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On the Borderline – Using National and International Legal Frameworks to Address the Traffic of Pre-Columbian Antiquities between Mexico and the United States

Abstract: This article examines legal provisions and remedies for illicitly trafficked pre-Columbian antiquities, focusing on Mexico and the United States of America (USA), to determine gaps and areas for improvement. These two countries provide an interesting contrast, as they are contiguous neighbours but have different legal systems and approaches to the protection of cultural property. Nonetheless, Mexico and the USA have a history of fruitful cooperation in the recovery and return of pre-Columbian cultural objects under both domestic and international frameworks, such as bilateral agreements and cultural heritage conventions. In particular, as a country that accounts for nearly half of all global art market transactions, the USA is uniquely placed to act as a gatekeeper for pre-Columbian antiquities and serve as an example for the effective protection of foreign cultural property seized within its borders. However, while

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the examination of Mexico and the USA provides a useful case study, the illicit traffic of these objects should not be viewed in isolation or characterized as solely a regional problem. Globalization and the international nature of the art market require a more expansive view of the subject, while still taking countries' legal and cultural specificities into account. A balanced and holistic approach will help increase the effectiveness of both national and international remedies; this will improve the legitimate market as a whole and curb illicit trafficking. By tackling the problem at both ends of the supply chain and increasing visibility, the possibilities of success shall rise.

Keywords: antiquities, illicit trafficking, art market, cultural property protection, legal frameworks

Introduction

Cultural heritage, in both its tangible and intangible forms, is a non-renewable resource of great importance for humankind. While States are tasked with safeguarding cultural heritage for current and future generations, cultural objects are also subject to commerce and ownership by private parties. The multi-faceted dimensions of cultural heritage thus present a challenge for its regulation and the enforcement of applicable legislation, depending on a country's particular approach to these types of goods. This is further complicated by the fact that it is not unusual for transactions involving cultural objects to take place across several jurisdictions. For instance, a Mexican pre-Columbian antiquity¹ may have been smuggled into the United States (USA), sent to the United Kingdom (UK) for sale at auction, and purchased by a resident of China for display at their residence in Australia. As a result, cultural heritage occupies a distinct position in the national and international legal landscape, which must be taken into account when proposing or enforcing remedies. Although items such as the Benin Bronzes have been at the forefront of debates on returns and restitutions, less attention has been paid to Indigenous artifacts hailing from Latin America. As Jorge Sánchez Cordero² has indicated:

To defuse the charge of eurocentrism, we need to move the focus to other latitudes such as the American continent and analyze the legal mechanisms for the protection of cultural objects that exist there. [...] Illegal and unscrupulous excavations of Pre-Columbian archaeological sites have meant the loss of precious information not

¹ For purposes of this article, the term "pre-Columbian antiquities" refers to cultural property originating in Latin America prior to the Spanish Conquest in the late 15th century, encompassing ceramics, metalwork, stonework, and figurines. This includes, but is not limited to, items from the Mayan and Aztec cultures, and focuses particularly on those located in or exported from Mexico.

² Member of the UNIDROIT Governing Council.

only for the countries concerned, but for mankind in general. In effect, it is universal knowledge that resents the loss.³

While the art market is a lucrative business, cultural objects may fall within the scope of national laws prohibiting their private ownership, trade, import, or export. As a result, certain individuals have sought to circumvent legal prohibitions which prevent them from selling or purchasing such items openly. It has been said that the trade in illicit antiquities is one of the most lucrative criminal activities in the world, second only to the international narcotics trade,⁴ and the international market for illegally obtained cultural objects is thought to have approached \$8 billion.⁵ Although concrete data is difficult to access, it is a demand-driven crime, often linked to terrorist financing, money laundering, and drug and weapons trafficking. Furthermore, antiquities trafficking dovetails with the legitimate cultural property market, which had an estimated value of \$64.1 billion in 2019.⁶ Objects can infiltrate the market through falsified provenance documentation and the acts of unscrupulous dealers, as demonstrated by the recent case of Erdal Dere and Faisal Khan, who used the identities of deceased collectors to dupe buyers into purchasing questionably-sourced antiquities.⁷ Furthermore, given that sales in the gallery and dealer sector reached \$36.8 billion in 2019, illicit antiquities trafficking is a matter that concerns both public and private law.⁸

The following section provides an overview of the traffic in illicit antiquities, including pre-Columbian artifacts, to pinpoint market trends and obstacles that affect related transactions.

Illicit Antiquities Trafficking: Trends and Obstacles

Over the past few decades, the problem of antiquities trafficking has not only increased, but also become more visible.⁹ This process takes various forms: (1) over-seeing or directing the initial looting of objects from sites, including archaeological ruins; (2) facilitating, aiding, or taxing the transportation and smuggling of objects

³ J. Sánchez Cordero, *The Protection of Cultural Heritage: A Mexican Perspective*, "Uniform Law Review" 2003, Vol. 8(1-2), pp. 566-567.

⁴ R.D. Phelps, *Protecting North America's Past: The Current (and Ineffective) Laws Preventing the Illicit Trade of Mexican Pre-Columbian Antiquities and How We Can Improve Them*, "Texas Law Review" 2016, Vol. 94, p. 785.

⁵ L. Aminatedoleh, *The Role of Museums in the Trade of Black Market Cultural Heritage Property*, "Art Antiquity and Law" 2013, Vol. 18(2), p. 235.

⁶ C. McAndrew, *The Art Market 2021: An Art Basel & UBS Report*, "Art Basel & UBS", 16 March 2021, p. 17, https://d2u3kfw92fzu7.cloudfront.net/The_Art_Market_2021.pdf [accessed: 11.05.2021].

⁷ *US v. Erdal Dere and Faisal Khan*, Case No. 20-cr-501 (SDNY 2020). See Department of Justice press release, 22 September 2020, <https://www.justice.gov/usao-sdny/pr/antiquities-dealers-arrested-fraud-scheme> [accessed: 10.09.2021].

⁸ C. McAndrew, op. cit., p. 18.

⁹ N. Brodie, C. Renfrew, *Looting and the World's Archaeological Heritage: The Inadequate Response*, "The Annual Review of Anthropology" 2005, Vol. 34, p. 344.

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within and between countries; and (3) obtaining looted objects through theft or purchase. At each stage, illicit antiquities generate funds that can be sold or exchanged for weapons, equipment, or other black market goods. While tracking and disrupting these networks is highly important for reasons of national security as well as cultural protection, the clandestine nature of these transactions complicates the enforcement of legal remedies.¹⁰ In response, various countries with ties to the art market have enacted mechanisms to tackle this problem, ranging from financial controls to bilateral agreements and customs regulations. The USA itself recently amended its chief money laundering law to include antiquities dealers.¹¹

However, persistent challenges hampering the effectiveness of these protective regimes remain. For instance, an object that is unlawfully exported from one State may be legally imported and sold in another (in the absence of applicable bilateral agreements or international treaties). Also, because there is no uniform legal definition as to what constitutes a cultural object,¹² these items are not granted the same level of protection across the board. Certain countries permit private ownership of designated cultural objects (with or without restrictions) while others prohibit it entirely. The concepts of “due diligence” and “good faith purchasers” (discussed in greater detail below) create additional friction in the event of disputes, as there is no centralized judicial or adjudicative body dealing with such cases, or guidelines establishing legal standards for determining ownership.¹³ As a result, legal, political, and economic factors contribute to the uneven application of remedies for illicit antiquities trafficking.

Regarding pre-Columbian antiquities, these have been subject to looting and theft since the Spaniards arrived on American shores in the late 15th century, but international demand for these objects rose sharply during the 20th century. As points of sale shifted from local cities towards global metropolises,

trafficking networks (both simple and complex) grew to fill the important middle transit stage of the antiquities smuggling chain and the pillage of archaeological sites rose sharply. Because most Latin American countries outlawed the export of antiquities before an international market grew for them, all the Latin American antiquities on the market were tainted by crime and were illegal in some jurisdictions. This is still the case.¹⁴

¹⁰ M. Sargent et al., *Tracking and Disrupting the Illicit Antiquities Trade with Open-Source Data*, RAND Corporation, 2020, p. iii, https://www.rand.org/content/dam/rand/pubs/research_reports/RR2700/RR2706/RAND_RR2706.pdf [accessed: 10.05.2021].

¹¹ N. McGreevy, *How a New Law Will Impact the U.S. Antiquities Trade*, “Smithsonian Magazine”, 11 January 2021, <https://www.smithsonianmag.com/smart-news/congress-increase-regulations-antiquities-trade-us-180976712/> [accessed: 11.05.2021].

¹² Related terms include cultural heritage, cultural property, ancient artifacts, and works of art, to name a few.

¹³ M. Sargent et al., op. cit., p. 7.

¹⁴ D. Yates, *Illicit Cultural Property from Latin America: Looting, Trafficking, and Sale*, in: F. Desmarais (ed.), *Countering Illicit Traffic in Cultural Goods: The Global Challenge of Protecting the World's Heritage*, ICOM, Paris 2015, p. 37.

Moreover, Donna Yates indicates that despite the presence of patrimonial laws, Latin American countries were commonly subjected to “disrespect and indignity by the antiquities trade”, with pre-Columbian antiquities suffering the brunt of looting and trafficking.¹⁵

Because pre-Columbian artifacts do not belong solely to one nation or Indigenous group, Latin American laws focus on criminalizing the traffic of such items irrespective of their origin.¹⁶ This is especially important given their high market demand. Mayan stelae, or free-standing commemorative monuments erected in front of pyramids or temples and made from limestone, are frequent casualties of criminal activity. Looters typically hack them into smaller pieces to facilitate their transport and label them as “personal effects” in order to bypass customs regulations upon departure and entry. Interest from wealthy collectors, museums, and dealers has also fuelled “made-to-order” thefts, implicating corrupt local officials.¹⁷ Furthermore, looters are often aided by the local population in rural areas, who are economically disadvantaged, under-educated, and may see such thefts as a victimless crime.

Artifact-rich sites are usually identified by locals, who sell the relevant information to crime groups or notify intermediaries to finance illicit digging. Once removed, the artifacts enter the possession of an in-country intermediary, who arranges transit to an out-of-country intermediary, who then receives and “cleans” the items when necessary. The items are subsequently placed on the legitimate market or offered directly to purchasers.¹⁸ Cultural institutions and private collectors prize all kinds of pre-Columbian antiquities, such as polychrome vessels, gold funerary masks, stone altars, and sculptured figurines.¹⁹ Powerhouse auctioneers Christie’s²⁰ and Sotheby’s each offer pre-Columbian antiquities for sale. According to Sotheby’s, auctions of these items have realized nearly \$45 million over the past 15 years.²¹

This means that a new approach is required to effectively tackle illicit pre-Columbian artifacts entering domestic and international markets. The following section discusses international law instruments that address illegal antiquities trafficking, which can be leveraged alongside national laws for the protection of vulnerable cultural objects.

¹⁵ Ibidem.

¹⁶ For instance, some groups like the Maya were migratory. See J. Sánchez Cordero, *The Protection...*, pp. 568-569.

¹⁷ L.S. Potter, B. Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, “Global Business and Development Law Journal” 1992, Vol. 5(2), pp. 635-636.

¹⁸ Ibidem.

¹⁹ D. Yates, op. cit., pp. 33-34.

²⁰ <https://www.christies.com/departments/Pre-Columbian-Art-91-1.aspx>.

²¹ <https://www.sothebys.com/en/departments/pre-columbian-art>.

International Law Framework

The global nature of antiquities trafficking makes it a priority for international cooperation, given the frequent cross-border nature of transactions. However, debates on the regulation of the antiquities trade are ongoing. Collectors, dealers, and institutions argue that outlawing the trade altogether will drive objects further underground, and that it is better for purchasers to serve as the custodians of antiquities. Source countries and local communities argue that this heritage possesses a special significance that warrants repatriation. Policy-makers are caught between these two polarized views, although negative consequences often result from stringent legislation that fails to account for practical realities.²² With a highly profitable market and international relations at stake, effective regulation that takes feasible measures into account is more important than ever.

The looting and intentional destruction of cultural property, particularly as a result of conflict, has been addressed in international law, as looters commonly deprive nations, cultural and ethnic groups, and humankind of important archaeological information about artifacts by removing them from sites without adhering to conservation measures, thereby diminishing their historical context, educational value, and even causing physical damage.²³ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Resolutions by the United Nations Security Council²⁴ demonstrate the international community's acknowledgement of antiquities trafficking as a grave threat affecting humanity as a whole. Significantly, the International Criminal Court (ICC) has ruled that perpetrating the unlawful destruction of cultural heritage may be considered a war crime.²⁵ However, it is important to combat harmful actions that affect cultural heritage outside of conflict as well.

The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 Convention")²⁶ was the first legal instrument to tackle the illicit international trade in cultural property during peacetime.²⁷ It states that: "The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit" (Article 3). However, the Convention is founded on a philosophy of government action and

²² A. Bauer, *New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, "Fordham International Law Journal" 2007, Vol. 31, pp. 693-695.

²³ L. Amineddoleh, *op. cit.*, pp. 227-228 and 230-231.

²⁴ Resolutions 2199 (2015), 2253 (2015), 2347 (2017), 2368 (2017).

²⁵ *The Prosecutor v. Ahmad Al Faqi Al Mahdi* (Case No. ICC-01/12-01/15).

²⁶ 14 November 1970, 823 UNTS 231.

²⁷ R.D. Phelps, *op. cit.*, p. 789; M. Schneider, *The 1995 UNIDROIT Convention: An Indispensable Complement to the 1970 UNESCO Convention and an Inspiration for the 2014/60/EU Directive*, "Santander Art and Culture Law Review" 2016, Vol. 2(2), p. 151.

requires States to designate cultural objects under domestic law before requesting their return.²⁸ This means that not all cultural property qualifies for return under the instrument.²⁹ Article 7 provides that States shall recover and return cultural property that was illegally exported after the entry into force of the Convention in both the receiving State and the State of origin at the request of the State Party of origin. This request must be made through diplomatic channels, and the requesting State shall pay just compensation to an innocent person or a person with valid title to the object. The Convention further requires contracting States to adopt protective measures for cultural property in their territories, including specialized national legislation (Article 5), and to impose penal or administrative sanctions on anyone contravening the relevant prohibitions (Article 8). To date, 140 countries have ratified this Convention.³⁰

While the 1970 Convention serves as an important tool to combat the trafficking of cultural property, its focus on public law and ensuing loopholes have allowed illegally-acquired items to slip through the cracks. The 1970 Convention only provides a mechanism for States to request the return of cultural property, leaving private owners without recourse if cultural objects were not officially designated as such under domestic law or if the State chose not to pursue their return.³¹ As a result, UNESCO asked UNIDROIT for assistance in drafting a private law instrument to serve as a complement to the 1970 Convention, and in due course the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“1995 Convention”)³² was born. It deals with the main weaknesses of the 1970 Convention while building on its strengths.³³

Unlike its predecessor, the 1995 Convention does not require the prior designation of cultural property under national laws and includes a broad range of objects, such as those subject to clandestine excavation and unlawful export.³⁴ Significantly, it allows dispossessed owners to bring legal action in foreign courts for the restitution of stolen objects, although in cases of illegal export, only the State from which the object was illegally exported may request its return from a court

²⁸ L.V. Prott, *UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects*, “Uniform Law Review” 1996, Vol. 1(1), p. 62.

²⁹ Article 1 defines *cultural property* as that which “on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and falling into the categories set out in the article.

³⁰ <https://en.unesco.org/fighttrafficking/1970>.

³¹ L.V. Prott, *op. cit.*, p. 62.

³² 24 June 1995, 34 ILM 1322.

³³ M. Schneider, *op. cit.*, p. 154.

³⁴ Article 3(2): “A cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place”.

or other competent authority.³⁵ To date, 50 countries have ratified the 1995 Convention.³⁶ Although the USA and Mexico are both parties to the 1970 Convention, neither State has ratified the 1995 Convention. Nonetheless, it is important to note that both Conventions aided in developing a cross-jurisdictional dialogue on the need for greater protection of cultural property vulnerable to looting, smuggling, and theft.

The following section focuses on national frameworks and discusses the applicable laws, treaties, and judicial interpretations in Mexico and the USA dealing with pre-Columbian antiquities to provide an in-depth view of the current situation.

National Frameworks

Mexico

At the national level, many antiquities-rich countries have implemented patrimonial laws conferring ownership to the State of cultural objects over a certain age (typically 70-100 years) and/or of a certain type. There are also complementary laws governing private conduct, such as import/export regulations, customs restrictions, bilateral agreements, and international treaties. In keeping with this trend, Mexico has restrictive legislation in place for cultural objects which fall under the purview of the federal government. These umbrella statutes classify all antiquities of a certain age or older, whether discovered or still unknown, in public or private possession, as national property.³⁷ Mexico was among the first countries to enact protective legislation for archaeological resources, beginning in the 1880s. Archaeological cultural heritage is still considered a core element of the country's protection regime, occupying a preferential position in legislation when compared to artistic and historic heritage.³⁸ This is part of an overarching "nationalist project" whereby Mexico, as a postcolonial nation-state, is claiming the right to its own past and cultural identity in opposition to European authority.³⁹

Mexico's chief law vesting ownership of cultural property in the State is the 1972 Cultural Protection Act.⁴⁰ Article 28 of the Act defines *archaeological monuments* as "movable and immovable objects [which are] products of the cultures prior

³⁵ Article 5(3).

³⁶ <https://www.unidroit.org/status-cp>.

³⁷ L.S. Potter, B. Zagaris, op. cit., pp. 667-669.

³⁸ J. Sánchez Cordero, *The Evolving Landscape of Mexican Cultural Heritage*, in: *The Preservation of Cultural Heritage. The Combat against Illicit Trafficking of Cultural Property*, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Mexico 1997, p. 319.

³⁹ S. Valiant, *Why Was Mexico So Determined to Stop a Sale of Ancient Artefacts in Paris?*, "Apollo Magazine," 23 March 2021, <https://www.apollo-magazine.com/mexico-ancient-artefacts-heritage-christies/> [accessed: 27.09.2021].

⁴⁰ Ley Federal sobre Monumentos y Zonas Arqueológicas, Artísticas, e Históricas, 6 May 1972, 312 D.O. 16 (Mex.).

to the establishment of the Spanish culture in the National Territory, as well as the human remains, flora and fauna related to these cultures”. These items are considered *res extra commercium*, being inalienable and imprescriptible heritage that belongs to the State, and archaeological excavations may only take place under the auspices of the government or recognized scientific institutions.⁴¹ According to this patrimonial law, the government is not required to establish provenance or control over pre-Columbian antiquities in order to assert ownership vis-à-vis third parties.⁴² This is largely a result of the illicit trade in antiquities and its “corresponding drain on culturally significant objects”.⁴³ The Act completely prohibits the export of archaeological monuments unless they are part of a scientific or diplomatic exchange or for purposes of exhibition abroad on a temporary basis, as authorized by the President of the Republic or the relevant institution.⁴⁴

However, this export ban has been criticized on the grounds that it incentivizes illegal trade by highlighting the desirability of pre-Columbian objects. This increases their worth and value while exposing the government’s lack of financial resources to offer adequate protection and preservation for the large number of objects present in the country.⁴⁵ Many items that hail from historical sites and ruins have not been officially discovered or inventoried, making it simpler for looters and intermediaries to remove the antiquities and smuggle them out of the country.⁴⁶ While transactions concerning pre-Columbian antiquities subject to private ownership before the entry into force of the Act are not directly covered, the reality is that as a result of the inalienability provision, trade only occurs privately or on the black market.⁴⁷ Mexico does have a law to combat money laundering in the art market,⁴⁸ but it does not apply to pre-Columbian antiquities.

The successful application of legislation in Mexico depends on the collaboration between the federal government, the States, the Counties, and the Government of the Federal District (Mexico City). It must also take into consideration the country’s constitutional multiculturalism and policies concerning Indigenous peoples’ rights. As a country with a diverse population that contains multiple national identities, social tensions often impinge upon regulatory efforts.⁴⁹ While States have a degree of autonomy and are permitted to legislate on certain matters, they

⁴¹ Articles 27 and 30.

⁴² R.D. Phelps, *op. cit.*, p. 794.

⁴³ L.S. Potter, B. Zagaris, *op. cit.*, p. 669.

⁴⁴ Articles 16, 27, 29.

⁴⁵ L.S. Potter, B. Zagaris, *op. cit.*, p. 670.

⁴⁶ R.D. Phelps, *op. cit.*, p. 786.

⁴⁷ J. Sánchez Cordero, *The Evolving Landscape...*, p. 346.

⁴⁸ Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita [Federal Law to Prevent and Identify Illegal Resources], 17 October 2012.

⁴⁹ J. Sánchez Cordero, *The Evolving Landscape...*, pp. 325, 367-371.

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must always comply with the General Constitution. This can place States with a high concentration of archaeological sites and antiquities, such as Yucatán, at a disadvantage under blanket federal regulation.⁵⁰

At the national level, several specialized groups, such as the National Institute for Anthropology and History (NIAH), the Directorate for Security and Intelligence in Defense of Cultural Heritage, the Museum Security Committees, and National Councils on Legal Affairs, Archaeology, Cultural Heritage Protection, Museums and Exhibitions help safeguard Mexico's cultural heritage. Notably, a special investigative unit was also established to tackle crimes arising under the 1972 Act.⁵¹ In 2011, NIAH announced the launch of a new unified database for cultural property, which allows for the inscription of cultural goods from anywhere within Mexico. It collects information on technical and academic criteria pertaining to the registration of heritage items which were previously dispersed, resulting in a standardized and publicly accessible system. Once inscribed online, each item in the database will be provided with a unique identifying number and accompanying details (such as type, material, dimensions, and provenance). NIAH stated that this is an invaluable tool that will aid the government to obtain greater knowledge and control over cultural property in the country, determine which conservation measures are required, establish greater protective mechanisms, and combat the illicit traffic of pre-Columbian objects. Given the tremendous quantity of cultural property in Mexico – including over 42,000 reported archaeological sites and approximately 1.8 million pre-Columbian objects – the register represents a concrete positive step towards the recovery of looted and smuggled goods.⁵²

Mexico was one of the first States to ratify the 1970 Convention (in 1972), but has not ratified the 1995 Convention due to conflicts with national legislation; specifically, the issue of compensation for good faith purchasers.⁵³ Unfortunately, there is scant evidence that the 1970 Convention has had a meaningful impact on the illicit trade of Latin American cultural property, including pre-Columbian

⁵⁰ See Ley de Preservación y Promoción de la Cultura de Yucatán [Law for the Preservation and Promotion of the Culture of Yucatán], 8 August 2005, <http://www.archivogeneral.yucatan.gob.mx/files-content/general/14d4b9111d2efa7a84d9f0a674c9ea2b.pdf>; Reglamento para la Preservación de las Zonas de Patrimonio Cultural del Municipio de Mérida [Regulations for the Preservation of Cultural Heritage Zones in the Municipality of Merida], 4 July 2008, https://isla.merida.gob.mx/serviciosinternet/normatividad/files/Reglamentos/PRESERV_ZONAS_PATR.pdf [both accessed: 18.09.2021].

⁵¹ Mexico. *Report on the Implementation on [sic] the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, UNESCO, July 2015, http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/MEXICO_REPORT.pdf [accessed: 05.09.2021].

⁵² Sistema Único de Registro Público de Monumentos y Zonas Arqueológicas e Históricas. See Gobierno de México, Instituto Nacional de Antropología e Historia, *INAH estrena nuevo Sistema de registro de bienes culturales*, "Cultura", 11 March 2011, <https://www.inah.gob.mx/boletines/786-inah-estrena-nuevo-sistema-de-registro-de-bienes-culturales> [accessed: 11.05.2021].

⁵³ Mexico holds the belief that the State should not be required to pay for its own property in repatriation claims. See E. Duhne, J.P. Pérez, S. Chagoya, Mexico, in: B. Boesch (ed.), *The Art Collecting Legal Handbook*, Thomson Reuters, London 2013, p. 226.

antiquities. In fact, many high-profile antiquities were looted post-1970 and have not been recovered.⁵⁴ The Mexican government has correspondingly become more aggressive in pursuing illegally exported and stolen cultural property abroad over the past decade. In March 2013, the governments of Mexico, Guatemala, Costa Rica, and Peru contested the sale of pre-Columbian art from the Barbier-Mueller Museum at Sotheby's Paris. The sale went ahead as planned; a French diplomat stated that the items did not appear on the Interpol database or ICOM Red List, and as such were not considered looted or stolen – even though pre-Columbian antiquities are underrepresented on both lists. However, nearly half of the lots failed to sell and the total amount fell far below the pre-sale estimate, indicating that public pressure may have played a role in staving off bidders.⁵⁵

In September 2019, Mexico and Guatemala jointly denounced the auction of pre-Columbian artifacts at the French auction house Millon and stated their intent to sue to protect their interest in these items. Millon claimed the sale was “perfectly legitimate” and proceeded to sell 93% of the lots, netting €1.2 million for the entire sale.⁵⁶ While Mexico's resistance was mainly a symbolic act (no litigation ensued), it serves as a cautionary tale for sellers, purchasers, and intermediaries participating in transactions involving Mexican cultural property. Although a legal case may fail, this type of moral claim can place a cloud on the future marketability of the objects and collectors may be subject to public scrutiny. Subsequently, NIAH lodged a formal protest against Christie's in February 2021 after it sold various pre-Columbian objects. While Christie's maintained that it was confident in the legitimate provenance of the items, Mexican historian and archaeologist Daniel Salinas Córdova indicated that the circumstances under which the items had left their places of origin were still unclear. He reiterated that auctioning pre-Columbian antiquities is dangerous because it “promote[s] the commercialization and privatization of cultural heritage, prevent[s] the study, enjoyment, and dissemination of the artifacts, and promote[s] archaeological looting”.⁵⁷

More recently, in September 2021, the Ministry of Culture and NIAH filed a complaint with the Mexican Attorney General's Office regarding the planned auction of 324 pre-Columbian artefacts by a German dealer (Gerhard Hirsch Nachfolger), of which at least 74 had been identified as Mexican in origin. Mexico joined Panama and other ambassadors from the Group of Latin America and the Caribbean (GRULAC) in protesting the sale via a press conference, highlighting that by selling

⁵⁴ D. Yates, *op. cit.*, p. 40.

⁵⁵ K. Fitz Gibbon, *No More “Good Provenance”*, “Cultural Property News”, 29 March 2013, <https://cultural-propertynews.org/no-more-good-provenance/> [accessed: 07.05.2021].

⁵⁶ *French Auctioneer Defies Mexico with Sale of Pre-Columbian Artifacts*, “Reuters”, 18 September 2019, <https://www.reuters.com/article/us-mexico-france-art-idUSKBN1W326D> [accessed: 11.05.2021]; V. Noce, *Pre-Columbian Auction in Paris Goes Ahead in Face of Protest from Guatemala and Mexico*, “The Art Newspaper”, 19 September 2019, <https://www.theartnewspaper.com/news/Guatemala> [accessed: 11.05.2021].

⁵⁷ S. Valiant, *op. cit.*

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these items the auction house is violating the national laws of the respective countries of origin as well as the moral rights of Indigenous communities. The Mexican ambassador to Germany, Francisco Quiroga, even visited the auction house personally to block the sale and appealed to the public via Twitter: “This trade is tainted with illegality and insensitivity”. However, despite these efforts, the auction proceeded as planned on 21 September 2021. The stone mask of an Olmec dignitary valued at \$117,000 and tied to Mexico was among the items sold.⁵⁸ By contrast, Mexico was able to succeed in cancelling the auction of 17 pre-Columbian objects in Rome earlier that same month. The Mexican ambassador to Italy worked alongside the Carabinieri to secure the unsold pieces and block the delivery of those that had been sold. Mexico’s Secretary of Culture, Alejandra Fraustro, stated that this was the result of “cultural diplomacy, of dialogue and the permanent work of two nations that recognize in their heritage one of their greatest treasures, symbols of their history, their identity and the most sacred thing that their peoples have”.⁵⁹

In addition to diplomatic cooperation, other international instruments can be used to provide additional support for the return of pre-Columbian antiquities. For instance, Mexico is a party to the 1994 General Agreement on Tariffs and Trade (GATT), which establishes a “national treasure” exception to the free trade of goods, in consideration of the protection of the country’s cultural, archaeological, and historic heritage.⁶⁰ In 1976, the Organization of American States approved the San Salvador Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (“San Salvador Convention”).⁶¹ This Convention addresses the looting and dispossession of native cultural goods specifically within the Latin American context, noting that the protection and safeguarding of such objects depends on strong mutual respect and cooperation between the region’s governments. Its measures are similar to the 1970 Convention, although the San Salvador Convention expressly targets unlawful excavation in addition to provisions on the export, import, removal, and return of cultural property (Article 9).

Although Mexico has not ratified the San Salvador Convention mentioned above, it has implemented various bilateral agreements with other Latin American countries, including El Salvador (1990), Belize (1991), Guatemala (1995), Bolivia

⁵⁸ T. Landsberg, *Looted Art: Mexico, Panama Protest Munich House Auction*, “DW”, 21 September 2021, <https://www.dw.com/en/looted-art-mexico-panama-protest-munich-house-auction/a-59248908> [accessed: 27.09.2021].

⁵⁹ T. Solomon, *Mexican Government Attempts to Halt German Auction of Pre-Columbian Artifacts*, “ARTnews”, 20 September 2021, <https://www.artnews.com/art-news/news/mexican-government-halt-sale-pre-columbian-artifacts-germany-1234604280/> [accessed: 28.09.2021].

⁶⁰ Article XX, Section f. See also E. Becerril, *Mexico*, in: J. Nafziger, T. Stoel, R. Kirkwood Paterson (eds.), *Handbook on the Law of Cultural Heritage and International Trade*, Edward Elgar Publishing, Cheltenham 2014, p. 271.

⁶¹ http://www.oas.org/en/sla/dil/inter_american_treaties_C-16_Convention_Protection_Archeological_Heritage.asp [accessed: 18.09.2021].

(1998), Peru (2002), Uruguay (2012), Chile (2013), and Colombia (2015). These treaties focus on the restitution of illegally-exported cultural material and the protection of monuments; there is an overlap with the 1995 Convention regarding restitution concerning private parties, except that due diligence or good faith will not allow the purchaser to receive compensation.⁶² According to Mexico's periodic report on the implementation of the 1970 Convention, approximately 3,900 archaeological and historical objects were returned to the country as a result of bilateral agreements during 2007-2010.⁶³ Mexico also maintains diplomatic relations with other countries to encourage the exchange of information and facilitate the return of illicitly-exported cultural objects, which have recently borne fruit. In 2014, Mexico entered into a bilateral agreement with China⁶⁴ and it was announced in July 2021 that Mexico and France signed a "declaration of intent" to strengthen their cooperation in the field.⁶⁵ The rapprochement between Mexico and France is likely a result of the controversial Christie's auction earlier this year, and while there is no formal agreement in place yet, this diplomatic measure is encouraging.

In sum, Mexico has various laws at the individual state and federal levels (including international treaties) protecting pre-Columbian antiquities, but their enforcement is not sufficiently robust to prevent illicit trafficking. Various factors – lack of resources; insufficient coordination between public and private parties; the prevalence of organized crime; instability caused by the narcotics and weapons trades; and vast economic inequality – hamper the government's monitoring of vulnerable artefacts and contribute to these objects' illegal trade and export.⁶⁶ However, the main destination for pre-Columbian antiquities, the USA, has implemented statutory and judicial remedies that help compensate for the shortcomings at the source end of the supply chain.

USA

Mexico's earliest bilateral agreement, which is arguably one of its most significant, is with the USA. This bilateral agreement has been in place for 51 years and predates the implementation of the 1970 Convention in both countries. While Mexico is responsible for the prevention of antiquities trafficking as the country of origin of pre-Columbian objects, the USA – a country that accounts for the largest share of the global art market (44% as of 2020⁶⁷) and serves as the primary destination for

⁶² E. Becerril, op. cit., p. 273.

⁶³ Mexico. *Report on the Implementation...*, p. 4.

⁶⁴ Ibidem.

⁶⁵ S. Ayuso, *México y Francia firman una "declaración de intenciones" contra el tráfico de bienes culturales*, "El País", 1 July 2021, <https://elpais.com/mexico/2021-07-01/mexico-y-francia-firman-una-declaracion-de-intenciones-contra-el-trafico-de-bienes-culturales.html> [accessed: 05.09.2021].

⁶⁶ D. Yates, op. cit., p. 42.

⁶⁷ C. McAndrew, op. cit., p. 17.

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Mayan works⁶⁸ – is a key strategic partner to stem the trade of illicitly excavated, exported, and imported pre-Columbian antiquities from Mexico.

In 1970, both countries signed the Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties,⁶⁹ providing for bilateral control and mutual cooperation in this field. Pre-Columbian artifacts “of outstanding importance to the national patrimony” are covered in the treaty, but it has a narrow scope and possesses a number of limitations; i.e., it only applies to stolen property that is government-owned and the applicability of the definitions provided must be determined between the governments or an appointed panel of experts. A core flaw of the agreement is its focus on the recovery of stolen material rather than the prevention of illicit trafficking, and it fails to adequately address the difficulties in pursuing judicial remedies in a foreign jurisdiction.⁷⁰ Nevertheless it does provide a mechanism for each State to assist the other, upon request, in recovering stolen property falling under the treaty. This mechanism automatically triggers enforcement procedures in the State receiving the request, whose attorney general is authorized to institute a civil action in the appropriate court if the State is unable to recover and return the stolen object.⁷¹

Unfortunately, the treaty did not sufficiently protect pre-Columbian antiquities and their trafficking subsequently increased,⁷² requiring additional measures. A targeted law was quickly enacted to cover these types of antiquities. The 1972 Pre-Columbian Act⁷³ protects stone carvings, wall art, or fragments thereof that are the product of a pre-Columbian Indigenous culture, classified in a list prepared by the Secretary of the Treasury. Those imported into the USA without a valid export license from their country of origin are subject to seizure and forfeiture by customs agents, and shall be offered for return. Customs officers are the primary enforcers of this Act and its accompanying regulations, which have yielded effective results. For instance, in 2012 USA Immigrations and Customs Enforcement (ICE) returned over 4,000 stolen and looted pre-Columbian objects to Mexico.⁷⁴

Another important law is the 1983 Convention on Cultural Property Implementation Act (CPIA),⁷⁵ which implements the 1970 Convention in the USA. It covers items imported after the entry into force of the Convention or the CPIA (whichever is later) that have been stolen from a museum or similar institution.

⁶⁸ L.S. Potter, B. Zagaris, *op. cit.*, p. 634, note 29.

⁶⁹ 22 U.S.T. 494, T.I.A.S. No. 7088 (17 July 1970), ratified by the U.S. Senate on 10 February 1971.

⁷⁰ L.S. Potter, B. Zagaris, *op. cit.*, p. 639.

⁷¹ R.D. Phelps, *op. cit.*, pp. 793-794.

⁷² *Ibidem*, p. 796.

⁷³ Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals (Pre-Columbian) Act. Pub. L. No. 92-587 (1972), codified at 19 U.S.C. §2091-2095.

⁷⁴ R.D. Phelps, *op. cit.*, p. 797.

⁷⁵ Pub. L. 97-446, codified at 19 U.S.C. §2601-2613.

This however leaves items from private collections or archaeological sites, or those imported prior to these dates, exposed. Nonetheless, the CPIA grants the USA government the power to act unilaterally to protect archaeological or ethnological material when one of the following emergency conditions arises: (1) a newly-discovered type of material is important to the understanding of mankind and in jeopardy of pillage; (2) the object was found at a site of high cultural significance and is in jeopardy of crisis proportions; or (3) it is a part of the remains of a culture or civilization whose record is in jeopardy of crisis proportions.⁷⁶ This can certainly apply to pre-Columbian antiquities sent to the USA from Mexico in contravention of Mexico's patrimony laws, subject to the Act's other controls.

Since the USA only partially implemented Articles 7 and 9 of the 1970 Convention through the CPIA, additional domestic legislation and judicial precedent are required to fill in the gaps, such as the National Stolen Property Act (NSPA).⁷⁷ The NSPA prohibits the transportation in interstate or foreign commerce of any goods with a value of \$5,000 or more knowing that they were illegally obtained as well as the "fencing" of said goods. This law allows foreign patrimony legislation to be enforced in the USA by domestic courts, as long as ownership of the cultural property is conferred on the government of its country of origin. The first case to discuss this scenario was *US v. Hollinshead*,⁷⁸ where a dealer in pre-Columbian artifacts and his co-conspirators illegally excavated and attempted to sell a Mayan stela that had been documented in its original location in Guatemala. This documentation, in addition to Guatemala's patrimony law, was sufficient to prove the country's ownership of the stela and uphold the defendant's criminal conviction in the US under the NSPA. In *US v. McClain*,⁷⁹ the Fifth Circuit upheld the application of Mexico's patrimony law regarding the illegal exportation of cultural property. The court stated that a "declaration of national ownership is necessary before illegal exportation of an object can be considered theft, and the exported object considered 'stolen', within the definition of the NSPA".⁸⁰ Here, Mexico's national declaration of ownership over cultural property and its restriction on exportation were sufficient to trigger the NSPA. In other words, the court held (for the first time) that illegal export of cultural property can render its subsequent import into the USA illegal under domestic law.⁸¹

However, *Hollinshead* and *McClain* are exceptions to the norm. NSPA cases require the defendant to have constructive knowledge that the property in question has been stolen according to the source country's national law; for instance,

⁷⁶ CPIA §2603(a).

⁷⁷ 18 U.S.C. §2314 et seq. (2001).

⁷⁸ 495 F.2d 1154 (9th Cir. 1974).

⁷⁹ 545 F.2d 988 (1977) and 593 F.2d 658 (1979).

⁸⁰ 545 F.2d at 1000-1001.

⁸¹ L.S. Potter, B. Zagaris, op. cit., pp. 664-665.

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that it was illegally excavated. Therefore, claimant governments must demonstrate the trajectory of the relevant antiquity; i.e., when it left the country and when it entered the USA. This burden of proof can be difficult (if not impossible) to meet, as the circumstances surrounding the looting of antiquities are often ambiguous. Objects are not always recorded *in situ*, and illegally excavated items are often not documented at all. Patrimony laws must also be “clear and unambiguous” to be applied successfully. As a result, many source countries face a heightened evidentiary standard that may discourage them from pursuing litigation in USA courts, forcing them to rely on direct negotiations with private parties instead.⁸²

The Foreign Sovereign Immunities Act (FSIA)⁸³ can also aid third countries seeking the return of cultural property on USA soil. The FSIA grants States a presumption of immunity from litigation in USA courts unless one or more specific statutory exceptions apply. Its application to antiquities cases is a relatively recent phenomenon, but an ongoing one. In *Barnet v. Ministry of Culture & Sports of the Hellenic Republic*,⁸⁴ the Court for Appeals for the Second Circuit recognized that nationalizing and regulating the export of cultural property is a uniquely sovereign activity. Such acts confer immunity on foreign States regarding the enforcement of their patrimonial laws if they are sued in USA courts. This opens the door for countries to request the return of antiquities held by private parties in the USA without fearing expensive and protracted litigation. USA law enforcement officials may also act pursuant to state criminal law and intervene if they suspect an item consists of stolen property. The Manhattan District Attorney’s Office has a dedicated unit for art and antiquities trafficking and cooperates with foreign and international organizations, such as Interpol, to investigate potential cases of looted antiquities.⁸⁵

Finally, recent legislation enacted in the USA has the potential to cast a wider net on the illicit trafficking of antiquities. In 2020, a bipartisan Senate report indicated that Russian oligarchs had taken advantage of the art market – labelled as the “largest legal unregulated market” in the country – to evade sanctions and launder millions of dollars through the sale of fine art.⁸⁶ In response, the legislature approved legislation to extend the provisions in the Bank Secrecy Act to antiquities

⁸² J.E. Morrow, *The National Stolen Property Act and the Return of Stolen Cultural Property to its Rightful Foreign Owners*, “Boston College International and Comparative Law Review” 2007, Vol. 30, pp. 255-257.

⁸³ Pub. L. No. 94-583 (1976) codified at 28 U.S.C. §1602-1611.

⁸⁴ No. 19-271 (2d Cir. 2020).

⁸⁵ J. Daley, *Manhattan DA Launches First Antiquities Trafficking Unit*, “Smithsonian Magazine”, 22 December 2017, <https://www.smithsonianmag.com/smart-news/manhattan-da-launches-first-antiquities-trafficking-unit-180967607/> [accessed: 10.05.2021].

⁸⁶ US Senate, Permanent Subcommittee on Investigations, Staff Report, *The Art Industry and U.S. Policies that Undermine Sanctions*, 27 July 2020, <https://www.hsgac.senate.gov/imo/media/doc/2020-07-29%20PSI%20Staff%20Report%20-%20The%20Art%20Industry%20and%20U.S.%20Policies%20that%20Undermine%20Sanctions.pdf> [accessed: 11.05.2021].

dealers. As of January 2021, antiquities dealers are subject to customer due diligence and anti-money laundering reporting requirements, similar to the EU's Fifth Anti-Money Laundering Directive⁸⁷ and the UK's Money Laundering Regulations.⁸⁸ This is seen as a significant step for art market regulation in the USA, although it may disproportionately affect smaller businesses. Over the following year, the Financial Crimes Enforcement Network will carry out a study on the actual impact of money laundering in the art market to determine how the new law will operate and whether further regulations are necessary. Notably, the term "antiquities dealer" is yet to be defined.⁸⁹

Gaps and Remedies

Varying legal systems and concepts, a lack of consistent implementation, and uneven enforcement all contribute to the current fragmented landscape between Mexico and the USA, to the detriment of looted and smuggled pre-Columbian antiquities. Illicit antiquities trafficking continues to be an "enormously complex problem".⁹⁰ A report by the USA Federal Bureau of Investigation (FBI) noted that art crime flourishes due to the market's inherent peculiarities: "What other multi-million-dollar market so rarely leaves a paper trail of transactions, regularly hides commodities to avoid tax, and relies so heavily on the unscientific assurance of connoisseurs to determine authenticity and value?"⁹¹ The COVID-19 pandemic has placed additional stress on these legal fissures by causing an economic recession and leaving sites vulnerable to looters due to a lack of security personnel. The sharp rise in online trafficking groups during this time (including on the widely-used social media site Facebook) points to a "perfect storm" of looting, which is a worrisome pattern.⁹²

Concerning the illicit trafficking of pre-Columbian antiquities, the USA-Mexico border is a crucial point – both literally and figuratively. James A.R. Nafziger observed that

⁸⁷ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, OJ L 156, 19.06.2018, p. 43.

⁸⁸ The Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (SI 2019/1511).

⁸⁹ N. McGreevy, op. cit.

⁹⁰ L.V. Pratt, op. cit., p. 59.

⁹¹ Ibidem, p. 8, note 13.

⁹² C. Porterfield, *Smugglers Are Using Coronavirus Lockdowns To Loot Artifacts*, "Forbes", 30 April 2020, <https://www.forbes.com/sites/carlieporterfield/2020/04/30/smugglers-are-using-coronavirus-lockdowns-to-loom-artifacts/?sh=58e7ae4436bf> [accessed: 11.05.2021]; E. Sharpe, *Online Antiquities Smugglers Are Taking Advantage of the Coronavirus Crisis*, "The Art Newspaper", 29 April 2020, <https://www.theartnewspaper.com/news/increase-in-online-trade-of-illicit-antiquities-during-the-coronavirus-crisis> [accessed: 11.05.2021].

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[i]t is all too easy to smuggle cultural contraband into the United States. Hidden caches in cargo shipments, personal luggage and motor vehicles are not the only means. Blatant use of the mails, courier and parcel services, as well as laundering of items through third countries, are also common practices. One successful smuggler, Val Edwards [...] bragg[ed] that he had no problem hustling into this country some 1,000 museum-quality artworks from ancient burial sites in Mexico and Guatemala.⁹³

During his decade-long career as a purveyor of looted artifacts, Edwards posed as a businessman and his bags were only searched once. Tellingly, this search targeted drugs rather than cultural property, allowing him to continue to blatantly traffic items by claiming they were cheap reproductions.⁹⁴ While Edwards' activities took place 25 years ago, similar smuggling rings continue to operate today.

Multinational crime syndicates dealing in cultural property have succeeded by exploiting loopholes in existing national legislation and treaties, denoting the need for multilateral agreements and enforcement mechanisms that consider private and regional actors as well as national ones. Countries of origin and those of transit are two sides of the same coin, requiring legal frameworks that both apply to and transcend territorial boundaries:

Domestic legislation and judicial remedies are inadequate to stem the burgeoning international trade. National processes, by virtue of their status as institutions of limited authority, impact on only one facet of the illicit traffic. A market nation like the United States, acting singularly, only has an effect on the capture and return of property once it has already been illegally excavated and exported. A lesser-developed source nation, like Mexico, often does not independently possess the means to prevent the traffic.

Since both licit and illicit cultural goods often pass through the same channels on their way to purchasers, it is necessary to pay close attention to points of contact in both types of jurisdictions.⁹⁵ Thus, Mexico and the USA have a key role to play in the prevention, safeguarding, and return of pre-Columbian antiquities. Despite having domestic legislation in place at both ends of this transactional chain, the existing legal frameworks in these countries are inadequate to the task of combatting the illicit export and import of such objects. Furthermore, as countries with different legal systems who share a common border that facilitates the flow of illicit trade, "[t]he typical difficulties in retention of cultural property by a source nation and control of imports by a market nation are exacerbated".⁹⁶

⁹³ J.A.R. Nafziger, *Seizure and Forfeiture of Cultural Property by the United States*, "Jeffrey S. Moorad Sports Law Journal" 1998, Vol. 5, pp. 19-20.

⁹⁴ W. Honan, *Art for Whose Sake? Trading in Antiquities; Rare Pre-Columbian Relics, at Any Cost*, "The New York Times", 31 July 1995, <https://www.nytimes.com/1995/07/31/us/art-for-whose-sake-trading-in-antiquities-rare-pre-columbian-relics-at-any-cost.html> [accessed: 11.05.2021].

⁹⁵ S. Manacorda, *Criminal Law Protection of Cultural Heritage: An International Perspective*, in: S. Manacorda, D. Chappell (eds.), *Crime in the Art and Antiquities World: Illegal Trafficking in Cultural Property*, Springer Verlag, New York 2011, p. 21.

⁹⁶ L.S. Potter, B. Zagaris, op. cit., p. 629.

Efforts to create effective policy responses to illicit antiquities trafficking have been hindered by the lack of data and evidence as to the size of the market and the network structure of participants. Existing laws have also failed to account for geographically-dispersed and fragmented supply chains, as well as the opportunistic (rather than planned) nature of related criminal activity.⁹⁷ Furthermore:

Broad international measures that are meant to focus on the source-end of the illicit antiquities market are likely to do very little as the underlying problems that cause cultural property threats will remain. Small-scale targeted capacity building may help in limited contexts [...] but not the greater issues.⁹⁸

Yates suggests that a more effective method would be to target market countries, implement and enforce punitive measures, and develop soft control techniques such as increased oversight of donations and commending collectors and museums that willingly return pre-Columbian antiquities to their countries of origin.⁹⁹ This would help reduce demand for these objects, and correspondingly disincentivize looters and their facilitators.

Such initiatives are feasible for the USA, despite potential pushback from dealers and other participants in the art market sector. This proposed framework should complement the legal framework already established through the 1970 and 1995 Conventions, building upon existing domestic legislation, bilateral agreements, and shared histories of cooperation between the USA and Mexico. For instance, in March 2021, Homeland Security Investigations (HSI) returned 277 pre-Columbian artifacts to Mexican officials following two separate investigations that began in 2012 and 2013. In the first case, HSI special agents in Arizona were contacted regarding multiple pottery figures in the possession of the City of Chandler Museum. The museum director turned over 10 artifacts, which were identified as being over 1,500 years old and with a value of \$26,100-\$45,700. In the second case, customs agents contacted HSI after seizing 267 artifacts from Mexican citizens at the USA border. The items included ancient weapons, such as arrowheads, and small stone carvings. These were dated between 1,000 and 5,000 years old and valued at \$124,000. Both groups of antiquities were deemed of significant cultural value and repatriated to their country of origin in an official ceremony.¹⁰⁰ This successful operation demonstrates that it is not necessary to reinvent the wheel, but rather shift focus to strengthening current mechanisms and properly training law enforcement and customs officials to seize suspicious items.

⁹⁷ M. Sargent et al., op. cit., pp. xi-xiii.

⁹⁸ D. Yates, op. cit., p. 42.

⁹⁹ Ibidem.

¹⁰⁰ US Immigrations and Customs Enforcement, *HSI Arizona Returns Hundreds of Pre-Columbian Artifacts to Mexico*, "ICE Newsroom", 9 March 2021, <https://www.ice.gov/news/releases/hsi-arizona-returns-hundreds-pre-columbian-artifacts-mexico> [accessed: 11.05.2021].

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Another area for improvement is the application of punitive measures to those involved in the looting, smuggling, and illicit sale of pre-Columbian antiquities. International law has traditionally focused on protecting cultural property rather than criminalizing illicit activity related to it, resulting in continued theft and trafficking.¹⁰¹ Activities related to illicit antiquities trafficking are also rarely confined to the territory of a single country, leading to potential legal inconsistency, but at the same time this also provides an opportunity for the creation and enforcement of multiple offenses.¹⁰² In the absence of a uniform system of law, such as the 1995 Convention, countries should focus on their respective proven deterrents. As mentioned above, the USA has a criminal statute (the NSPA) that applies to cultural property considered stolen under foreign patrimony laws, which has been upheld through judicial precedent, and the Manhattan DA's Office continues to pursue trafficked antiquities. Mexico should avail itself of these remedies, and the USA should consider prosecuting these cases more aggressively and increasing the fines and penalties on responsible parties, including dealers and collectors.¹⁰³

The looting and trafficking of Mexican pre-Columbian artifacts also has implications for Indigenous rights, human rights, and the post-colonialist restitution discourse. The Mexican Constitution safeguards the rights of all citizens with regard to diverse forms of cultural heritage, including Indigenous groups.¹⁰⁴ Mexico also ratified the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, as well as the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights in 1996. These instruments recognize that free access to and enjoyment of culture in its diverse expressions is necessary for the healthy development of democratic societies. This is echoed by Prof. Francisco J. Dorantes Díaz, who indicates that access to culture is indispensable for quality of life and human dignity in Mexico.¹⁰⁵ Raising public awareness and educating individuals on the importance of cultural heritage, and the damage caused by its loss, is therefore paramount. When items are divorced from their historical and geographical context, they lose part of their inherent value. It is vital for marginalized groups, who could potentially benefit the most from having access to such objects, to be included in their protection.

¹⁰¹ A. Levine, *The Need for Uniform Legal Protection Against Cultural Property Theft: A Final Cry for the 1995 UNIDROIT Convention*, "Brooklyn Journal of International Law" 2011, Vol. 36, p. 757.

¹⁰² S. Manacorda, op. cit., p. 21.

¹⁰³ L. Amineddoleh, op. cit., pp. 238-239.

¹⁰⁴ Constitución Política de los Estados Unidos Mexicanos, Article 4.

¹⁰⁵ F.J. Dorantes Díaz, *Derecho a la cultura en México. Su constitucionalización, sus características, alcances y limitaciones*, "Alegatos", September-December 2013, No. 85, pp. 851-852, <https://www.corteidh.or.cr/tablas/r32205.pdf> [accessed: 10.09.2021].

Moreover, international organizations can provide support to national governments. In May 2021, Interpol announced the launch of a new app (ID-Art) to help identify stolen cultural property, reduce illicit trafficking, and increase the chances of recovering stolen works and artifacts. It provides real-time access to Interpol's Stolen Works of Art database, a global database containing certified police information on stolen and missing objects. The app is open to the public, including general users, and has the potential to aid national law enforcement bodies, many of whom have limited personnel and resources in the field of cultural property.¹⁰⁶ Both Mexican and USA authorities could use this app and encourage private citizens to do the same, thus increasing the likelihood of obtaining information related to pre-Columbian antiquities. Finally, Mexico should consider making its national cultural property register available to USA law enforcement, particularly customs agencies, in order to facilitate the identification and seizure of looted pre-Columbian antiquities before they enter the USA market. Although many illicitly trafficked pre-Columbian antiquities hail from undiscovered sites, and consequently are not in NIAH's register, this could help USA authorities identify the general types of objects they should flag at customs checks and marketplaces. Since all such items are covered by Mexico's patrimony law, their entry in the register is not a precondition for ownership and return.

By allocating more resources for heritage protection and education, the USA and Mexico will be able to recoup time and money spent on illicit trafficking investigations and prosecutions, while serving as an example of beneficial international cooperation in the field of pre-Columbian antiquities. This could spur additional bilateral agreements and collaborative law enforcement investigations with other Latin American countries specifically dealing with this type of cultural property. As countries continue to develop more advanced frameworks to deal with the ongoing challenges of cultural property protection and illicit trafficking, requesting and providing support at both the international and national levels is crucial. In order to properly address the illicit trafficking of pre-Columbian antiquities, the USA and Mexico must work together to strengthen existing mechanisms, pool available information and resources, and implement both legal and non-legal measures, such as educational campaigns on the significance of cultural property. Their shared and fruitful history of collaboration in this field indicates that there is a strong desire to protect pre-Columbian antiquities on both ends; it is simply a matter of taking additional complementary steps to ensure that legal remedies are effective and efficient.

As Yates aptly notes, the looting and illicit trafficking of such objects cannot be viewed in isolation,¹⁰⁷ but is rather a reflection of political, social, and economic challenges at the regional level, which intertwine in complex ways between different countries according to their particular relationships. A holistic approach would pro-

¹⁰⁶ Interpol, *INTERPOL Launches App to Better Protect Cultural Heritage*, "Interpol News", 6 May 2021, <https://www.interpol.int/en/News-and-Events/News/2021/INTERPOL-launches-app-to-better-protect-cultural-heritage> [accessed: 11.05.2021].

¹⁰⁷ D. Yates, *op. cit.*, p. 42.

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vide greater chances of success while minimizing the need for additional legislation, which can be time-consuming. Furthermore, given its status as a top market country and popular destination for pre-Columbian antiquities, the USA should take the lead in prosecuting those involved in imports and transactions concerning such goods. Not only would it set a good example for other market countries to follow, this would also comply with the core functions of the CPIA, NSPA, and the 1972 Pre-Columbian Act. Existing domestic laws on the import and export of cultural goods can supply a way forward, and cases applying these laws have already been prosecuted successfully in USA courts. In turn, Mexico should continue to pursue trafficked antiquities through both diplomatic and private channels to increase its chances of success. Mounting public pressure through the media, as in the case of the European auctions mentioned above, will send a message to other countries that patrimony laws should be respected. The ultimate goal is to ensure that pre-Columbian antiquities are adequately protected, no matter their origin or destination. A two-pronged approach between Mexico and the USA offers a greater opportunity for effective oversight.

Conclusion

It is widely recognized that cultural property, national identity, and social cohesion are linked.¹⁰⁸ Stemming the illicit trade in objects of cultural property is thus not an isolated concern, but rather a matter of global priority. While it is highly unlikely that the commodification of culture and the trade in cultural property, including pre-Columbian antiquities, can be undone completely,¹⁰⁹ it is also true that the looting of archaeological sites represents “an increasing loss to our knowledge and understanding of the past” and of different cultures.¹¹⁰ Although the USA and Mexico have made a valiant effort to stem the tide of illicit trafficking in pre-Columbian antiquities by complying with existing international legal frameworks, current legislation fails to account for real-life factors that abet the trade. As the illegal cultural property market has developed into a highly lucrative activity worldwide, supplied by antiquities pillaged from archaeological sites and exacerbated by the COVID-19 pandemic, the looting and destruction of pre-Columbian sites and artifacts has reached “crisis proportions”. Various factors – including the demand for these objects, the amount of items available, their portable size, and the lack of financial resources for Mexican law enforcement – have compounded the situation.¹¹¹

¹⁰⁸ The Preamble to the 1970 Convention “propounds the legal principle that cultural heritage belongs to humankind and involves the moral obligation of all nations to protect human cultural heritage”. A. Levine, *op. cit.*, p. 760.

¹⁰⁹ A. Bauer, *op. cit.*, p. 696.

¹¹⁰ P. Gerstenblith, *Implementation of the 1970 UNESCO Convention by the United States and Other Market Nations*, in: J. Anderson, H. Geismar (eds.), *The Routledge Companion to Cultural Property*, Routledge, Oxon-New York 2017, p. 71.

¹¹¹ L.S. Potter, B. Zagaris, *op. cit.*, p. 634.

Nonetheless, there is cause for optimism. The increased public awareness of the importance of provenance and due diligence in art market transactions has contributed to greater success in tracking down illicit antiquities, often with international cooperation. For example, in 2015 a German court convicted an antiquities dealer smuggling pre-Columbian antiquities after an investigation involving Mexican authorities.¹¹² This is a positive development that demonstrates the willingness of countries to assist each other in recovering objects and to criminalize acts related to looting and trafficking. Disincentivizing looting through education and awareness-raising campaigns about the importance of pre-Columbian cultural heritage is required, but so too is the need for more robust enforcement of existing legal remedies and targeted amendments to produce effective solutions. Not all countries have specific legislation in place protecting cultural property hailing from foreign States; in such instances, bilateral agreements and international conventions are crucial to bridge gaps.¹¹³ These agreements can also boost existing national legislation by widening its scope of application in foreign countries.

Enhanced protection through a holistic approach, including public engagement and a targeted application of existing legal and judicial remedies, will increase the chances of successful return and restitution of pre-Columbian antiquities. Taking advantage of current treaties and agreements, as well as recent developments in technology such as the Interpol app, will allow both Mexico and the USA to disrupt trafficking networks and ensure that this type of cultural property does not fall by the wayside.

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¹¹² S. Cascone, *Infamous Antiquities Dealer Convicted of Smuggling and Forgery*, "Artnet News", 9 December 2015, <https://news.artnet.com/art-world/antiquities-dealer-convicted-smuggling-forgery-389324> [accessed: 08.05.2021].

¹¹³ N. Brodie, C. Renfrew, op. cit., p. 347.

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