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**Preliminary draft convention
on the protection of the diversity of cultural
contents and artistic expressions**

Preliminary report of the Director-General

I. Background

1. UNESCO's commitment to promoting cultural diversity is in keeping with its specific mandate within the United Nations system and with the continuity of the action that it has been carrying out for nearly 60 years "with a view to preserving ... the fruitful diversity of the cultures" and in order to "recommend such international agreements as may be necessary to promote the free flow of ideas by word and image" (UNESCO Constitution).

To this end, the Organization has expended efforts on two fronts: on the one hand by reflecting on and defining concepts,¹ and on the other, by preparing standard-setting instruments with a view to establishing an ethical and legal framework accepted by the international community.

2. The growing pace of globalization has raised new challenges for cultural diversity which the Member States of UNESCO have chosen to meet through standard-setting action by adopting in 2001 the *UNESCO Universal Declaration on Cultural Diversity* and its action plan. That instrument, which binds States together in an ethical commitment, recognizes cultural diversity for the first time as the "common heritage of humanity". It also commits UNESCO to "pursue its activities in standard-setting, awareness-raising and capacity-building in the areas related to the present Declaration within its fields of competence" (Article 12(c)). Moreover, the first paragraph of the action plan recommends "taking forward notably consideration of the advisability of an international legal instrument on cultural diversity". Since the adoption of the Universal Declaration on Cultural Diversity, there have been many international initiatives to encourage reflection on the desirability of reinforcing standard-setting action in relation to cultural diversity.

3. The Member States have thus deemed it desirable to draw up a binding standard-setting instrument on cultural diversity, in particular on one of the domains identified by the Director-General in his preliminary study on the technical and legal aspects relating to the desirability of a standard-setting instrument on cultural diversity (166 EX/28, March 2003). The four following options were proposed: (a) a new comprehensive instrument on cultural rights; (b) an instrument on

¹ See for example the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico, 1982) and the World Decade for Cultural Development (1988-1997); the work of the World Commission on Culture and Development (*Our Creative Diversity*, 1995); the first and second *World Culture Report* (1998 and 2000); the work of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998), the symposium "Culture: A form of merchandise like no other? Culture, the market and globalization", UNESCO, June 1999 and the Experts Committee on the Strengthening of UNESCO's Role in Promoting Cultural Diversity in the Context of Globalization, UNESCO, Paris (France), 21-22 September 2000; and the conclusions of the round tables of ministers of culture held in 1999, 2000 and 2002.

the status of the artist; (c) a new Protocol to the Florence Agreement; or (d) a new instrument on the protection of the diversity of cultural contents and artistic expressions.

4. Following 166 EX/Decision 3.4.3, adopted on the basis of the preliminary study, the General Conference, at its 32nd session (October 2003), after having examined document 32 C/52, adopted by consensus 32 C/Resolution 34 inviting the Director-General to submit to it at its 33rd session, in 2004, a preliminary report accompanied by a preliminary draft convention on the fourth option proposed (the protection of the diversity of cultural contents and artistic expressions), in accordance with the Rules of Procedure concerning recommendations to Member States and international conventions. That option touches on two areas that are particularly threatened by globalization, and for which there is no suitable international treaty. It was decided that they would form the core of the preliminary draft convention, without however losing sight of the full range of elements included in the scope of the Universal Declaration.

5. Following the Organization's customary practice, the Director-General set up a multidisciplinary international group of 15 experts whose task was to submit to him suggestions and views on the elaboration of the preliminary draft convention. At the conclusion of its three meetings (defined as category VI), held between December 2003 and May 2004, the group produced a draft text which it submitted to the Director-General. Thanks to the consensus-based efforts of the experts over the last six months, the Director-General is now ready to transmit to the Member States the present preliminary report together with a preliminary draft convention, in compliance with the statutory deadline, that is, at least 14 months before the opening of the 33rd session of the General Conference. The preliminary draft convention is being sent to Member States for their written comments and observations, which may be submitted up to mid-November 2004.

6. In addition, in its progress report on the preparation of the draft convention, the Executive Board, at its 169th session (April 2004), invited "the Director-General to convene meetings of government experts (category II) aimed at taking forward the preparation of the preliminary draft convention in order to report to the General Conference at its 33rd session" (169 EX/Decision 3.7.2).

II. Progress of the work

7. Pursuant to 32 C/Resolution 34 adopted by the General Conference at its 32nd session, and in line with the procedures followed at UNESCO for the elaboration of international instruments, the Director-General has decided to adopt a multi-stage approach based on the experience acquired during the preparation of other standard-setting instruments relating to protection of the cultural heritage. He has asked 15 independent experts chosen by virtue of their diverse areas of specialization (anthropology, international law, economics of culture, philosophy) to make recommendations and give legal opinions on the drafting of an outline of a convention on the protection of the diversity of cultural contents and artistic expressions.

First meeting of experts (17-20 December 2003)

8. The independent experts brought together by the Director-General began by proposing to consolidate the gains of the Universal Declaration. They agreed that their first priority was to prepare a preliminary draft that would enhance the capacity of States to define cultural policies for the protection and promotion of cultural contents and artistic expressions. The overall thrust of their work has remained that of the Universal Declaration: the link between respect for fundamental rights, democracy and creative diversity, the link between cultural diversity, dialogue and development, the equal importance of the cultural and economic aspects of development, recognition of the specific character of cultural contents and artistic expressions, meaning the dual –

cultural and economic – nature of cultural goods and services, and lastly, promotion of creative activity and of the cultural goods and services that are the main channels thereof.

9. At their first meeting, held from 17 to 20 December 2003, the experts expressed the wish that the convention, a binding legal instrument, should not take the form of a catalogue of penalties, but rather be a generous document ensuring a climate conducive to cultural diversity, dialogue and renewed international cooperation. Most of the experts thus considered that the convention's primary aim should be to tackle the imbalances apparent in the relevant fields which are liable to threaten the diversity of cultural contents and artistic expressions to the detriment of developing countries and minorities in particular.

Acknowledging that cultural development underlies many aspects of economic development, the experts agreed that the convention should define its own norms in order to ensure that cultural and economic development may go hand in hand. Agreeing that the convention should define the rights and obligations of the States Parties at the national and international levels, the experts proposed from the start that the term "protection" should under no circumstances be taken to mean that States Parties should turn in on themselves or close themselves off from others. Rather, the diversity of cultural contents and artistic expressions should always be guaranteed by freedom of expression, and the public should be afforded the broadest possible access to them.

The experts then set about defining the aims and principles, the scope, and the basic ideas of the convention, taking care to arrive at precise, but not fixed, definitions in the very broad and constantly evolving field that is the subject of the convention. The definitions selected are purely operational, and are intended to facilitate joint understanding among the States Parties throughout this process, which has a precise and limited goal. That is why, for example, the terms "culture" and "cultural diversity" were not approached in the full range of their acceptations and manifestations, but only in relation to the term "cultural expressions", which are notably transmitted by means of "cultural goods and services", having due regard for the Universal Declaration of Human Rights. The experts also tackled the themes of international cooperation and assistance, in particular for the developing countries. They stressed the need to escape the development assistance mentality and to devise mechanisms which could help those countries to enhance the field of their cultural expressions sufficiently to allow their economies to benefit therefrom. One idea was to institute partnerships and to set up databanks and indicators relating to the cultural sectors of the developing countries.

The experts suggested that the term "cultural expressions" should be used in the preliminary draft convention because it is more condensed, encompassing both the idea of "cultural contents" and that of "artistic expressions". That does not imply any modification of the objective or scope of the convention. The term was adopted by the Director-General, and is used in the preliminary draft convention.

Second meeting of experts (30 March – 3 April 2004)

10. At the second meeting, proposals for articles were formulated against the background of a debate whose underlying themes were the principles of dialogue and development. Constant reference was made to other fundamental principles of the UNESCO Universal Declaration on Cultural Diversity: respect for human rights, democracy, the free flow of ideas, and the pre-eminence of the cultural value of "cultural goods and services" over their commercial value. Other topics of discussion included the preamble, the objectives and principles, which should ensure consistency between the Universal Declaration and the convention, the scope, and the definitions, which the experts endeavoured to make functional with a view to optimum legal clarity. Two non-exhaustive lists of cultural goods and services and cultural policies were provided in the form of

annexes. The experts also discussed the rights and obligations of States Parties in relation to protection and promotion of the diversity of cultural expressions, and agreed on a series of binding provisions, on most of which a consensus was reached. They also examined the topic of international cooperation, which should benefit the developing countries in particular, and lastly, the topic of the follow-up bodies and mechanisms for the convention (a governmental body, a committee of independent experts, or a body composed of both at the same time, with UNESCO providing secretariat services in all three cases).

At the end of the meeting, a first outline of the preliminary draft convention was drawn up.

Third meeting of experts (28-31 May 2004)

11. At their third meeting, the experts concentrated on topics that had not been discussed in depth at the second meeting, and reviewed the entire draft text. One important conclusion reached at that meeting was that international cooperation should be a core feature of the rights and obligations of States Parties in order to protect and promote the diversity of all cultural expressions. The mechanisms of such cooperation, as well as its “tools” (an observatory on cultural diversity, and dynamic partnerships), were refined with a view to providing maximum benefit to countries lacking strong cultural industries, in particular developing countries.

At the national level, the experts agreed on an obligation for States Parties to protect vulnerable forms of cultural expression. The concept of vulnerability, and the criteria by which it is defined, will be one of the priority tasks assigned to the Advisory Group. The Advisory Group, defined as a follow-up mechanism which is essential to ensuring that the convention’s objectives are attained, constitutes an innovative addition to the other follow-up mechanisms, which also include a General Assembly of States Parties and an Intergovernmental Committee. The Advisory Group is an independent body charged with responding to requests from the Director-General and/or the Intergovernmental Committee which may also act on its own initiative by advising or encouraging States Parties to adopt appropriate cultural policy measures or alerting them to the need to do so.

The establishment of an observatory on cultural diversity highlights once again a determination to translate the convention’s objectives into action. The observatory is to collect, analyse and disseminate data in this field in question, and, at the same time, compile a databank designed to foster dynamic partnerships among all the potential partners. The experts then worked to refine the dispute settlement mechanisms, on which States are invited to agree in good faith. The principles of the convention were clarified and separated into basic and operational principles based on balance, openness, proportionality and transparency. Their prescriptive force was increased. The dispute settlement mechanisms were refined and the idea of sanctions definitively ruled out. Overall funding for all these mechanisms was envisaged but not determined; as the draft convention indicates that that task should be the responsibility of the category II intergovernmental meeting of experts.

Two options were identified in regard to the relationship of the convention to other legal instruments: either the convention would not affect the rights and obligations of States Parties under other international instruments, or it could affect them wherever exercise of those rights or compliance with those obligations might give rise to serious damage to the diversity of cultural expressions or might threaten such diversity, except in the case of international instruments concerning intellectual property rights.

Aside from the last item, the final meeting of experts produced a consensus text divided into seven chapters: “Preamble”, “Objectives and guiding principles”, “Scope of application and

definitions”, “Rights and obligations of States Parties”, “Relationship to other instruments”, “Follow-up bodies and mechanisms” and “Final clauses”.

Information meetings by the Director-General with the Permanent Delegations

12. During the past six months of work, the Director-General, wishing to provide Member States and governmental and non-governmental organizations with the most transparent and comprehensive information possible, has decided to ensure broad and regular dissemination of the reports of the three meetings of experts,² and also to publish frequent press bulletins on the work being carried out at UNESCO. This regularly disseminated information has enabled Member States who so wish to compile documentation for consultation and reflection among the various parties involved in the project. In addition, the Director-General brought together the Permanent Delegations of the Member States on three occasions – 21 January, 7 April and 21 June 2004, and provided information to the Executive Board at its 169th session, in April 2004. On these occasions, the Director-General thanked the Member States for their trust and for having endorsed the process of work embarked upon. He emphasized that the six months of tenacious work accomplished by the experts, in an excellent working climate, had made it possible, having due regard for the mandate of the General Conference and integrating their respective approaches, to adjust positions, iron out differences, and come up with a balanced text which is based on consensus and sufficiently elaborated to facilitate to the greatest extent possible the forthcoming intergovernmental discussions. The experts made an in-depth review of a broad spectrum of questions and problems, ensuring that the preliminary draft reflects the various concerns and demonstrating the complementarity between the economic and cultural spheres.

Consultations with WHO, WIPO and UNCTAD

13. Following the three meetings, and pursuant to 32 C/Resolution 34, which invites the Director-General to undertake consultations with the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD) and the World Intellectual Property Organization (WIPO), meetings were held with the secretariats of WTO and WIPO on 16 and 17 June 2004 in Geneva. Because it was holding its general conference in Brazil on those dates, UNCTAD could only be consulted in writing. The meetings with those two organizations, whose chief mandate is ensuring observance of the agreements concluded, highlighted the complementarity of UNESCO’s approach, which is aimed at encouraging States to develop innovative cooperation policies at the national and international levels. Both WTO and WIPO congratulated UNESCO for holding inter-agency consultations at such an early stage in the process of drawing up a new standard-setting instrument, and stressed that they were available to pursue informal exchanges between secretariats in the coming months.

The representatives of the WIPO secretariat have welcomed with interest the main lines of emphasis and objectives of a preliminary text which recognizes the full importance of the protection of intellectual property rights. They have promised to transmit their detailed, albeit preliminary, written remarks to UNESCO.

WTO, while affirming that its secretariat was available for informal exchanges with UNESCO on technical and legal aspects common to the draft convention and WTO agreements, has indicated that it wishes to consult its specialized councils and its General Council in a formal manner.

The Director-General has agreed to communicate the preliminary draft convention to the WTO secretariat in mid-July, at the same time as he will be sending it to the UNESCO Member

² The three reports of the meetings of experts (category VI) are available on the Internet at the following address: <http://www.unesco.org/culture/diversite>.

States. WTO will circulate the draft convention among its specialized councils (Services Council, Intellectual Property (TRIPS) Council, Goods Council), and then transmit it, with their comments, to its General Council before bringing them to the attention of UNESCO. UNESCO should thus be informed of WTO's official position by December 2004. In this way, the Director-General hopes that the Member States of both institutions will have plenty of time to express consistent and concerted views, following interministerial consultations within each Member State.

III. The next steps

14. In accordance with 169 EX/Decision 3.7.2, adopted by the Executive Board at its 169th session, in which the Board invited the Director-General to “convene meetings of government experts (...) aimed at taking forward the preparation of the preliminary draft convention in order to report to the General Conference at its 33rd session”, the first of these meetings will be held from 20 to 25 September 2004 at UNESCO Headquarters, funded principally by extrabudgetary funds. The meeting will provide an opportunity for all Member States and invited observers to express their views on the preliminary draft of UNESCO's future convention on the protection of the diversity of cultural contents and artistic expressions annexed to the present report. Further intergovernmental expert meetings should then be held to take the debate forward. Suggestions and observations by Member States on the preliminary draft and on the present report should be sent to the Director-General by mid-November 2004, whether or not they are submitted by government experts at the first intergovernmental meeting in September 2004.