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**Private Art Collections – Orphan Objects**

**Working Group  
First meeting (in presence and online)**

**Rome, 2-3 May 2024**

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**SUMMARY REPORT**

**I. Background**

1. The theme of orphan cultural objects falls within UNIDROIT's topic on private art collections and has recently been upgraded to medium priority. Since the UNIDROIT 2017-2019 triennial Work Programme, the Secretariat has identified orphan objects as a subject in need of transnational legislative attention. Defining orphan objects and due diligence, and understanding the role of provenance and the legal status of the objects in private collections fall within the scope of the project. These topics additionally related to the [1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects](#) (the "1995 UNIDROIT Convention").

2. In December 2022 the Secretariat signed a Memorandum of Understanding with two partners, the Art-Law Centre of the University of Geneva (ALC) and the Fondation Gandur pour l'Art (FGA) and a meeting was held in September 2022 for preliminary discussions on selected topics. The second meeting of the Exploratory Group of Experts was held in March 2023. The Group examined the definition proposal submitted by the Definitions Sub-Group and the reports presented by the two stakeholder groups.

**II. Introductory remarks**

3. The UNIDROIT Secretary-General welcomed the participants and introduced the subject of orphan cultural objects at this first Working Group meeting of the private art collection project. He clarified that the Group would follow Unidroit's established procedures.

4. Mr Sanchez Cordero, Chairman of the Working Group, thanked the participants for their presence and expressed his gratitude for their work. He specified that this Working Group is part of an international attempt to provide answers to the international trade market.

5. Mr Renold, Professor at the University of Geneva, UNESCO Chair in international law on the protection of cultural property and Founder of the Art-Law Centre of the University of Geneva, gave a brief history of UNIDROIT's efforts regarding orphan cultural works. He emphasised that UNIDROIT was the

first international institution to tackle the difficult issues of due diligence and provenance connected to orphan objects.

6. Mr Renold opened the discussion by presenting the concepts of possession in good faith, the compensation of the good faith purchaser and due diligence. He pointed to Articles 4.1 and 4.4 of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (hereafter “the 1995 Convention”) to support his point. The possessor of a stolen object can claim compensation according to Article 4.1, but they must prove that they exercised due diligence in acquiring the object. He emphasised that the 1995 Convention does not mention provenance and referred to the *American Heritage Dictionary of the English Language* and the *ICOM Code of Ethics for Museums* definitions to provide the basis for the Working Group’s approach.

### **III. Adoption of the draft agenda**

7. The Working Group adopted the draft agenda as proposed after agreeing to discuss the case studies on the first instead of the second day.

8. On the second day, the Working Group decided to modify the agenda to follow the possible frame of the future UNIDROIT guidelines as follows: Definition / Applicable Law / Provenance / Due Diligence / Burden of proof / Definition of orphan objects / Procedure for clearing orphan objects (see ANNEXE II) and the summary report follows this revised agenda.

### **IV. Presentation of three case studies, selected for their representativeness**

9. The discussion was introduced by indicating that an examination of the selected case studies was pivotal to understanding how disputes involving orphan objects are adjudicated.

#### **A. A First Century Roman Cameo Vase**

##### *1. Presentation of the Facts*

10. The first case study that was presented concerned a first century Roman cameo vase. Here, the daughter of a Belgian collector got in contact with a Swiss/Tunisian dealer as she suspected that the vase she wanted to sell was an original item. An ownership dispute arose between the collector and the dealer, which became a criminal case. Specifically, the dealer successfully claimed that the Belgian collector committed a breach of trust by not returning the vase to him. Having been seized at the beginning of the proceedings, the vase is now kept in a bank vault in Brussels. During the presentation of this case, it was emphasised that three theories were in competition regarding the provenance of the vase. Firstly, the Belgian collector argued that the vase had been in her family for as long as 300 years; however, she was not able to produce evidence to support said claim apart from a witness statement from her sister saying that she remembers seeing the vase in their father’s study. The second theory is the dealer’s, who claimed that the vase belonged to the inventory of a small business of which he had purchased in Lausanne. In opposition to the aforementioned theories, the Public Prosecutor in this case presented the hypothesis that said vase was the product of illicit trafficking which took place in Tunisia.

## 2. *Discussion*

11. A participant highlighted the importance of forensic science in scenarios such as this, noting that these methods were pivotal to disproving the Belgian collector's argument that the vase had been photographed in her property in Belgium. Despite the case being publicised, no claim for restitution has been advanced by any country including Tunisia. Relevantly, it was indicated that UNESCO did not act upon a request made by two participants of the Working Group to publicly exhibit the vase before the proceedings. It was suggested that UNESCO adopted this course of action due to policy reasons.

12. A representative of the art market maintained that orphan objects deserve to have a life. Referring to the vase in question, she noted that this is an issue for museums to resolve. A general consensus was found that a place, either virtual or physical, could be set up where orphan objects are shown for a certain number of years, after which they are exhibited in a public institution with information about their provenance or lack thereof. Relevantly, a member of the Working Group noted that the main question at issue related to determining what kind of international organisation can be responsible for deciding the future of orphan objects.

## **B. *Juba II Bust***

### 1. *Presentation of the Facts*

13. The second case study that was discussed differs from the first because it presents elements of provenance. In this case, a valuable antique sculpture was acquired by a collector at public auction. The provenance of the sculpture was described as 'former collection of the X family, late 19<sup>th</sup> century, remained in the family descendants'. No explicit reference was made to the family in question, except for their initials. The collector deposited the work with the Louvre, where it was exhibited with the intention of future dation or donation. After seven years, the museum informed the collector's family that it would terminate the deposit and no longer consider dation as the provenance of the sculpture had become uncertain. This was mainly due to the fact that the expert who created the description in the sale catalogue was under investigation. Specifically, the museum believed the work had been discovered as a result of illicit excavations on Algerian territory and that afterwards it had been exported illegally. While the auction house never replied to a request to disclose the identity of the seller and provide clarification regarding some elements of provenance, the aforementioned expert produced several documents. Among these were: (1) a certificate drawn up by the auctioneer stating the sculpture had belonged to the family since the 19<sup>th</sup> century and was still with them; (2) a family tree showing the name of the two sellers, their parents' names, as well as the names of their maternal and paternal grandparents, born at the end of the 19<sup>th</sup> century; (3) an email sent by one of the sellers to the auctioneer 15 days before the sale stating that she only has two photographs dating back to the 1980s as proof of ownership, of which show the work in the presence of family members; (4) two photos of the work on display at the auction, then at the Louvre, after the sale; and (5) a photograph of a similar work on display at the Musée National Archéologique in Rabat, Morocco.

### 2. *Discussion*

14. A participant commented that elements of provenance are subjective. Specifically, she observed that while the elements of provenance present in this case were sufficient for the Louvre to consider dation at the time of sale, they subsequently became inadequate due to new elements emerging. It was noted that Algeria has never shown any interest in the work nor has France approached Algeria on this matter due to the tense political situation existing between the two countries. Additionally, it was

indicated that dation was deferred for tax purposes. A representative of the art market stated this case was illustrative of the fact that there are three different standards of provenance (museum, trade and cross-border international movement of cultural goods standards of provenance) which are in tension with each other. She also suggested that a more concrete solution should be found by the museum sector in dealing with orphan objects as they are public goods.

15. The Working Group discussed which one of the two options above mentioned would be more adequate in relation to this case: whether creating a category like that of MNR or instituting an auction, with the income being devoted to promoting world culture, for instance. A member explained that the categories of MNR and NK were created after the Second World War as to hold on trust works whose origin was unknown pending possible identification by their legitimate owner. He observed that in this case the second option is preferable. He continued by explaining that this is due to there being no possibility of finding a suitable owner because the Algerian State (the sculpture's legitimate owner) has shown no interest in claiming said sculpture. Specifically, the member noted that as this is a museum quality piece and there is no risk of preventing someone from claiming the work as their own in the future, the idea of auctioning the object after it has been publicly exhibited for a few years and using the income to promote world culture would constitute a better solution. Finally, he added that the categories of MNR and NK are not applicable in this case as they were specifically created in anticipation of future claims.

16. A participant noted that at the time of the auction the Louvre was granted authorisation from the Committee of Acquisition to acquire the object. It was also clarified that the Louvre subsequently decided to dishonour their agreement with the collector due to the expert being sued. As such, having the expert's name on the catalogue was considered problematic. In this regard, it was clarified that the piece was returned to the collector who bought it through the auction house once the deposit was terminated.

17. Relevantly, a member asked whether the second option of clearing the provenance by putting the object on auction would be actually viable. Specifically, he observed that if the second option is based on the identity of the legitimate owner being unclear, this case study would not be encapsulated within the second option as the collector regained ownership. It was indicated that if a court was set up allowing whoever has a claim in relation to the piece to come forward, it would be likely that the collector will be proven to be the owner as he may have some evidence. It was further noted that in this case the collector would be advised to go to court to obtain a declaratory judgement stating he is the legitimate owner. In this regard, it was clarified that the collector has ownership but would not be able to sell the sculpture. As such, a declaratory judgement would purify the title.

18. A participant indicated that at the time of the sale there was an agreement between the collector and the museum showcasing that the museum considered the provenance satisfactory for them to acquire the piece. The issue, it was noted, was that the museum associated the object with unclear provenance thereby making the object unmarketable. Relevantly, a member argued that the concept of free and marketable title is more important than that of legal title because if the market decides an object cannot be sold, its value drops to zero. Therefore, he suggested the cultural object should be made free and marketable.

### C. *Portrait of Fräulein Lieser*

#### 1. *Presentation of the Facts*

19. In the third case study, *Portrait of Fräulein Lieser*, a long-lost 1917 Gustav Klimt painting of which remains unsigned and unfinished, was sold for about €35 million with fees at the auction house 'im Kinsky' in Vienna. In contrast to the other cases, the auction house here disclosed in its sale catalogue that it had been unable 'to clarify the precise provenance of the painting' since 1925. Despite not revealing the identity of the seller, im Kinsky conceded that the painting was likely acquired illegally during the Anschluss. The winning bidder was Patti Wong, the founder of Patti Wong Associates, who was bidding on behalf of an Asian client. Relevantly, when asked about whether she and her client had any concerns in relation to the painting due to its unclear subject and ownership history, Mrs Wong noted they had done their research. Art historians suggest that the painting, which was left unfinished in Klimt's studio when he died in 1918, was returned to the subject's family. However, differing views exist regarding the identity of the person who commissioned the painting and the subject depicted. Initially, it was thought that the painting had been commissioned by Adolf Lieser, a Jewish industrialist in Vienna, and depicted his teenage daughter, Margarethe Constance. According to more recent research, it may be possible that the painting had been commissioned by Adolf's sister-in-law, Henriette Lieser, and showed one of her two teenage daughters. While Henriette died in Auschwitz, her two daughters and Margarethe managed to escape. In this regard, im Kinsky clarified in the catalogue that it has facilitated a confidential, fair and just solution to be reached by the painting's owners and the Lieser family heirs, with both benefiting from the sale. Additionally, it was noted that the painting's marketability was increased when Austria's Federal Monuments Authority issued an export licence for the work, meaning it could be sold to an international buyer.

#### 2. *Discussion*

20. A member of the Working Group maintained that despite this being an orphan, it has been marketed. Another member indicated that the amount the painting was sold for is little compared to other Klimt paintings. She also added that a descendant of the original owner has come forward and made a claim in relation to the painting. She finally observed that all these elements of uncertainty would have influenced the final price. A representative of the art market suggested that the price could have also been influenced by the fact there is no signature.

21. During the discussion, it was suggested that the painting being auctioned at im Kinsky, a small auctioneer in Vienna, may be proof that the seller was not comfortable with the situation. It was also observed that the Austrian government issuing a certificate for the exportation of the piece was suspicious and/or odd due to Klimt being such an integral artist for Austria. Specifically, it was hypothesised that this may indicate Austria wanted to rid itself of this painting because of its questionable provenance.

22. A member asked what would happen in France if the Lieser family was able to show that they were dispossessed of the painting during the Anschluss after the painting is lost due to the Austrian government granting an export licence. Specifically, he asked whether the Austrian government could be sued for negligence in issuing an export licence and awarding not only legal title but also free and marketable title. A participant responded by noting that in France *le certificat des biens culturels* is the strongest evidence that a piece is free and marketable and that in the last few months it has been found that France issued said certificates without proper provenance research. Regarding the liability of France in these circumstances, she claimed there probably will be some litigation and that it is a possibility to litigate based on the State's alleged negligence.

23. It was asked whether one of the two options discussed above (creating a public trust or instituting an auction) are applicable to this case. A participant noted that the best option in Austria would be to ask the Art Restitution Advisory Board for their opinion on whether there is evidence of misdeeds in the past before selling or auctioning a particular piece. A representative of the art market claimed that doing so would be suitable only where the value of the object is over a certain level. She also argued that as no one was involved in this case, it is not possible to know what due diligence was carried out. An observer asked whether there were some private assurances given to the bidders. It was noted that there might have been some reasons for the Lieser family to have agreed to receive a certain sum of money from the sale. It was suggested that the fact the Lieser family agreed could be taken into account in assessing the case. A member responded to this query by remarking that the main issue is that it is uncertain who the commissioner of the painting is. As such, she continued, it may be assumed that the provenance research was not conducted properly as a member of the family claimed the piece afterwards. She argued this case shows that in order to clear a piece on the market, provenance research must be conducted adequately. In this regard, it was highlighted that here the problem is to know who the responsible party is, whether the auctioneer or Mrs Wong.

24. A participant asked whether requirements of provenance need to always be as strict for hard cases where possible alternative conditions exist as in normal cases. For example, if the heirs of the Lieser family agreed to share the proceeds of the sale per option 2 not only with the existing owner but also with the additional individual claiming the painting. Another member said he dealt with similar cases where rival groups of heirs were involved and one branch of the family of the claimant side was known, while the other one was missing. He suggested that in these cases if you know that a definite percentage of the claim belongs to a side of the family that is known, you could settle with that side and hold the rest on trust until someone comes forward. He observed that in a case like this what might happen is that the painting might have its provenance settled under the Washington Principles or via a fair and just solution settlement and unless someone else comes forward, the market may accept that or not.

25. It was noted that all the parties made a deal the content of which is not known to the public. Remarkably, it was maintained that the public has no need to know the details of said agreement. However, it was suggested that there might have been a problem of communication between the parties, that might have led to the agreement being tainted. Relevantly, it was specifically noted that due to every piece of information being publicly available and there being so much money involved in the art market, there is an interest on the part of the public to be informed. The advice given was that when confronted with such cases, legal counsel should ensure that communication is made properly. It was finally stressed, however, that even if provenance research has been conducted and there is an agreement with the owner, the issue of making the piece marketable still remains if provenance is questionable.

26. An observer asked whether any participant would advise their client to buy the piece in question from Mrs Wong's client. A consensus was found that they would be against it. A member suggested that we consider ADR in this case. Another participant suggested to first check whether there is an entry of the claim on a Lost Art Database and whether the entry has been amended to return it, which would indicate that the object has been communicated as returned to the world at large. A client in this case would be able to argue that it was clear there was a settlement in relation to this claim. Specifically, they could claim that nobody came forward and that they did their due diligence in getting this information. A member stated that even when all the conditions for a piece to be clear are satisfied, it sometimes happens that some years later the piece is not clear anymore. She also noted that if she needed to advise a client to buy the painting, she would suggest checking the available databases.

## **V. Round table discussion**

### **A. Definition of orphan cultural objects**

27. Mr Renold introduced the discussion by asking if the Working Group wanted to keep the term “orphan cultural object.” He supported the term because of its poignancy. Other members seconded support for this term because of its simplicity and because it allows for the sub-categorization of orphan objects. Another member wondered if it would be beneficial to limit the focus of the Working Group to only the most important orphan objects. Another member accepted but emphasised that it is important to choose a term that covers all objects.

28. The UNIDROIT Deputy Secretary-General asked a clarifying question about whether the carve-outs to the principles should be defined by the value or category of objects.

29. When a member joined the group online, the Deputy Secretary-General resumed the discussion of orphan objects. A member pointed out that the use of the term “orphan object” may be complicated given its extant meaning in intellectual property (copyright) law. Another member expressed concerns about the use of the term because it can be confusing and also may predetermine the direction of the Working Group’s principles. Both members proposed and supported the expression “cultural objects with problematic provenance”, but noted that this term may be overinclusive.

30. Another member responded to say that “orphan object” may be preferable because the market already understands the term, and “problematic provenance” may be misleading. Other members joined in to support the term orphan object.

31. A member intervened to propose “orphan cultural goods”. The Deputy Secretary-General responded that “object” is a term of art in previous UNIDROIT instruments, so the Working Group should hesitate before removing “object”. In the following discussion, the Working Group settled on “orphan cultural object” as the best term.

### **B. Applicable law**

32. The Secretary-General highlighted the importance of distinguishing between the law applicable to the adjudication of property in an auction or sale (contract law) and the regulatory requirements for exporting objects.

33. Participants pointed out that many people, not just collectors or dealers, own items inherited from family without clear documentation. A member expressed concern about the retroactive application of modern standards, which can lead to objects being seized by authorities in various countries, including Italy, Germany, France, and the United States of America.

34. Some participants suggested that the project could benefit from general guidelines clarifying the concept of provenance. They proposed that the Working Group should specify factors to consider when addressing provenance issues. A representative of the art market pointed out that in certain cases, individuals make claims on behalf of countries, which can further complicate matters. She stressed the need to be pragmatic about the enforcement of these laws historically and expressed concern that by changing moral standards, the Working Group could retroactively render legally acquired objects illegal.

35. Mr Renold acknowledged the complexity of the issue of applicable law. He referred to a 1991 resolution by the Institute of International Law in its Basel session, which proposed that the transfer of ownership of artworks belonging to a State's cultural heritage should be subject to the law of that State, rather than the current location of the work. Mr Renold noted that this idea, championed by Professor Lalive, influenced the 1995 UNIDROIT Convention.

36. The Chairman emphasised the importance of introducing certainty in the international art market and providing guidance to purchasers on how to avoid disputes over cultural property. He highlighted the need to establish criteria to ensure certainty, particularly regarding export legislation. Some participants cautioned against solely relying on market value to determine the significance of cultural artefacts, citing examples of items with immense cultural value but minimal market price.

37. Mr Renold proposed that the Working Group develop principles around orphan objects as has been done with the [1998 Washington Principles on Nazi Confiscated Art](#). He additionally asked the Working Group to reflect on the best way to publicise the final principles to make them known.

38. A participant suggested thinking about soft law principles and creating a new soft law global model, as has been done with digital assets.

39. No consensus was found regarding the question of the applicable law. The Working Group proposed developing the content of possible guidelines first and then determining if these principles could be more prescriptive. It was decided that any hard law instrument, model law, and legislative guide should be excluded because the audience might go beyond legislators.

40. The Secretary General pointed out that the implementation of the 1995 Convention today could be influenced by the result of the discussion of this Working Group even as the 1995 Convention itself is the origin for the programme on orphan objects. However, a participant reminded the Working Group that hard law guides people, especially judges, to efficient outcomes. Another participant disagreed because going to court is a long process, and soft law helps find solutions without going to court. The participant continued to point out that in going to court, a party must know which law is applicable and it can be hard to do so, so soft law is better situated to guide pretrial negotiations.

41. A participant noted that the question of jurisdiction must be answered before that of applicable law.

42. A member proposed that the Working Group considers how the choice of applicable law will interact with provenance and suggested that a text emphasising this point is necessary.

### **C. Provenance**

43. The discussion started with an introduction of what constitutes sufficient provenance. The Working Group agreed that most cultural property lacks a full provenance history. The participants pointed to Holocaust-era looted assets to emphasise that there may be suspicious gaps in provenance, which is what professionals must focus on.

44. A participant expressed the opinion that provenance relates to the object, while due diligence relates to the purchaser. She recommended creating a list that defines problematic provenance depending on the time period and country of origin, rather than creating a universal definition. However,



a representative of the art market thought that provenance should depend on the type and value of an object.

45. The Chairman emphasised the need to distinguish between the country of origin and the source country in this context. He also questioned whether a universal definition of provenance should be extended to all objects, or limited based on market value. He highlighted the European Regulation's approach to protecting the import of archaeological objects into the EU.

46. Participants noted the confusion which often appears between source country and country of origin. After discussion, certain participants emphasised the importance of selecting a terminology that aligns with common sense understanding.

47. The Chairman clarified that a source country is where the item was originally found or created, but a country of origin can be the last country where an object was stored or exported from. He stressed that international courts might apply the legislation of the country of origin rather than the source country, particularly because countries like Switzerland, France or Italy have strong protections for good faith purchasers. This distinction is crucial for understanding the legal and practical implications of provenance and the trade in cultural property.

48. Mr Renold suggested instead distinguishing between the "State of origin" or "source country" and the "State of last export" to avoid confusion. He defined the country of origin as the country which, from a cultural point of view, has the closest link to the object in question. This definition reflects the importance of cultural ties in determining the origin of cultural objects.

49. The Chairman questioned whether cultural links would take precedence over the legislation of the export country in legal disputes and wondered if cultural arguments would prevail over legal arguments in such cases, especially when multiple countries share a cultural heritage. He emphasised the complexity of determining ownership when cultural and legal claims intersect.

50. A representative of the art market expressed concern about balancing the protection of private ownership rights with the preservation of cultural heritage. She highlighted the challenge of determining whose rights should take precedence and how to address this issue effectively.

51. To draw up principles and guidelines, an institutional observer reminded the Working Group that it must take into account the fact that there are many objects for which there is no available provenance. For this observer, even when there is a problematic gap in provenance, it is important for the Working Group to develop solutions to allow the objects to re-enter the market.

52. A participant wanted to focus on the objects, rather than the purchasers given that the Working Group must account for changes in moral understanding with respect to purchasing objects.

53. A representative of the art market repeated the importance of respecting private property and the need to release these orphan objects, even of low value, that might be stopped at the border because there is insufficient provenance.

54. One participant proposed that the Working Group should focus only on valuable objects, the ones that will be important in 500 years.

55. A participant proposed that the Working Group should work with Professor Matthias Weller from the University of Bonn, the leading German expert in nazi-confiscated art, who wrote a report about different countries establishing their own holocaust art restitution committees.

#### **D. Due diligence**

56. The Chairman reflected on the challenges of defining good faith in past discussions and suggested that the Working Group focus on identifying key factors related to due diligence instead of striving for a general consensus.

57. Because there are different understandings of ownership in different countries, a representative of the art market suggested different definitions for different regions. Alternatively, she proposed that the Working Group focus on the types of objects that cause the most concern in specific national markets. She wondered if UNIDROIT could create a checklist to allow buyers to prove their due diligence and make both buyers and countries more comfortable in allowing the movement of objects. She also emphasised that both museums and the private sector are custodians of cultural objects.

58. The Deputy Secretary-General emphasised that every stakeholder has to be taken into consideration. Mr Renold proposed that databases be added to the list of due diligence measures.

59. A representative of the art market proposed that Article 4.4 of the 1995 Convention covers databases, but it is necessary to focus on what the expectation was at the time of the acquisition, not today. Due diligence is about the effort, not the outcome as there is not always a satisfactory one.

60. A participant recommended that buyers conserve a file of all the due diligence done at the time of the acquisition as provided for by the 1995 Convention. If good faith is still appropriate, it is important to be able to establish one's good faith at the time of the acquisition as there could be civil or criminal charges brought against the purchaser. The Working Group should try to develop a checklist for due diligence. A part of this process must be to ensure that documents are genuine, so a collaboration with the police could be helpful. An institutional observer pointed to the [Art Transaction Due Diligence Toolkit](#) of the Responsible Art Market, which provides evidence for potential purchasers to consider, as a potential source of inspiration.

61. A representative of the market stressed the financial cost of due diligence and the link between the value of the objects and the level of due diligence it is practical to exercise. In particular she indicated the costs relating for example to Art Loss Register checks and to notarising documents, which dictate the amount of due diligence it is economically viable to carry out on low value objects.

62. Many participants emphasised that the importance of databases is increasing with respect to due diligence. A participant pointed to a case that was decided in a German court in December 2023 about a painting listed in the [Lost Art Database](#) run by the German Lost Art Foundation. The court determined that the plaintiff owned the painting, but it could not be removed from the database as it was likely stolen during the Holocaust. Per the participant, in this context, it is necessary to consider how to use and to manage digital databases as objects cannot be easily removed once added, creating orphan objects with respect to marketability.

63. Mr Renold explained that quality documents of fake provenance can be easily created today, but forensic science can catch the forged documents. While it is not necessary to create a list of art dealers who were convicted for acquiring and selling objects of illicit provenance, it may be possible to establish a rebuttable presumption that objects sold by them are suspicious.

64. A representative of the art market pointed out that people who create fake provenance documents do so because they are afraid they will be unable to sell an object. She would like to see the art dealers who frequently sell illicit objects listed. In addition, she described her work analysing an Egyptian export licence and a Cypriot export licence and explained that they tend to be generic. In a court of law, it is unlikely that these documents would have a material impact.

65. A participant described how buyers can abuse digital databases by listing objects as stolen to be notified of their presence in the market and buy them cheaply despite the legality of the ownership.

66. A representative of the art market outlined two main issues: (1) objects without an export licence, and (2) old export licences which did not identify a specific object. The representative distinguished the two types of export licences: (1) those from the country from which an object had most recently been exported from and (2) those from the original source country. The member continued to elaborate on the difficulty with respect to objects that have been acquired in the past when many of the paper records have been lost, destroyed, or have otherwise disappeared.

67. In a later continuation of this theme, a representative of the art market stressed the importance of moving beyond the view that a lack of an export licence necessarily means that the object is illicit.

68. A participant suggested that the Working Group focus only on objects above a specific value threshold in enforcing an export licence requirement. The Chairman pointed to the lack of knowledge of customs officials on this particular issue.

69. A participant explained that good faith can look different in different jurisdictions using an example of Nazi looted art. Soft law principles were used to overcome the unfairness of different applicable laws, in a way to provide equity.

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

70. Mr Renold introduced this topic, which covers two items: proof and burden of proof. He reminded the Working Group that the 1995 Convention places the burden of proof on purchasers to establish that they were diligent with respect to provenance.

71. The Deputy Secretary-General asked for clarification about whether this topic falls within the previous issue of due diligence.

72. An institutional observer answered that the burden of proof becomes relevant when a buyer needs to demonstrate that he/she performed his/her due diligence in trying to determine the provenance of an item, including maintaining a record of its research. The observer also pointed out that this requirement falls into line with many existing cultural property laws.

73. Mr Renold raised a question about the case in which there is no evidence about an item's provenance.

74. A member returned to the Deputy Secretary-General's question. She advised that it is crucial to understand that the art market historically functioned in a totally different manner, such that possession of a cultural good was sufficient to prove ownership. Per the member, this context makes the distinction between due diligence and proof and burden of proof important because due diligence is about creating a proper file for the future, while both proof and the burden of proof are about how to deal with today's situation before a court. She proposed that there must be recommendations both for how to approach due diligence going forward, given that provenance research has and is continuously improving, and how to approach proof from the past.

75. The Chairman mentioned that blockchain may be an interesting tool to research an object's provenance.

#### **F. Procedure for “clearing” orphan objects**

76. A participant asserted that there are two normative perspectives regarding what can be done with orphan objects: (1) creating a new category similar to the concepts of MNR ([Musées Nationaux Récupération](#) / [National Museum Recovery](#)) utilised in France or NK ([Nederlands Kunstbezit](#) / Netherlands Art Property) utilised in the Netherlands, whereby a public trust is created on the object; and (2) placing the object on auction, with the income being devoted to a common cause such as promoting world culture. A representative of the art market noted that this would require museums to adapt their code to allow for unprovenanced artefacts to be exhibited. Regarding the use of databases to publicise orphan objects, she remarked that said databases would need to be limited to specific items in a format that is accessible to potential State claimants. A member of the Working Group raised institutional and organisational issues. Specifically, he questioned whether assigning the task of managing orphan objects to a group of academics or experts would be appropriate. He also invited the Working Group to consider how decisions can be secured with any kind of authority at the international level.

77. A participant made two observations in relation to the normative perspectives mentioned above. First, she noted that once the category of MNR is introduced, it must be decided who will be responsible for deciding whether restitution should take place. Second, while remarking that clearing the provenance by instituting an auction is a good idea, she suggested that whoever puts an orphan on the market should not be disadvantaged but rather rewarded. She also observed that the place and location where the object will be held should be secured. In this regard, she proposed to organise a conference like the Washington Conference Principles on Nazi-Confiscated Art to promote the adoption of the UNIDROIT principles or guidelines.

78. An observer noted that some objects become orphans only due to them presenting gaps in their history. While stressing museums' educational role, a representative of the art market proposed to exhibit orphan objects as to prevent said objects from being hidden but also to inform the public about this phenomenon. In relation to whether you can claim ownership of an item whose provenance is entirely unproven, a participant observed there exist common and civil law approaches. While at civil law you can own an object only if you are able to demonstrate your title going backwards, this is not the case in common law. As such, this participant claimed that the main question to be resolved was whether an orphan object can be lawfully owned if there is no record in relation to its history. A compromise, he suggested, would be to allow for said object to be kept by introducing a new category similar to that of good trust.

79. A member reminded the Working Group of the role played by the market: for a cultural good to be valuable, it needs to circulate on the international market. She highlighted that since the 1995 Convention any item with doubtful provenance is unsellable and mentioned that oftentimes artefacts become unsellable because they are associated with a bad name, with the person presenting them on auction being publicly vilified. She noted that this is happening with regards to a wide array of objects including orphan objects that are not worth huge amounts.

80. A participant raised again the idea of Musées Nationaux Récupération (MNR) in France. One of the key audiences of such a soft law principle would be museums that will have guidelines: to not hide unprovenanced items, but to be transparent about the provenance gaps. A participant explained MNR: After World War II, France created a category of objects based on the Declaration of London. These objects were stolen from private art collectors and Jewish art owners by Nazis and returned to France after the war. The most important objects were placed in public French museums and upon this placement, became MNR. Despite their placement in museums, these objects are not owned by the museums nor by the French State.

81. Another participant proposed a way to “clear” orphan objects even without past proof of provenance. One potential solution is to ask the government of the country of origin if it wants to claim the object, and if so, why. This claim would be submitted to a group of experts (art historians and diplomats). However, in many cases, the experts must contend with the difficulty of owners and purchasers showing due diligence. An institutional observer remarked that this method was not a realistic solution, especially for common cultural goods.

82. A member reminded the Working Group that a solution was needed for the future. Because the Working Group cannot solve all the problems today, the participant proposed that the group focus on the most important items first before turning to the problem of less valuable items.

83. Returning to this theme at a later point, Mr Renold reopened the discussion by strongly emphasising that UNIDROIT cannot be the body with jurisdiction to “clear” orphan objects.

84. A member reiterated his two proposals for procedures to “clear” orphan objects: (1) Follow MNR-like approach and display orphan objects with transparent signage about the missing provenance. This approach would not solve the ownership problem nor allow for future marketability, but would allow the exhibition of important cultural goods. (2) Develop a procedure where all potential stakeholders make a claim for ownership, and a tribunal decides who is the legal owner. This approach is complicated by the issue of finding an appropriate jurisdiction. Potential solutions could involve creating a board of arbitration, at an institution like the Art Law Centre in Geneva. In addition, arbitration would block future claims thereby providing some finality (and also market security) and require the consent of the stakeholders to participate; it can also occur without national legislation or an international convention. The member pointed out that the goal is to release an object from its orphanage.

85. The Deputy Secretary-General raised a question about how arbitration could accommodate interested third parties. A response was that the principles should not name a specific body, but should generally present arbitration as a good solution. Another member agreed that arbitration could be a good solution, but expressed hesitation due to the failures of arbitration in the past and the issue of cost. In response, the member who proposed arbitration pointed to the German model that makes arbitration affordable for potential dispossessed persons, which another member pointed out is especially important given the possible wealth disparities between the possessor and dispossessed owner. Other members joined the discussion to point to the possibility of a volunteer advisory panel as in the UK as a means of

cost reduction. The members also raised and considered concerns about the pressure that arbitration panels face because of the dearth of cases.

86. Mr Renold intervened to mention that arbitration is explicitly considered in Article 8 of the 1995 UNIDROIT Convention and to discuss the voluntary restitution offered via the University of Geneva's platform for the diplomacy of cultural heritage.

## **VI. Future work and next meeting**

87. A participant proposed that the Working Group consider organising an international conference where the principles could be proposed. Attendees could be provided with all relevant material from the Working group's sessions.

88. The Chairman suggested that the next meeting of the Working Group be in October. The Deputy Secretary-General remarked that it was not yet clear if that timeline would be possible, but that dates would be circulated later.

89. The Chairman also suggested that enlarging the Working Group with other participants, from the United States of America, Africa and China, is in the Working Group's best interest. Mr Renold seconded the importance of this enlargement. The Deputy Secretary-General noted that with authorization from the Governing Council, it would be possible to create a bigger Working Group.

90. The Deputy Secretary-General proposed that a smaller group within the Working Group begin drafting during the intersessional period so that a more advanced working issue paper could be considered at the next Working Group's meeting. She also asked that the members involve the Secretariat as they coordinate the work.

91. The Chairman closed the meeting by thanking the Working Group's members and observers, and other members joined in the thanks before the formal end of the meeting.

**ANNEXE I****LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS****MEMBERS / MEMBRES**

Mr Eric Cottier	Ancien Procureur Général du canton de Vaud
Ms Corinne Hershkovitch	Avocate à la Cour Paris
Ms Joanna van der Lande	Antiquities Dealer's Association United Kingdom
Mr Keun-Gwan Lee	Professor, International Law Seoul National University Republic of Korea
Mr Amnon Lehavi	Atara Kaufman Professor of Law, Academic Director, G City Real Estate Institute, Harry Radzyner Law School, Reichman University (IDC Herzliya)
Mr Jorge Sánchez Cordero	Director of the Mexican Center of Uniform Law; Vice President of the International Academy of Comparative Law; Professor; Notary public; Mexico; Member of the Governing Council of UNIDROIT  CHAIRMAN OF THE WORKING GROUP / <i>PRÉSIDENT DU GROUPE DE TRAVAIL</i>
Mr Marcílio Toscano Franca Filho	Professor, Federal University of Paraíba Brazil
Mr Till Vere-Hodge	Partner, Payne Hicks Beach United Kingdom

**PARTNER INSTITUTION / INSTITUTION PARTENAIRE**

Mr Marc-André Renold	Professor at the University of Geneva, UNESCO Chair in international law on the protection of cultural property, Director Art-Law Centre of the University of Geneva
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**OBSERVERS / OBSERVATEURS**

United Nations Educational, Scientific and Cultural Organization / <i>Organisation des Nations Unies pour l'éducation, la science et la culture</i> (UNESCO)	Ms Sunna Altnoder Head of Movable Heritage and Museums Unit / <i>Chef de l'Unité "Patrimoine mobilier et Musées"</i>
International Centre for the Study of the Preservation and Restoration of Cultural Property / <i>Centre international d'études pour la conservation et la restauration des biens culturels</i> (ICCROM)	Mr Tomas Meraz Castano Movable Heritage Officer / <i>Responsable du patrimoine mobilier</i>
International Council of Museums / <i>Conseil international des musées</i> (ICOM)	Ms Marianthi Kopellou Cultural Heritage Protection Coordinator / <i>Coordinatrice des Programmes de Protection du Patrimoine</i>
International Confederation of Art and Antique Dealers' Associations / <i>Confédération Internationale des Négociants en Œuvres d'Art</i> (CINOA)	Mr Mark Dodgson Secretary General, BADA <i>Secrétaire Général</i>
The British Antique Dealers' Association (BADA)	

**UNIDROIT**

Mr Ignacio Tirado	Secretary-General / <i>Secrétaire Général</i>
Ms Anna Veneziano	Deputy Secretary-General / <i>Secrétaire Générale adjointe</i>
Ms Priscila Pereira de Andrade	Legal Officer / <i>Juriste</i>
Ms Aliko Facon-Soret	UNIDROIT intern / <i>stagiaire</i>
Ms Caroline Lesueurs	UNIDROIT intern / <i>stagiaire</i>
Ms Giuseppina Milite	UNIDROIT intern / <i>stagiaire</i>
Ms Asena Poyrazer	UNIDROIT intern / <i>stagiaire</i>
Ms Ceren Soydan	UNIDROIT intern / <i>stagiaire</i>



**ANNEXE II****AGENDA**

1. Opening of the session and welcome by the UNIDROIT Secretary-General
2. Adoption of the draft agenda and organisation of the session
3. Presentation of the members and observers of the Working Group
4. Objectives and problems posed by orphan objects
5. Presentation of three case studies, selected for their representativeness
6. Development of guidelines and procedure - Possible frame of the UNIDROIT guidelines
7. Future work and timetable
8. Other business