



**EN**

**Working Group on Orphan Objects**

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**UNIDROIT Preliminary Draft Guidelines on Orphan Cultural Objects:**

**Reports of Sub-groups**

1. Following the second session of the Working Group on Orphan Objects (Rome, 11 - 13 December 2024), Sub-groups were set up within the Working Group to enable a more in-depth discussion of the preliminary Guidelines on Orphan Objects and a possible revision of their wording, in particular those for which there was no consensus among the Working Group. A small group was also tasked with drafting a preliminary Preamble (see ANNEXE 1).
2. The Sub-groups met separately online on different occasions and delivered the following reports to be discussed at the third meeting of the Working Group. Some members participated in more than one Sub-group and this document summarises all comments.

**A. Definition of an orphan cultural object**

*Text as it stood at the end the second session of the Working Group –*

For the purposes of the present Guidelines, an orphan cultural object is a movable cultural object of importance, as defined in Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which has incomplete provenance.

*New text proposed by the Sub-Group –*

*For the purposes of the present Guidelines, an orphan cultural object is a movable cultural object of importance, as defined in Article 2 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which has [no or] incomplete provenance.*

*Comments of the Sub-group on definitions*

3. The definition “orphan cultural object” was amply discussed in the Sub-group on definitions, in the Exploratory Expert Group and in the Working Group, in particular in connection with the possible confusion with “orphan works” in copyright law. It was, however, decided to keep the notion of “orphan cultural objects”, as it was felt that this term was the closest to the types of objects discussed in the Guidelines.

4. For the time being, the decision was made to have a clear and short definition, to adopt a broader approach allowing for sub-divisions (providing sub-categories with specific regimes) at a later stage.

5. The reference to Article 2 of the 1995 UNIDROIT Convention<sup>1</sup> was questioned and found by some as not apt to non-legal use, for example for museum professionals. It must also be recalled that the criterion for objects under Article 2 of the 1995 Convention is “cultural importance” and not “economic value”.

6. Concerning the definition of a moveable cultural object *of importance*<sup>2</sup>, this is understood in terms of the definitions of Article 1 of the 1970 UNESCO Convention<sup>3</sup> and Article 2 of the 1995 UNIDROIT Convention<sup>4</sup>.

7. A member of the Sub-group proposed to replace the terms “incomplete provenance” with terms “no or incomplete provenance”.

8. A member of the Sub-group still had reservations about the use of the word ‘orphan’ (see also further commentary in paras. 18-20). Although this had been amply discussed previously, it could be reconsidered at the next meeting of the Working Group.

9. The term ‘provenance’, which is also referred to in Guideline A, should be understood as an object’s known history from the moment of creation or discovery.

10. While the lack of a complete provenance creates an orphan cultural object, as defined in the Guidelines, this does not in itself taint the object as most objects do not have a history back to the moment of creation or discovery. One has to distinguish, therefore, between gaps in information that may raise substantial doubts about the legitimacy of past actions, transfers, and other “relocations” of the cultural object, and other gaps that do not necessarily undermine the legal or ethical status of the object’s current possession. [to reduce and make more concise]

11. Provenance research is an on-going process and while the ideal goal is to create a complete documented or identifiable provenance, the Working Group accepted that this is rarely achievable. While noting a lack of identifiable or complete provenance could create substantial consequences for the object’s international movement, exhibition and for the purposes of scientific research, it was to be considered when conducting due diligence. [to reduce and make more concise]

12. Ongoing provenance research is a form of audit, whereby all known provenance is reviewed, with new research filling the gaps created during the process. Provenance research is an important subject with many sub-categories that can be developed.

1. A documented provenance may be defined by the following non-exhaustive list:

- a. Scientific or academic reports or references
- b. Visibility on the market (auction or dealer catalogues or references)
- c. Invoices and receipts
- d. Dated insurance schedules
- e. Shipping schedules (including evidence of import or export)
- f. Datable photographs or film

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<sup>1</sup> <https://www.unidroit.org/instruments/cultural-property/1995-convention/>

<sup>2</sup> Reference is made to the short paper *Some thoughts about "of importance"* which appears in Annexe 2 to this document.

<sup>3</sup> <https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural>

<sup>4</sup> <https://www.unidroit.org/instruments/cultural-property/1995-convention/>

- g. History of restoration and materials used
- h. The date of the mount

[It was discussed that perhaps this should be in the commentary of Guideline C]

2. An identifiable provenance may be defined as a non-documented provenance formed from recollections and witnesses relating to the history of that object. [perhaps this should be in the commentary of Guideline C]

3. Both professionals and non-professionals may conduct provenance research. [Some members of the group consider that. provenance research needs to be developed as both an academic discipline and a professional practice. [This needs to be discussed further]

#### *Comments of the Sub-Group on Guidelines F, G and H*

13. This Guideline directly refers to the definition of cultural objects given by Article 2 of the 1995 UNIDROIT Convention.

14. It emphasises the movable quality of cultural objects, stressing that these goods may circulate on an international scale and that provenance can be lost, for example, through their repeated displacements. These numerous displacements may also be used as elements of provenance through, for example, the generated import/export documentation. Voluntary and involuntary transfers may provide some evidence of provenance, even though provenance may be incomplete for earlier and later time periods.

15. The term “incomplete provenance” refers to objects that have an incomplete history of ownership, location or movement. The existing provenance history may also have insufficient or unreliable documentation. The term “incomplete” should be understood as a matter of degree, which also carries with it substantive normative implications. In other words, a distinction has to be made between serious gaps in information that may raise concrete doubts about the legitimacy of past actions, transfers, and other “relocations” of the cultural object, and other types of gaps that do not necessarily undermine the legal or ethical status of the object’s current possession.

16. The Sub-group proposes to add the terms [*no or*] before “incomplete provenance”, in order for the definition to be more precise.

17. One member of the Sub-group did not think the above paragraph added anything. Any evaluation of provenance and its documentation constitutes an assessment of risk. The extent to which any individual or institution (regardless of their role) is involved in such objects is a question of their tolerance for risk. That is where the issue of “degree” comes in (that is, what is the degree or extent of risk tolerance that each person or institution has) and that will vary for each person/institution.

18. The same member of the Sub-group reiterated her objection to the use of the term *orphan object*. The term is arguably misleading and inappropriate for two reasons: (1) it risks confusion with the term “orphans” as used in copyright law; and (2) it anthropomorphizes an inanimate object, implying that we must treat the object as a human child would be treated. The completely accurate and transparent term to be used should be “unprovenanced or incompletely provenanced” objects.

19. Another member of the Sub-group defended the use of the term *orphan cultural object*, highlighting the need to use a term that would call for attention and awareness. She argues that it is the object that should be addressed as the main issue. She explains that in her current practice, she often sees objects without complete or clear provenance disappear because no solution is offered to them.

20. Another participant defended the use of the term *orphan cultural object* and connected it with the underpinning notion of custody for present and future generations.

## **B. Applicable Law**

21. As there was no consensus on the existence of a guideline on applicable law at the second meeting of the Working Group, no specific Sub-group was constituted before the policy decision was taken. Nevertheless, the Sub-Group on “Evidence and burden of proof” composed of prosecutors offered the comments presented below.

*Text as it stood at the end the second session of the Working Group –*

The existence, legal status and acquisition of an orphan object are subject to the relevant conventions. If no convention is applicable, the existence and legal status of an orphan object are subject to the domestic law of its country of origin. The transfer of an orphan cultural object is subject to the law of the place of its location at the time of the transaction, provided the present Guidelines are respected.

*New text proposed by the Sub-Group on Evidence and burden of proof –*

*The existence, legal status and transfer of an orphan object are subject to the relevant conventions. If no convention is applicable,*

- *the existence and legal status of an orphan cultural object are subject to the law of the place of its location;*
- *the transfer of an orphan cultural object is subject to the law of the place of its location at the time of the transfer.*

*However, where circumstances so require, the domestic law of the object’s place of origin or another applicable law may be considered, either ex officio or on request.*

22. This Sub-group took advantage of its experience in some concrete cases to also offer some pragmatic comments on the wording of Guideline B on Applicable Law.

23. Firstly, terms such as “transfer” or “transferring” (and not “acquisition” or “transaction”) should be adopted uniformly throughout the text.

24. Secondly, the rule that, in the absence of a convention, the law of the country of origin of the orphan object should be applied is sometimes complex and difficult to use by a judge who, often, will not be the judge of the country of origin. Sometimes it is not even possible to identify the country of origin of an orphan cultural object, as already demonstrated in previous meetings of the Working Group. It seemed more appropriate for the principle to be the application of the law of the country where the object is located. The rule that gives precedence to the law of the country of origin in the absence of an applicable convention may indeed present practical and theoretical difficulties, especially for judges who are not familiar with that foreign law. The primacy of the law of the country where the object is located seemed more pragmatic and easier to apply.

25. Hence, the suggested text for Guideline B on Applicable Law.

### C. Provenance Research

*Text as it stood at the end the second session of the Working Group –*

Provenance research is the process by which the possessor or the acquirer of an orphan cultural object is to find out the place of origin and/or the history of circulation of the object. The extent of provenance research depends on the specific case at hand and the history of the object. Provenance research should be performed by [relevant experts in that field] [experienced researchers] [experts], and it can involve, among other actions, library research, consultation of archives (public or private), document analysis, scientific analysis and exchanges with witnesses.

*New text proposed by the Sub-Group –*

1. Provenance research is the process of searching information related to the history and circulation of an object, from its creation or discovery to its current location, in the aim of establishing its provenance/must be conducted on an object to thoroughly investigate its history and circulation. Provenance research also endeavours to ensure that the object has not been subject, in the past, to any illicit transfer or similar action.
2. Complete and unbroken records of provenance are rare. The provenance of some objects may not be able to be verified in its entirety since its creation or discovery to its current location. In such circumstances, provenance research should aim to collect all reasonably obtainable information in evaluating provenance gaps and undocumented transfers.
3. (Due diligence and) Provenance research require(s) extensive and comprehensive research that integrates various types of information. Conducting (due diligence) provenance research may confirm that the object is an orphan cultural object as defined in Guideline A.
4. Provenance research must be conducted under the circumstances specified by a provenance researcher or a recognized expert in the field.
5. The extent of provenance research depends on the specific case and the history of the object. It involves examining all available documentation and information at the time of the search. This may include, among other actions, library research, consultation of public or private archives, document and scientific analysis, and exchanges with witnesses. The results are only relevant at the moment/time/period when provenance research is conducted.
6. The results of the provenance research must be preserved and follow the object. They must be shared with any present or future possessor.

*Comments, paragraph by paragraph, of the Sub-group*

26. Members of the Drafting Sub-Group “Provenance research” submit the following two alternative proposals to the Working Group:

1. Inverting *Guideline C. Provenance research* and *Guideline D. Due Diligence*.
2. Merging *Guideline C. Provenance research* and *Guideline D. Due Diligence* into one *Guideline*.

**1.** Provenance research is the process of searching information related to the history and circulation of an object, from its creation or discovery to its current location, in the aim of establishing its provenance/must be conducted on an object to thoroughly investigate its history and circulation. Provenance research also endeavours to ensure that the object has not been subject, in the past, to any illicit transfer or similar action.

27. This first paragraph aims to define what provenance research is. This definition of provenance research is kept quite broad, as the scope of the search should be first discussed during the sub-group *Provenance research* meeting.

28. The proposed wording “from its creation or discovery” is a key element of the provenance research Guideline and highlights divergent opinions on the matter. The key point to be addressed here is to determine whether a cut-off date/reference date should be fixed.

29. Two members maintained that, since each object is unique and has its own unique provenance, it is impossible to adopt a fits-all *dies a quo* for Provenance research and Due diligence.

30. The following wording proposition “to ensure that the object has not been subject, in the past, to any illicit transfer”, highlights that provenance research aims to also ensure that the object is not of illicit origin. The licitness of the provenance has to be considered in light of all the previous transfers and circulation of the object. Provenance research, by searching information related to the history and past transfers of the object, should be able to rule out all hypotheses (notably in a conflict context) of violation of import and export regulations; violation of property rights; confiscation, misappropriation, spoliation; looting and illicit trafficking. Two members especially proposed to add “or similar action”.

31. Another member did not agree with the term “must”. The same member also maintained that the period covered by provenance research should be delimited by this Guideline, and the date needed to be the same for every object covered in Guideline A.

32. *Key points that need to be addressed during the third Working Group session:*

- Should the provenance element, as the place of origin of the object, the history of its circulation, the previous chain of ownership, be given as an example in the Guideline ? Or should those elements be put in the commentary of the Guideline ?
- Should the period covered by provenance research be delimited by this Guideline? If so, should this date be the same for every object covered in Guideline A ?

**2.** Complete and unbroken records of provenance are rare. The provenance of some objects may not be able to be verified in its entirety since its creation or discovery to its current location. In such circumstances, provenance research should aim to collect all reasonably obtainable information in evaluating provenance gaps and undocumented transfers.

33. Even after the most extensive research, obtaining a full provenance since the date of the creation or discovery can be complicated. This paragraph addresses the issue of provenance containing gaps that may not be verified through provenance research. Resolving provenance gaps, particularly during periods of war, conflict, political upheaval or natural disaster, may be further complicated by the loss or destruction of records in such circumstances. Gaps can also be the result of a past owner’s desire for anonymity, or an absence of transaction records due to the nature of the trade, or there may not have been the requirement for the records at that time.

34. A member of the Drafting Sub-Group disagreed with the inclusion of this paragraph, which was superfluous and unnecessary in her opinion. She maintained that its inclusion made unbroken provenance records seem like the exception, whereas the goal should be to have provenance records that are as complete as possible. In fact, in any circumstance "... provenance research should aim to collect all reasonably obtainable information in evaluating provenance gaps and undocumented transfers".

**3.** (Due diligence and) Provenance research require(s) extensive and comprehensive research that integrates various types of information. Conducting (due diligence) provenance research may confirm that the object is an orphan cultural object as defined in Guideline A.

35. Intrinsically linked to the concept of due diligence, conducting provenance research reflects the execution of one of the aspects of exercising due diligence. However, provenance research requires in-depth and precise research and has to be addressed by these Guidelines as a specific area of expertise. The time-consuming and precise nature of provenance research implies that a specific attention and timeframe should be given to this field. The different types of information researched may be scientific, legal, historic or cultural.

36. The wording "Conducting provenance research may confirm that the object is an orphan cultural object as defined in Guideline A" refers to the fact that you can only identify an orphan cultural object after exercising due diligence and conducting provenance research. Two members of the Drafting Sub-Group proposed to add "due diligence" before provenance research. They pointed out that transactional due diligence, as outlined in the UNIDROIT Convention, and provenance research, as intended in this article, must be conducted together. The members were in favour of not separating them, except for definitional purposes, but were not inclined to sever the actions of conducting provenance research and due diligence. In their opinion, all objects should be considered potentially orphaned (as stated in Guideline 1) until careful analysis and study confirm the authenticity of their records or clarify them.

37. Another member proposed to delete "may".

**4.** Provenance research must be conducted under the circumstances specified by a (licensed) provenance researcher or a recognized expert in the field.

38. One of the main key points regarding provenance research was to determine who could conduct it. Can every possessor of future potential acquirer conduct provenance research, or should it be someone entitled to conduct it? This paragraph answers this key point by proposing 2 alternatives. Provenance research can be conducted by:

- "a provenance researcher": a person who conducts provenance research as a professional activity, on a day-to-day basis. Two members proposed that provenance research must be conducted under the circumstances specified by a "licensed" provenance researcher, as they envisaged the future creation of an official list of provenance researchers.

- "a recognized expert in the field": a person who conduct provenance research as a part of its professional activity, as someone working in the legal team/department team of an auction house for example, or a person, for example a collector, who has developed a precise knowledge of provenance throughout his multiple acquisition on a specific kind of items.

39. One member proposed to replace "under the circumstances specified" with "in the previous paragraphs".

40. *Key point to be addressed during the third Working Group session:*

- Who will validate that the collector can conduct provenance research, that he/she has a proper knowledge of this field?

**5.** The extent of provenance research depends on the specific case and the history of the object. It involves examining all available documentation and information at the time of the search. This may include, among other actions, library research, consultation of public or private archives, document and scientific analysis, and exchanges with witnesses. The results are only relevant at the moment/time/period when provenance research is conducted.

41. The first sentence of this paragraph, by stating that the extent of the provenance research depends on the object in question and its history, aims to affirm that each provenance research conducted has to be specific to the object. It emphasises that the extent of the search, and therefore its proportionality, depends on the object. The degree of provenance research has to be adapted according to the object studied. In this Guideline it was preferred to keep the provisions broad, and to not be too specific about which information can be searched and where.

42. The proposed sentence "It involves examining all available documentation and information at the time of the search." conveys that provenance research can be conducted by searching all documentation and information in relation to the object. No common methodology can be proposed for every object: it depends on the nature of the object under scrutiny. However, examples of documentation could be given, such as library research, consultation of archives (public or private), document analysis, scientific analysis and exchanges with witnesses.

43. As provenance research is a constantly developing and deepening field, no limited list of databases should be given in the Guideline or in its commentary/annexe.

44. The wording proposition "The results are only relevant at the moment/time/period when provenance research is conducted." underlines that the results of provenance research are not definitive. The creation of new databases, the development of archives and the creation of new research resources all call for renewed provenance research. It is important for the Guideline to specify that the results obtained are not binding for the future and cannot guarantee the legal provenance of the item *ad vitam æternam*. The outcome of the provenance research is only valid at the time of the transfer in the light of the elements available at that precise moment, and new elements may be discovered later. One member expressed herself in favour of keeping the term "period", and was also in favour of proposing new provenance elements in the commentary section of this paragraph.

45. *Key points to be addressed during the third Working Group session:*

- Should the commentary section propose new provenance elements such as: country of origin (if known); possible date/period of origin; history of exhibition/publication ; contact authorities / government / community representatives / museums; was the object subject to pre-existing, prior disputes or circumstances that compromise the contemporary ethical status of the object ?
- Should a non-limited database list be given? (Even though it could be outdated really fast...)



**6.** The results of the provenance research must be preserved and follow the object. They must be shared with any present or future possessor.

46. During the conduct of provenance research, every element searched has to be documented, and every element found has to be kept. All these elements must follow the object's transfer and be shared with the possessors. A proposition was made by two members to consider including other options in the commentary: e.g. sharing the document when obliged under subpoena, or with scholars, for FOIA requests, or similar.

47. Another member stated that appropriateness of the term "must" should be discussed.

48. The commentary could also address the issue of searching and dealing with sensitive information and personal data when conducting provenance research, notably regarding the General Data Protection Regulation (GDPR)<sup>1</sup>. Elements resulting from provenance research may be personal and concern sensitive data. The Guideline has to address with whom all the personal and sensitive information have to be shared.

49. *Key points to be addressed during the third Working Group session:*

- Should this provision state the form in which provenance research should be shared, such as a provenance report?
- Should this provision also state that public or private institution have to share the results of provenance research?
- Should this report be shared publicly?
- Should this provision also address the extent of the provenance research report; could it be submitted to a court?
- Should a new paragraph be added for public or private institutions, and even collectors, to share their provenance research element after reviewing their collections?

#### **D. Due diligence in acquiring an orphan cultural object**

*Text as it stood at the end the second session of the Working Group –*

When acquiring a potential orphan cultural object, attention must be paid to all the circumstances relevant to the acquisition. In this respect, the criteria of due diligence provided for in Article 4.4 of the 1995 UNIDROIT Convention are a point of reference.

Due diligence also applies to public and private institutions and collectors when reviewing their collections.

*New text proposed by the Sub-Group -*

1. *Due diligence in relation to an object described/defined in Guideline A/an object from a category listed in Guideline A may include, but is not limited to, the criteria provided for in Article 4.4 of the 1995 UNIDROIT Convention.*
2. *Due diligence shall be performed on such an object in relation to a transfer of the object. For the purposes of this Guideline D [C], "transfer" shall mean a change in ownership, possession or physical location across international borders.*

Due diligence shall be performed in such circumstances by public and private institutions and collectors.

3. If, after exercising due diligence, the object remains in the listed categories of Guideline A, further provenance research should be carried out.

4. All findings should be documented, kept and shared in the event of a future transfer.

*Comments, paragraph by paragraph, of the Sub-Group*

50. Members of the Drafting Sub-Group on "Due Diligence" have a proposal to submit to the Working Group:

➤ Inverting *Guideline C. Provenance research* and *Guideline D. Due Diligence*.

**1.** Due diligence in relation to an object described/defined in Guideline A/an object from a category listed in Guideline A may include, but is not limited to, the criteria provided for in Article 4.4 of the 1995 UNIDROIT Convention.

51. The Drafting Sub-Group thought it would be more adequate to begin this provision by defining what due diligence is, and specify when due diligence has to be exercised in a second paragraph.

52. The optional wording proposed "an object described/defined in Guideline A / an object from a category listed in Guideline A" depends on the decision taken on the definition of an orphan objects (description, definition, categories.....).

53. The 1995 UNIDROIT Convention sets out, in Article 4.4, the obligation of due diligence, implicating the vigilance required from any individual to be exercised at the time of the acquisition. This notion of vigilance primarily relates to the behaviour of the individual, manifested by a series of actions, listed in the cited article above, to ensure that they do not participate nor facilitate any acquisition of an object of illicit origin. Article 4 of the 1995 UNIDROIT Convention is intended as a (double) sanction against those who acquire cultural objects without making serious inquiries into the acquisition's circumstances (including provenance). Indeed, the possessor of a stolen cultural object will return it and receive no compensation when he/she cannot prove that he/she fulfilled his/her obligation of due diligence (see Article 4.1 of the 1995 UNIDROIT Convention).

**2.** Due diligence shall be performed on such an object in relation to a transfer of the object. For the purposes of this Guideline D [C], "transfer" shall mean a change in ownership, possession or physical location across international borders.

Due diligence shall be performed in such circumstances by public and private institutions and collectors.

54. After defining due diligence in the first paragraph, the second paragraph focuses on the moment when due diligence is to be exercised. The removal of the term *when acquiring* from the first paragraph of the Guideline follows the idea that due diligence is to be exercised, without necessarily limiting that to the acquisition of the object. Therefore, due diligence is not only to be exercised in the case of acquisition but should be carried out in the event of each transfer of the object, be that a change in possession, ownership or physical location across borders. A member proposed to add precisely "across international borders".

55. The different elements of due diligence to be exercised should highlight the history of the object and the circumstances of its transfer (sale, acquisition, loan, exhibition, inheritance or gift (see Article 4.5 of the 1995 UNIDROIT Convention) or bequest).

56. This exercise of due diligence is to be performed by all possible stakeholders involved, whether public and private institutions and collectors.

**3. If, after exercising due diligence, the object remains in the listed categories of Guideline A, further provenance research should be carried out.**

57. The vigilance expected from an individual's behaviour when transferring an object may be supported by a list of elements, related to the object, that have to be verified. Exhaustive or non-exhaustive, this list of obligatory verification elements extends beyond the scope of only researching the provenance of the object. These due diligence elements may concern the price of the object, the quality of the parties, previous transfers of the object, databases and documentation consulted, the professionals contacted or the state of conservation and physical characteristics of the object. Investigating and analysing such information involves multiple areas of expertise, which are much broader than provenance only.

58. The proposed wording "the listed categories of Guideline A" depends on the decision taken on the optional wording proposition of paragraph 1 of the Guideline.

59. Intrinsically linked to the concept of due diligence, provenance research aims to reconstruct the history and circulation of an object, from its creation or discovery to its current location, combining different types of information. Conducting provenance research reflects the execution of one of the aspects of exercising due diligence.

60. While elements of it form part of the due diligence exercise, provenance research must follow on from due diligence. This may occur by or at the request of any parties involved in the process of the object's transfer.

61. Resulting from exercising due diligence, conducting provenance research could be addressed in that order in these Guidelines. The inversion of the current order of *Guideline C. Provenance Research* and *Guideline D. Due diligence* addresses the links and interconnections between both concepts.

**4. All findings should be documented, kept and shared in the event of a future transfer.**

62. During the exercise of due diligence, every element searched has to be documented, and every element found has to be kept. All these elements must follow the object's transfer and be shared to the extent permitted by applicable law. The person with whom all those elements have to be shared must be determined (the next possessor/owner?).

63. Moreover, the Due Diligence Guideline commentary should address the issue of searching and dealing with sensitive information and personal data when exercising due diligence, notably regarding the General Data Protection Regulation (GDPR)<sup>5</sup>. Elements resulting from exercising due

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<sup>5</sup> Regulation (EU) 2016/679 of the European Parliament and of the of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679>.

diligence may be personal and concern sensitive data. The Guideline has to address with whom all the personal and sensitive information should be shared.

64. It has to be decided if this specific issue should be addressed in the Due Diligence Guideline commentary or in the Provenance Research Guideline commentary.

## **E. Evidence and burden of proof**

*Text as it stood at the end the second session of the Working Group –*

Keeping the proof of all elements surrounding the provenance research and the due diligence performed when acquiring or selling an orphan cultural object is of paramount importance. In case of a transaction, the burden of establishing that due diligence was performed will lie on the acquirer, the seller or the donor.

*New text proposed by the Sub-Group -*

*When transferring an orphan cultural object, all elements relating to the provenance and due diligence performed are to be retained and shared. They should follow the object in any transfer of it.*

65. On this point, there is no discussion as to the merit of the Guideline, but only as to its form. The proposal of the Sub-group is to make this text clearer, more objective, and emphatic regarding certain duties when transferring an orphan cultural object. The Sub-group understands that, since a guideline is merely a soft law norm, and therefore has a more restricted normative force, it is necessary for its wording, at least, to be as clear, direct, objective, peremptory, and emphatic as possible. Otherwise, its usefulness tends to diminish.

66. To the extent possible, the wording should avoid alternating between the indicative and the conditional, aiming above all at the clarity of the text, in the name of the objective sought at the beginning of our work (cf. Chapters 2, 3 and 5 of the working document [Study LXXB - W.G.2 - Doc. 2](#) of the second session of the Working Group, 11-13 December 2024). Therefore, the proposed new wording.

## **F. “Clearing” an orphan cultural object**

*Text as it stood at the end the second session of the Working Group –*

A person or institution possessing an orphan cultural object, regardless of how long ago it was acquired, can subject its possession to a “clearing” procedure. This will involve the physical and/or virtual presentation of the object on a platform specifically designed for this procedure.

*New text proposed by the Sub-Group -*

*F. “Clearing” [or publishing] an orphan cultural object*

*A person or institution possessing an orphan cultural object [...] can subject its possession to a “clearing” [or publishing] procedure. This will involve the physical and/or virtual presentation of the object on a platform specifically designed for this procedure.*

*Comments of the Sub-Group*

67. A person or institution possessing an orphan cultural object, regardless of how long ago it was acquired, can subject its possession to a “publication” procedure. This procedure will provide an opportunity for the object to be made available to the public for scrutiny of its provenance background.

68. This Guideline does not refer to the “clearing” procedure, which is tackled in the next Guideline G. It might be worth changing the title of this Guideline. Some suggest “publication”, which has been added in square brackets, but there may be a better term.

69. The term “clearing” is inspired by the financial and banking sector, where a clearing procedure refers to a timely and secure transfer of funds with regards to a transaction. The use of quotation marks intends to underline this borrowing of words, which has been made because of the similarities between the framework (the transaction) and its effects (securing the transfer).

70. One member of the Sub-group was opposed to including this paragraph. The “clearing” process for bank transfers and other financial transactions is an entirely different matter—one that is subject to clearing and is definitively verifiable, whereas it is doubtful that the procedure being proposed here can serve that function for orphan objects.

71. This provision offers the opportunity to create a procedure enabling an orphan cultural object to be examined by experts, and to circulate again on the market if no claims are made. The use of this procedure would not be compulsory, but it should be strongly encouraged in order to improve the transparency of transactions and increase the scientific knowledge on the objects submitted.

72. One of the underlying ideas is to prevent trafficking and recourse to the black-market with regards to orphan cultural objects, by offering the holder of the object the opportunity to subject the object to the “clearing” procedure, regardless of how long ago it was acquired.

73. Another member of the Sub-group did not approve of the sentence “and to circulate again if no claims are made” used in the preceding paragraph. Nothing stops such objects from circulating on the market and subjecting objects to this process does not mean that there is clear, legal title to them. She does not see how this procedure prevents the black market. In fact, in her opinion, the availability of this procedure may well encourage the black market.

74. The procedure is time-limited, and if no claim is made within the allotted time, the object may be researched, published, auctioned. This list is non-exhaustive.

75. Objects may be researched, published and sold now, independently of this Guideline. According to this member of the Sub-group, this procedure is not what will determine marketability (or publishability) nor can it. Marketability and publishability will be determined by others, including law enforcement, museums and scholarly publications and these are unlikely to be affected by the procedure proposed by Guideline F.

76. One member of the group considered that the term “holding” was better than the term “possessing”.

77. Another member of the Sub-group expressed her deep concern about the aim of the “clearing procedure”. She outlined her fear that this procedure would *in fine* encourage the black-market, in the sense that someone might buy an object without provenance in the hope of being able to keep it, even though it has no or an incomplete provenance. This procedure might encourage the buying of objects without a complete provenance.

78. Another member of the Sub-group agreed that the risk of abuse exists, but this procedure would limit it. The object will have to be presented publicly and shown on a platform, allowing new

provenance elements to be collected, and therefore maybe having in the end a complete provenance. She emphasised that 0 risk did not exist, but this procedure would really limit and fight against the black-market phenomenon for unprovenanced objects.

### **G. “Clearing” procedure**

*Text as it stood at the end the second session of the Working Group –*

Issues connected with the provenance or due diligence of an orphan cultural object should be put before an international committee. The international committee has to be as inclusive as possible to allow for comprehensive just and fair solutions.

#### *Comments of the Sub-Group*

79. Operation of the “clearing” procedure: The “clearing” procedure will take place before an international committee. This will involve the physical and/or virtual presentation of the object on a platform specifically designed for this procedure.

80. Is the key term here “international” or, rather, “expert”?

81. One might wish to consider setting up an “international expert committee”.

82. The international committee should be composed of X members, nominated case by case or for X years. All members should be experts from the relevant fields, such as anthropology, history, history of art, law, sociology, etc.

83. A member of the Sub-group queried if the Guideline should not rather encourage the establishment of *national* committees who would, once established, create an international overseeing body.

84. The physical and/or virtual presentation of the orphan cultural object aims to publicise it, in order to collect information relevant to its history and its provenance. The place where this presentation is made should be easily accessible if physical, and sufficiently publicised if virtual.

85. The holder of the object must submit a request to the committee. The object will then be presented and may be claimed by third parties (source States or private parties) for a given period. Claims must be supported by reliable evidence of ownership, to be assessed by the committee.

86. The committee may deem it appropriate to ask the source State for assistance in certain cases. It will also have to take into account the geopolitical context when an object submitted comes from a country experiencing a political crisis.

87. One participant underlined that the idea of creating a database would be very hard to put into place. She also expressed her disagreement with naming this a clearing procedure following the financial and banking sector with regards to money laundering. She pointed out that creating an international committee would be nearly impossible.

88. One member of the Sub-group considered that attempting to establish some sort of committee of experts in art history, archaeology, anthropology, religion, etc., is in itself a nearly impossible task. The range of cultural objects (types, time periods, countries/communities of origin, etc.) is so vast that multiple vetting committees would be needed and would require significant financial resources as academics and other experts should not be expected to give their time (especially in the service of the commercial market) for free. On the other hand, paying them raises questions of potential conflicts of interest. Also, and more to the point, if the Guidelines were not intended to be adopted as legal provisions, then this procedure does not “clear” the title to the object.

It may reassure some who are more risk averse through publicizing the existence of the object (although that is accomplished in Guideline F), but it will not actually assure anyone of anything substantive. For example, stating that claims may be brought only for a limited amount of time is a legal statement in a document that purports not to be attempting to change the law. The publicizing aspect is accomplished in Guideline F and does not serve as a justification for Guideline G. In terms of publicizing, it may be of interest to look at the database of the Association of Art Museum Directors (<https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/browse>). However, any time limit set through these Guidelines for bringing a claim would be meaningless.

## H. Dispute Resolution

*Text as it stood at the end the second session of the Working Group –*

Any dispute relating to the provenance, due diligence or clearing of an orphan cultural object shall be resolved by negotiation, mediation, conciliation or international arbitration.

### *Comments of the Sub-Group*

89. Any dispute relating to the title, provenance, due diligence or clearing of an orphan cultural object shall be presented to the international committee, which will have to be as inclusive as possible to allow for just and fair solutions. Encouraged means of dispute resolution are negotiation, mediation, conciliation and arbitration.

90. In the event of a claim, disputes will first be examined by the committee. Disputes may concern the title to the property of the submitted orphan cultural object, its provenance as defined in Guideline C, due diligence as understood in the 1995 UNIDROIT Convention, or the “clearing” procedure.

91. The parties to the dispute are the holder and any other party, individual or collective, private or public, that believes it has a right to the submitted object. Groups and communities will not need to be represented by their national State, as long as they can justify the tangible and ongoing existence of their group.

92. The settlement of disputes may take various forms; the list in the article is not exhaustive. International procedures are nevertheless strongly encouraged, rather than national ones, in order to foster a rich dialogue.

93. Disputes should lead to just and fair solutions. This term is drawn from the Washington Principles (1998), enacted specifically with regards to objects looted during World War II but relatively adaptable to other types of claims relating to cultural objects, considering, of course, any historical, professional or ethical relevant differences. Just and fair solutions cover a wide and varied range of forms: restitution (including restitution followed by re-acquisition), compensation, scientific research projects, exhibition, publication, etc.

94. One member of the Sub-group maintained that the instrument was a non-legal document purporting to have legal effect. For example, the Guideline states: “*shall be resolved by negotiation, mediation, conciliation or arbitration*”. This sounds like the option of litigation is being foreclosed to any potential claimant where the current possessor chooses to go through this process. The current possessor thereby has the choice of how it may limit the options of a potential claimant. To the extent it purports to have legal effect, this is an inherently unfair process being imposed on individuals, communities and States who did not consent to the process. Any binding resolution method cannot

be imposed on parties that did not consent to such a resolution process. To the extent that the Guideline does not attempt to create new law, such statements were deemed meaningless.

95. The same member found the analogy to the Washington Conference Principles to be particularly inept. The Washington Conference Principles served only the goal of reuniting those victims and their heirs who were spoliated (a very worthwhile goal)—not to place unclaimed, possibly stolen objects on the market so that they become freely saleable (what she believed to be the goal of the Guidelines). In the areas of unprovenanced or incompletely provenanced cultural objects, one needed to be concerned also about the ongoing effects of looting and thefts (which are not a concern with Holocaust-expropriated art). In that sense, the goals of the Washington Conference Principles and the goals of these Guidelines were arguably polar opposites. Furthermore, the parties to be bound by a decision of an art commission concerning Holocaust art are the parties that voluntarily seek restitution and the current possessors who are, for the most part (or entirely), government institutions, where the governments have consented to the process. No process is being imposed on parties without their consent. Here, no representatives of communities and few of States that have potential claims are involved, even at this preliminary stage. This was deemed a fundamentally unjust and unfair approach with which the Subgroup member could not agree. In addition, there was the matter of payment owed to those running and staffing the ADR process, which raised the same conflict of interests mentioned with Guideline G, as the funds would presumably come from market participants who stood to benefit from these proposed procedures.

96. Overall, the aforementioned member of the Sub-group believed that the goals of these Guidelines (in particular Guidelines G and H) were not clear, as supported by some of the comments of other members of the Sub-group. She did not see any purpose other than to purport to launder title to cultural objects that were not completely provenanced, and to cut off possible claims for restitution or repatriation of States, communities, institutions and individuals who were not consulted and did not consent to the processes that the Guidelines purport to create. According to this member of the Sub-group, whatever the Working Group would ultimately propose and however the Guidelines were eventually formulated (if at all) must remain, consistent with the 1995 UNIDROIT Convention and the 1970 UNESCO Convention, as well as with other obligations of States under both treaty law and customary law. The member expressed her belief that, as the Working Group project is currently formulated, the Guidelines seem to derogate from, rather than promote and contribute to, accomplishing the goals of these bodies of law.

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**ANNEXE 1****Sub-group on Preamble -  
Preliminary Draft Preamble for the Guidelines on Orphan Cultural Objects**

Orphan cultural objects, in other words cultural property with limited or no proven provenance<sup>6</sup> or with significant gaps in provenance, are the source of many legal, ethical, archaeological and historical questions.

Due diligence, provenance research and the future of objects with gaps in their provenance are all linked together. It is therefore ever more necessary to find a procedure that will allow any objects with gaps in their provenance, but no evidence/indication of an illicit past, to be retained, sold or traded and to cross international borders.

**Background**

Each of the millions of cultural objects under the care of the current generation has its own unique past. However, due to the passing of time as well as the ravages of conflict most such objects, whether held in public institutions or privately, are not accompanied by a known chain of ownership or location history stretching back to the time of their creation or discovery.

Furthermore, cultural objects that are held privately in a domestic setting are unlikely to have been listed or catalogued methodically or at all. It is therefore the case that for most such items documentation does not exist to demonstrate an unbroken chain of ownership or possession back to when the UNESCO 1970 Convention<sup>7</sup> came into force in convention countries in the case of objects located there, or to when the 1995 UNIDROIT Convention on Cultural Objects<sup>8</sup> came into force in the relevant convention countries. Indeed, it is often the case that within just one generation the records and recollections of a family's acquisition of a cultural object are lost. A reader need only look at their own family possessions to appreciate the accuracy of this.

**Focusing on cultural goods more at risk of being tainted**

For many cultural objects an incomplete provenance or location history does not present a problem for their owners or the market. It is therefore appropriate for these guidelines to focus on those categories of object with the greatest likelihood of being problematic ("tainted") because they might have been stolen, conveyed under duress, or illegally exported from their country of creation or discovery.

This is done first by considering cultural objects that, on religious or secular grounds, are of importance for archaeology, prehistory, literature, art or science, as defined in Article 2 of the Annex to the 1995 UNIDROIT Convention, but then also to drill down within that definition and classify each category according to the level of risk of their being tainted.

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<sup>6</sup> The history of ownership or possession from the time of creation or discovery.

<sup>7</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

<sup>8</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

The risk of cultural objects in circulation having been tainted depends, among other factors, on both the type of object, as well as their likely country of creation or discovery. Purchasers understandably need to have confidence that they are not parting with sums of money in exchange for a cultural object to which they will not acquire title, or which has been exported from a country in breach of its export laws. Moreover, institutional bodies such as museums are mindful, not only that their sources of funding include voluntary public donations and taxes, but also, in common with private collectors and the trade, of the reputational damage to them if they acquire or hold tainted objects.

When they acquire cultural objects, purchasers assess risk, whether unconsciously (and therefore unrecorded) or intentionally by creating a written record of the process. For example, a purchaser of a second-hand antique dining chair is unlikely to regard the chair as highly at risk of being within a category of tainted cultural objects, so will not even consider documenting any due diligence undertaken. In contrast, a trade purchaser of a valuable oil painting by a world-renowned artist, one whose works are known to have been involved in illicit activity in a conflict zone, and could therefore be tainted cultural objects, would be advised to carry out due diligence checks, as would the purchaser of a valuable ancient sculpture originating from a famous site in the middle east well-known to have been subject to plunder. Cultural institutions and other professional market actors would be expected to conduct due diligence to a higher standard than a non-professional acquirer.

### **Visibility**

The internet and digital technology mean that never before in history has so much information been so readily available concerning the existence and whereabouts of cultural objects, be they in public institutions or private collections, or circulating on the art market or other internet platforms.

Yet it is this very availability of information which, for some categories of cultural objects, has fuelled a sense of vulnerability for their owners and holders. As a result, they are more exposed than ever before to claims the cultural objects in their possession may be tainted in some way, whether evidence to confirm this exists or not.

These guidelines seek to use existing technology positively, and to create a transparent and secure environment within a legal and well-formed framework, in which both parties can engage in an open dialogue to resolve disputes and where both parties are treated as equal partners in the process. Publicly accessible digital databases can play a particularly important role in this context.

### **Unintended Consequences**

There is evidence that the concerns of institutional purchasers to avoid reputational damage has led to the application of onerous and unachievable expectations of due diligence compliance and provenance information, irrespective of whether objects are of a type likely to be at risk of being tainted or not, and also to a failure to take into account that most cultural objects do not have a provenance sufficient to satisfy certain buyers' acquisition criteria. This approach has resulted in some institutions refraining from purchasing or accepting donations of historical artefacts, important or otherwise, thus denying scholars and the public the opportunity to expand knowledge and scholarship from the study of those artefacts.

That an item of cultural property is deemed to be tainted is not the fault of the object.

### **Aims**

These guidelines aim to balance three interests: the desire of acquirers, be they public institutions or private individuals, to avoid acquiring a tainted object, the interests of other relevant stakeholders,

such as source nations or communities, and the need for cultural objects to continue to be cared for, seen, studied and transferred, whether between owners or across international borders.

In addition, these guidelines seek to create an environment for a fruitful discussion about the private ownership of cultural objects, the role of institutions, as well as enhancing legal certainty in the market by defining the concept of orphan objects and – to the extent possible – their legal regime, through the use of a clearing procedure.

The guidelines do this by advising, as best practice, owners or potential owners on how:

- to identify whether an object is an important cultural object as defined in the UNIDROIT Convention
- to assess and access the existing information available about its provenance
- based on this, to decide whether it constitutes an orphan cultural object (as defined within these guidelines)
- to assess the risk of it falling within a category or type of objects that could be tainted and to carry out due diligence appropriate to this risk level
- to consider the extent to which it could be considered tainted
- despite having been unable to find evidence/an indication that it is tainted, should they believe the extent of uncertainty could prevent transfers, to consider whether they wish to put the object through a clearing procedure approved by UNIDROIT.

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#### **Comments from two members of the Sub-Group of the Guideline C. Provenance research**

Proposal to add the following sentence/idea to the Preamble “Exercising due diligence and conducting provenance research in any situation (transfer, reviewing collections, ...)”.

**ANNEXE 2****Some thoughts about “of importance”**

(Joanna Van der Lande)

Both the 1995 UNIDROIT Convention and the 1970 UNESCO Convention apply to claims of an international character for the restitution of stolen cultural property, and both conventions provide that cultural objects must be “of importance” to qualify for protection under the respective treaty.

It is therefore imperative to agree on the criteria for the definition of “of importance”, as to distinguish between cultural objects that are not “of importance”.

“Orphan cultural objects” that are “of importance” do require some form of provenance investigation, however, “orphan cultural objects” that are not “of importance” only need a simple “provenance” to establish that they are legal possessions. For this type of cultural object, which often lacks extensive provenance information, a simple provenance could suffice, such as: (at least) one innocent owner before the current owner, assuming that the current owner acquired the cultural property in good faith, before they can be given the green light for acquisition by a museum.

As explained in this paper, we discuss here “cultural importance” and not “economic value”.

In order to be “of (cultural) importance” an object should comply with one or more of the following criteria that are similar to the Waverly criteria; **Rarity, Aesthetics and Scholarship.**

**Rarity; Is the cultural object distinctive, rare or unique?**

If an object is a unique example with individualized modelling, or of a type of which only a handful exist, then it is likely to be of cultural significance or importance.

Conversely, if an object was mass-produced, then that single figure is unlikely to matter. These types of cultural goods usually appear on the market frequently and for a long time and are probably not of importance.

**Aesthetics; Is the cultural object of outstanding aesthetic importance?**

The assessment of outstanding aesthetic importance involves a subjective judgement. It is not restricted to great works of painting or sculpture. For example, you might conclude that an exquisite snuff box met this criterion, as did an exceptional Japanese woodprint.

Conversely, objects that do not meet the highest standards of aesthetics and quality are not of cultural importance if they do not meet at least one of the other criteria.

**Scholarship; Is the cultural object of outstanding significance for the study of some particular branch of art, learning or history?**

If an object is of a type previously unrecorded and/or with only a handful existing, then art historical records may be incomplete. In that case, the object would more likely be of cultural importance.

Conversely, if an object is within a range or type that is already well-documented in museums and in scientific journals, and if its existence does not add any new or unique knowledge to our understanding of that type, then it is unlikely to be of importance.