

Lawfulness and Ethics around Cultural Property Auctions: The Case of the Barbier-Mueller Pre-Columbian Collection

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Abstract: In March 2013, the Barbier-Mueller collection of pre-Columbian art was auctioned at Sotheby's Paris. This event ended with the sale of half of the works offered and generated a confrontation between six of the countries of origin of the artifacts, which were absolutely opposed to the sale, and the Sothebys' Parisian branch. This article, taking the case described above as a reference, intends to analyze the ethical considerations and lawfulness implied in the buying and selling of cultural property at auction. With this purpose in mind, the arguments held by both parties in this disagreement are analyzed. At the same time, the efficacy of national laws, international conventions, and regulations is considered, mainly with reference to the use of principles and ethical codes that seem to be applied when the law has no jurisdiction.

INTRODUCTION

In March 2013, 313 lots belonging to the Barbier-Mueller collection of pre-Columbian art were auctioned at Sotheby's Paris. This event ended with the sale of half of the works offered and just over €10 million in profits, which was an amount smaller than what was initially predicted. The results obtained can be interpreted as a consequence of the confrontation between the countries of origin of the artifacts and Sotheby's Parisian branch. Six of the source countries demanded a halt to the sale as they believed that the objects offered had left their borders illegally. In its

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defense, Sotheby's asked for irrefutable proof that there had been a misappropriation of the cultural property and argued that the collection had been sufficiently examined and also had an important historiographic and expositive background.

This study intends to analyze the result of the auction and discuss it in light of the different arguments held by both parties in this disagreement. On the one hand, it is taken into account the law of the countries of origin, the French legislation at the time of the auction, as well as the international conventions that attempt to regulate the trafficking of cultural property. On the other hand, ethics is appealed to in searching for a moral standard that should be implicit in this kind of transaction to prevent the looting and theft of pieces.

The auction of the Barbier-Mueller pre-Columbian collection exemplifies a much more complex phenomenon and is a summary of how the buy and selling of cultural goods work nowadays.¹ In the art market, one finds a convergence of codes of ethics, laws, and conventions—all of which reflect on one of the greatest problems of cultural heritage: where it belongs and where it should stay. Using the Barbier-Mueller auction as a case of study, this article aims to highlight the necessity for regulating the art market, by searching for more reasonable and acceptable positions for both parties. In this way, with the aim of preserving cultural property in the best way, the circulation and sale of pieces could continue to be carried out, always under strict standards of legality, as a result of an agreement between the source and market countries.

ORIGINS AND AUCTION OF THE PRE-COLUMBIAN COLLECTION

Assembly of the Collection

The beginning of the Barbier-Mueller collection of pre-Columbian art dates back to the 1920s when Josef Mueller (1887–1977) bought his first pieces in Paris, at a time when tribal art had started to come into fashion in exclusive and bohemian circles. Among his first acquisitions were an anthropomorphous figure from Costa Rica and an Aztec stone sculpture of a water goddess, Chalchiuhtlicue, which were both purchased from the dealer Joseph Brummer.²

In the 1970s, Jean Paul Barbier (1930–2016) and his wife Monique (Josef Mueller's daughter and heiress) took charge of the collection, and it was at this time that they acquired a large number of the works.³ The first important purchase was in 1976 and comprised an Olmec figure of a seated man, followed by other significant acquisitions such as objects from the Guy Joussemet's collection, Olmec and Chavin pieces from the estate of Gérard Geiger in Lausanne, and a Maya

¹Joyce 2019, 7.

²Susan Moore, "The Age of Rediscovery," *Financial Times*, 8 March 2013.

³Between 1950–1990 were formed the majority of pre-Columbian collections. See Berger 2019, 112.

fragment of censer that belonged to the American film director John Huston.⁴ Little by little, they assembled a rich collection of pre-Columbian art with objects coming from Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, the United States, and Venezuela, covering a wide range of times and cultures.⁵

Thus, in 1997, with the purpose of housing and exhibiting their collection, the Barbier-Mueller Pre-Columbian Art Museum was opened in Barcelona.⁶ This institution was unique in Europe, and, through it, the Barbier-Mueller family intended to show the richness of their collections and to perpetuate its unity: “[I]n lending 150 pre-Columbian pieces for five years to the new Barbier-Mueller Museum in Barcelona, Mr. Barbier is also hoping that the city will exercise an option to buy them.”⁷ However, after 15 years with the collection exhibited on loan, the museum closed down, and, after a failed purchase attempt from the Barcelona City Council, the owners decided to offer the collection on the open market.⁸

March 2013: Sotheby's Auction in Paris

The auction of the Barbier-Mueller collection of pre-Columbian art was carried out in Sotheby's Paris on 22–23 March 2013. In total, 313 lots were put up for sale, and approximately half of them were sold: 147 works amounting to €10,296,300, which was much less than expected.⁹ Masterpieces of the collection such as the Chupicuaro Venus figure and the flying duck were auctioned at a lower price than expected—€2,001,500 and €1,609,500 respectively—while the feline head from the Moche culture reached a much higher price, selling for €289,500.¹⁰ The Parisian branch of Sotheby's interpreted the results of the auction positively since, although the sales were lower than estimated, a large number of the objects were sold and many of them broke several sales records.¹¹

The causes for the auction to not achieve its expected sale figures are diverse. On the one hand, it seems that for some museums and institutions the prices of the

⁴Moore, “The Age of Rediscovery.”

⁵*Catalogue Sotheby's: Collection Barbier-Mueller Art Précolombien*, 2013, <http://www.sothebys.com/en/auctions/2013/collection-barbier-mueller-pf1340.html> (accessed 9 June 2019).

⁶See Casas Gilberga and Pérez Ricart 2009.

⁷Alan Riding, “Wanting the World to See What Pleases Him,” *New York Times*, 13 July 1997, <http://www.nytimes.com/1997/07/13/arts/wanting-the-world-to-see-what-pleases-him.html> (accessed 9 June 2019).

⁸“El museo de arte precolombino de Barcelona cierra este viernes,” *La Vanguardia*, 12 September 2012, <http://www.lavanguardia.com/cultura/20120912/54349329930/museo-arte-precolombino-barcelona-barbier-mueller-cierre.html> (accessed 9 June 2019).

⁹Roberta Bosco, “Pujas discretas en la subasta de la colección Barbier-Mueller,” *El País*, 15 March 2013, http://ccaa.elpais.com/ccaa/2013/03/24/catalunya/1364156180_637358.html (accessed 17 June 2019).

¹⁰Bosco, “Pujas discretas.”

¹¹“Sotheby's recauda 9mde en subasta de arte precolombino,” *El Universal.mx*, 22 March 2013, <http://archivo.eluniversal.com.mx/notas/912206.html> (accessed 29 June 2019).

pieces were not affordable. Such was the case for the Museum of the Americas in Madrid¹² as well as for the owner of *J. Bagot Arqueología-Ancient Art*, who expressed his interest in buying some of the objects. The latter also stated that in these kinds of transactions, one was paying not only for the piece but also for the reputation of its owner and the collection's background,¹³ which, in this case, had been published on several occasions and had been part of traveling exhibitions around the world.¹⁴

On the other hand, the main problem that the auction faced was the claims from some of the pieces' source countries, including Costa Rica, Ecuador, Guatemala, Mexico, Peru, and Venezuela. All of them, considering themselves as owners of the pieces, and without clear information about their provenience, asked for the return of what they thought to be illegally exported artworks. With these petitions, they sought the return of the works; however, although they were aware of the fact that this was difficult to achieve, they apparently intended to "make a public protest over the sale, and list the power of the press to reduce the market value of these under-provenanced objects."¹⁵ Thus, in Peru's case, it wanted to sensitize public opinion about the illicit trade of pre-Columbian cultural heritage.¹⁶

Therefore, as stated by Jacques Blazy, who was responsible for the sale, not only did the economic crisis reduce the sales of this kind of art, but "the claims of the Latin American States are in part [also] responsible."¹⁷ It was because both the museums and the private buyers were afraid of having to return the pieces or even of having problems exporting the items¹⁸ and, as one collector attending the auction declared, "because of the rage of Latin American States when pre-Columbian objects are being sold, it is better to leave a collection of so much importance."¹⁹

¹²Miguel Ángel García Vega, "Precolombinos y el rosario de la aurora," *El País. Blog: Con Arte y Sonante*, 15 March 2013, <http://blogs.elpais.com/con-arte-y-sonante/2013/03/precolombinos-y-el-rosario-de-la-aurora.html> (accessed 29 June 2019).

¹³García Vega, "Precolombinos y el rosario."

¹⁴Apart from being permanently exhibited in the Barbier-Mueller Pre-Columbian Art Museum in Barcelona between 1997 and 2012, some pieces were in temporary exhibits in Santa Fe (Granada, Spain) or Lisbon (Portugal). At the same time, the collection appears in publications like *Art de l'Amérique Précolombienne* (Musée Barbier-Mueller, 1981); *Tesoros de la Cerámica Precolombina* (Musée Barbier-Mueller and Somogy éditions d'art, 2003); or *Guía de Arte Precolombino* (Ed. Skira, 1997).

¹⁵Derek Fincham, "A Hollow Victory for Mexico in the Barbier-Mueller Sale," *Illicit Cultural Property Blog*, 25 March 2013, <http://illicit-cultural-property.blogspot.co.uk/2013/03/a-hollow-victory-for-mexico-in-barbier.html> (accessed 17 June 2019); see also Emilie Barraza, "México en venta: el patrimonio de la discordia," *Proceso.com.mx*, 3 April 2013, <http://www.proceso.com.mx/337984/mexico-en-venta-el-patrimonio-de-la-discordia-2> (accessed 20 June 2019).

¹⁶Mathieu van Berchem, "Barbier-Mueller vende pese al veto de Perú," *Swissinfo.ch*, 22 March 2013, https://www.swissinfo.ch/spa/colecci%C3%B3n-de-arte_barbier-mueller-vende-pese-al-veto-de-per%C3%BA/35297454 (accessed 7 June 2019).

¹⁷Barraza, "México en venta" (translated by the author).

¹⁸Kate Fitz Gibbon, "No More 'Good Provenance'," *Cultural Property News*, 29 March 2013, <https://culturalpropertynews.org/no-more-good-provenance/> (accessed 19 June 2019).

¹⁹Fitz Gibbon, "No More 'Good Provenance'" (translated by the author).

Actions and Reactions in Latin America

Six of the Latin American countries with artworks in the Parisian auction declared themselves to be against the sale. However, no civil or criminal claim was ever filed, perhaps because it is a long and expensive process, which does not guarantee the return of the artifacts. Beginning with Costa Rica, it requested a deeper commitment to stop and fight the illegal traffic of cultural property in a letter of intent addressed to the French government. And although it did not file any formal claim, it did show interest in one particular object: a Diquis culture deity (Lot 154),²⁰ acquired by Josef Mueller around 1920, which ultimately sold for €721,500.²¹ Nevertheless, Costa Rica would not have had the opportunity to win in a legal battle because the acquisition of this object was in 1920, and its first patrimonial law date only to 1938.²²

Ecuador reported the presence of at least 14 objects in the auction from the Valdivia, Chorrera, and Jama-Coaque cultures. All of the objects were considered national cultural heritage according to the National Technical Committee for the Fight against Illicit Traffic of Cultural Property, which was created in 2010.²³ Moreover, Ecuadorian laws have recognized historical and artistic items as state property since 1945, and, from 1967, it has been forbidden to export archaeological items.²⁴ Although, once again, it is difficult to apply these legal standards since there is unclear information about the date the auctioned objects left the country.

In the case of Guatemala, 13 pieces were claimed, pursuant to its legislation—in particular, Decree no. 425: Law on the Protection and Conservation of Monuments, Archaeological, Historical and Traditional Objects.²⁵ However, this was not the first time that this country had unsuccessfully challenged the possession of Guatemalan cultural property in the Barbier-Mueller collection. In 2001, Guatemala had asked for the repatriation of a set of pieces, which included a jade Classic Maya mask. It was an object that was not among those auctioned and that was apparently illegally looted from the archaeological site of Rio Azul and probably sold before 1984. This claim was filed in Barcelona, which was the last place that was known to have

²⁰Patricia Recio, “Costa Rica solicitó a Francia detener el tráfico de bienes culturales,” *La Nación*, 18 July 2013, http://www.nacion.com/vivir/patrimonio/Costa-Rica-solicito-Francia-culturales_0_1354464685.html (accessed 15 June 2019).

²¹*Catalogue Sotheby's*.

²²International Council of Museums (ICOM), *Red List of Latin American Cultural Objects at Risk*, 2003, 63, <https://icom.museum/en/ressource/red-list-of-latin-american-cultural-objects-at-risk/> (accessed 22 June 2019).

²³“Ecuador denuncia subasta de piezas patrimoniales en la sucursal de París de la Casa Sotheby's,” *Andes: Agencia Pública de Noticias del Ecuador y Suramérica*, 21 March 2013.

²⁴Mejía Salazar 2014, 14–15.

²⁵M. Frechette, “Red Flags in Paris: Half of Sotheby's Barbier-Mueller Pre-Columbian Sale Lacks Provenance,” *Chasing Aphrodite: The Hunt for Looted Antiquities in the World's Museums*, 19 March 2013, <https://chasingaphrodite.com/2013/03/19/red-flags-in-paris-half-of-sothebys-barbier-muller-pre-colombian-sale-lacks-provenance/> (accessed 16 June 2019). Decree no. 425: Law on the Protection and Conservation of Monuments, Archaeological, Historical and Traditional Objects, 1966.

sheltered the piece, and it was denied since Spain did not have jurisdiction in the alleged crime, which had been committed in another country. As a result, the object, the whereabouts of which remain unknown, left Spain, possibly heading to Switzerland.²⁶

Mexico, through the National Institute of Anthropology and History, submitted a claim to the French Ministry of Foreign Affairs on 15 February 2013, which, according to the media, was never answered.²⁷ The foundations for such a claim included a national law, the 1972 Federal Law on Archaeological, Artistic and Historic Monuments and Areas, which prohibits the export of archaeological items and promotes the recuperation of valuable items that are already in a foreign country.²⁸ In addition, Mexico's case was quite significant since, out of the 130 objects from its culture that were included in the sale catalogue created by Sotheby's, only 51 of them were claimed, stating that the rest were "handicrafts" or "modern fakes."²⁹ This assertion is seen by some as a strategy to dissuade possible buyers since Mexico did not clarify which of the pieces were authentic; meanwhile, others see it as quite plausible that many of the auctioned pieces were inauthentic.

Studies by Christopher Donnan and by Christina Luke and John Henderson have endorsed this last hypothesis, bringing to light the existence of a significant market of falsifications of pre-Columbian items.³⁰ It was also supported by Nancy L. Kelker and Karen O. Bruhns, who demonstrate how Mexican, Peruvian, or Ecuadorian items tend to be frequently forged.³¹ This does not mean that the pre-Columbian objects auctioned in Paris were not original, although it reinforces the questions of authenticity that arose due to the lack of certified provenience and because the objects were acquired when replicas and forgeries had multiplied owing to the market's growing demand.

Peru also requested the cancellation of the auction and the return of 69 pieces.³² As a basis for its claim, it used the first law that had been passed after its independence, the Supreme Decree of 2 April 1822.³³ Given the lack of information available on the provenience of the objects, it is quite possible that the items left Peru after 1822 and, therefore, were illegally exported antiquities. In fact, it is important to bear in mind that Peru is a protectionist country, which has proclaimed different laws and provisions related to the protection of pre-Columbian cultures.³⁴ However,

²⁶Hernández Sánchez 2008.

²⁷Barraza, "México en venta."

²⁸Federal Law on Archaeological, Artistic and Historic Monuments and Areas, 1972, https://en.unesco.org/sites/default/files/mexique_legislative_text_1972_engl_tno.pdf (accessed 29 June 2019).

²⁹Frechette, "Red Flags in Paris."

³⁰See Donnan 1982; Luke and Henderson 2006.

³¹Kelker and Bruhns 2010; Bruhns and Kelker 2010.

³²"Perú denunciará a Sotheby's si no retira de una subasta objetos precolombinos," *ABC*, 1 March 2013, <http://www.abc.es/cultura/arte/20130301/abci-peru-201302282036.html> (accessed 29 June 2019).

³³Yates and Lee 2014.

³⁴See Avalos de Matos and Ravines 1974.

in this case, its claim was not accepted by Sotheby's, which defended the lawfulness of the sale with the argument that "in France, the Peruvian law from 1822 (that prohibits the export of archaeological goods from the country without authorization) is not applied."³⁵ On that subject, as we can see in the cases *Government of Peru v. Johnson*³⁶ and *United States v. McClain*,³⁷ the application of a Peruvian or Mexican law in an international context depends on the national law's perspective (from the country where the litigation is taking place) or even on the court.

The government of Venezuela confirmed "its strongest rejection to the actions that are planned to be carried out on five (05) archaeological pieces of the Trujillo and Timotocuica cultures that belong to Venezuelan cultural heritage."³⁸ But, in this case, the protectionist laws were not very old,³⁹ and it was necessary for the country to continue working in this sense in order to make it possible for the return of their cultural treasures.

Lastly, these initiatives were driven through the Group of Latin America and Caribbean Countries, which requested the United Nations Educational, Scientific and Cultural Organization (UNESCO) to make a public condemnation of the illegal traffic of cultural property and heritage commodification. To this request, UNESCO's general director appealed to the responsibility and ethics of art dealers,⁴⁰ which can be interpreted as a good intention but without an effective and positive result. In addition, the complainant Latin American countries were supported by a broad network of allies, which, according to Blanca Alva, were in constant communication trying to avoid the sale. It was an interesting experience, which was very useful in order to learn how to act and react in such situation, even though it did not end with a positive result for the source countries.⁴¹

Sotheby's Argument

In the face of claims made by some of the source countries, Sotheby's asserted that nothing irregular had taken place. According to the legal issues, France did not have

³⁵Eduardo Salinas, "Rostro felino de la cultura Mochica se subastó en más de 383 mil dólares en París," *La República*, 23 March 2013, <https://larepublica.pe/sociedad/699134-rostro-felino-de-la-cultura-mochica-se-subasto-en-mas-de-383-mil-dolares-en-paris/> (accessed 29 June 2019) (translated by the author).

³⁶*Government of Peru v. Benjamin Johnson, Lawrence Wendt, David Swetnam, Jacqueline Swetnam, George Gelesbach, Oman Gaspar, Ronald Stanman and 352 Peruvian Artifacts*, 720 F Supp 810 (CD Cal. 1989). Merryman 1992.

³⁷*United States v. McClain*, 545 F2d 988 (5th Cir. 1977), rehearing denied, 551 F2d (5th Cir. 1977), and appeal after remand, 593 F2d 658 (5th Cir. 1979). Janevicius, Chechi, and Renold 2014.

³⁸"Venezuela rechaza subasta de piezas arqueológicas en París," *El Universal*, 22 March 2013 (translated by the author).

³⁹ICOM, *Red List of Latin American Cultural Objects*, 65.

⁴⁰"Gobierno peruano pide suspender una subasta de piezas precolombinas," *El Comercio*, 22 March 2013, <http://elcomercio.pe/mundo/actualidad/gobierno-peruano-pide-suspender-subasta-piezas-precolombinas-noticia-1553486> (accessed 29 June 2019).

⁴¹Interview with Blanca Alva, Lima, December 2017.

to recognize an alleged crime of illegal trade committed in another country.⁴² Theoretically and as a signatory country of the 1970 UNESCO Convention, France should have taken some legal actions,⁴³ but the application of this convention always depends on being “consistent with national legislation.”⁴⁴ At the time of the auction (2013), the French legislation did not consider any measures about the importation of items without an export certificate if they did not come from a European country.⁴⁵

Both circumstances left the source countries with almost no options to recover their heritage. These, together with the restrictions connected to the bilateral agreements between the source countries and the United States,⁴⁶ makes it understandable why the auction was carried out in Paris rather than in New York, as was usually done with pre-Columbian objects.⁴⁷ Europe is “a more profitable place in which to sell antiquities of all kinds,”⁴⁸ and Paris is nowadays the main market center in order to avoid problems with the legal status of the pieces.⁴⁹ Such an event had already happened in 2011, when the US government sided with Cambodia in its argument with Sotheby’s about the return of the statue Duryodhana Bondissant, which was considered to have been looted from its source country.⁵⁰

In addition, it was asserted that none of the pieces auctioned were registered in the French database that was checked by the Central Office of Cultural Property, either in Interpol’s stolen art database or in the Red Lists created by International Council of Museums (ICOM).⁵¹ However, this is not completely true since ICOM’s Red Lists are not intended to be exhaustive and do not refer to specific stolen objects but, rather, show the typologies of pieces at risk of being trafficked. Thus, in the Red List of Endangered Cultural Objects of Central America and Mexico, effigy vessels are defined as endangered heritage, and a “Pataki polychrome vessel, Gran Nicoya, Costa Rica” is depicted as an example.⁵² A comparable vessel was auctioned in the

⁴²See Tremain 2019, 174.

⁴³Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231, Art. 7 (1970 UNESCO Convention).

⁴⁴O’ Keefe 2000, 58.

⁴⁵From 2016, the Code du Patrimoine includes an article (L111-8) about the necessity of showing a certified provenance to import any artwork.

⁴⁶The United States has bilateral agreements to protect cultural heritage with Guatemala, Mexico, and Peru as well as with other countries. ICOM, *Red List of Latin American Cultural Objects*, 63–65.

⁴⁷Fitz Gibbon, “No More ‘Good Provenance’.”

⁴⁸Kelker 2019, 164.

⁴⁹Kelker 2019, 164–65.

⁵⁰“Milenaria estatua camboyana desata batalla legal en EEUU,” *El Día*, 13 April 2012, <http://eldia.com.do/milenaria-estatua-camboyana-desata-batalla-legal-en-eeuu/> (accessed 28 February 2019).

⁵¹Mark Stevenson, “Mexico Demands Sotheby’s Halt Auction of Artifacts,” *Washington Post*, 13 March 2013.

⁵²ICOM, *Red List of Endangered Cultural Objects of Central America and Mexico*, 2009, <https://icom.museum/en/ressource/red-list-of-endangered-cultural-objects-of-central-america-and-mexico/> (accessed 4 June 2019).

Sotheby's sale as Lot no. 59. Similarly, in the Red List of Latin-American Cultural Objects at Risk, there are several protected categories of objects that are represented in the Parisian auction, such as Lot no. 73 including a Jama Coaque double-bodied figural vessel, Ecuador,⁵³ or Lot no. 131 comprising a Olmec stone figure of a seated man, México.⁵⁴ Based on this information, the majority of the objects included in the auction should have been protected according to the level demanded by ICOM and its Red Lists.

Despite this fact, Sotheby's defended the legality of the transaction by arguing that they had carefully studied the provenance of the collection, a fact also supported by the extensive records that accompany most of the objects. Yet, as is common in Sotheby's catalogues,⁵⁵ there is a documentary gap when one tries to discern the moment in which the objects left their source countries or the circumstances of their acquisition. As a result, only a part of their story was known but not their origin.⁵⁶ And, obviously, it is not possible to explain the provenance of artwork just by talking about its presence in an "old collection" or by having it be sold by a "very reputable and ethical dealer."⁵⁷

Thus, "the sale highlighted how mutable and easily undermined the concept of 'good provenance' is today."⁵⁸ Since it is quite difficult to know for certain how or when the pieces left their country of origin, it makes them quasi-legal on the market. As the researcher Neil Brodie has put it, the antiquities trade is "neither completely licit, nor completely illicit," and what was illegally excavated and exported could be sold in the legal market in Europe or North America.⁵⁹ In the end, the lack of data about the provenience of the pieces takes on a double meaning. On the one hand, the source countries suspect that the pieces were exported illegally since there are no documents with reference to their legal export and since their laws have prohibited the export of this kind of object for decades. On the other hand, the lack of documents is ignored by dealers and auction houses, and, in a way, this absence is even used in their favor. In this case, Sotheby's argued that any complaint must be based on concrete information concerning the objects' provenience,⁶⁰ which is virtually impossible taking into account that these kinds of transactions are illegal and that they are also related to the black market. As a result, it is the same dead-end

⁵³Category: Jama Coaque Figures and Vessels (Ecuador). ICOM, *Red List of Latin American Cultural Objects*, 16–17.

⁵⁴Category: Olmec Figurines (México). ICOM, *Red List of Latin American Cultural Objects*, 28–29.

⁵⁵Tremain 2019, 174.

⁵⁶For example, about the Venus Chupicuario (Guanajuato, Mexico), Lot no. 137, the object's record is: "Collection Guy Joussement, Montréal, début des années 1960; Galerie Arts des Amériques, Paris, 1988; Collection Barbier-Mueller, Genève, Inv. no. 500-20." *Catalogue Sotheby's*.

⁵⁷Kelker and Bruhns 2010, 220.

⁵⁸Fitz Gibbon, "No More 'Good Provenance'."

⁵⁹Brodie 2003, 186.

⁶⁰"Perú denunciará a Sotheby's."

street that countries pressed by heritage loss always encounter, as Peruvian archaeologist Walter Alva explains:

The major obstacles faced when reclaiming pieces found in auction houses or collections is establishing the date of entry into countries which respect international agreements or in proving they have been stolen from a museum or archaeological site. This is often an almost impossible task since the objects are obviously the product of clandestine excavation.⁶¹

SOTHEBYS' AUCTION LEGALITY AND ETHICS

The Application of International Agreements

At this point, we are in a situation that seems to favor the position taken by Sotheby's and even makes it plausible to assert that the auction was carried out legally. This assertion is also supported by the fact that international conventions do not encourage the argument taken by the Latin American countries in this case. In that regard, there are two main reasons why the source countries could not use the UNIDROIT Convention.⁶² First and most significantly, despite the fact that France signed the UNIDROIT Convention in 1995, it did not ratify it,⁶³ so France is not a state party, and its measures cannot be applied. Moreover, the UNIDROIT Convention is not retrospective. It entered into force in 1998, and some of the Latin American countries ratified it later than that date:⁶⁴ thus, it cannot be applied to most of the objects in the Barbier-Mueller auction since they have a previous acquisition record.

Second, the fact that the claims for restitution were not filed until 2013 makes them prescribed and prevents the use of the Article 3.3 of the UNIDROIT Convention. According to this rule, any claim for restitution should be made within the next three years after discovering the location and the current possessor of the objects, which, in this case, were displayed for fifteen years with no claims being made against them by the source countries.⁶⁵ In addition, the fact that the auction took place in Paris again favors the sellers by making it possible to apply the French law, which establishes even less time to denounce the existence of the pieces that were probably looted after being aware of such circumstances.⁶⁶

⁶¹Alva 2001, 94.

⁶²Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457 (UNIDROIT Convention).

⁶³France signed the UNIDROIT Convention in June 1995. See <http://www.unidroit.org/status-cp> (accessed 11 January 2019).

⁶⁴Dates when the UNIDROIT Convention entered into force in the countries involved: Ecuador (1 July 1998), Guatemala (1 March 2004), and Peru (1 September 1998). Costa Rica, Mexico, and Venezuela are not party to the Convention. See <http://www.unidroit.org/status-cp> (accessed 11 January 2019).

⁶⁵Prott 1997, 35.

⁶⁶Prott 1997.

For its part, the 1970 UNESCO Convention has also shown its inefficacy when applied to this case.⁶⁷ Although France signed the UNESCO Convention in 1997, its application depends on its consistency with the national law of the country at hand. At the time of the auction, the French legislation did not have any measures about the importation of non-European artwork without exportation certificate. Actually, the UNESCO Convention is devoid of real and effective authority, and it is necessary to expect assistance from the signatory countries. As museum president James Cuno states, the Convention “failed because it has not teeth,” and it cannot contradict the authority and the law of its member states.⁶⁸ Hence, the outcome of the application of the UNESCO Convention is directly connected to the national law, the courts, and even to the state-to-state cooperation of the countries involved.⁶⁹

Furthermore, the Barbier-Mueller family allegedly acquired the objects in good faith after they had already been part of other collections.⁷⁰ According to the framework of UNESCO Convention, if the claimant countries made a successful reclamation, in the case of confiscation and return, it would require payment of just compensation to the current owner,⁷¹ which was an expense that the source countries were not willing to bear. Thus, it would either be an unaffordable expense or fundamentally wrong since, as owners of the pieces, which they considered themselves to be, it prevented them from paying for the recovery of their own pre-Columbian heritage.

The Auction from an Ethical and Moral Perspective

The 1970 UNESCO Convention has also been interpreted as a “cut off date” when trying to discern what is legitimate on the international antiquities market.⁷² 1970 has been set as a reference date for buying property legitimately, considering that all of the objects that left their source country before such a date are legally on the market.⁷³ This rule was reinforced by the University of Pennsylvania Museum, which established that they would not acquire objects without an impeccable provenance record stretching to before 1970,⁷⁴ as well as by the Harvard University Art Museum, which in 1971 introduced the idea of taking the UNESCO Convention as reference for the acquisition of cultural property.⁷⁵ Since then, at US museums, it

⁶⁷All of the countries involved have accepted or ratified the UNESCO Convention: Costa Rica (6 March 1996), Ecuador (24 March 1971), Guatemala (14 January 1985), Mexico (4 October 1972), Peru (24 October 1979), Venezuela (21 March 2005), and France (7 January 1997). See <http://www.unesco.org/eri/la/convention.asp?KO=13039&language=S&order=alpha> (accessed 23 April 2019).

⁶⁸Cuno 2008, 153.

⁶⁹Yates 2019, 197.

⁷⁰See Merryman 2007.

⁷¹1970 UNESCO Convention, Art. 7(b)(ii).

⁷²Tremain 2019, 175

⁷³Brodie and Renfrew 2005.

⁷⁴Brodie and Renfrew 2005, 344.

⁷⁵Brodie and Renfrew 2005, 351.

has become less acceptable to obtain objects without clear evidence and whose date of entry into the country dates after 1970.⁷⁶

The “1970 Rule,” which intends to set an ethical boundary,⁷⁷ has been established as a symbolic date.⁷⁸ For those involved in the buying and selling of works of art, especially public museums, this rule is fundamental to set a reference date for the legal acquisition of antiquities, while, for archaeologists and the pieces’ source countries, the date is random and unsatisfactory. Likewise, for researchers Donna Yates and Greg Lee, the date 1970 should not be taken into account in this case as an ethical or legal reference because:

[t]he UNESCO Convention does not take away the sovereign rights of any signatory to determine ownership. In this sense, the idea of antiquities with pre-1970 surface dates being safe is problematic at best and highly deceptive. The year was meant as a general guideline for best practices but does not trump local law regarding ownership nor does it provide an international statute of limitations for the recovery of what local law considers stolen property. To use Peru as an example, a Peruvian object that left Peru prior to 1970 but after 1929 (or, perhaps, 1822) could, at any time, be claimed by the Peruvian government as stolen property. This is what happened in the Barbier-Mueller auction.⁷⁹

Thus, although the establishment of the year 1970 as a limit of legality should have resulted in a decrease of looting and theft of objects in the market, it is an ethical rule devoid of legal authority. In the case in question, it can be observed that 46 percent of the pieces have a date of appearance on the market that is after 1970 and a 38 percent of these were successfully sold in the auction.⁸⁰ This percentage shows that the 1970 date may not exert any real influence in the ethics of some antiquities buyers. And even though the pieces with dates before 1970 represent a higher percentage of the sale (54 percent), this tendency can be attributed to the fact that the pieces corresponding to this time frame were of higher quality and were more in demand by collectors of pre-Columbian art.⁸¹ As Cara G. Tremain states, desires for acquisition of one unprovenanced object “have largely outweighed the concern about illegality or threats to cultural heritage.”⁸²

With this in mind, we can state that: (1) the “1970 Rule” has failed to halt the commodification of heritage, and (2) the ownership claims of the pieces’ source countries have not had the expected influence in this case. So, in general, there was limited ethical behavior in the buying and selling of antiquities at this auction mainly because there was no standard and international code of good practice that could be

⁷⁶Joyce 2019, 2.

⁷⁷Brodie and Renfrew 2005.

⁷⁸Cuno 2008.

⁷⁹Yates and Lee 2014, n.p.

⁸⁰*Catalogue Sotheby’s*.

⁸¹Yates and Lee 2014.

⁸²Tremain 2019, 176.

applied to the buying and selling of cultural property at the auction, or that could be applied to our case since the Barbier-Mueller was a private collection and part of a private museum. In its place, there are some instruments that can help us to establish some sense of ethical conduct regarding three of the groups involved in the art market: museums, auction houses, and art dealers.

The most significant is the ICOM's Code of Ethics for Museums, which must be followed by all ICOM members and which applies to the Barbier-Mueller Museum in Geneva as both an ICOM member and a custodian of the collection.⁸³ First of all, this Code asserts that museums are responsible for the objects in their collections, both regarding conservation and for public enjoyment.⁸⁴ The latter premise was not complied with since the sale of the Barbier-Mueller pre-Columbian collection has meant its disintegration and the disappearance of many of the pieces into the hands of private collectors. Sections 2.2, 2.3, 3.4, 4.5, 5.1, 7.1, and 8.5 of the Code were also not followed since, among other things, the Barbier-Mueller Museum presumably acquired the objects without a valid certificate of exportation from the source countries, to the detriment of the cultural heritage of those countries, and without a complete provenance record of each of them. Moreover, the museum did not apply sections 6.2 and 6.3, which establish the need to return and repatriate those objects that left their countries of origin illegally because of the condition of having irrefutable evidence of such activity. The latter stipulation is a serious problem for source countries because, as stated above, the illegal export of the objects does not allow for the creation of a record for this kind of transaction.

Concerning good practices that are applicable to an auction house, it is worth pointing out that Sotheby's has created its own Code of Business Conduct and Ethics in October 2015. This text refers to the auction of property presumably illegally exported under the sections "Legal Movement and Sale of Property" and "Due Diligence."⁸⁵ In the text, the need to adjust to the exportation laws of the place where the property in question is currently located is established, and it is also necessary to observe the national laws of the country where the auction takes place (as we stated before, in this case, the French law was strictly followed). At the same time, the Code proclaims adhesion "to the relevant domestic and international laws that govern the

⁸³ICOM, Code of Ethics for Museums, 1986, <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> (accessed 11 June 2019). On the Barbier-Mueller Museum's webpage, its membership to ICOM is not expressly stated. However, the author believes that it is a member since ICOM members have free access to its facilities, and in the "Swiss Museum Association," which is a partner of ICOM Switzerland, the museum is included as such. See <http://www.museums.ch/en/home/vms/> (accessed 25 June 2019).

⁸⁴ICOM, Code of Ethics for Museums, Principle 2, 6–15.

⁸⁵Sotheby's Code of Business Conduct and Ethics, 2015, 50–51, http://www.sothebys.com/content/dam/sothebys/PDFs/JC_1416483_Legal_Code%20of%20Conduct%20Brochure.pdf (accessed 4 January 2019).

markets for archaeological and ancient property”⁸⁶ and, in fact, the 1970 UNESCO Convention and 1995 UNIDROIT Convention were also observed in this case.

Finally, the International Code of Ethics for Dealers in Cultural Property is also relevant since the bidding was carried out, and followed by, dealers and people related to the antiquities market.⁸⁷ This Code is an important tool because it makes it clear that under no circumstances should property resulting from theft, looting, or illegal export be commercialized; and, at the same time, it establishes the need to cooperate in the return of cultural objects. This text was developed in 1999 by the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to Its Countries of Origin or Its Restitution in Case of Illicit Appropriation. It is an international tool that has proven its efficacy in some cases (for example, in the return of the Makondé mask from the Barbier-Mueller collection),⁸⁸ although it does not have the capacity to adopt any binding decisions.

It is important to note that these are only codes of ethics that apply to museums, auction houses, and art dealers. But what about other actors in the art world? And, more specifically, what are the ethical standards that should be applied to private collectors as buyers and sellers? According to the opinion of this author, they would be the same ethical regulations that apply to museums and art dealers. Collectors should consider the possible risks regarding the acquisition of cultural property that may have left source countries illegally. In this way, buyer participation in the market for illicit antiquities should be reduced since it is known that demand drives the looting of antiquities, a situation that will continue as long as there are buyers that are willing to acquire “unprovenanced” pieces.⁸⁹

To introduce ethical thinking into buyer behavior, the first step lies in the difficult task of changing the social standards concerning the collector’s standing. It is necessary to make the acquisition of antiquities with no certified provenance socially unacceptable. Private collectors are often seen as people who acquire their works for the common benefit of society and, sooner or later, end up donating them to a museum or foundation.⁹⁰ This societal ideal did not happen in this case, where the pre-Columbian pieces of the Barbier-Mueller collection were removed from a museum and have ended up dispersed in the hands of unknown individuals. Undoubtedly, one of the main ethical dilemmas that we are faced with is the

⁸⁶Sotheby’s Code of Business Conduct and Ethics, 51.

⁸⁷United Nations Educational, Scientific and Cultural Organization, International Code of Ethics for Dealers in Cultural Property, 1999, <http://unesdoc.unesco.org/images/0012/001213/121320M.pdf> (accessed 28 February 2018).

⁸⁸ICOM, *Masque Makonde: Signature d’un accord pour le don du Masque Makonde du Musée Barbier-Mueller de Genève au Musée national de Tanzanie*, 2010, <https://plone.unige.ch/art-adr/cases-affaires/masque-makonde-tanzanie-et-musee-barbier-mueller/icom-dossier-de-presse-masque-makonde-signature-d2019un-accord-pour-le-don-du-masque-makonde-du-musee-barbier-mueller-de-geneve-au-musee-national-de-tanzanie-10-mai-2010/view> (accessed 20 July 2019).

⁸⁹With reference to this debate, the “Good Collector” figure has appeared. See Brodie 2006, 57.

⁹⁰See Brodie 2006, 52–53; Mackenzie and Yates 2016.

disappearance from the public eye of several one-of-a-kind pieces that are irreplaceable. This dilemma can be also seen in the actions of the pieces' source countries, which, despite knowing that the pieces were being held in a museum in Barcelona, did not take action for their return until the antiquities were to be sold.⁹¹ In other words, they chose not to act when the collection was publicly accessible but pressed their case when the collection was going to be removed and dispersed. Nevertheless, while the pieces belonged to the Barbier-Mueller private collection, the claims against them would involve a complex process, as seen in the case of the Rio Azul mask, which did not have the expected outcome for the source country.

In this way, even though it was always clear that the provenience of the pieces was not clearcut, the source countries decided to act once they perceived that there was more possibility of success. They also may have been encouraged by the attention of the media and by the existence of positive precedents regarding the cancellation of auctions, although not so for the repatriation of artworks. For example, the withdrawal of a piece from Cuzco in 2010 from a Christie's auction⁹² or the stoppage of the auction of two Peruvian pieces on Time Auctioneers.⁹³ In our case study, decreasing sales in auctions can be considered a success for the source countries since it implies a greater awareness of cultural property issues on the part of society.⁹⁴ However, in the author's opinion, buyers may fear possible reprisals or the forced return of the acquired property more than they fear public awareness.

SHOULD THE RETURN OF THE PIECES BEEN MADE?

At this point, we are faced with one of the greatest dilemmas for museums with collections acquired in the twentieth and twenty-first centuries. Two trends are evident: cultural nationalism, which defends the preservation of the pieces in their countries of origin, and cultural internationalism, which advocates heritage globalization as long as it is well preserved and available to the public.⁹⁵ In the same way, there is the conflict between countries with restrictive laws regarding the export of cultural property and universal or encyclopedic museums that encourage heritage internationalization through the Declaration on the Importance and Value of Universal Museums, which was signed in 2002 by 18 of the most renowned museums in the world.⁹⁶

⁹¹Abida Ventura, "Una misión casi imposible," *El Universal.mx*, 20 March 2013, <http://archivo.eluniversal.com.mx/cultura/71340.html> (accessed 15 July 2019).

⁹²María Verza, "México, Guatemala y Perú reclaman el 'Tesoro Barbier-Mueller'," *El Mundo*, 22 March 2013, <http://www.elmundo.es/elmundo/2013/03/22/cultura/1363946782.html> (accessed 25 October 2018).

⁹³Verza, "México, Guatemala y Perú."

⁹⁴Barraza, "México en venta."

⁹⁵Merryman 1986.

⁹⁶"Declaration on the Importance and Value of Universal Museums," *ICOM News*, vol. 1, no. 4, 2004.

These two points of view have opposing opinions around the appropriateness of returning objects that are currently within foreign collections to their places of origin, as is the case with the Barbier-Mueller pre-Columbian collection. Nonetheless, the main problem to deal with is not necessarily related to the place where the pieces should be but, rather, to the fact that the collection has been divided and removed from public view. Following the theory of divided property proposed by Massimo Giannini, the cultural property may be owned by an individual, a museum, or a state only if its enjoyment is a right that everyone holds.⁹⁷

Jean Paul Barbier-Mueller, when offering his collection for sale, chose a controversial option, questionable from an ethical standpoint since there are more appropriate alternatives. His choice is ethically questionable considering that the main reason given by collectors to legitimize their position is that their pieces will end up in a public institution for everyone's enjoyment and that the object's time in the private sector is no more than a temporary situation.⁹⁸ In view of this, Barbier-Mueller argued that, with the money gained from the 2013 sale, more pieces would be bought to improve the Oceanian and African art collections in the Barbier-Mueller Museum in Geneva.⁹⁹ This is an acceptable action according to ICOM's code of ethics,¹⁰⁰ but we should not downplay the fact that the pre-Columbian collection has been dissolved and that the majority of its pieces have become part of a strictly private sphere.

Perhaps it would have been a better decision to repatriate the pieces to their places of origin, having taken into account that these countries consider themselves the owners of the objects because they were produced by ancient cultures that inhabited their borders. This is a position to be reconsidered since the appearance of one piece in a place is not such a guarantee of ownership, and we should also keep in mind the globalization of cultural heritage. Anyway, such a return should be subject to several conditions, especially considering that the current state borders may not correspond to the ancient boundaries of the pieces' source cultures. At the same time, the topic of safety and good conservation of the objects must be carefully considered because not all of the source countries have good museum systems nowadays or suitable institutions to preserve cultural heritage.

Thus, a conscientious repatriation plan should have been proposed, which might have affected the most representative pieces, such as the Diquis stone deity figure from Costa Rica or the controversial Rio Azul mask. In this way, more common pieces or those with suitable representation in the source countries' institutions might be allowed to remain in foreign museums as a loan. The latter solution has already been observed in an agreement between Ecuador and the Rimini Museum in

⁹⁷Giannini 1976.

⁹⁸Mackenzie and Yates 2016.

⁹⁹Barraza, "México en venta."

¹⁰⁰According to ICOM's Code of Ethics for Museums (section 2.16), the sale of a part of a collection is allowed as long as the profits are used for the collection's improvement.

Italy, and it is the reason why several hundred Ecuadorian objects remained in the Italian museum on long-term loan after the issues around ownership had been clarified.¹⁰¹ There is also the possibility, as argued by Neil Brodie, that some of the most common pieces be left in the hands of private collectors since the market needs pieces to meet the demand. It would make better sense to allow the source countries to choose the appropriate pieces—copied pieces or those that have already been studied in archeological excavations—so that there is no large-scale heritage loss, both for their cultures and for society in general.¹⁰²

FINAL REFLECTIONS

In this article, the auction of the Barbier-Mueller pre-Columbian collection is used as an example to think about a controversial phenomenon: the trade of cultural objects. In this way, the related Parisian auction can be studied from two very different perspectives: that of the source countries and that of Sotheby's Parisian branch. For the former, the auction implied a violation of their laws and a lack of respect towards their heritage; while, for the latter, the auction was carried out under the strictest degree of lawfulness and around a group of objects that have an important historiographic background and an impeccable ownership record.

From a legal point of view, the national laws of the source countries do not always have the power to enforce in an international context. And, in this case, the French legislative corpus made it easier for Sotheby's to hold the auction in Paris. Moreover, international treaties developed by organizations like UNESCO, although they apply in this situation, do not strengthen the position of the countries of origin, mainly because they are not retroactive and they must be consistent with the national law matter at issue. Thus, given that the law is not effective for their interests, there is a need to introduce ethical norms that take into account other types of concerns beyond lawfulness.

In this context, we must ask ourselves if the auctioning of the Barbier-Mueller pre-Columbian pieces was ethical. This question does not have just one definite response, especially because there is not an exclusive code of ethics applicable to this particular case. Therefore, it should be vital to establish ethical guidelines beyond the legal restrictions, which, first of all, address the need to halt the looting, robbery, and illegal trade of property, whatever its provenience may be. This proposal would not decisively eliminate the urgent problem of heritage loss since it would again be subject to the goodwill of states, auction houses, art dealers, and others involved in the world of art. However, it could be a good starting point, especially for private collectors, who, in any case, should be subject to the same standards that public museums and galleries are since they are also the custodians of cultural property.

¹⁰¹Des Portes 1998, 144.

¹⁰²Brodie 2006, 61–62.

Furthermore, concerning the pieces' source countries, it is necessary to take into account that return may not always be the ideal solution, especially if we consider that these objects can serve as cultural ambassadors.¹⁰³ Several of mechanisms should be established to ensure the return of the most representative and one-of-a-kind pieces to their source countries, in such a way that the best pieces would be in the museums and galleries of the place where they originally came from. At the same time, other pieces could remain in international collections via long-term loan or other kinds of agreements. To conclude, it can be asserted that the auctioning of cultural property is full of moral and ethical considerations that are difficult to approach objectively since each case must be analyzed independently. But what we are sure about is the necessity of using the same standards and codes to ensure that buyers and sellers, as well as the source countries and cultures, can regulate the art market by reaching an agreement for the protection and appreciation of the world's cultural heritage.

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¹⁰³Kersel 2011.

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