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Item 8.3 of the provisional agenda

**DRAFT UNESCO DECLARATION CONCERNING
THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE**

OUTLINE

Source: 31 C/Resolution 26.

Background: In pursuance of this resolution, the Director-General was invited to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage.

Purpose: The Director-General submits for adoption the Draft Declaration concerning the Intentional Destruction of Cultural Heritage which embodies principles of protection inspired by UNESCO's cultural heritage conventions and other relevant instruments.

Decision required: paragraph 3.

1. This document is submitted to the General Conference in pursuance of 31 C/Resolution 26 which invited the Director-General to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage ("Draft Declaration"). It contains the Draft Declaration resulting from an expert meeting held in December 2002 in Brussels (Annex I), a report on the Brussels meeting containing a detailed commentary (Annex II) and three dissenting opinions of experts provided to the Secretariat after the meeting (Annex III).

2. It should be stressed that the main purpose of the Draft Declaration is threefold: (a) to uphold existing obligations of States under international agreements for the protection of cultural heritage in force; (b) to prevent and prohibit the intentional destruction of cultural heritage, and when linked, natural heritage, in time of peace and in the event of armed conflict; and (c) to encourage States to become party to instruments protecting cultural heritage if they have not already done so.

3. In light of the above, the General Conference may wish to adopt a resolution along the following lines:

The General Conference,

1. Recalling 31 C/Resolution 26 which, among other things, invited the Director-General to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage,
2. Having examined document 32 C/25,
3. Adopts the UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage as annexed thereto;
4. Urges Member States to take appropriate measures to promote this Declaration and to facilitate its application;
5. Invites the Director-General to take the necessary steps to ensure dissemination of, and follow-up to the Declaration, in particular in relation to the institutions of the United Nations system and other intergovernmental and non-governmental organizations concerned.

ANNEX I

THE DRAFT DECLARATION CONCERNING THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE

The Preamble

The UNESCO General Conference,

Recalling Resolution 26 adopted by the General Conference at its 31st session which, among other things, invited the Director-General “to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage”,

Referring to Article I(2)(c) of the UNESCO Constitution which entrusts UNESCO with the task to maintain, increase and diffuse knowledge by “assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions”,

Underscoring the principles of UNESCO’s conventions and recommendations for the protection of cultural heritage and, in particular, of the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, as well as the 2001 UNESCO Universal Declaration on Cultural Diversity,

Mindful that cultural heritage is a component of cultural identity and social cohesion so that its intentional destruction may have adverse consequences on human dignity and human rights,

Reiterating one of the fundamental principles of the Preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict providing that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”,

Recalling the principles concerning the protection of cultural heritage in the event of armed conflict established in the 1899 and 1907 Hague Conventions, respectively, and, in particular, in Articles 27 and 56 of the Regulations of the 1907 Fourth Hague Convention, as well as other subsequent agreements,

Mindful of the development of rules of international customary law related to the protection of cultural heritage in peacetime as well as in the event of armed conflict,

Further referring to Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia and the relevant Tribunal’s case-law related to the intentional destruction of cultural heritage,

Recalling Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute of the International Criminal Court penalizing the intentional destruction of cultural heritage in international and non-international armed conflicts,

Reaffirming that issues not fully covered by the present Declaration and other international instruments concerning cultural heritage will continue to be governed by the principles of international law, the principles of humanity and the dictates of public conscience,

Adopts and solemnly proclaims the present Declaration:

Article 1 – Recognition of the importance of cultural heritage

The international community solemnly recognizes the importance of the protection of cultural heritage and reaffirms its commitment to combat its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.

Article 2 – Scope

1. The present Declaration addresses intentional destruction of cultural heritage, as well as of natural heritage when linked to cultural heritage, in peacetime as well as in the event of armed conflict.
2. For the purposes of this Declaration “intentional destruction” means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes an unjustifiable offence to the principles of humanity and dictates of public conscience.

Article 3 – Measures to refrain from intentional destruction of cultural heritage

1. States should take all the necessary measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage located in their territory. This applies also to such acts when committed against cultural heritage situated on the territory of another State.
2. States should adopt the necessary legal, administrative, educational and technical measures, within the framework of their economic resources, to protect cultural heritage as well as to revise them periodically with a view to adapting them to the evolution of national and international cultural heritage protection standards.
3. States should:
 - (a) become parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols and the Additional Protocols I and II to the four 1949 Geneva Conventions, if they have not yet done so;
 - (b) promote the elaboration and the adoption of instruments of the same nature providing a higher standard of protection of cultural heritage; and
 - (c) promote a coordinated application of the existing and future instruments relevant to the protection of cultural heritage.

Article 4 – Protection of cultural heritage when conducting peacetime activities

When conducting peacetime activities, States should take all the appropriate steps to conduct them in such a manner as to protect cultural heritage and, in particular, in conformity with the principles and objectives of the 1972 World Heritage Convention, of the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage

and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

Article 5 – Protection of cultural heritage in the event of international or non-international armed conflict

When being involved in an armed conflict, be it of international or non-international character, including occupation, States should take all appropriate steps to conduct their activities in such a manner as to protect cultural heritage and, in particular, in conformity with the principles and objectives of the following existing international agreements on the protection of such heritage during hostilities such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols and the relevant provisions of the 1977 Additional Protocols to the four 1949 Geneva Conventions. States should also do their utmost to conform their conduct to any future international multilateral convention having a universal scope providing a higher level of protection of such cultural heritage.

Article 6 – Responsibility

States that intentionally destroy or intentionally fail to take the necessary measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction, bear the responsibility for such destruction. The responsible State should provide reparation in the form of restoration when technically feasible, or compensation as a measure of last resort.

Article 7 – Individual criminal responsibility

1. States should take all necessary steps, in accordance with international law, to establish jurisdiction over, and provide effective penal sanctions for those persons who commit or order to be committed acts of intentional destruction of cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction.

2. For the purposes of a more comprehensive protection, each State is encouraged to take all necessary steps, in accordance with international law, to establish jurisdiction over, and provide effective penal sanctions for those persons who are found present on the territory of this State, regardless of their nationality and the place where such act occurred, who commit or order to be committed acts referred to in Paragraph 1 of this Article.

Article 8 – Cooperation for the protection of cultural heritage

States recognize that they have a duty to cooperate with each other and with UNESCO to protect cultural heritage from intentional destruction. Such a duty entails at a minimum: (i) provision and exchange of information regarding circumstances entailing the risk of intentional destruction of cultural heritage; (ii) consultation in the event of actual or impending destruction of cultural heritage; (iii) assistance to Member States of UNESCO, as requested by them, in the promotion of educational programmes, awareness-raising and capacity-building for the prevention and repression of any intentional destruction of cultural heritage; (iv) judicial and administrative assistance, as requested by interested States, in the suppression of any intentional destruction of cultural heritage.

Article 9 – Human rights and international humanitarian law

Nothing in this Declaration should be interpreted as weakening international rules relating to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations.

ANNEX II

MEETING OF EXPERTS ON THE DRAFT DECLARATION CONCERNING THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE

Brussels, Belgium
9-13 December 2002

REPORT

A. HISTORY

1. Following the destruction of the Buddhas of Bamiyan, subsequent widespread calls for improved protection of cultural heritage and a discussion of this issue in the Executive Board and the thirteenth General Assembly of States party to the World Heritage Convention (October 2001), the UNESCO General Conference adopted at its 31st session 31 C/Resolution 26 which, among other things, invited the Director-General “to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage”. The matter was further considered by the Executive Board at its 164th session (Paris, May 2002) which adopted 164 EX/Decision 3.5.4 welcoming, among other things, “the continuing efforts of the international community for the protection of cultural and natural heritage” and expressing “strong determination and commitment with regard to the protection and preservation of culturally important monuments and sites and affirming the significance of transmitting these monuments and sites to future generations”.

B. ORGANIZATION OF THE MEETING

2. In pursuance of 31 C/Resolution 26, the Secretariat, together with the generous cooperation of the Belgian authorities, organized in Brussels from 9 to 13 December 2002 an expert meeting on the elaboration of the Draft Declaration concerning the Intentional Destruction of Cultural Heritage (“the Draft Declaration”). The meeting was officially opened by H.E. Mr Louis Michel, Vice-Prime Minister and Minister of Foreign Affairs of Belgium, and H.E. Mr Yves Haesendonck, Ambassador and Permanent Delegate of Belgium to UNESCO, who reiterated the task given to the participating experts by the Director-General, namely, “to formulate for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage”.

3. Professor Wojciech Kowalski (Poland) was nominated as Rapporteur, Professor Erik Franckx (Belgium) was named Chairperson and Professor Jiří Toman (Switzerland/the Czech Republic) was appointed Vice-Chairperson. Eleven experts participated and there were several observers.

4. To facilitate the work of the meeting, the Secretariat prepared and submitted to the meeting a preliminary Draft Declaration. The participants were also able to make use of two studies: (1) *The Destruction of the Buddhas of Bamiyan and International Law* (2002) elaborated by Professor Francioni (University of Siena, Italy); and (2) *Le renforcement de la mise en oeuvre des conventions relatives à la protection des biens culturels* (The Reinforcement of the Implementation of Conventions for the Protection of Cultural Property) (2002) by Professor Franckx and Mr van Assche (Center of International Law, Free University of Brussels, Belgium).

C. OBJECTIVES OF THE DRAFT DECLARATION

5. The Draft Declaration is a set of principles aimed at preventing and dissuading the intentional destruction of cultural heritage, and when linked, natural heritage, by States when conducting their activities in time of peace and in the event of armed conflict. The Draft Declaration is inspired by different international instruments such as the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1977 Additional Protocol I to the four 1949 Geneva Conventions for the protection of war victims or the Statute of the International Criminal Tribunal for the former Yugoslavia and that of the International Criminal Court, respectively.

6. The Draft Declaration is a soft-law text and is not intended to modify existing obligations of States under international agreements in force for the protection of cultural heritage. Its main purpose is threefold: (i) to state basic principles for the protection of cultural heritage specifically against intentional destruction in peacetime and wartime; (ii) to raise awareness of the growing phenomenon of intentional destruction of this heritage; and (iii) to encourage indirectly the participation of States not yet party to the 1954 Hague Convention, its two Protocols, the 1977 Additional Protocols and other agreements protecting cultural heritage.

D. RESULT OF THE MEETING – THE DRAFT DECLARATION ANNOTATED BY THE SECRETARIAT

7. As a result of a group of experts intervening in their personal capacities, the Draft Declaration was adopted by at least the majority of the experts for most of its provisions, and unanimously for the least debatable ones. The few reservations and/or dissenting opinions submitted in writing are attached in full in Annex III.

8. The Preamble and Articles of the Draft Declaration are provided below, each followed by a commentary.

The Preamble

TEXT:

The UNESCO General Conference,

Recalling Resolution 26 adopted by the General Conference at its 31st session which, among other things, invited the Director-General “to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage”,

Referring to Article 1(2)(c) of the UNESCO Constitution which entrusts UNESCO with the task to maintain, increase and diffuse knowledge by “assuring the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions”,

Underscoring the principles of UNESCO’s conventions and recommendations for the protection of cultural heritage and, in particular, of the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage, and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas, as well as the 2001 UNESCO Universal Declaration on Cultural Diversity;

Mindful that cultural heritage is a component of cultural identity and social cohesion so that its intentional destruction may have adverse consequences on human dignity and human rights,

Reiterating one of the fundamental principles of the Preamble of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict providing that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world”,

Recalling the principles concerning the protection of cultural heritage in the event of armed conflict established in the 1899 and 1907 Hague Conventions, respectively, and, in particular, in Articles 27 and 56 of the Regulations of the 1907 Fourth Hague Convention, as well as other subsequent agreements,

Mindful of the development of rules of international customary law related to the protection of cultural heritage in peacetime as well as in the event of armed conflict,

Further referring to Article 3(d) of the Statute of the International Criminal Tribunal for the former Yugoslavia and the relevant Tribunal’s case-law related to the intentional destruction of cultural heritage,

Recalling Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute of the International Criminal Court penalizing the intentional destruction of cultural heritage in international and non-international armed conflicts,

Reaffirming that issues not fully covered by the present Declaration and other international instruments concerning cultural heritage will continue to be governed by the principles of international law, the principles of humanity and the dictates of public conscience,

Adopts and solemnly proclaims the present Declaration:

Commentary:

9. The Preamble makes reference to principles contained in specific UNESCO and other international instruments, mainly in the field of international humanitarian law, stresses the clear link between these instruments and the Draft Declaration, with a view to facilitating their co-existence. The group preferred to mention the most important instruments, differently from one expert who had a preference to refer simply to “all relevant instruments”. Beyond pure references to existing standard-setting instruments, the Preamble emphasizes the moral and humanitarian basis of the Declaration. After discussion a general reference to human rights was ultimately included. Though developments in customary international law were acknowledged, the need expressed by the General Conference for the elaboration of such a Draft Declaration reflects the uncertainties still evident in customary international law on the existence of rules providing clear obligations to protect cultural heritage from intentional destruction both in time of peace and in time of armed conflict.

Article 1 – Recognition of the importance of cultural heritage

TEXT:

The international community solemnly recognizes the importance of the protection of cultural heritage and reaffirms its commitment to combat its intentional destruction in any form so that such cultural heritage may be transmitted to the succeeding generations.

Commentary:

10. This provision reiterates the commitment of the international community within UNESCO to protect cultural heritage from a new and growing threat, intentional destruction in its various forms.

Article 2 – Scope

TEXT:

1. The present Declaration addresses intentional destruction of cultural heritage, as well as of natural heritage when linked to cultural heritage, in peacetime as well as in the event of armed conflict.

2. For the purposes of this Declaration “intentional destruction” means an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes an unjustifiable offence to the principles of humanity and dictates of public conscience.

Commentary:

11. This article is one of the key provisions of the Draft Declaration, as it sets forth its scope, both in terms of its subject matter (*ratione materiae*) and its time framework (*ratione temporis*). The experts considered establishing a threshold for the kind of cultural heritage to be protected, some of them finding it unreasonable to expect all forms of cultural heritage, large, small, public or private, to fall within the scope of the Draft Declaration. “Cultural heritage of outstanding (universal) (important) value”, which is similar to the language of the 1972 UNESCO Convention, was suggested but rejected here. The meeting decided to elaborate two thresholds. The first appears in Article 2, where a threshold is implied by characterizing the act of intentional destruction rather than setting a threshold on, or giving a value to, the cultural heritage to be protected. The second threshold appears in Articles 6 and 7 for the specific cases of States and personal criminal responsibility which have a narrower scope and are thus limited to intentional destruction of “cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction”.

12. These two thresholds being distinguished, it is clearer why the term “cultural heritage” was not qualified but was left intentionally broad for the scope of the whole Draft Declaration, so as not to exclude expressly its “movable” or “immovable” natures, or its “tangible” or “intangible” forms. By application to both cultural heritage and natural heritage when the former is linked to the latter, the Draft Declaration has a wider scope than specific instruments such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols, and partially follows the dichotomy between cultural and natural heritage embodied in the 1972 World Heritage Convention.

13. In addition, the Draft Declaration covers both the situation of peacetime and wartime, tackling directly and deeply the real complexity of intentional destruction of cultural heritage in all its forms and causes. However, it also implies a broad scope of application, broader than instruments specific to the event of armed conflict (as the 1954 Convention), and exposed the experts to the difficult assessment of the precise status and content of international law (both treaty and customary law) for the regimes, if any, currently applicable against the intentional destruction of cultural heritage in both time of peace and armed conflict.

14. The second paragraph defines intentional destruction of cultural heritage for the purposes of the Draft Declaration. Though the definition adopted is meant to ensure a wide application of the Draft Declaration, this scope is subject to an implied threshold set by two limits on the definition of

intentional act: a *result* on the one side, the integrity of the heritage compromised; and a given *manner* of destruction on the other, constituting an unjustifiable offence to the principles of humanity and dictates of public conscience. Within this latter limit (inspired by the Additional Protocol I to the four Geneva Conventions for the protection of war victims, Art.1(2)), the Draft Declaration excludes from its scope of application, and therefore does *not* prohibit, acts of lawful destruction of cultural heritage. An example may be authorized public works conducted as set out in the relevant international instruments, primarily the 1968 UNESCO Recommendation.

Article 3 – Measures to refrain from intentional destruction of cultural heritage

TEXT:

1. States should take all the necessary measures to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage located in their territory. This applies also to such acts when committed against cultural heritage situated on the territory of another State.
2. States should adopt the necessary legal, administrative, educational and technical measures, within the framework of their economic resources, to protect cultural heritage as well as to revise them periodically with a view to adapting them to the evolution of national and international cultural heritage protection standards.
3. States should :
 - (a) become parties to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols and the Additional Protocols I and II to the four 1949 Geneva Conventions, if they have not yet done so;
 - (b) promote the elaboration and the adoption of instruments of the same nature providing a higher standard of protection of cultural heritage; and
 - (c) promote a coordinated application of the existing and future instruments relevant to the protection of cultural heritage.

Commentary:

15. The first paragraph is one of the main provisions of the Draft Declaration. As such, not surprisingly, it attracted most of the terminological debates. Consideration by the experts of the nature of a declaration first arose under Article 3, and then resurfaced in relation to other Articles as well. Though generally of a soft-law character, it was felt that the Draft Declaration, especially once adopted by an international body like UNESCO, could carry more weight than a recommendation, potentially inspire State practice and thereby contribute to customary international law developments.

16. By including measures with a view to preventing, avoiding, putting an end to and suppressing acts of intentional destruction of cultural heritage, this provision clearly expresses the variety of measures a State should take to ensure an effective prevention against intentional destruction, prevention which is incompatible with intentional non-action or negligence on the part of a State. The provision extends to cultural heritage situated both in the territory of the State concerned as well as in the territory of another State. Though it does not suggest an automatic and unconditioned extraterritoriality of national measures, this paragraph does recommend States to consider giving selective extraterritorial effect to those measures where appropriate, and to facilitate international cooperation and mutual legal assistance, for the purpose of protecting cultural heritage.

17. The second paragraph focuses on the necessary legal, administrative, educational and technical measures for the protection of cultural heritage, making this obligation not absolute but subject to the economic resources of the State concerned. Though so economically conditioned, these measures are nevertheless to be revised periodically so as to adapt to the evolution of national and international cultural heritage protection standards.

18. Following an extensive discussion on the need to promote the principles of existing conventions and to encourage States to join them if they have not done yet done so, the meeting expressed this need in the third paragraph concerning the Hague Convention, its two Protocols and Protocols I and II to the Geneva Conventions. This need is also reflected in Articles 4 and 5. Considering that for States Parties the threshold of protection set by these instruments is already applicable, this paragraph further invites States to promote the elaboration and the adoption of instruments of a *higher* standard of protection of cultural heritage.

Article 4 – Protection of cultural heritage when conducting peacetime activities

TEXT:

When conducting peacetime activities, each UNESCO Member State should take all appropriate steps to conduct them in such a manner as to protect cultural heritage and, in particular, in conformity with the principles and objectives of the 1972 World Heritage Convention, of the 1956 Recommendation on International Principles Applicable to Archaeological Excavations, the 1968 Recommendation concerning the Preservation of Cultural Property Endangered by Public or Private Works, the 1972 Recommendation concerning the Protection, at National Level, of the Cultural and Natural Heritage and the 1976 Recommendation concerning the Safeguarding and Contemporary Role of Historic Areas.

Commentary:

19. This Article invites all Member States to protect cultural property on a general level as well as, in particular, in conformity with the principles and objectives of the World Heritage Convention and four UNESCO recommendations on different aspects of the protection of cultural heritage, without excluding other relevant instruments. As, by definition, no prior ratification to the 1972 Convention or spontaneous and full implementation of the four Recommendations is assumed by this provision for its addressees, the invitation it expresses is limited to State conduct in conformity to “principles and objectives” of those instruments.

20. The brief list of instruments selected for Article 4 was adopted by the majority of experts for the guidance it provides to States. The 2001 UNESCO Underwater Cultural Heritage Convention was also considered as a significant and relevant instrument. It was, however, not expressly mentioned principally because it had not entered into force yet.

Article 5 – Protection of cultural heritage in the event of international or non-international armed conflict

TEXT:

When being involved in an armed conflict, be it of international or non-international character, including occupation, each UNESCO Member State should take all appropriate steps to conduct its activities in such a manner as to protect cultural heritage and, in particular, in conformity with the principles and objectives of the following existing international agreements on the protection of such heritage during hostilities such as the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two 1954 and 1999 Protocols and the relevant provisions of the 1977 Additional Protocols to the four 1949 Geneva Conventions.

The UNESCO Member States should also do their utmost to conform their conduct to any future international multilateral convention having a universal scope providing a higher level of protection of such cultural heritage.

Commentary:

21. By addressing any conflict, this provision acknowledges the contemporary phenomenon of a growing number of conflicts of an ethnic and non-international character, without omitting the more traditional and still recurrent international and interstate conflicts. Importantly, the scope of the provision includes occupation.

22. Similarly to Article 4, this provision calls upon UNESCO Member States to conduct their activities in a manner that protects cultural heritage in general and, in particular, that conforms with the principles and objectives of Conventions to which they are assumed not to be Party and therefore not already bound by them. The list is not only not exclusive of other current relevant instruments, but it is also not exclusive of future international conventions of a universal scope providing a higher level of protection for cultural heritage.

Article 6 – Responsibility

TEXT:

UNESCO Member States that intentionally destroy or intentionally fail to take the necessary measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction, bear the responsibility for such destruction. The responsible State should provide reparation in the form of restoration when technically feasible, or compensation as a measure of last resort.

Commentary:

23. This Article is one of the crucial provisions of the Draft Declaration. First of all, it covers a broad number of situations, as it refers both to intentional destruction or failure to take the necessary measures to prohibit, prevent, stop and punish any intentional destruction of cultural heritage. The meeting took into consideration the ability of a State to “permit” a group to serve as the State’s proxy and commit acts while the State intentionally stands by. Therefore under this Article, the State is responsible if it intentionally fails to take the necessary measures to prevent any intentional destruction. Though other terminologies and standards such as “by act or by omission causes ...” and “not exercising due diligence” were considered, they were felt to be too broad. Only the unintentional destruction or failure to take those measures relieves the State of responsibility.

24. Secondly, the discussions clearly showed the need to strike a balance between the broadness of the scope of the Declaration (Article 2) and a pragmatic approach limiting State responsibility to “significant” cases. After quite an intense debate, these cases were seen as those concerning the destruction, or the omission to avoid such destruction, of “cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction”. This terminology is also the result of a compromise between a narrower (first part of the sentence) and a broader (second part of the sentence) view of the cultural heritage to be protected in terms of State responsibility.

25. A concern was expressed also with regard to State sovereignty. The meeting concluded that State sovereignty was not jeopardized here and that the full phrase including the community’s

interest was necessary since it offers wider protection. The experts intentionally used the same language in Articles 6 and 7 for consistency. (See Annex III for dissenting opinions).

26. Thirdly, the Article makes clear that the responsibility implies the duty to provide: (i) reparation in the form of restoration when technically feasible, which is the principle adopted in view of the uniqueness of cultural property but covers only cases where the (intentional) destruction of the object was partial or not irreversible; or (ii) compensation as a measure of last resort. The nature and the amount of this compensation is not predetermined. It may be argued that, where appropriate, its nature may be financial as well as “cultural”, in terms of assistance to cultural development or other significant measures for the beneficiary State. Concerning the financial compensation, its quantification is left to a delicate assessment. It may be argued that its amount should not necessarily be based on the current market value (if available for the cultural property concerned) of the destroyed property, especially if this value is very high and the responsible State is not particularly and directly involved in the intentional destruction.

27. With regard to inclusion of failure to “punish”, some experts felt this was to be covered in Article 7 only. Though it was noted that a wrongful act has two consequences, reparation and sanction, the majority preferred to focus on “punish”. One expert felt that it was necessary to include agency specifically, making the State responsible for acts committed by its administrative agents. After some discussion, also with reference to the work of the International Law Commission, this was not taken up by the majority.

28. As any act or misdeed done with intent involves a higher standard, all experts agreed that the responsible State has a duty to provide reparation. Adding the words “such as” and then offering a list of possibilities was also proposed but not accepted. The majority preferred to provide exact terminology regarding reparation forms and priorities.

Article 7 – Individual criminal responsibility

TEXT:

1. UNESCO Member States should take all necessary steps, in accordance with international law, to establish jurisdiction over, and provide effective penal sanctions for those persons who commit or order to be committed acts of intentional destruction of cultural heritage of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction.

2. For the purposes of a more comprehensive protection, each UNESCO Member State is encouraged to take all necessary steps, in accordance with international law, to establish jurisdiction over, and provide effective penal sanctions for those persons who are found present on the territory of this State, regardless of their nationality and the place where such act occurred, who commit or order to be committed acts referred to in Paragraph 1 of this Article.

Commentary:

29. As already stressed, the scope of application of this crucial provision is consistent with that of Article 6, as they both refer to intentional destruction of cultural property of great importance for humanity, including such cultural heritage which is of special interest for the community directly affected by such destruction.

30. According to the first paragraph of this Article, UNESCO Member States should adopt the relevant administrative, legal and legislative measures to establish jurisdiction over and penalize two categories of persons: (i) perpetrators of acts of intentional destruction of cultural heritage; and

(ii) persons who ordered the commission of such acts. Though the nature and the precise content of these measures are left to the assessment of the State concerned, they are required to be in accordance with international law. Finally, the scope of this paragraph does not cover omission, in order not to extend excessively individual criminal responsibility.

31. In a novel second paragraph, the provision encourages States to establish universal jurisdiction over perpetrators of acts of intentional destruction of cultural heritage or persons who ordered the commission of such acts. The provision focuses on encouragement for States, while States are obviously free to organize the jurisdiction of their national courts in the way they feel most appropriate. Though expressing a simple encouragement, this provision is very important. It implies the clear desire to strengthen the efficiency of prevention measures and sanctions by the judicial system against intentional destruction, as it is encouraged to operate regardless of the nationality of the wrongdoer and the place where the intentional destruction occurred.

32. In the formulation of this Article consideration was given to existing duties in times of peace and armed conflict, as well as to the distinctions between penal and civil responsibility. Establishing criminal jurisdiction for the violation of the duty to protect cultural heritage with criminal punishment is certainly not unprecedented, both in domestic and international law (for instance, Article 28 of the Hague Convention, and Chapter IV of the 1999 Second Protocol to the Hague Convention).

Article 8 – Cooperation for the protection of cultural heritage

TEXT:

UNESCO Member States recognize that they have a duty to cooperate with each other and with UNESCO to protect cultural heritage from intentional destruction. Such a duty entails at a minimum: (i) provision and exchange of information regarding circumstances entailing the risk of intentional destruction of cultural heritage; (ii) consultation in the event of actual or impending destruction of cultural heritage; (iii) assistance to Member States, as requested by them, in the promotion of educational programmes, awareness-raising and capacity-building for the prevention and repression of any intentional destruction of cultural heritage; (iv) judicial and administrative assistance, as requested by interested States, in the suppression of any intentional destruction of cultural heritage.

Commentary:

33. Though the objective to strengthen international cooperation against the intentional destruction of cultural property underlies several provisions of the Draft Declaration, this Article focuses on it for UNESCO Member States, following an interstate cooperation philosophy expressed, for instance, in Article 6.1 of the World Heritage Convention 1972. The content of this provision is a remarkable and substantial one, as it sets a minimum threshold consisting of no less than four different fields of activities aimed at both the prevention and the suppression of intentional destruction. Particularly relevant from a legal standpoint is the cooperation related to judicial and administrative assistance in the suppression of any intentional destruction of cultural heritage (iv).

34. Concerning the need to prevent, the example of the intentional destruction of the Bamiyan Buddhas was clearly in the mind of all the experts and inspired them in elaborating this Article, which is intended, at least, to reduce the repetition of such dramatic cases.

Article 9 – Human rights and international humanitarian law

TEXT:

Nothing in this Declaration should be interpreted as weakening international rules relating to the criminalization of gross violations of human rights and international humanitarian law, in particular, when intentional destruction of cultural heritage is linked to those violations.

Commentary:

35. The growing number of legal international instruments in the interrelated fields of the protection of cultural property and humanitarian law may increase the risk of their reciprocal interferences for common States Parties. This provision represents a safety clause preventing that adherence to this Declaration from States may be rejected on the assumption that it would weaken international rules relating to the criminalization of gross violations of human rights and international humanitarian law.

ANNEX III

MEETING OF EXPERTS ON THE DRAFT DECLARATION CONCERNING
THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE

(Brussels, 9–13 December 2002)

Reservations/Dissenting Opinions¹

RESERVATIONS submitted by:

Dr Mohamed S. AMR

Dr Ariel W. GONZALEZ

Mr Zaude HAILEMARIAM

RESERVATIONS TO THE DRAFT DECLARATION CONCERNING
INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE

(Brussels; 9-13 December 2002)

Despite the agreement of all experts on the importance of the subject matter of this Declaration, different points of views were expressed concerning some fundamental issues. I find myself obliged to introduce in writing my reservations which were previously presented during the above-mentioned meeting and to explain the reasons behind these reservations.

I wish that these reservations be clearly reflected in the final report of the meeting which will be attached to the Draft Declaration.

My reservations are as follows:

First, I do not agree with the definition of “intentional destruction” which restricts the elements of such lawful act to the “intention” without considering the knowledge. This is contrary to the well-established principles of criminal law as well as Article 30 of the Rome Statute of the International Criminal Court. Therefore, I do share other experts who were in a view to include both “intent and knowledge” as the criteria of such lawful acts.

Second, I do not agree with the use of some terms included in the Draft Declaration such as:

“duty” in Articles 2, 3, 5 and 7;

“obligation” in Article 4;

“undertake” or “undertakes” in Articles 2, 3, 4 and 6.

¹ The reservations/dissenting opinions contained in Annex III were provided to the Secretariat before it introduced editorial changes to respect the non-legally binding nature of the Draft Declaration and introduced a new Article 1 on the *Recognition of the importance of cultural heritage*. The redrafted version of the Draft Declaration takes into account some of the reservations/dissenting opinions.

These terms are not consistent with the nature of the Declaration which has a non-binding value. These terms could lead, from a practical point of view, some UNESCO's Member States not to accept such an important declaration.

Third, I do not agree to expand the term of cultural heritage which is covered by this Declaration to include “cultural heritage which is of special interest for the community affected by such destruction” as indicated in Article 5 (responsibility) and Article 6 (individual criminal responsibility) of the Draft Declaration. This opinion is based on the following reasons:

- (1) The scope of cultural heritage as indicated in the above-mentioned articles goes beyond the General Conference's 31 C/Resolution 46. This resolution expressed the willingness of UNESCO's Member States to adopt an international declaration concerning the destruction of cultural heritage which constitutes the “common heritage of humanity”, and not any kind of cultural heritage;
- (2) Using “cultural heritage which is of special interest for the community affected by such destruction” can be considered by UNESCO's Member States as intervention in their internal affairs and affecting their national sovereignty.

Dr. Mohamed Sameh Amr
Member of the Expert Group

**PARAGRAPHS SUGGESTED BY MR ARIEL W. GONZALEZ FOR INCLUSION IN
THE REPORT OF THE MEETING OF EXPERTS ON THE INTENTIONAL
DESTRUCTION OF CULTURAL HERITAGE**

(Brussels; 9-13 December 2002)

- One expert considered that preambular paragraph 4 of the Draft Declaration had to be clarified in order to better explain which human rights would be affected by the intentional destruction of cultural heritage.
- Mr Ariel W. Gonzalez expressed a dissenting opinion as to the definition of “intentional destruction” in Article 1 of the Draft Declaration. He considered that the description of what is meant by “intentional” could not disregard Article 30 of the Rome Statute of the International Criminal Court, which clearly links such concept to “intent and knowledge”. He was of the view, therefore, that the latter expression had to be included in the referred definition.
- Mr Ariel W. Gonzalez expressed a dissenting opinion as to the use of: (a) the term “duty” in Articles 2, 3, 5 and 7 of the Draft Declaration; (b) the term “obligation” in Article 4; and (c) the term “undertake” or “undertakes” in Articles 2, 3, 4 and 6. He considered that such terms were scarcely consistent with the non-binding nature of the Draft Declaration. He also recalled that the intention of the General Conference of UNESCO, when it invited the Director-General to prepare such a draft, was to promote the elaboration of a set of principles which “would not be intended to create obligations for States” (emphasis added; please see 31C/Resolution 26 and paragraph 6 (c) of document 31 C/46).
- Mr Ariel W. Gonzalez had difficulties with the reference in Articles 5 and 6 of the Draft Declaration to the “cultural heritage which is of special interest for the community directly

affected” by the intentional destruction of such heritage. He recalled that the object of the Draft Declaration was the cultural heritage of interest for humanity. He considered that any such reference must be read in the light of two important principles of international law: the principle of non-intervention and the principle of sovereign equality.

- Mr Ariel W. Gonzalez expressed a dissenting opinion as to the use of the expression “cultural heritage of great importance for humanity” in Article 6 of the Draft Declaration. He recalled that this provision: (a) commits States to establish jurisdiction and penalize individual acts of intentional destruction of cultural heritage, both in the event of war and in time of peace; and (b) encourages States to establish universal jurisdiction for such acts. He considered that the object of such a provision had to be consistent with the existing normative schemes of individual criminal responsibility for the destruction of cultural heritage. He identified Chapter IV of the 2nd Protocol to the 1954 Hague Convention as such a scheme, which is applicable to “cultural heritage of the greatest importance for humanity” (emphasis added). Consequently, he was of the view that this latter expression should be used in Article 5 of the Declaration.
- Mr. Ariel W. González expressed a dissenting opinion as to the use of the term “necessary” in Articles 2.1, 2.2, 5 and 6 of the Draft Declaration. He considered that, given the mandatory formulation of the referred provisions, such term had to be replaced by “appropriate”.

RESERVATIONS of Mr Zaude Hailemariam. 13 December 2002.

CONCERNING THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION’S EXPERT MEETING ON THE DRAFT DECLARATION CONCERNING THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE, Brussels, 9-13 December 2002,

I briefly submit, below, my reservations on the conclusions of the said Expert Meeting, as follows:

1. *Inter alia*, in the interest of criminalizing the intentional destruction of the cultural heritage of minorities, I had suggested reference to be made to Article 27 of the International Covenant on Civil and Political Rights, which provides, in part, that persons belonging to minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language. The recent intentional cultural destructions of the Buddhas of Bamiyan were undertaken, *inter alia*, in manifest violation of the above-mentioned Article 27. This, however, regrettably is not mentioned in our report.
2. Leaving earlier war crimes tribunals aside, to refer in the report to the tribunal for the former Yugoslavia would unfairly particularize the unfortunate recent events in European politics only, and as such, it may have been left out from this report, which is of global interest.
3. More importantly, I object to the reference to the Rome Statute of International Criminal Court of 17 July 1998, which, of course, has some value for referring to the criminalization of intentional destruction of cultural heritage, but, *inter alia*, the same instrument sought also to gain immunity for war crimes committed by Italian Fascists during the Second World War, which had claimed no less than 760,000 innocent lives in Ethiopia alone, besides the looting and intentional destruction of very many cultural objects. This fact, which is almost always overlooked, may not remain hidden in the presence of direct victims. Indeed, some provisions of the Statute are contrary

to the provisions of the Convention on the Prevention and Punishment of Crimes of Genocide of 9 December 1948.

4. Having invited attention to the above rather few points, I share full responsibility for the rest of the content of our report.

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Zaude Hailemariam



32 C/25 Add.
3 October 2003
Original: English

Item 8.3 of the agenda

**DRAFT UNESCO DECLARATION CONCERNING
THE INTENTIONAL DESTRUCTION OF CULTURAL HERITAGE**

ADDENDUM

OUTLINE

Source: 31 C/Resolution 26 and 167 EX/Decision 5.6.

Background: By 31 C/Resolution 26, the Director-General was invited to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage. This Draft Declaration was submitted to the 167th session of the Executive Board (167 EX/21).

Purpose: Pursuant to 167 EX/Decision 5.6, which the Executive Board adopted on this item, the present addendum sets out below the text of that decision.

As concerns the informal meeting convened by the Secretariat which was held on Friday, 26 September 2003 upon the request of the Executive Board, the outcome of the debates of that meeting on the Draft UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage is reflected in document 32 C/INF.14.

167 EX/Decision 5.6:

The Executive Board,

1. Recalling 31 C/Resolution 26 which, among other things, invited the Director-General to formulate, for the 32nd session of the General Conference, a Draft Declaration concerning the Intentional Destruction of Cultural Heritage,
2. Having examined document 167 EX/21,
3. Recommends that the General Conference at its 32nd session adopt the Draft UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage as contained in document 32 C/25, taking into account the comments and suggestions presented during the 167th session of the Executive Board including the results of the meeting to be convened by the Secretariat before the General Conference with a view to submitting to the General Conference a revised version of document 32 C/25.