“Cultural Diversity” from the Perspective of Human Rights, Media, and Trade Law: Cross-Fertilization or Conflict?

Abstract: Over the last twenty years, a number of high-level policy meetings have emphasized the significance of cultural diversity in all matters related to international cultural cooperation. Instruments negotiated both in the context of the UNESCO and other agencies of the United Nations demonstrate the pervasive interest of the international community in strategies enhancing cultural diversity. Yet the concept of diversity is a particularly broad one, entrenched on a variety of rationales for its protection, such as the promotion of human rights and democratic participation; sustainable and human development; protection of cultural industries vis-à-vis the liberalisation of audio-visual services and free trade; promotion of intercultural and interreligious dialogue; as well as protection of cultural rights and cultural heritage. As this article submits, the promotion of cultural diversity is a laudable cause in and of itself, and a first step towards achieving equality. Its omnipresence, however, taken in conjunction with its imprecise content and function in the cultural market (in accordance with the 2005 UNESCO Convention on the
Promotion of Cultural Expressions) runs the risk of downplaying its significance and effectiveness.

**Keywords:** cultural diversity, human rights, media, trade law, participation

**Introduction**

The proliferation of debates on equality has both reflected and led to a renewed interest in “diversity” discourse. A plain Google search of the term “cultural diversity” brings up about 37 million results (as a measure of comparison, the term “human rights law” brings up only 10 million results, and “the Beatles” about 60 million results). The notion of diversity is far from being understood as gender diversity alone. Culture, race, and ethnicity are now clearly part of the diversity narrative, especially following the sweeping influence of the Black Lives Matter (BLM) movement in many parts of the world. Sexual diversity and gender variance are also gradually accepted in both the academic discourse and in soft law instruments.

*Cultural diversity* however may be the only one of the many diversity narratives that is so well entrenched in international instruments. The Principles of International Cultural Cooperation of 1966 was the first United Nations instrument that aimed specifically at its promotion, while the statute of the United Nations Educational, Scientific and Cultural Organization (UNESCO) itself states that it has been set up to preserve “the independence, integrity and fruitful diversity of cultures and

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educational systems of the States members”. At the national level as well governments around the world have been fervently reaffirming their commitment to “cultural diversity” – at times also passing relevant legislation. Diversity is celebrated every year on 21 May, in accordance with Resolution 57/249 of the UN General Assembly, under the motto “think globally and act locally”. Other famous days are also inspired by diversity. For example, the theme for the international museum day celebrated on 18 May 2021 was “Museums for Equality: Diversity and Inclusion”.

From the perspective of international law, the recognition and safeguarding of cultural diversity has borne fruit. The diversity narrative has contributed to the emergence of substantive case-law on the acceptance of (collective) cultural claims; to the understanding of international law in its entirety as a rich and diverse body of norms; and even to making the composition of human rights bodies more diverse, reflecting the variety of legal traditions. And yet in normative terms, cultural diversity remains one of those open-ended terms that are hardly defined – and rarely delimited in scope. The instruments that exist today for its protection and promotion vary substantially: not only are they drafted within the context of different international bodies and agencies, but even in the context of policy making, as well as in different spheres or disciplines of regulation (as is the case with the “human rights law” and “trade law” regimes). As a result, enunciations of cultural diversity end up conflicting, rather than resonating, with each other.

This article aims at offering an overview of the different ways “cultural diversity” is understood across a variety of legal regimes, in particular international hu-

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7 A poignant example is the Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, issued by the President of the United States in June 2021, according to which “diversity” means “the practice of including the many communities, identities, races, ethnicities, backgrounds, abilities, cultures, and beliefs of the American people, including underserved communities” (at b). The text of the Executive Order is available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/ [accessed: 24.09.2021].


The Meaning of the Terms “Culture” and “Diversity”: Are Words Important?

Preliminary etymological remarks

Diversity essentially means variety – it is a word that describes a fact. The Cambridge Dictionary, for example, defines diversity not only as variety, but also “the fact of many different types of things or people being included in something”;14 and the Oxford Dictionary defines it as a practice (or quality) of “including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, etc.”;15 while the Dictionary of the English Language (2016) used the definition “the condition of having or including people from different ethnicities and social backgrounds”.16 The best definition of cultural diversity is arguably the one found in the UNESCO Universal Declaration on Cultural Diversity (“2001 UNESCO Declaration”), which celebrated its 20th anniversary in 2021. The Declaration provides that “cultural diversity is [...] the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations” and is “as necessary for humankind as biodiversity is for nature”.17 Also, according to the 2005 UNESCO Convention on the Protection and

13 For the purposes of this paper, “cultural law” is understood as both cultural heritage law and the law governing popular culture, media, and the audio-visual.
Promotion of the Diversity of Cultural Expressions ("DCE Convention"), diversity refers to the “manifold ways in which the cultures of groups and societies find expression” and which are “passed on within and among groups and societies”. That said, “diversity” is arguably one of the most prominent “buzzwords” at both the policy and law-making levels. Debates over the peculiar term appeared in the 1990s, exploded in the 2000s, and since then have been relentlessly expanding. In the post-Covid era, the need to enhance all types of diversity is increasingly emphasized by various types of stakeholders, businesses, and corporations, and is one of the hallmark features of marketing. Its effect has been sweeping in broadcasting, audio-visual media, and the press, as well as in the cultural sphere, especially museums and educational institutions.

“Culture” on the other hand is both polysemous and broader in scope. Various attempts have been made to define its special characteristics. The prevalent view

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18 20 October 2005, 2440 UNTS 311. As of March 2021, the DCE Convention has 143 members including the EU.
20 Indicatively, see L. Naylor (ed.), Problems and Issues of Diversity in the United States, Bergin & Garvey, Westport, CT 1999, p. 1 (arguing in the late 1990s that ‘cultural diversity has become the buzzword of the 1990s”).
is that culture is a threefold notion. In its most common sense, it refers to creativity, art, and science. The functioning of museums, libraries, and cultural institutions, for example, as well as access to monuments, buildings, architecture, and sites, is in this sense “culture”. Secondly, it is further widely accepted that culture refers to the intellectual freedoms that are requisite for cultural production and the creative process, as well as its final products. In this sense, tangible cultural heritage, artworks, but also cultural popular arts and mass entertainment phenomena, cinema, and the audio-visual sphere are also “culture”. Thirdly, taken in its anthropological sense “culture” encompasses a much wider range of human activities that emphasize the sentiment of belonging to a certain group, or community, or even an entire civilization. In this sense, ways of life and worldviews, value systems, traditions, and beliefs which individuals may or may not identify with are also “culture” – or civilizations. From this point of view, as noted by the former UN Special Rapporteur on cultural rights, Karima Bennoune, it would be more accurate to describe “culture” in the plural sense.

The Different Rationales for the Protection of Cultural Diversity

Democratic participation and enhancement of human rights protection

The first rationale for the protection of cultural diversity is the will to achieve participation, inclusion, as well as to grant more visibility to disadvantaged individuals and groups via human rights law. From a European perspective, minority rights have served as the flagship for the enunciation of diversity in the context of Europe, following the collapse of the former Soviet Union. Hence, the preamble of the Framework Convention for the Protection of Minorities, for example, “consider[s] that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society”, and provides that States Parties should “undertake to promote the conditions nec-

29 Cf. UN General Assembly, Universality, Cultural Diversity and Cultural Rights, 25 July 2018, UN Doc. A/73/227, p. 17, para. 56 (“while it is customary to do so, referring to culture in the singular has problematic methodological and epistemological consequences. It must be understood that culture is always plural. ‘Culture’ means cultures”).
ecessary for persons belonging to national minorities to maintain and develop their culture”. In a broader sense, too, cultural diversity is a crucial element of the human rights discourse in achieving better social cohesion, participatory structures, and, ultimately, democratic forms of governance. The 2009 UNESCO report dedicated to diversity and intercultural dialogue explains in detail the perils of cultural uniformity. More and better civil society participation is therefore at the heart of cultural diversity strategies. This was also evidenced in the participation of civil society during the drafting of the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (“ICH Convention”), and also in the DCE Convention, in particular Article 11, which states that “parties acknowledge the fundamental role of civil society in protecting and promoting the diversity of cultural expressions” and that they “shall encourage the active participation of civil society in their efforts to achieve the objectives of this Convention”.

The drafting of universal human rights treaties provides arguably an even better example of how social struggles for equality and inclusion have influenced the formation of international law. For example, the objective of racial diversity has been among the motivations underlying the drafting of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); claims for the inclusion of women led to the drafting of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and more recently the struggles for the acceptance of a social model of disability have motivated the drafting of Convention on the Rights of Persons with Disabilities (CRPD) (an under-

32 Ibidem, Art. 5.
36 21 December 1965, 660 UNTS 195, Preamble: “[...] reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State [...]”. See generally, P. Thornberry, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary, Oxford University Press, Oxford 2016.
lying principle of which is specifically the “respect for difference and acceptance of persons with disabilities as part of human diversity and humanity”).

The same logic underpins the formation of soft law. Indigenous peoples’ struggles to preserve their identities have also been a catalyst in the consideration of the value of cultural diversity. Several provisions of the United Nations Declaration on the Rights of Indigenous People (UNDRIP) may in particular be read as advancing cultural diversity, including the proclamation of Indigenous cultural self-determination as a means of cultural survival and the protection of Indigenous cultural rights. Interestingly however, the UNDRIP is the only instrument proclaiming an independent right to cultural diversity in these words: “indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information”.

Enhancing the protection of cultural heritage and cultural rights

A second rationale for the protection of cultural diversity is the safeguarding of cultural heritage, both tangible and intangible, for the benefit of present and future generations. On the one hand, cultural diversity is an inherent element of policies to protect tangible assets. While the term “diversity” is not explicitly stated in the text of the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, the Intergovernmental Committee monitoring the Convention has however elaborated on a number of different occasions on the need to safeguard diversity in the preservation of heritage. More specifically, the World Heritage Committee has been proactive in recognizing a variety of elements for the effective management of heritage, which include an understanding of local values, and

39 The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is also based on the precept of the equal value of all cultures, affirming that “all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind”, see UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, UN Doc. A/RES/61/295, Preamble.
40 UNDRIP, Art. 3. Cf. Art. 43: “The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”.
42 UNDRIP, Art. 15.
43 16 November 1972, 1037 UNTS 151.
44 On the work of the Committee, see https://whc.unesco.org/en/.
also “respect for diversity, equity, gender equality and human rights, and the use of inclusive and participatory planning and stakeholder consultation processes”. It has further explained ways that biological and cultural diversity constitute tools by which to achieve sustainability. The ICH Convention, on the other hand, protects intangible cultural heritage as an independent type of heritage. It establishes obligations for States to adopt measures to promote diversity in expressions, including by identifying their intangible heritage and living traditions, preparing inventories, and adopting other safeguarding measures with the participation of the communities concerned. The Representative List of the Intangible Cultural Heritage of Humanity is per se a mechanism safeguarding cultural diversity.

That said, the protection of cultural heritage has expanded beyond the scope of the work of UNESCO bodies. The International Covenant on Economic, Social and Cultural Rights (ICESCR), and specifically the right to “take part in cultural life” guaranteed under 15(1)(a) has been the basis of the so-called “human rights-based approach to the protection of cultural heritage”. This approach has been embraced in reports of the UN Committee for Social, Economic and Cultural Rights, the Special Rapporteur’s thematic report in 2016, and resolutions passed by the UN Human Rights Council. In addition, the safeguarding of both heritage and diversity are to a certain extent an area of preoccupation also for the World Intellec-

45 UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, Operational Guidelines for the Implementation of the World Heritage Convention, 10 July 2019, WHC.19/01, at 111 (Decisions 39 COM 11 and 43 COM 11A).
46 Ibidem, at 119 (Decision 43 COM 11A).
47 ICH Convention, Art. 2 (referring to both “practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith”). See generally, L. Lixinski, Cultural Heritage in International Law, Oxford University Press, Oxford 2013.
48 ICH Convention, Preamble, “considering the importance of the intangible cultural heritage as a main-spring of cultural diversity and a guarantee of sustainable development [...]”.
49 Ibidem, Arts. 11-24.
52 CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc. E/C.12/GC/21, para. 15 (b); see, analytically, L. Pineschi, op. cit., pp. 31-39 (discussing the broad approach adopted by the Committee and relevant State obligations).
tual Property Organization (WIPO), especially in relation to Indigenous peoples’ traditional knowledge (TK) and traditional cultural expressions (TCEs).

Promoting intercultural (and interreligious) dialogue at the global level

A third rationale underlying cultural diversity is the promotion of intercultural dialogue at the global level. This, in and of itself, is a noble idea, based on the postulate that an understanding between peoples of various ethnic, racial, religious, and cultural backgrounds is possible, leading ultimately to peace and solidarity. The concept of “intercultural dialogue” was initiated in 2001, the year proclaimed as the Year of Dialogue among Civilizations, following a proposition from the former Iranian President, Mohammed Khatami. Khatami himself, however, has been a fervent opponent of Western politics and liberalism. This also raises a number of questions as to the political agenda of States endorsing the Declaration, as well as the way the Declaration impacts the discourse on international politics.

These views were reiterated in the 2001 Durban Conference, an event that attracted significant participation by delegates from around the world. The Durban Declaration endorsed the aforementioned decision of the UN General Assembly to proclaim 2001 the year of dialogue, and was further the first occasion to formally associate diversity, dialogue between civilizations, and “common challenges to humanity that threaten shared values”. During the event, which ironically ended a day before the 9/11 attacks, State delegates emphasized the prerogative of respect for intercultural dialogue at the global level, affirming that dialogue among civilizations “can dispel notions of cultural superiority based on racism, racial discrimination, xenophobia and related intolerance, and facilitate the building of a reconciled world for the human family”. Similarly, the 2001 UNESCO Declaration also affirms that respect for diversity should occur in a climate of “tolerance, dialogue and cooperation”, as well as “mutual trust and understanding”.

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59 Ibidem, p. 33, para. 82.

60 2001 UNESCO Declaration, Preamble.
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A few months after the Durban Conference and about the same time as the adoption of the 2001 UNESCO Declaration, the UN General Assembly adopted a resolution on the *Global Agenda for Dialogue among Civilizations*, and in 2004 Kofi Annan stated that “the United Nations was created in the belief that dialogue can triumph over discord, that diversity is a universal virtue and that the peoples of the world are far more united by their common fate than they are divided by their separate identities”. Also, the *World Summit Outcome* document envisaged a culturally diverse world and highlighted the importance of “respect and understanding for religious and cultural diversity throughout the world”. Two months later, on 16 December 2005, the UN General Assembly adopted the first resolution dedicated specifically to “cultural diversity”. Other resolutions followed, in particular Resolution 62/155 adopted in December 2007, in which the UN General Assembly states that it is convinced that “dialogue among various cultures and civilizations would contribute to the efforts of all peoples and nations to enrich their cultures and traditions” and is determined to “prevent and mitigate cultural homogenization, through increased intercultural exchange guided by the promotion and protection of cultural diversity”. Similar affirmations on the significance of cultural diversity and dialogue are found also in the Durban2 conference of 2009, as well as in the political declaration of the High-Level meeting of the UN General Assembly adopted in 2011 as a follow-up to Durban2.

Enhancing development strategies in the context of globalization

Cultural diversity is also seen as a fundamental element of development policies. This means, first, economic development. The promotion of diversity in fact has been accelerated by research associating it with measurable economic growth and the creation of sustainable labour markets, including by managing mobility and migration. Several recent studies have shown that diversity in the labour

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force drives creativity and innovation. For example, a ground-breaking study of the corporate sector and individual companies ranked in the S&P 500 index dated 2019 made a business case for cultural diversity, finding that inclusive companies employing more diverse personnel are generally more successful. Development policies mean, secondly, human development. The 1982 Mexico City Declaration (proclaimed following the Mondiacult Conference, which was attended by 960 participants from 126 States), first proclaimed that culture “helps to strengthen the independence, sovereignty and identity of nations” and that there is a need to enhance human development. According to the Declaration, “it is vital to humanize development, the ultimate goal of which is the individual in his dignity as a human being and his responsibility to society”. In fact, the concluding remarks of that Conference have been especially influential on the work of UNESCO in the years that followed, especially in relation to the definition of culture. The latter was defined as “the whole complex of distinctive spiritual, material, intellectual, and emotional features that characterize a society or a social group”, and it was also noted that “each culture represents a unique and irreplaceable body of values”. A careful reading of both the 1966 Principles and the Mexico City Declaration that was drafted following Mondiacult reveal the enormous influence of anthropologists on UNESCO’s work, in particular Franz Boas and Claude Lévi-Strauss, who elaborated the idea that no culture is superior to another. Furthermore, the definition of culture in the Mexico City Declaration is almost a verbatim iteration of Edward Tylor’s definition.

The findings of UNESCO have found fertile ground in the work of the United Nations Development Programme (UNDP). The work of the UNDP in the first

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73 UNESCO, Mexico City Declaration..., para. 11.
74 Ibidem, p. 1 (Preamble).
decade of the 2000s was largely influenced by the thoughts of philosopher, economist, and Nobel Prize Winner Amartya Sen (who elaborated the so-called Human Development Index, or HDI, based on a concept of development that takes into account equality, human capacity, and availability of choice). In particular the 2004 UNDP report, which stresses the linkages between cultural liberty and development as explained above, focuses expressly on human rights and cultural diversity as the prerequisites of development, as well as the eradication of poverty. At the same time, the idea that the promotion of cultural rights is a condition for sustainable development, including environmental protection, has become more visible at all levels of cultural rights' protection.

**Opposing cultural globalization and resisting monopolies**

In addition to the above, diversity has been the flagship of the forces opposing globalization. According to the 2009 UNESCO Report, for example, "globalization is often seen as a unidirectional and unidimensional process, driven by a Western-dominated global market economy and tending to standardize, streamline and transnationalize in ways inimical to cultural diversity". Interestingly, the report refers to anthropologists’ work, in particular that of Lévi-Strauss, whose work has been pivotal in UNESCO’s earlier efforts to safeguard the world’s cultural diversity and also influenced the drafting of the Mexico City Declaration, as discussed above.

Clearly the discourse on globalization has important implications for the cultural market, especially given that the cultural and creative sector accounts roughly for about 6% of the global GDP, which potentially could rise to 10% in the near future. In fact, from the 1990s onwards, the idea of “resistance” to market power, trade liberalization, and the influence of US media, in particular in the entertainment, telecommunications, audio-visual, and other cultural industries and services,
has become more pressing. Various members of the WTO, however, such as Canada, France, and the EU, have been seeking ways to boost their cultural markets, through enunciations of diversity that have been implemented at a political level in the course of intergovernmental conferences. Consequently, during the round of negotiations in 1994, they argued in favour of excluding the audio-visual sector from the General Agreement on Trade in Services (GATS). The tension became even more evident in the following round of negotiations in 2001, as reflected in the pressure for greater liberalization of free trade by the United States. At this juncture the aforementioned States, joined by a number of African, Asian, and Latin American States, tabled the UNESCO 2001 Declaration on Cultural Diversity, and later on, in 2005, the DCE Convention. The latter was largely seen by its supporters as “the legal remedy to the WTO”.

Dialogue, Cross-Fertilization, or Conflict?

Conflicting meanings

The conflicting meanings and rationales of cultural diversity necessarily impact on the effectiveness of the work undertaken for the preservation of diversity even within those spheres of regulation that are not contradictory per se – for example

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88 DCE Convention. The most important provision of the DCE Convention in this respect is Article 5(1), which “reaffirms [States’] sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions [...]”. See also T. Voon, *UNESCO and the WTO...*; W.-M. Choi, op. cit., p. 274.

89 L. Schéré, op. cit., p. 574.
cultural heritage law or human rights law. A good illustration of this is the actual drafting of instruments guaranteeing diversity, in particular the DCE Convention. Apart from the problematic tension between this Convention and free trade agreements, which will be discussed below in more detail, there is an increased complexity with respect to binding obligations which States Parties must adhere to, given that it posits three sets of different objectives (nine in total)\(^\text{91}\) and lays down eight guiding principles.\(^\text{92}\) In addition, the DCE Convention builds upon State obligations that are particularly complex and broad, such as the encouragement of intercultural dialogue “with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace”.\(^\text{93}\)

**Overlapping competences**

The problem of overlapping competences also becomes visible when the number of stakeholders and bodies that are involved is elevated. For example, the promotion of both intercultural dialogue and cultural heritage stopped being a matter of concern for governments and political entities in fora such as the Durban Conference as it became a top priority for both UNESCO bodies as well as human rights mechanisms. This however has not been accompanied by increased dialogue between these regimes. For example, references to the work of the UNESCO Intergovernmental Committee for the DCE Convention still remain scarce in the work of the Committee on Economic, Social and Cultural Rights (CESCR). At the same time, cultural diversity and intercultural dialogue have become an area of concern also for the United Nations Sustainable Development Group, which “serves as a high-level forum for joint policy formation and decision-making” and “guides, supports, tracks and oversees the coordination of development operations”.\(^\text{94}\) Since 2015, and in particular with the adoption of the new 2030 agenda for the Sustainable Development Goals (SDGs),\(^\text{95}\) diversity is also increasingly seen as a *sine qua non* feature of sustainable development. Yet the understanding of diversity in the context of the UNDP largely operates on the basis of a policy perspective,\(^\text{96}\) rather than human

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\(^{91}\) DCE Convention, Art. 1(3): “the objectives of this Convention are: (a) to protect and promote the diversity of cultural expressions; (b) to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner; and (c) to encourage dialogue among cultures with a view to ensuring wider and balanced cultural exchanges in the world in favour of intercultural respect and a culture of peace”.

\(^{92}\) Ibidem, Arts. 11-12.

\(^{93}\) Ibidem, Art. 1, objective (c).

\(^{94}\) https://undg.org/about/who-we-are [accessed: 24.09.2021].

\(^{95}\) UN General Assembly, Resolution 70/1: Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015, UN Doc. A/RES/70/1, para. 26. And further, see UN General Assembly, *Culture and Sustainable Development*, 8 December 2015, UN Doc. A/C.2/70/L.59, affirming culture’s contribution to the three dimensions of sustainable development.

rights law. As Juan Telleria explains, the HDI in particular is largely based on the concept of “cultural progress”, in sharp contrast with the plural meaning of culture and the concept of cultural equality.97

Conflicting regimes

In the case of self-contained regimes, such as trade law and human rights law, the differences in the way that “diversity” is understood, safeguarded, and promoted is striking. The broader problem in this respect is arguably the problem of fragmentation of international law. As suggested by the Study group on the topic, chaired by Professor Martti Koskenniemi, the problem of conflicts between rules or rule-systems is inherent in specialized law-making and the creation of self-contained regimes such as human rights law and trade law, tending “possibly [to] the loss of an overall perspective on the law”.98 Regardless of the view that one adopts towards the DCE Convention (and whether or not it has been effective),99 it remains in essence an instrument that creates tensions vis-à-vis the liberalization of the cultural market. The very objectives of the DCE Convention and the promotion of cultural exchange in a spirit of equality100 are by definition in conflict with the objectives of agreements negotiated in the context of the World Trade Organization (WTO). The history of the drafting of the DCE Convention and its current rejection by the US is illustrative of these tensions.101 Free trade and the liberalization of services is far from meaning “equality” in cultural exchange. Rather, it means maintaining the status quo in music and film distribution. The DCE Convention in this sense acts as a type of protectionist regulation that aspires to set restraints on an otherwise liberalized cultural market and the oligopoly of Hollywood.102 The aim to regulate cultural production in the pursuit of a more diverse content is particularly

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100 DCE Convention, Art. 2(3).
101 The full list of parties to date excludes the US, Israel, and a few others; see https://en.unesco.org/creativity/convention/parties. Analytically, see L. Schéré, op. cit., p. 575; and E. Brooks, op. cit., p. 112 (noting also that “ratification of the [DCE Convention] could potentially curtail the ability of the United States to export Hollywood films at its current rate”) and 122-127.
visible in the Operational Guidelines on the Implementation of the Convention in the Digital Environment, which invite States to, *inter alia*, update their legislative and regulatory frameworks for the media in order to increase diversity at all levels of the creation, production, and diffusion of content.\(^\text{103}\)

Three areas of tension between the DCE Convention and agreements negotiated in the context of the WTO appear to be particularly acute. Firstly, the DCE Convention gives a very broad definition of cultural goods and services, and clarifies that the latter may not necessarily have an economic value.\(^\text{104}\) Under the GATT and the GATS however – which aim at facilitating free exchange by lowering trade barriers in the areas of goods and services respectively – the non-economic value of cultural products or services is translated into eligibility for a “cultural exception” in favour of local cultural industries, without this being considered a “market distortion.”\(^\text{105}\) This means in practice that any measures taken to support local cultural production could be justified as a measure protecting cultural diversity under the DCE Convention, including for example limitations on imports of media hardware (such as newspapers, videos, and DVDs); screen quotas in favour of domestic audio-visual production; or any other measures to boost the local music business and film industry or to protect “cultural contents”. These measures are technically violations of the national treatment and non-discrimination obligations under the GATT and would be more likely to be rejected by WTO panels as inconsistent with free trade.\(^\text{106}\)

Secondly, the Convention explicitly states that its purpose is to provide an opportunity to the countries of the global South to develop and promote their culture, in a spirit of solidarity.\(^\text{107}\) This is based on various provisions of the Convention, in particular obligations aimed at facilitating dialogue;\(^\text{108}\) promoting cultural


\(^{104}\) DCE Convention, Art. 1(4). For more on this, see T. Voon, *UNESCO and the WTO…*, p. 637 (noting that “the broad scope of the UNESCO Convention could create difficulties for the WTO treatment of many arguably ‘cultural’ or culture-related goods and services such as audio-visual products; books and periodicals; food, wine and spirits [especially those subject to geographical indications or otherwise of regional significance]; and tourism”).


\(^{107}\) See, indicatively, DCE Convention, Art. 1, objective i: “to strengthen international cooperation and solidarity in a spirit of partnership […]” and Principle 7: “Equitable access to a rich and diversified range of cultural expressions from all over the world and access of cultures to the means of expressions and dissemination constitute important elements for enhancing cultural diversity […].”

\(^{108}\) Ibidem, Art. 12.
cooperation and collaborations for development, as well as poverty reduction;\textsuperscript{109} and even granting preferential treatment for artists and creators of the developing world.\textsuperscript{110} Direct obligations of funding are also provided for in the DCE Convention, which establishes a fund to promote cultural diversity through collaborative initiatives and mobility programmes.\textsuperscript{111} However, these powerful provisions in favour of diversity policies are not accompanied by adequate and clear safeguards against possible abuses, other than the generic clause on the prevalence of human rights.\textsuperscript{112} Moreover, dividing the world into “developing” and “developed” countries is also vague terminology, especially in relation to the obligations emanating from the GATT, the GATS, the TRIPS, and other multilateral trade agreements. In fact, as of 2019, 109 States Parties to the DCE Convention “are recognized by UNCTAD as developing economies, economies in transition and least developed countries”.\textsuperscript{113} Developed countries also run the risk of cultural uniformity, and are in equal need of boosting their cultural markets vis-à-vis monopolies. Countries such as Canada and France for example are among those that have “suffered the effects of cultural erosion due to the pervasive international distribution of American cultural products”, as noted by Eireann Brooks,\textsuperscript{114} and this is precisely why they have spearheaded the efforts to promote diversity.

Thirdly, unlike the WTO dispute settlement system, the DCE Convention is accompanied by only a weak mechanism of supervision, based on cooperation and negotiation.\textsuperscript{115} And yet the DCE Convention does contain clauses on the interpretation of eventual obligations stemming from other treaties; especially Article 20 of the Convention which aspires to regulate the relationship with other instruments, recognizing that parties should perform their duties in good faith under this treaty “and all other treaties to which they are parties”; and Article 21 that compels parties to “promote the objectives and principles of this Convention in other international forums”.\textsuperscript{116} The reception of these clauses by States opposing the DCE Convention has been inimical. For example, in the aftermath of the adoption of the

\textsuperscript{109} Ibidem, Arts. 13-15.
\textsuperscript{110} Ibidem, Art. 16.
\textsuperscript{111} Ibidem, Arts. 13 and 18(4).
\textsuperscript{114} E. Brooks, op. cit., p. 119; L. Schéré, op. cit., pp. 567-568.
\textsuperscript{115} DCE Convention, Art. 25. See analytically, T. Voon, UNESCO and the WTO..., pp. 9-10 (on the Conduct of UNESCO Convention Parties in the WTO).
\textsuperscript{116} DCE Convention, Art. 20(1): “[…] without subordinating this Convention to any other treaty, (a) [Parties to the Convention] shall foster mutual supportiveness between this Convention and the other treaties to which they are parties […]” and 20(2): “Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties”. For a critique, see R.J. Neuwirth, The Convention on the Diversity..., p. 842.
DCE Convention, the US Mission to UNESCO noted that “the [DCE] Convention must not be read to prevail over or modify rights and obligations under other international agreements, including WTO Agreements” and that “potential ambiguities in the [DCE] Convention must not be allowed to endanger what the global community has achieved, over many years, in the areas of free trade, the free flow of information, and freedom of choice in cultural expression and enjoyment”.117

Conflicting principles

From the human rights law perspective, diversity appears to be setting an additional set of standards, arguably lowering the common denominator upon which agreement has already been entrenched. Diversity is only a first step towards the realization of equality, non-discrimination, and other human rights. The association between diversity and human rights has been the object of long-standing discussions within UNESCO. In an article published in 2007, the former Director of UNESCO Kōichirō Matsuura wrote that it is precisely human rights and liberties that are the essential guarantees of cultural diversity, in particular free speech; media freedom and pluralism; cultural rights and the right to one’s language; equal access to cultural life, and so on.118 More recently, CESCR in its General Comment 21 found that the recognition of diversity is the first step towards the elimination of discrimination,119 and the UN Special Rapporteur Karima Bennoune in her 2018 report on cultural rights recognized that non-discrimination provides a legal basis for diversity.120 This is an important point in avoiding misconceptions about the normative content of diversity. Non-discrimination and equality obligations are both prerequisites and the legal basis for States to be able to realize diversity through accommodating the various cultural claims.121 This is also demonstrated by the numerous relevant judgments and decisions of human rights bodies, not only with respect to minority and Indigenous peoples’ rights (for example, with respect to the promotion of cul-

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118 K. Matsuura, op. cit., p. 1047.
119 CESCR, op. cit., para. 23: “a first and important step towards the elimination of discrimination, whether direct or indirect, is for States to recognize the existence of diverse cultural identities of individuals and communities on their territories”.
120 UN General Assembly, Universality..., para. 23 (pointing to the fact that the “principle of non-discrimination, enshrined in a large number of international legal instruments, constitutes an important legal basis for the relationship between universality and diversity”).
Cultural traditions and ways of life), but also in the area of media pluralism. However, the emphasis on the promotion of diversity by a variety of entities, agencies, and bodies risks shifting the focus away from equality considerations. The same can be said for State obligations to abide by diversity standards, as in the case of the DCE Convention, which subjects the right of States to adopt measures aiming at the promotion of diversity to the principle of sovereignty. While the rationale of this Convention has been primarily protectionist, as explained in the previous section, taken in the context of human rights law, and given the complexity and imprecision of its exact scope, such enunciations risk blurring the legal and non-legal components of diversity. Surely non-discrimination and equality contribute to enforcing pluralism and can provide more fertile grounds for making diversity an operational and effective principle. Contrary to well-defined obligations concerning non-discrimination and equality in human rights law however (especially vis-à-vis minorities, migrants, and other vulnerable and socially excluded groups), diversity obligations are a priori non-justiciable.

Conclusions

Diversity is an amazing phenomenon and its safeguarding is undoubtedly of vital significance in order to maintain the cultural richness of our world and transmit knowledge, skills, and happiness to future generations. The less culturally diverse our world is, the more impoverished the human experience is. Cultural diversity, however, is not only about those who are learning the skills of one art or another, but also about economic considerations. It is important to safeguard expressions of one particular way of life in sustainable economic terms, as well as allow cultural (and audio-visual) production to circulate freely in a spirit of equality and diversity. Over-emphasizing cultural diversity, however, significantly risks downplaying human rights norms. What is crucial in this respect is to clarify the meaning one gives to the term “diversity”. It is human rights obligations, rather than soft law in the form of UNESCO norms, that are vital to compelling States to enable and enhance the equal participation of all groups in cultural life, especially vulnerable groups.

In addition, the multiplicity of actors involved in the promotion of diversity is not necessarily indicative of better or more effective protection. Cultural diversity requires preservation and is indeed a crucial element of multicultural societies and

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122 E.g. European Court of Human Rights, Meltex Ltd. and Mesrop Movsesyan v. Armenia, Application No. 32283/04, Judgment of 17 September 2008; also, e.g. Inter-American Court of Human Rights, Granier et al. (Radio Caracas Television – RCTV) v. Venezuela, Judgment of 22 June 2015 (in which the IACHR found that the reforms in licensing processes were “against the spirit of pluralism” as their purpose was to silence voices critical of the government).

123 DCE Convention, Art. 5: “the parties [...] reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention”.
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“global” pluralism. However, the emphasis from a normative perspective should be less on proclaiming diversity across various fora, and more on working on the ground for a better implementation of social, economic, and cultural rights, as well as the principles of non-discrimination and equality. In other words, excessively broadening the concept of cultural diversity runs the risk of coalescence – if not substitution – of the value of diversity with justiciable rights and principles of human rights law such as equality and non-discrimination. In this way the promotion of cultural diversity loses its effectiveness and is reduced to solemn, yet empty, words.

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