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Convention for the fight
against the illicit trafficking
of cultural property

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**Subsidiary Committee of the Meeting of States Parties to the UNESCO Convention
on the Means of Prohibiting and Preventing the Illicit Import, Export and
Transfer of Ownership of Cultural Property
(UNESCO, Paris, 1970)**

Seventh Session
UNESCO Headquarters, Room XI
22 and 23 May 2019

Item 8a of the Provisional Agenda: Due Diligence

This document presents a study on “Due diligence”, one of the priority topics to be addressed at this session, as reflected in Decision [6.SC 10](#) of the Subsidiary Committee at its Sixth Session

Draft Decision: Paragraph 18

Introduction

1. The Subsidiary Committee of the Meeting of States Parties to the 1970 UNESCO Convention on its Sixth Session (28-29 May 2018) adopted Decision [6.SC 10](#) to include “Due Diligence” as one of the priority topics in the provisional agenda of its Seventh Session (2019).

Due diligence

2. Due diligence has emerged as a pivotal tool for responding to illicit trafficking in cultural property and the partnership between the 1970 UNESCO Convention and 1995 UNIDROIT Convention is undeniable. In terms of due diligence, the legal framework of the UNIDROIT Convention is standard setting and, therefore, it fuels national legislations. Promotion of the due diligence standard in purchasers’ behaviour has gained additional gravity in light of new circumstances on the art market, resulting from the phenomenon of the trade in illicitly trafficked or excavated cultural property.
3. Due diligence was given a new meaning in the 1995 UNIDROIT Convention. Its due diligence model derives from the draft Uniform Law on the Acquisition in Good Faith of Corporeal Movables (LUAB). The Convention avoids using of the term “good faith possessor” and instead offers an independent due diligence concept (Article 4(4)):

In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.

4. Under the UNIDROIT Convention, the purchaser has to prove (s)he exercised due diligence, in order to receive compensation. Thus, the 1995 UNIDROIT Convention offers a new private law restitution model, with no implementation needed. Perhaps only a few could have predicted that the role of due diligence in the 1995 UNIDROIT Convention would go far beyond the scope of this treaty and influence jurisprudence, national laws, and the European Union (EU) legal framework. The implementation by EU Member States of [Directive 2014/60/EU](#) results in the absorption of the UNIDROIT “due diligence” wording in their national legislation. The due diligence standard functions in several national legislations, e.g. in Switzerland, the Netherlands, and Germany. Hence, not surprisingly the introduction of similar provisions in national legal systems appears under consideration in other countries as well. Due diligence requirements vary depending on the character of the parties under assessment. For instance, assessing the criteria of behaviour is more demanding in situations where the buyer is a professional (museum, auction house, art dealer).

a. Due diligence requirements in museums’ and art dealers’ codes of ethics

5. Two layers of due diligence can be distinguished: one is provided in a normative framework, and the second in an ethical framework (professional self-regulation). Many cultural institutions have decided to include due diligence obligations in their respective ethical codes. The due diligence notion has been integrated into the following: [the ICOM Code of Ethics for Museums](#); the [UNESCO International Code of Ethics for Dealers in Cultural Property](#); and the [CINOA Code of Ethics and Charter](#). As codes like these apply to professionals, the documents contain a higher standard of diligence. It is assumed that professional actors have better knowledge of the art market than non-professionals (consumers) and thus they are expected to conduct in depth examination of cultural objects with which they deal. The supportive role of professional self-regulation is undisputed. However, self-regulation mechanisms cannot be the

sole tools to deal with due diligence on the art market. Legislative action by States is still required.

b. Due diligence and illicit trafficking in objects from conflict areas

6. Due diligence is an important part in the fight against illicit trafficking, specifically, in the case of objects with a possible origin from conflict areas. In these circumstances, due diligence should be enhanced by additional checks (contacting the national authorities responsible for import and export of cultural goods, checking [ICOM Red Lists](#) and the information on recent illegal excavations). Furthermore, the concept of due diligence when acquiring cultural property is referred to by the United Nations Security Council Resolutions condemning illicit trafficking in objects from Iraq and Syria: [Resolution 1483 \(2003\)](#) (“items with respect to which reasonable suspicion exists that they have been illegally removed”); [Resolution 2347 \(2017\)](#) (“where States have a reasonable suspicion that the items originate from a context of armed conflict, notably from terrorist groups, and which lack clearly documented and certified provenance, thereby allowing for their eventual safe return, in particular items illegally removed from Iraq since 6 August 1990 and from Syria since 15 March 2011”).

The tools to exercise due diligence

7. All the steps in exercising due diligence from assessing the circumstances in concluding a contract; the parties involved and the price; and verifying objects’ documentation in databases play a very important role in assessing a purchaser’s conduct. Additional information on an object’s status can be acquired from publications, museum exhibitions, the news, and reports on illegal excavations. Moreover, provenance checks are inextricably linked with due diligence, with the aim is to verify the history of the objects and their track record. The provenance of an object can be monitored through analysis of the available documentation (correspondence, affidavits, wills, private inventories, photographs, etc.). In some cases, common knowledge can give rise to an in-depth assessment of the object. For example when it comes to objects with suspicious provenance from Iraq, Libya, Mali, Syria, or Yemen, further checks are necessary to ensure that the object has not been stolen, illegally exported, or illegally excavated.
8. The [UNESCO Database of National Cultural Heritage Laws \(Natlaws\)](#) can be used as a tool to examine national laws, specifically regarding export provisions. Additionally, the database holds copies of original export certificates, which can be shared upon request. Moreover, many direct searchable and non-direct searchable object-based databases also exist, that may be managed by either commercial ([Art Loss Register](#)) or institutional entities (national registers of stolen cultural objects). What is more, the available tools are evolving, such as [INTERPOL’s Database of Stolen Works of Art](#), which is to be supplemented with a mobile app and national level databases. Similarly, the ICOM Red Lists is an officially recognized tool, which lists objects that are at risk. The Red lists can be used to cross-reference suspicious objects. Finally, there are two platforms that are also worth noting: World Customs Organization’s [ARCHEO](#), which serves as an electronic information exchange platform, and United Nations Office on Drugs and Crime’s [SHERLOC](#), a platform with resources and laws on the crime of trafficking in cultural property.
9. Due diligence is however, has its risks. For instance, the exercise (or non-exercise) of due diligence includes: no compensation, forged documentation confirming an ownership chain; export permits; statements from a producer confirming that an object is a new product; loopholes in an object’s ownership history; and vague knowledge of an object or objects by the heirs of collectors. Therefore, when raising the awareness of potential buyers, emphasis should be placed on the importance of critically assessing every object raising suspicion. A practice that should influence future practices in the art market.

10. Initiatives, such as the [UNIDROIT Convention Academic Project \(UCAP\)](#) or the [Responsible Art Market](#) launched in 2017, are aimed at offering support to cultural actors. Furthermore, the [Social platform on endangered cultural heritage and on illicit trafficking of cultural goods](#), created within Horizon 2020 (the EU Research and Innovation programme), appears to have much to offer for the future if it is successfully implemented and introduced to the wider public.

Due diligence applied to the UNESCO 1970 Convention, with practical examples

a. The Convention

11. The 1970 UNESCO Convention addresses three issues: combating the illicit trafficking in cultural property by implementing preventative measures; offering a restitution model; and cooperation between States. The fundamental provisions relating to restitution are set out in Article 7 of the Convention. The provisions gave rise to many questions concerning cultural property covered by the article and the notion of “just compensation to an innocent purchaser or to a person with valid title to that property” (Article 7(b)(ii)).
12. Due diligence is not directly mentioned in the 1970 UNESCO Convention, which instead refers to national legislations. However, the differences in national legal systems could lead to their abuse. The notion of due diligence does appear, however, in the Operational Guidelines for the Implementation of the 1970 Convention. This document indicates recent practices involving the UNIDROIT standard of due diligence and encourages State Parties to adopt it. The exercise of due diligence offers support for an assessment of a purchaser’s innocence and the validity of his or her title to an object. Exercising due diligence could be useful in establishing the possessor’s good faith when he has acquired the object in countries with bona fide possessor regulations.

b. Cases

13. A milestone case involved the Maori Carvings from New Zealand, which had been sold to Mr Ortiz in the United States ([Attorney-General of New Zealand v Ortiz et al](#)). New Zealand’s claim to have the Maori carvings returned did not succeed in court in three instances (proceedings in the High Court, the Court of Appeal, the House of Lords). The New Zealand government negotiated with heirs of the buyer and paid NZ\$4.5 million compensation for the objects in 2014. This sum significantly exceeded the price that had been paid by Ortiz. The payment of this compensation only took place after the failure of the legal proceedings for restitution.
14. Furthermore, the importance of transposing the 1970 UNESCO Convention into national legal systems is illustrated through the recent [El Manati Case](#). This case was dismissed under the German Act on the Return of Cultural Property of 18 May 2007 ([Kulturgüterrückgabegesetz 2007](#)) and thus demonstrate the low operational effectiveness of the provisions on restitution. The act is no longer in force and was replaced by the Act Reforming the Law on the Protection of Cultural Property of 31 July 2016 ([Kulturgutschutzgesetz 2016](#)), which provides a dual-level due diligence standard. The new regulations introduce general due diligence obligations and enhanced standard for professionals. Such new legal developments give hope for more effective procedures in the future.
15. In both cases, one could argue that the buyers had not exercised due diligence as the given circumstances of the transactions and the origin of objects should have raised reasonable doubts. If in these cases, the due diligence standard had been applicable as a requirement for obtaining compensation, no compensation would have been granted. More cases that are relevant are available in the [ArThemis database](#).
16. Nevertheless, the implementation of the due diligence standard by Member States would reinforce the procedure for return and/or compensation (or partial compensation) in the 1970

UNESCO Convention. The recent UNESCO publication “Fighting the Illicit Trafficking of Cultural Property. [A Toolkit for European Judiciary and Law Enforcement](#)” aims to help navigate the legal proceedings between parties. Establishment of the rules of due diligence at national levels would offer significant support in future cases and make the restitution pillar of the 1970 UNESCO Convention more operational.

Recommendations

17. UNESCO plays central role in establishing and maintaining dialogue between different stakeholders and encouraging Member States to introduce the due diligence concept into their national legal systems, as well as in creating and sponsoring awareness-raising campaigns. Hence the following recommendations can be made:

- Encouraging the practice of high standards of due diligence is in the commercial interests of the art market actors. However, the lack of harmonisation in national legislations still remains a challenge. Thus, UNESCO Members States are encouraged to become Parties to the 1995 UNIDROIT Convention.
- Bearing in mind the success and good reception of the [UNESCO–UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects](#), a new document could be developed to provide guidance on to how to effectively implement due diligence standards into national legislation. Such a document may serve as a due diligence manual for interested parties and enhance the occurrence of good practices among market actors.
- The building of networks (such as [EU CULT-NET](#)) and the strengthening of existing cooperation is an inevitable, and should be reinforced. Harmonizing international and national regulations should involve exchanges and dialogue among all market actors. This can be done through awareness-building campaigns similar to the joint EU-UNESCO project entitled “Engaging the European art market in the fight against the illicit trafficking of cultural property”. Parallel initiatives at the national/regional levels would be very beneficial.
- Discussions on harmonization of ethical codes is essential in order to ensure effective cooperation with art market through partnerships, joint initiatives (round-table discussions, research, working documents).
- Support should be given to existing and future international/national platforms that can be viewed as forums for exchanges by stakeholders. Such initiatives ultimately raise awareness of the due diligence concept, and could lead to a shift in behaviours of buyers and dealers of cultural property.

18. The Subsidiary Committee may wish to consider adopting the following decision:

DRAFT DECISION 7.SC 8a

The Subsidiary Committee,

1. *Having examined* document C70/19/7.SC/8a,
2. *Recalling* the importance of exercising due diligence by all stakeholders concerned as a response to illicit trafficking in cultural property;

3. Reminds States Parties that the 1995 UNIDROIT Convention complements the 1970 UNESCO Convention, and thus strongly encourages States Parties to the 1970 Convention to become Parties to the UNIDROIT Convention;
4. Encourages States Parties to the 1970 Convention to consider adopting appropriate legislation, encompassing due diligence into national legislation;
5. Recommends States Parties to ensure that the art market actors abide by codes of ethics developed by national and international bodies, such as the Code of Professional Ethics of the International Council of Museums (ICOM);
6. Invites States Parties to share their good practices in the implementation of due diligence at national level.