<sup>15</sup>. In this context, cultural diversity, issues related to the preservation of cultures and the enjoyment of cultural rights have emerged as global key concerns<sup>16</sup> from different perspectives. This awareness led the international community to discuss the need for a binding instrument aiming at promoting and protecting cultural diversity. This debate led to the adoption of the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions in 2005. In the next paragraph, I will try to give a quick framework of the main current cultural issues underlying the discussion above the adoption of the 2005 UNESCO Convention.

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<sup>14</sup> MCGOLDRICK D., "Culture, Cultures, and Cultural Rights", in BADERIN M.A. and MCCORQUODALE R. (eds.), *Economic, Social and Cultural Rights in Action*, Oxford University Press, 2007, p. 448; see also: FRANCIANI F., *supra* at 10; PROTT L.V. *supra* at 6.

<sup>15</sup> See, for example, the work of HUNTINGTON S.P., *The Clash of Civilizations and the Remaking of World Order*, Simon and Shuster, London, 1997.

<sup>16</sup> STAMATOPOULOU E., "Why Cultural Rights Now?", Carnegie Council paper, 2004, available at <http://www.cceia.org>. See also: UNESCO World Report 2009, *Investing in Cultural Diversity and Intercultural Dialogue*, p.1.

## 1.2) Cultural interactions in our globalized world: the controversial need for a “stronger protection” without “protectionism”

The facilitated mobility of persons and the increasing of migrations' waves reshaped our societies. Big and small cities are, nowadays, places where people of different origins, cultures and beliefs live and interact. Within these multicultural societies, the cohabitation of locals and foreigners is not always easy. Examples of racism and xenophobic episodes affecting migrants, as well as the adoption of stricter national migration policies, are very often reported. This situation recently led to claims and tensions related to the respect of diversity and tolerance<sup>17</sup>. Major problems for minorities, indigenous communities and migrants emerge when coercive state measures or policies do not permit them the enjoyment of certain cultural practices and try to assimilate them, rather than promote their integration within society and respecting their identities. Cultural identities can be also suppressed by other state policies leading to social, political and economic exclusion of certain groups or individuals<sup>18</sup>. On the other hand, new claims are raised by locals, who feel their cultural identity undermined by the presence and requests of accommodation of migrants and minority's groups. The fear of losing local identities hinder multicultural dialogue and mutual understanding, whereas it creates social and political tensions. This kind of tensions opened a debate whether cultural diversity is positive or negative<sup>19</sup>. Some argued that cultural differences are main causes of social conflict and wars, thus they undermine the sight of our common humanity. Others started to discuss whether universal values exist<sup>20</sup>, if

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<sup>17</sup> See: KYMLICKA W., *Multicultural citizenship: A Liberal Theory of Minority Rights*, Clarendon Press Oxford, 1995 and “The Global Diffusion of Multiculturalism: Trends, Causes, Consequences”, in TIERNEY S. (ed), *Accommodating Cultural Diversity*, Ashgate, Burlington, 2007, pp.17-34.

<sup>18</sup> UNDP, Human Development Report 2004, *Cultural Liberty in Today's Diverse World*, p. 1.

<sup>19</sup> UNESCO World Report, *supra* at 17, pp. 1-6.

<sup>20</sup> PAREKH B., *Rethinking Multiculturalism. Cultural Diversity and Political Theory*, Macmillan Press, Basingstocke, 2000.

there are good or bad cultures and if there is a need for a specific “right to cultural identity”<sup>21</sup>.

Assuming that all cultures have the same dignity and as such has to be respected, I think that a pivotal role in solving these problems is played by States through the adoption of multicultural policies which facilitate the participation of migrants and minorities in public life and their access to education. These policies, though, should not aim at assimilating diverse groups, rather should promote their integration through the respect of their diversities<sup>22</sup>. For this reason, multicultural policies should ensure the implementation of cultural rights. Although cultural rights have been given less attention, and are often less developed, than civil and political rights<sup>23</sup>, today they are living a sort of *renaissance*. Indeed, the respect of cultural rights is a central element for the accommodation of cultural diversity in our society. Nevertheless, cultural rights are often considered a weak category. Their weakness mainly derive from the vagueness of the notion of culture, which, as above mentioned, is the base for defining their content. In effect, no international instruments provide a definition of cultural rights as such, yet cultural rights are listed in different legal instruments<sup>24</sup>. The development of cultural rights has, often, been perceived as a threat for state integrity: promoting cultural rights for minority groups or indigenous people could justify claim for independence. Today, this issue has turned into the fear to empower

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<sup>21</sup> DONDEERS Y., “A Right to Cultural Identity in UNESCO”, in FRANCONI F. and SCHEININ M. (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, 2008, pp. 324-325.

<sup>22</sup> Looking at some European experiences, we have recently assisted to the failure of the French model based on assimilation ( images of the burning suburbs of Paris in 2006 are still very fresh). Nevertheless, even the very opened and democratic British model, based on the tolerance of all diversities, has partially failed. In effect, most of the British big cities have suburbs mainly populated by migrants’ communities, where poverty, delinquency and marginalization are current issues. It seems that there is a need to re-think the classic models dealing with multiculturalism; yet, on the other hand, it is very difficult to reach a balance between locals and migrants’ claims.

it would be wrong there is not a model which did not it is still very recent the scenario o the

<sup>23</sup> FRANCONI, *supra* at 10, at 1; MCGOLDRICK, *supra* at 15, at p. 447.

<sup>24</sup> Among the international instruments’ provisions on cultural rights, we recall: Art. 27 of the UN Universal Declaration of Human Rights, 1948; Art. 27 of the UN International Covenant on Civil and Political Rights (1966); art. 15 of the UN Covenant on Economic, Social, and Cultural Rights (1966); Art. 13( c) of the Convention on the Elimination of Discrimination against Women (1979). Provisions related to cultural rights are also established in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the Council of Europe Framework Convention on National Minorities (1995). Moreover, the respect of many fundamental rights, usually considered civil and political rights such as the right to freedom of thought, expression and religion, as well as the right not to be discriminated on the base of race, gender, etc...contribute today to the implementation of cultural rights and answers to claim relating to cultural identity.

migrants' communities, so that their claims for distinctiveness could hinder the unity of States.

Over the past decades, the need for a comprehensive instrument on cultural rights, which could strengthen the enjoyment and enforcement of such rights, came to the fore. This idea was evaluated during the discussion towards a Convention on Cultural Diversity<sup>25</sup>. However, this option was abandoned: most States preferred to centre the text of the Convention on other issues related to culture and globalization, such as conflicts between trade and culture and the need to integrate cultural interests in development policy<sup>26</sup>.

The “free trade and culture” dilemma is broadly discussed and still unsolved<sup>27</sup>. The major debated threat is the risk for the homogenization of cultures and the consequent loss of cultural specificities. The liberalization of markets favored the global circulation of cultural goods and services of Western countries and, in some sort, determined their cultural superiority and the extinction of some cultural expressions at risk<sup>28</sup>. The dominance of the Hollywood productions, or the widespread presence of western fast-food chains, are samples of this western predominance. As a consequence, we assist to a “westernization” of most countries in terms of culture, homogenization of artistic creativity according to the market’s standards<sup>29</sup> and a loss of traditional cultural models.

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<sup>25</sup> UNESCO Doc. 32C/52, *Desirability of drawing up an international standard-setting instrument on cultural diversity*, Paris, 18 July 2003, pp. 5-7; and UNESCO Doc. 166EX/28, *Preliminary Study on the Technical and Legal Aspects relating to the Desirability of a Standard-Setting Instrument on cultural Diversity*, 2003, available at <http://unesdoc.unesco.org/images/0012/001297/129718e.pdf>

<sup>26</sup> It is worth to remind that a leading role in the negotiation of the 2005 UNESCO Convention was played by Canada and France, whose primary intention was to create an instrument based on the idea of the cultural exception to use as a counterbalance for the WTO rules. The two countries exercised their influence on all the block of French speaking countries and created the so called “*group de la Francophonie*”. For an history on the evolution of the subject matter of the Convention during the *travaux préparatoires*, see: BERNIER, I. *A UNESCO International Convention on Cultural Diversity*, available at <http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/update0303.pdf>.

<sup>27</sup> For a comprehensive view on this issue: VOON T., *Cultural Products and the World Trade Organization*, Cambridge University press, 2007.

<sup>28</sup> OBULJEN N., “From Our Creative Diversity to the Convention on Cultural Diversity: Introduction to the debate”, in *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions : making it work*, Institute for International Relations, Zagreb, 2006, pp. 19-20

<sup>29</sup> For example, the fact that almost 80% of the recorded music is distributed by only four giant companies - Sony Music Entertainment (USA), Universal Music Group (France), Warner Music Group (USA) and EMI (UK)- is highly influencing the kind and the quality of the music listened to by people all over the world. In this situation, there is very

From a very liberalist perspective, the loss of a cultural model should not be perceived as a problem when it derives from a free and informed choice. Rather, it is the natural consequence of a selective process, which determines a shift from a certain cultural model to another one. Moreover, as we could see during the analyses of the notion of culture, changing is a structural element of culture itself. Anyways, the increasing westernization and the loss of traditional cultures in developing countries cannot be considered, in my view, natural phenomena. These cultural shifts are not determined by an informed choice, rather they are due to the technological and financial superiority of Western countries.

However, cultural homogenization is not only a concern for developing countries. Indeed, since thirty years, the confrontation on cultural hegemony is dividing European countries and Canada from the USA: the US model of cultural industry is in opposition with the founding idea of Europe “united in diversity”, which considers the coexistence of diverse cultural identities, languages and cultures as its specific richness<sup>30</sup>; Canada, which shares a large border and (for the majority) a common language with the United States, is directly exposed to the US challenges at its own markets. Canada and the EU often adopted measures limiting the import of American cultural products or supported States’ aid policy in cultural industry, breaching their obligations under the WTO regime. This return to protectionism relied on the idea that cultural goods and services are not like any other commercial good: they embed cultural and artistic values and are the expression of national identities.

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little place for non-commercial music creations, experimentation and traditional songs, which, in a more optimistic view, are destined to a niche-market.

<sup>30</sup> The widespread use of English as the main language of global communication, better technologies and higher investments in the US audiovisual sector are the main reasons limiting distribution of European audiovisual products in the global market. These factors, and the growing liberalization of trade under the WTO rules, also determine the fact that the 80% of films distributed in Europe are Americans.

For this reason, they should be granted a different trade treatment: they should benefit of an “*exception culturelle*”<sup>31</sup>.

The numerous disputes related to trade and culture under the DSB of the WTO put in evidence the inadequacy of the current trade regime in preserving cultural diversity<sup>32</sup>. From this view, the adoption of protectionist measures seems to be the only efficient means. Yet, a return to protectionism would cut off the benefits deriving from liberalization, such as the free flow of persons, goods and services, which can act as positive factors for creativity and foster the dialogue among cultures. It is not often mentioned that globalization can also have a positive impact in diffusing cultural expressions, facilitating cross-cultural fertilization and promoting the access to cultural life. These are also preliminary conditions for the full enjoyment of cultural rights. Furthermore, in my opinion, a strong survivalist approach of all cultures is not appropriate: as Lévi-Strauss argued in its work *Race et Histoire*, it is not the status-quo of cultural diversity which has to be preserved, rather “diversity itself must be saved”<sup>33</sup>. Thus, there is a need to preserve the capacity of societies to maintain the dynamic of change. This means that, on one side, cultural and artistic exchanges has to be fostered; whereas, on the other side, the predominant presence of only few actors in international exchanges must be counterbalanced.

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<sup>31</sup> This concept was firstly introduced by France during the GATT's negotiations in 1993. France aimed at maintaining tariffs and quotas to protect its cultural market from other cultural products, most notably American films and television. France argued that cultural goods are the expression of national identities, therefore, they should not be subjected to the rules of free market. The French idea was, then, supported by the other European countries: so the French battle for the *exception culturelle* became a EU's fight for the protection of European cultural diversity. On this issue: DE COCK BUNING M., *Cultural Diversity in Mass Media Regulation*, in SCHNEIDER H. and VAN DEN BOSSCHE (eds.), *Protection of Cultural Diversity from an International and European Perspective*, 2008, pp.250; MAZZONE, G. “*Dall'eccezione alla diversità culturale: ministoria di una sfida per l'Europa*”, *Economia della Cultura*, Anno XVIII, 2008/ n. 3, pp. 329-332.

<sup>32</sup> See VOON T., *supra* at 28, at 69. It is useful to remind here that the tension between the supporters of the *exception culturelle* and the USA was exacerbated in 1997, when the WTO's Dispute Settlement Body condemned Canada for an infringement of its trade obligations based on domestic measures supporting Canada's magazine industry. While Canada argued that those measures had a view to safeguard and promote its cultural identity, the Panel did not consider that the issue of cultural identity was at stake (*Canada – Certain Measures Concerning Periodicals*, WT/DS31/R 1997). This decision amplified the debate around the globe on the need to have a legally binding instrument for protecting cultural diversity. For more details on this issue: Neuwirth, R.J. “*United in Divergency: A Commentary on the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*”, 66 *Heidelberg Journal of International Law (HJIL)*, 2006, pp. 828-830.

<sup>33</sup> LEVI-STRAUSS C., *supra* at 13.

The idea of preventing and mitigating cultural homogenization without hindering cultural exchanges<sup>34</sup> is strictly connected to the current debate on the promotion of sustainable development. Culture has always been considered as *energy, inspiration and empowerment* for groups and individuals and profoundly contributed to their social development<sup>35</sup>. Most recently, in order to face the new challenges deriving from globalization, many studies were promoted in order to ascertain beneficial links between culture, environment and development<sup>36</sup>. For example: certain traditional methods of agriculture were recognized both as important elements of rural and cultural heritage and as environmentally friendly; Indigenous Peoples' traditional ways of hunting or managing natural resources and lands were recognized as vital for maintaining their cultural identity, as well as for ensuring them sustainable forms of living<sup>37</sup>. This holistic perspective calls for a stronger integration of culture within multidimensional strategies for development<sup>38</sup>.

These global claims towards a need to foster cultural exchanges in order to promote development and ensure protection and promotion of diversity, drove the adoption of the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions<sup>39</sup>. This Convention aims at filling a legal *lacuna* in the field of trade and culture regulations, as well as to establish the integration of cultural concerns in development cooperation policy, in order to erase disparities in development and global trade. It came to give a

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<sup>34</sup> This concept was also expressed in the UN Commission on Human Rights Resolution 2002/26 on the "Promotion of the enjoyment of the cultural rights of everyone and respect for different cultural identities".

<sup>35</sup> Report of the World Commission on Culture and Development *Our Creative Diversity*, UNESCO publishing, Paris, 1995 p. 11, available at <http://unesdoc.unesco.org/images/0010/001055/105586e.pdf>

<sup>36</sup> Among these: UNESCO and UNEP, *Cultural Diversity and Biodiversity for Sustainable Development*, report from the World Summit Sustainable Development held in Johannesburg on 3<sup>rd</sup> September 2002, available at <http://unesdoc.unesco.org/images/0013/001322/132262e.pdf>.

<sup>37</sup> Bates, P., Chiba M., Kube S. and Nakashima D. (Eds.), *Learning and Knowing in Indigenous Societies Today*, UNESCO, Paris 2009, pp. 128.

<sup>38</sup> BARTOLI, H. *Rethinking Development. Putting an end to poverty*, Ed. UNESCO, Paris, 2000, p. 31-60.

<sup>39</sup> The Convention was adopted on 20<sup>th</sup> October 2005, with 148 States voted in favor, only four States abstained (Australia, Honduras, Liberia and Nicaragua) and two voted against (the USA and Israel). For a detailed history of the negotiations of the Convention, see: DONDERS Y., "The History of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions", in SCHNEIDER H. and VAN DEN BOSSCHE P. (eds.), *Protection of Cultural Diversity from an International and European Perspective*, 2008, pp. 15-26; OBULJEN N. *supra* at 29. Also: RUIZ FABRI, H. "Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles", 43 *Revue générale de droit international* 2007, pp. 43-87.

juridical *status* to cultural diversity as a human right<sup>40</sup>, however it does not establish new cultural rights. Although a comprehensive instruments of cultural rights was among the many expectations, priority was given to an instrument which could regulate problems between culture and trade. Nevertheless, the text of the Convention often recalls the respect of cultural rights as a fundamental guarantee for the full protection and promotion of cultural diversity<sup>41</sup>.

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<sup>40</sup> In November 2001, UNESCO had already adopted the Universal Declaration on Cultural Diversity, which, for the first time, recognizes cultural diversity as affecting human dignity and as a right in need of protection. The debate on the necessity to affirm cultural diversity as a *per se* value and a human right had also produced the Declaration on Cultural Diversity adopted by the Council of Europe in 2000.

<sup>41</sup> Article 2(1) of the Convention.



## Section 2

### Cultural diversity under the 2005 UNESCO Convention and in the European Union

2.1) The notion of cultural diversity underlying the UNESCO Convention: a pragmatic approach

As clarified in the first section, the 2005 UNESCO Convention was adopted in order to answer to specific cultural threats under the ongoing globalization process. The title of the Convention already lets us understand that not all the aspects of cultural diversity are covered by the text, but only the diverse forms of cultural expressions fall under its umbrella. Article 4 of the Convention defines cultural diversity as :

“[...] the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies.

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

Looking at this provision, it results that the Convention does not provide for a direct definition of culture, but prefers to refer indirectly to cultural diversity. This approach was estimated as very pragmatic and convenient by some scholars, arguing that it will help avoiding the ambiguities contained in the definition of culture<sup>42</sup>. The use of a broad definition, such as the one adopted at the MONDIALCULT conference and usually recognized by UNESCO<sup>43</sup>, would have brought to a too vague and wide field of action and missed the primary

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<sup>42</sup> In particular, see: CRAUFURD SMITH R., *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Building a New World Information and Communication order?*, 1 International Journal of Communication (2007), p. 32-36; GRABER C. B., “Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity”, in SCHNEIDER H. and VAN DEN BOSSCHE P. (eds.), *Protection of Cultural Diversity from an International and European Perspective*, 2008, pp. 144-146.

<sup>43</sup> I am referring to the following definition: “culture as the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs”. From: Mexico City Declaration on Cultural Policies World Conference on Cultural Policies, Mexico City, 26 July - 6 August 1982, at [http://portal.unesco.org/culture/en/files/12762/11295421661mexico\\_en.pdf/mexico\\_en.pdf](http://portal.unesco.org/culture/en/files/12762/11295421661mexico_en.pdf/mexico_en.pdf)

goals of the Convention. The choice was, instead, to focus on a specific aspect of cultural diversity: its manifestations, the plurality of cultural goods and artistic expressions<sup>44</sup>. Moreover, the Convention asserts the double nature of cultural activities, goods and services as *vehicles of identity, values and meaning* (Art. 1.g) and as embedding *cultural expressions, irrespective of the commercial value they may have* (Article 4.4)<sup>45</sup>. For the first time, an international legal instrument recognizes the concept which gave birth to the principle of *exception culturelle* and gives it a legal value<sup>46</sup>.

Although the limited notion of cultural diversity adopted in the text, my opinion is that the overall concept of cultural diversity underlying the Convention still remains very broad. If it is true that the stress of the Convention is on the expressions, production, dissemination and distribution of cultural contents, these cultural contents are very widely defined. Article 4(2) defines them as referring to the symbolic meaning, artistic dimension and cultural values that originates from or express cultural identities. It also defines cultural expressions as those resulting from the creativity of individuals, groups and societies. By consequence, the forms of cultural expressions covered by the Convention are not only those belonging to the material heritage, but also the intangible forms, such as traditional knowledge, languages, beliefs and lifestyles which make the identity of minority groups, immigrants and local communities<sup>47</sup>.

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<sup>44</sup> It is not a case that the title of the first draft of the Convention was "Convention on the diversity of artistic content and cultural expressions".

<sup>45</sup> This definition was one of the main reasons of conflict among the States delegations during the negotiation. Main oppositions came from the US: they saw in this definition a clear attempt to create an international instrument aimed at ensuring a special treatment to cultural goods and services in trade negotiations. The US abandoned the negotiations of the Convention at their final stage, arguing that the subject matter of the UNESCO Convention was not cultural, but rather trade and economics and that UNESCO's mandate did not include the competence to negotiate such an instrument among its functions. They stressed that the participation of the European Union, which joined the negotiations in 2004, put in evidence the commercial nature of the Convention. On this issue: DONDERS, Y. *supra* at 40, pp. 15-21.

<sup>46</sup> NEIL, G., "The Convention as a response to the cultural challenges of economic globalization", in *UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Making it Work*, 2006, p.54; Also: GRABER C.B., *supra* at 43, pp. 141-146.

<sup>47</sup> This interpretation is confirmed by the provisions in article 8 referring to the special need for protection in case of cultural expressions under threats or at risk. As Bernier points out, these provisions have been underestimated by critics, whereas they recall respect for human rights and refer to intercultural dialogue and the protection of intangible heritage, which constituted the core of the debate giving birth to the Convention. In particular, the need for binding obligations for the protection of cultural expressions under threat was a very serious issue for developing countries,

Thus, it can be argued that the choice to refer only indirectly to the anthropological and sociological aspects of culture does not diminish the protection of other aspects of cultural diversity, namely cultural rights. Through the preservation and promotion of the different manifestations of cultural contents, the Convention grants indirect protection to cultural rights. Although it does not create new enforceable cultural rights for groups or individuals, the Convention affirms the tied connection between the enjoyment of such rights and the preservation of cultural diversity. Cultural diversity is, eventually, internationally recognized as a common good and a fundamental element of the cultural heritage of humankind<sup>48</sup>.

## 2.2) What cultural diversity for Europe?

Although cultural issues were not among the priorities of the founders of the European Community, culture plays a pivotal role in the European integration process: As pointed out by the President of the European Commission Barroso, culture is an integral part of the European project as such, and makes its wealth<sup>49</sup>. In effect, the EU adopted as its slogan “United in Diversity”. Being a regional integration organization of 27 member states, diversity of languages, traditions and cultural backgrounds is overspread among the European countries. Cultural diversity is present in Europe also in the form of political and legal diversity: a wide range of different constitutional regimes coexist in the Union<sup>50</sup>. Lately, the concept of a “European culture made of a plurality of cultures” emerged as a complementary element of the EU

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which claimed for stronger obligations of concrete assistance in situation of risk. Unfortunately, the version of article 8 approved in the final text does not create proper binding obligations. See: BERNIER I., *Cultural Expressions Under Threat in the UNESCO Convention on the Diversity of Cultural Expressions*, available at [http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/Cultural\\_Expressions\\_under\\_Threat.pdf](http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/Cultural_Expressions_under_Threat.pdf).

<sup>48</sup> FRACIONI F., *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*; 25 Michigan Journal of International Law, 2003-2004, p. 1228.

<sup>49</sup> « La dimension culturelle est une composante essentielle de la construction européenne et une condition de sa réussite [...]. La culture européenne, c'est la diversité – une diversité qui constitue notre richesse et qui doit être préservée. » Speech by José Manuel Barroso, President of the European Commission, concluding the meeting of the Member States' Ministers of Culture in Paris “Rencontres pour l'Europe de la Culture”, on the 2<sup>nd</sup> and 3<sup>rd</sup> of May 2005, at <http://www.culture.gouv.fr/culture/actualites/index-rec11.html>.

<sup>50</sup> The recent failure of the adoption of the project of a Constitutional Treaty for the European Union is also an evidence of the strong will of the Member States to maintain this constitutional pluralism, in order to preserve their national political identities.

citizenship and a central element for further improvements of the integration<sup>51</sup>. Further, the European countries are facing increasing flows of migration, which gives a new multiethnic shape to Europe. Challenges related to the respect of cultural identity and the enforcement of cultural rights are emergent issues in this new Union.

Despite the relevance of culture in Europe, the EC founding treaty<sup>52</sup> did not establish a specific cultural competence for the Communities. Such a competence was introduced only in 1992 by the Treaty of Maastricht with the adoption of the Article 151. This article confers a complementary competence to the Community in the cultural area, in order to contribute to the flowering of the cultures of its Member States, while respecting their national and regional diversity. No power of harmonization in the cultural sector is given to the EU. The use of the words “cultures” and “diversity” in article 151 shows that the EU adopts the broad modern understanding of culture: culture as a plurality of cultural identities and manifestations<sup>53</sup>. Moreover, the exclusion of any power of harmonization seems to be the expression of a will to preserve this plurality of cultures<sup>54</sup>.

Although before Maastricht the EU did not have any conferred power in culture, the Community engagement towards the protection of cultural diversity had already started under the EC Treaty<sup>55</sup>. The action of the Community mainly referred to the area of free movement of goods and services and took place

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<sup>51</sup> ROSS M., “Cultural Protection: a Matter of Union Citizenship or Human Rights?”, in NEUWAHL N.A. and ROSAS A. (eds.), *The European Union and Human Rights*, Martinus Nijhof Publishers, 1995, p. 247.

<sup>52</sup> Treaty establishing the European Community, Rome, 1957

<sup>53</sup> DE WITTE B., “The Value of Cultural Diversity in European Union Law”, in SCHNEIDER H. and VAN DEN BOSSCHE (eds.), *Protection of Cultural Diversity from an International and European Perspective*, 2008, p. 219-220; FERRI D., *La costituzione culturale dell'Unione Europea*, CEDAM, 2008, pp. 31-42.

<sup>54</sup> In truth, Member States have always been afraid of a risk of “European cultural homogenization” under the increasing of the European integration process. So, they wanted to keep the exclusive competence in the cultural sector, in order to protect their national identities. See: KATSIREA I., *Cultural Diversity and European Integration in Conflict and in Harmony*, Ant. N. Sakkoulas Publishers, Athens, 2001, pp. 31-49.

<sup>55</sup> Some scholars speaks of an existing cultural hidden agenda under the EC Treaty. See: CRAUFURD SMITH R., *Community Intervention in the Cultural Field: Continuity or Change?*, in CRAUFURD SMITH R. ed., *Culture and European Union Law*, Oxford University Press, 2004, pp. 28-49.

under Article 30 EC, which allowed restrictions of the free movement of goods possessing artistic, historic and archeological value. Some awareness towards the preservation of national tangible heritage was already present at the first stage of the European integration. Nevertheless, under the EC law, cultural heritage protection has mainly been a concern for Member States rather than a specific goal for Community level action<sup>56</sup>. The Community mainly showed its interest towards culture when it came to interact with free market's regulation and could jeopardize the internal market integration<sup>57</sup>. On the other hand, based on the principle of free movement of goods, services and persons, the internal free market fostered the circulation of artistic goods and activities, as well as the exchange of cultural operators and artists. From this perspective, the Community has certainly acted as a promoter of cultural exchanges and creativity.

However, as in any free trade regime, risks of loss of national cultural specificities came to the fore. In balancing commercial and cultural interests, the ECJ often gave priority to the freedom of circulation<sup>58</sup>. This attitude and the increasing interaction of EC policy and national cultural policies led the Member States to claim for a "cultural exception" to preserve their cultural identities under the EC/EU law<sup>59</sup>. Whereas in the initial phase of market integration both the Commission and the Court were not very sensitive towards cultural issues, over the years the ECJ adopted a different approach. In many cases, indeed,

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<sup>56</sup> The preservation of historical monuments and artistic works is a central worry for most of the Union's Member States, given that it is a matter intimately related to the need to preserve cultural identity. STEYGER E., *National Traditions and European Community Law: Margarine and Marriage*, Dartmouth, 1997, pp. 69-72.

<sup>57</sup> In one of the first case decided by the ECJ on the imposition of an export tax on cultural goods, the Court, although it recognized the special nature of cultural goods, rejected the idea of a general cultural exemption because likely to hamper realization of the internal free market. Case *Commission v. Italy*, C 7/68, ECR 423, at 428.

<sup>58</sup> This has been the case with culinary traditions and local food: the Court has often adopted a very restrictive approach on cultural issues. See, for instance, *Commission v. Germany*, C 178/84, 1987, ECR 1227; *Drei Glocken v. USL Centro-Sud*, C 407/85, 1998, ECR 4233. See, for other interrelations between culture and free trade: *Leclerc v. Au Blé Vert*, C 229/83, 1985, ECR 1.

<sup>59</sup> In particular the EC competition law and the ban of State Aids often created tensions between the Commission and Member States. Indeed, in the audiovisual media sector, France and most of the European countries have a long tradition of state intervention, regulating practices and subsidizing. Often, State's aids are the only means to ensure the survival of small cultural industries. See: FOA S. and SANTAGATA W., "Eccezione culturale e diversità culturale. Il potere culturale delle organizzazioni centralizzate e decentralizzate", 2 Aedon 2004, pp. 4-7.

the Court accepted trade restrictions or state aid policy justified on cultural arguments, when they were proportionate with the scope<sup>60</sup>. The ECJ, though, did not develop a homogenous and consistent doctrine on such issues, yet it proceeded on a case by case standard. This cautious approach of the Court is mainly given to the diffidence towards the genuine intentions of the States, which often use the “cultural excuse” to justify their breach of the EU/EC law. Nevertheless, the Court recognizes that the reasons underlying the recourse to restrictive measures can vary from a State to another, according to their diverse national values<sup>61</sup>.

Furthermore, although the ban of harmonization in art. 151, since early ‘90s the Commission started a series of initiatives in the field of culture, which led to some level of harmonization in specific cultural sectors. In particular, secondary law instruments were adopted to regulate the audiovisual sector, such as the directive “Television without frontiers”<sup>62</sup>. The final scope of this directive was to create a European broadcasting space, undermining national monopolies in the sector. Such regulations, of course, affected national public broadcasting policy, yet were also meant to contribute to the diffusion of knowledge, cross-cultural exchange and creative development<sup>63</sup>. The Commission, aware of the tied interrelation between culture and economic development, also promoted programs to incentive, through financial assistance, creative industries, the mobility of artists, and access to culture<sup>64</sup>. The Commission adopted similar programs also in the framework of regional

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<sup>60</sup> We cite here: *Cinéthèque v. Fédération National des Cinéma Français*, Joined Cases 60-61/84, 1985, ECR 2605; *Groener v. Minister for Education*, C 379/87, 1989, ECR 3967; *Commission v. Netherlands*, C 353/89, 1991, ECR I 4069; *Echirrolles Distribution SA v. Association du Dauphiné and others*, C 9/99, 2000, ECR I 8207. For a detailed view on these and other similar cases and a careful analyses of the ECJ attitude towards culture: CRAUFURD SMITH R., *supra* at 56, pp. 19-78.

<sup>61</sup> *Omega v. Bonn*, C 38/02, par. 31.

<sup>62</sup> Directive 89/552/EEC, as amended by Directive 97/36/EC.

<sup>63</sup> DE COCK BUNING, *supra* at 32, p.249.

<sup>64</sup> Kaleidoscope, Arianna, Raphael are the name of some of this projects; most famous are the MEDIA program and the Culture 2000 Programme. See: PSYCHOGIOPOULOU E., *The integration of Cultural Considerations in EU law and Policies*, Martinus Nijhoff Publishers, 2008, p.37.

development policy, aiming at supporting a local development comprehensive of environmental interests, indigenous traditions and economic elements<sup>65</sup>.

Culture was integrated also in the external relations of the EU, in particular within the framework of commercial and cooperation policies. Article 151(3) establishes that the Member States should foster cultural cooperation with third countries. The Lomé and Cotonu agreements with the ACP or the Mediterranean programs, for instance, previews financial and technical assistance for actions in the cultural sphere, mainly in the area of the preservation of tangible cultural heritage, as well as the exchange of best practice, teaching, dissemination of information<sup>66</sup>.

Cultural diversity issues in the Union does not come to the fore only when related to trade or development policy. The 27 Member States have very varied populations with diverse languages, diverse religions and traditions. Moreover, minorities groups and important communities of migrants are present in almost all the European Countries. Problems related to the accommodation of diverse identities and integration of immigrants are crucial issues today in the multiethnic Union. However, the Union has not developed a coherent policy focusing on cultural rights and cultural identity yet<sup>67</sup>. The Union has no specific competence in the field of human rights and a legal guarantee for fundamental rights was only introduced with the Treaty of Maastricht. Although linguistic diversity and minorities are historically present in Europe, no special instruments or special provisions on cultural diversity have been adopted. Moreover, the cultural policy of the Commission has not been very active in promoting cultural rights. In the case of linguistic diversity, for instance, the EU developed only few initiatives in order to promote it and never adopted a

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<sup>65</sup> *Ibidem*, at 85.

<sup>66</sup> PSYCHOGIOPOULOU E., *ibidem* at 108; MCMAHON J.A., "Preserving and Promoting Differences? The External Dimension of Cultural Cooperation", in CRAUFURD SMITH R. ed., *Culture and European Union Law*, Oxford University Press, 2004, pp. 327-352.

<sup>67</sup> DONDERS Y., "The protection of Cultural Rights in Europe: None of the EU's Business?", 10 *Maastricht Journal of European and Comparative Law* (2003), p. 145 (pp. 117-147).

minority language policy, to the detriment of the preservation of the European linguistic pluralism<sup>68</sup>.

In the absence of a specific framework, the protection of cultural rights relies on article 12 ECT, which establishes a general principle of non-discrimination on the base of nationality, and Art. 6 TEU, which states that the EU must respect fundamental rights as laid down in the ECHR and as derive from constitutional traditions. The approach of this article reflects the practice developed by the ECJ, that, in spite of a lack of competence on human rights, has often dealt with cases involving claims related to fundamental rights, included cultural rights. For example, in several cases on linguistic diversity, the Court, although affirming the supremacy of EC law, underlined the importance of granting protection to national linguistic diversity<sup>69</sup>. The Court also faced claims relating to the access to culture, in particular dealing with the mobility of artists and cultural workers<sup>70</sup>. In this cases, the Court promoted the enjoyment of cultural rights through the enforcement of socio-economic provisions, such as the right to freely move and work, yet stressing the importance to ensure equal access to culture and participation in the cultural life of other Member States than the state of origin. In this way, the ECJ has granted a certain indirect protection to some cultural rights<sup>71</sup>. However, as for identity's rights, so far the ECJ has avoided to express its judgment and the enforcement of such rights takes place in national *fora*.

The entry into force of the Lisbon Treaty gives a legal value to the Charter of fundamental values adopted at Nice in 2000. This should sign a step forward for the enforcement of human rights, and of cultural rights, at the EU level. Article 22 of the Charter states that the Union shall respect cultural, religious and linguistic diversity. It does not say if within the Member States or

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<sup>68</sup> DE WITTE B., Language Law of the European Union: Protecting of Eroding Linguistic Diversity?, in CRAUFURD SMITH R. ed., *Culture and European Union Law*, Oxford University Press, 2004, pp. 205-241.

<sup>69</sup> See, for instance: *Groener v. Minister for Education*, *supra* at 61.

<sup>70</sup> For example: *P. Steinhauser v. City of Biarritz*, C 197/84, 1985, ECR 1819; *Commission v. Spain*, 45/93, 1994, ECR I-5933.

<sup>71</sup> PSYCHOGIOPOULOU E., Accessing Culture at the EU Level: an Indirect Contribution to Cultural Rights Protection?, in FRANCONI F. and SCHEININ M. (eds.), *Cultural Human Rights*, Martinus Nijhoff Publishers, 2008, pp. 223-246.



among them, either directly establishes cultural rights. Anyways, it seems establishing a duty upon the Member States and the EU institutions to respect some rights related to cultural identity.

### SECTION 3

#### Interactions between the 2005 UNESCO Convention and the European Union

In 2006, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions entered into force within the EU legal order and its Member States<sup>72</sup>. As already mentioned, the EU not only ratified the Convention, but participated to the negotiation at UNESCO<sup>73</sup>. This fact is rather extraordinary: first, this is the first (and only) UNESCO Convention ratified by the Union; second, it is the first time that an international organization, such as the EU, was allowed to negotiate a convention within the UNESCO seat<sup>74</sup>.

This ratification is interesting under different points of view. First of all, one may ask why the Union was so interested in participating to a treaty on culture. This issue raises another question: was the EU competent to negotiate the UNESCO Convention as a mixed-agreement? Other might wonder what kind of new implications arise under the entry into force of the UNESCO Convention within the EU? Finally, will this ratification strengthen the protection and promotion of cultural diversity in the Union?

In this section, I will try to answer to some of the above questions, showing the interactions between the field of action of the UNESCO Convention and the EU. Finally, I will provide a framework of some specific new challenges that the EU has undertaken under the UNESCO treaty, in order to introduce new issues for further researches.

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<sup>72</sup> Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2006/515/EC).

<sup>73</sup> The Convention was jointly negotiated by the European Commission, on behalf of the Community, and the Council Presidency, on behalf of the Member States, on the base of the Code of Conduct 5518/05 CULT 3.

<sup>74</sup> According to the Statute of UNESCO, only sovereign States can become member and participate to the General Assembly of UNESCO. Anyways, in this special situation, UNESCO was very incline to permit the EU to take part to the negotiation. In order to allow this participation, a provision allowing the participation of regional organization was specifically introduced in the text of the Convention (art. 27)

### 3.1) Rights and obligations under the 2005 UNESCO Convention

The Convention establishes rights and obligations on its parties, both at national and international level, in the field of cultural policies and measures aiming at preserving and promoting cultural diversity<sup>75</sup>. The Convention identifies cultural policies and measures as all those relating to culture, whether at local, national, regional or international level, which can directly affect the cultural expressions of individuals, groups and societies<sup>76</sup>.

Despite the ambitious expectations towards the Convention, only few provisions turn into binding obligations. The language of the Convention is, in effect, often vague and imprecise. A first set of articles specifies the rights and obligations of parties at the national level (articles 6-11). What first strikes the attention of the reader here is the emphasis on the word *rights* rather than obligations. Moreover, the Convention strongly reaffirm the sovereign right of States to adopt, maintain and implement cultural policies and measures<sup>77</sup>. Although the pivotal role of States in order to preserve and promote culture is stressed, no serious obligations are established upon the States. States are usually “invited” or “exhorted” or “may” take measures in order to support artistic and creative production, as well as the free circulation of ideas and cultural products on the national territory. Article 6 refers to regulatory, institutional and financial measures which can provide assistance both to private and public sectors, such as public broadcasting measures. As no mention of principles of proportionality or effectiveness which could limit distorting effects on competition is present in the text, many scholars argued that the Convention is

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<sup>75</sup> Article 3 of the Convention.

<sup>76</sup> Article 4(6). The definition contained in this article is rather redundant and not very clear and leaves space for a broad as well as for a restrained interpretation. Ruiz Fabri argued that the comprehensive approach adopted in this text is often a common praxis in international law so that the subject-matter of the treaty will not be too narrow. See: RUIZ FABRI, H. “Reflections on possible future legal implications of the Convention”, in *UNESCO's Convention on the Protection and the Promotion of the Diversity of Cultural Expressions : making it work*, Institute for International Relations, Zagreb, 2006, p. 75.

<sup>77</sup> NEIL G., *supra* at 47, p. 55. The importance given to the sovereignty's issue during the negotiations even brought to the introduction of the “principle of sovereignty” among the guiding principles which underpin the Convention.

inclined towards some forms of protectionism and public intervention in the field of culture<sup>78</sup>.

Still at the national level, the Convention “invites” the Parties to encourage the dissemination and the access to cultural expressions of individuals and groups, with special attention to women, minorities and indigenous peoples (article 7); to preserve cultural expressions at risk of extinction (article 8); to promote public awareness of cultural diversity through education (article 10); to encourage the active participation of civil society in the efforts to pursue the objectives of the Convention (article 11). Even if the focus of this set of articles is on groups and individuals, the weak formulation of these provisions does not empower them to sue a State in case of non-action or non-compliance. Instead, the current framework leaves all choice in terms of initiatives and means to the State.

Another set of articles (13-18) relies on the principle of solidarity and the link between culture and development. These articles aim at strengthening international cooperation between developing and developed countries in the field of cultural exchange, trade and development, in order to promote mutual understanding and sustainable development<sup>79</sup>. Adopted under the strong pressure of the developing countries group, this part of the Convention becomes much more specific and surprisingly sets out more detailed arrangements. Firstly, article 13 establishes a duty on Parties to integrate cultural considerations in all their development policies and at all levels. This provision should lead to a careful assessment of the cultural impact of all actions undertaken in the framework of development policies at local, national and international level. Similarly to what happens for an environmental impacts

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<sup>78</sup> BURRI-NEVONA M., “*Reconciling Trade and Culture: A Global Law Perspective*”, *Journal of Arts Management, Law and Society*, No. 40, 2010, pp. 4-3; CRAUFURD SMITH *supra* at 43, p. 40.

<sup>79</sup> CICIRIELLO M.C., MUCCI F., “*La cooperazione internazionale per lo sviluppo in materia di diversità delle espressioni culturali: un tratto saliente della Convenzione UNESCO del 2005*”, *Studi in Onore di Vincenzo Starace*, Vol.1, 2008, pp. 123-142

assessment, this “cultural impact evaluation” should be based on principles such as: intergenerational and intragenerational equity, precautionary principle, interconnectedness of economic, social, cultural and environmental issues, the importance to protect diversity as a benefit for the humankind<sup>80</sup>. Hence, the Convention suggests various tools of cooperation, such as: technical and professional cooperation through the mobility of professionals and the exchange of best practices and knowledge in strategic fields, the reinforcement of partnership based on the interplay of all the stakeholders (civil society, local communities, governmental institutions, etc...), co-production and co-distribution agreements, facilitating the access to viable local and regional markets and the international distribution of their cultural goods and services to foster the cultural industry of developing countries.

In particular, as the *free flow* of ideas is a central element of the Convention<sup>81</sup> and has a pivotal role for cultural cooperation, the Convention creates an obligation on Parties to ensure a preferential treatment to artists, cultural professionals and practitioners, as well as cultural goods and services from developing countries. Article 16 is a clear-cut obligation among the Parties and the non-fulfillment of a State could be challenged by a Party to the Convention. The implementation of article 16 raises several interesting issues. It is clear that this provision is likely to affect delicate areas of national policies, such as migration and visa. It can also impact the internal labor and trade markets of States. It is natural to think, then, that States will be very cautious in implementing this provision. Indeed, during the negotiations, most of them insisted to introduce a safeguard clause of their internal national regulations: the preferential treatment has to be granted conformably to the appropriate institutional and legal framework of the States<sup>82</sup>. On the other hand, considering

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<sup>80</sup>THROSBY, D. “*Culture in sustainable development: insights for the implementation of art. 13*”, *Economia della Cultura*, Anno XVIII, 2008/ n. 3, pp. 389-395.

<sup>81</sup> Recital 11, Preamble.

<sup>82</sup> Some authors argued that this clause limit the effects of Article 16, reducing it to a *bona fide* obligation, or to a simply obligation of results: CICIRIELLO M.C., MUCCI F. *supra* at 80, pp. 130-132; HAHN M., “*A Clash of Cultures?*”

the increasing waves of migrants from developing countries, abuses of this article can be envisaged: who is an artist? It is very likely that there will be a request for shaping new clear definitions!

Looking at the overall Convention, it seems that the international community opted for a rather weak-binding instrument, which only sets out a series of incentives, good faith and best-effort obligations. Moreover, article 20 limits the force of the Convention establishing that it does not modify rights and obligations of the Parties under any other treaties. This clause raise questions, in particular, in relation to WTO rules. Hence, in case of conflicts between the Convention and the WTO law, it is very unlikely that the Convention could be the winner. However, the Convention can always have an impact on the interpretation of the application of the WTO rules, as well as of any other treaty (article 20.1)<sup>83</sup>. Furthermore, it is important to bear in mind that the Convention should be used and interpreted systematically with the other UNESCO's convention aiming at ensuring protection of culture in all its meanings. In this sense, the 2005 Convention can contribute to reach a balance between cultural and economical interests in trade negotiations.

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*The Unesco Diversity Convention and International Trade Law*", Journal of International Economic Law, Vol. 9, Issue 3, pp. 515-552, 2006

<sup>83</sup> Main issues raise in case of a dispute between a State party to the UNESCO Convention and a non State party. In effect, according to the traditional international doctrine, a State cannot be bound by treaty laws without its consent. As a consequence of this assumption, we can imagine that, in such a case, the UNESCO Convention will not be applied or respected. Yet, looking at the WTO practice, it is very likely that the DSB could use other solutions to ensure the respect of the Convention. For example, the DSB already referred in several cases to environmental treaties which were not concluded under its umbrella and were not ratified by all the parties involved in the dispute. The *rationale* of this "external reference" was based on a *evolutionary interpretation in the light of contemporary concerns of the community of nations* (see, for example, par. 129 of the case *US-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998).

3.2) When culture interacts with Union law, Bruxelles goes to Paris: love for culture or...?

Why the European Union participated to the negotiation of the 2005 UNESCO Convention? Was the EU competent to conclude this Convention?

As the analyses of the text of the Convention in Section 2 shows, the UNESCO Convention is not only about culture. The Convention is also about trade, competition law, migration regulations and international development cooperation. Some of these areas fall within the exclusive competence of the EU, such as the common commercial policy (art.133 EC)<sup>84</sup>, others fall within the shared competence, such as development cooperation (art. 181 and art. 181.a). Moreover, as we could see, the Convention is incline to certain forms of state intervention in the audiovisual sector and, more generally, in the area of cultural exchanges. The regulation of state aids fall within the exclusive competence of the EU. As far as it concerns the cultural competence, on the base of article 151 of the Treaty on the European Union, the EU has only a subsidiary competence. Anyways, in spite of this limited competence conferred by the Treaty, over the last two decades the EU has undertaken a wide range of actions in the cultural field, in order to develop a European cultural policy. Therefore, it is clear that many provisions established in the UNESCO Convention are likely to interfere with the EU/EC law.

As the majority of the EU Member States were taking part to the negotiation of the UNESCO Convention, the Commission estimated that there was an urgency to preserve the *acquis communitaire* as well as the unity of its representation within such negotiations<sup>85</sup>. According to the consistent practice of the ECJ, the Community is entitled to take part to international

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<sup>84</sup> For convenience, I will use here the articles' numbering of the former Treaties (ECT and EUT).

<sup>85</sup> Communication of the Commission to the Council and to the European Parliament of 23 August 2003 COM (2003) 520 final; Recommendation by the Commission to the Council to authorize the Commission to participate on behalf of the Community in the negotiations within UNESCO, doc. 12063/04 CULT 61.

agreements not only when it has explicit conferred competence for the subject-matter, but also when the subject falls within an area where the Community has adopted secondary regulation<sup>86</sup>. Moreover, given that some fields of the Convention fell within the EU competences, this Convention had to be negotiated as a mixed-agreement on the base of article 300 EC<sup>87</sup>.

So, a first answer to our initial question is that the EU had the proper competence to negotiate the UNESCO Convention. Then, whether the Commission was more concerned about preserving the consistency of the *acquis communautaire* and acquire a greater visibility at the international stage, rather than promoting cultural diversity is another issue. Moreover, many Member States felt very frustrated by the leading role played by the Commission during the negotiation. They also saw the new visibility acquired by the EU at UNESCO as a threat for their national competence in the field of culture and education<sup>88</sup>.

My view is that the EU ratification has not undermined the sovereign power of Member States on national cultural policies. First of all, as well defined in the Code of Conduct adopted at the time of negotiation<sup>89</sup>, the Commission only negotiated those areas falling within its exclusive competence: the areas of education, cultural awareness and other national domains still remain within the competence of Member States. Furthermore, as pointed out in Section 2, the Convention strongly reaffirm the sovereignty of States on their national policies. Therefore, Member States should not fear to loose their power on national cultural issues.

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<sup>86</sup> The so-called principal of parallel between internal and external competence developed by the ECJ: *Commission v. Belgium*, C-471/98; *Commission v Council*, C-22/70; ECJ Opinion 1/94.

<sup>87</sup> ROSAS A., "The European Union and Mixed Agreements", in DASHWOOD A. and HILLION C., *The General Law of E.C. external relations*, Sweet and Maxwell, 2000, pp. 200-220.

<sup>88</sup> Interviews with the legal adviser of the DG Culture and Education during the 3<sup>rd</sup> Intergovernmental Committee on the Implementation of the 2005 UNESCO Convention, held at UNESCO Headquarter, 7-11 December 2009, Paris.

<sup>89</sup> Code of Conduct, 28 January 2005, (5518/05 CULT 3).



However, it is undeniable that a reinforcement of the EU competence in the cultural field can derive from this ratification. First of all, culture is such a cross-cutting theme, that a clear separation of competences between Member States and the Union seems to be very difficult. The unclear delimitation of competences within the EU legal system is, often, a cause of tension between Member States and EU institutions and can lead to unexpected erosions of competence of the States<sup>90</sup>. It can be argued, then, that the implementation of the Convention by the EU can contribute to the slow process of erosion of State's competence and sovereignty<sup>91</sup>.

As far as it concerns the question on the genuine intention of the Commission in flying to Paris, it is rather obvious that the EU first concern was to protect the integrity of the *acquis*. This is also confirmed by the "unilateral declaration" contained in the Annex 2 of the Council Decision which ratifies the Convention<sup>92</sup>. This unilateral declaration states that "*Member States of the Community which are party to the Convention in their mutual relations apply the provisions of the Convention in accordance with the Community's internal rules and without prejudice to appropriate amendments being made to these rules.*" Such a declaration, unilaterally adopted on behalf of the Community, produces a sort of "disconnection effect" of the EU Member States from the rest of the world: when they apply the Convention in their relations, they have firstly respect their Communitarian obligations. In this sense, unilateral declarations are often used by the Community as a legal technique to affirm the supremacy

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<sup>90</sup> This is, in particular, what is happening in the area of EU external relations: the Union has greatly increased its role in the global scene and widely developed its external policies in the last years, where the intertwining dimension of subjects has often result in an expansion of the EU external competences. The Union did so in order to preserve the integrity and the coherence of the *acquis communautaire*, yet this activism in external relations diminished the role of Member States in the World, as well as their sovereignty. See: AZOULAI L., "*The Acquis of the European Union and International Organizations*", in 2 European Law Journal, 2005, pp.197

<sup>91</sup> FERRI D., "EU Participation in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions: Some Constitutional Remarks", 3 European Diversity and Autonomy Papers - EDAP (2005), p. 11, at [www.eurac.edu/edap](http://www.eurac.edu/edap)

<sup>92</sup> *Supra* at 73.

of EC law<sup>93</sup>. Anyways, this does not mean that no care for cultural issues was moving Bruxelles to Paris. We should not forget that the EU has strongly supported the battle for an *exception culturelle* at global level. As above mentioned, the need for a binding legal instrument recognizing the double nature of cultural goods and services was the main reason which led to the adoption of the UNESCO Convention (that is usually defined as the young sister of the cultural exception). We can see, then, that the EU participation to the Convention is coherent with previous cultural concern of the Union. Thus, another question arises: is the Union only interested in protecting cultural diversity when it turns into issues referring to culture and trade? And: what other aspects of cultural diversity can benefit from the entry into force of the UNESCO Convention within the Union?

### 3.3 Assessing the impact of the UNESCO Convention for the protection and promotion of cultural diversity within the EU: what's new?

Looking at the cultural issues at stake in the Union and the EU competences, it seems that the ratification of the 2005 UNESCO Convention was not out of the blue. Instead, it comes to add an important piece to the cultural puzzle of activities of the Union.

First of all, the official recognition at the international level of the double nature of cultural good and services will contribute to support the battle started with the *exception culturelle* in the WTO framework. For those who fear a return to protectionism at the EU level, it can be argued that the UNESCO Convention has to be applied according to its guiding principles. Among those principles, the exercise of the sovereign rights of States is limited by the obligation to respect fundamental and human rights. Second, as far as it concerns national measures, the principles of "equitable access" and "openness and balance"

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<sup>93</sup> Such a use of unilateral declarations can be compared to the use of "disconnecting clause" in international law. For a view on this issues: CREMONA M., *Disconnection Clauses in EC Law and Practice*, EUI Working Paper.

should mitigate distortive effects of the provisions and help to single out what measures are licit or illicit. The ECJ can use the Convention as an interpretative tool in case of disputes related to commercial and financial policies in the area of cultural industries and the circulation of cultural goods and services. This happened, for example in the UTECA case<sup>94</sup>, a case dealing with the conformity of a restrictive Spanish measure affecting the broadcasting discipline of the Directive Television without Frontiers. The Spanish measure requires television operator to allocate 5% of their operating revenues for the pre-funding of European films, and to allocate 60 % of this 5% for the production of films in one of the official languages of Spain. This last aspect is the more interesting for the scope of this paper. In effect, such provision is likely to refrain the mobility of workers, as well as the free movement of capital and establishment<sup>95</sup>. Although this was recognized by the Court, priority was given to the promotion of linguistic diversity, defined by the ECJ, on the base of the UNESCO Convention, as a fundamental element of cultural diversity. Therefore, the balance among the conflicting interests at stake was given to culture.

As for other cultural aspects, such as education, they remains under the national competence. Anyways, given the extraordinary paths often undertaken by the Union in order to realize harmonization even when it has no competence, I would not exclude *a priori* possible future actions of the Union in these areas, in the name of preserving the “European cultural diversity”. But future will tell!

At the global level, the Convention can strengthen battle carried on by the EU and its Member within the WTO framework for a different commercial treatment of cultural goods and services. Even though the major opponent to this principle, the US, did not ratify the Convention, it is very likely that the

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<sup>94</sup> *UTECA v. Administración General del Estado*, C 222/07, (decision not yet reported, delivered on 5 March 2009). See also the Opinion of AG Kokott to the case,

<sup>95</sup> See AG Kokott's Opinion to the case, par. 78-87.

Convention will be used as an interpretative tool for disputes related to trade and culture<sup>96</sup>.

Major challenges, in my view, derives from the implementation of Article 16 of the Convention, which establishes a duty upon States to grant a preferential treatment to artists and cultural workers coming from developing countries. As above mentioned, this article implies delicate issues and can create conflicts in the Union between the Commission and the Member States. So far, there is not a common policy on migration yet. Although, this is an objective under the Lisbon Treaty: this is probably the main challenge for today's Europe. Currently, States are adopting measures to refrain migration flows and the EU is settling down some directive to regulate migration and development issues. As for issues related to the implementation of article 16 of the Convention, the EU initial steps are very encouraging. For example, in 2008, the specific protocol on cultural cooperation adopted with the first EPA with the CARIFORUM States<sup>97</sup>, which invites the Parties to facilitate the entry into and temporary stay in their territories of performing artists, cultural professionals and practitioners in their territory. Even if the Protocol only previews temporary (and subjected to many conditions) measures, it makes a step forward in the enhancement of cultural exchanges with third countries<sup>98</sup>. Further, the Commission is discussing the possibility to create a "Cultural Visa"<sup>99</sup>. This visa would opens up the road for a standardized visa procedure and harmonization of legislations in this field. Of course, this is not without trouble:

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<sup>96</sup> See *supra* 84.

<sup>97</sup> PROTOCOL III On cultural cooperation of the EPA between the CARIFORUM States, the EC and its Member States, OJ (2008) L 289. This Protocol was expressly adopted under the umbrella of the implementation of the 2005 UNESCO Convention.

<sup>98</sup> Similar versions of the Cultural Protocol are being discussed with Korea and India and similar negotiations should be initiated with the Euromed, Andean and Central African countries ([http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc\\_137751.pdf](http://trade.ec.europa.eu/doclib/docs/2008/february/tradoc_137751.pdf)).

<sup>99</sup> This idea was first proposed during the International colloquium "Culture and creativity, vectors for development," held in Bruxelles in April 2009 and organized within the framework of development cooperation between the African, Caribbean and Pacific (ACP) countries and the European Union. The aim of this international meeting was to provide a forum in which new solutions can be identified that might substantially contribute to future EU action with its ACP partners in the fields of culture and development (<http://www.culture-dev.eu/website.php?rub=documents-generale&lang=en>)

issues related to a commonly recognized definition of artists and to national policies are at stake. Although, this steps sign a step forwards towards a new approach in development cooperation policy: we are slightly shifting from an economically centered perspective to a new integral approach!

### **Concluding remarks**

At the end of this analyses, my view is that the ratification of the 2005 UNESCO Convention can bring an added value to the protection and promotion of cultural diversity in the EU as a *per se* value. First, the EU is now legally bound to ensure such protection within and outside its borders. The UTECA judgment and the proposal for Cultural Visa seems to be sign of this awareness. As for the enforcement of cultural human rights in the EU, even though the Convention does not establish cultural rights, it affirms the protection of cultural diversity as a common good and common concern for humanity. This protection is strictly connected to the enjoyment of cultural rights. Therefore, indirectly, the Convention can strengthen the promotion of such rights within the EU. In particular, it can play a role in favor of those cultural identity's rights that seems to have no place in the EU legal order yet. The improvement of conditions for the mobility of artists is also a contribute to the enforcement of cultural rights. Mobility is an essential element for accessing culture and cultural services; it is also a promoter of creativity and, thus, of cultural development; freedom of artistic mobility refers also to freedom of expression. Finally, this can definitely give a positive contribute to the creation of an intercultural agenda for Europe, as well to the promotion of multicultural dialogue and reciprocal understanding. Then, it seems that the EU is slowly encompassing all the various aspects of cultural diversity within its integration process, or better, is becoming a global promoter of cultural diversity<sup>100</sup>!

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<sup>100</sup> VON BOGDANDY A., The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity-Elements of a Beautiful Friendship, 2 European Journal of International law, 19/2008, pp. 241-275.

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