

**SIR, HOW MUCH IS THAT MING VASE IN THE WINDOW?:  
Protecting Cultural Relics in the People's Republic of China**

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- I. INTRODUCTION
- II. CULTURAL PROPERTY IN A SHRINKING WORLD
  - A. *What is Cultural Property?*
  - B. *The Global Black Market for Antiquities*
  - C. *Cultural Property in China*
  - D. *The Challenge of Protecting Chinese Cultural Property*
- III. THE INTERNATIONAL LEGAL REGIME TO PROTECT CULTURAL PROPERTY
  - A. *1970 UNESCO Convention*
  - B. *UNIDROIT Convention*
- IV. CHINA'S LEGAL REGIME FOR CULTURAL PROPERTY: KEEPING THE DRAGON IN THE BOX
  - A. *China's Regulation of Cultural Property*
  - B. *The 2002 Law Protecting Cultural Relics*
  - C. *The 1997 Criminal Law and Cultural Property*
- V. MAKING THE FUTURE SAFE FOR CHINA'S CULTURAL TREASURES
  - A. *Educational Programs*
  - B. *Incentive Programs*
  - C. *Reducing Government Regulation of the Legal Relics Market*
  - D. *State-Sponsored Auctions*
- VI. CONCLUSION

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## I. INTRODUCTION

An explosion rumbled through the hills of Hebei Province outside the village of Xiyanchuan in the summer of 1994. As the dust cleared, a dozen black-clad men emerged from behind boulders and used shovels and picks to clear a path through the rubble that was moments earlier the capstone covering the entrance to the tomb of Wang Chuzi, military governor for the region during the 10<sup>th</sup> century Fifth Dynasty. Climbing into the gaping hole, the men lowered themselves into the underground tunnel and entered Wang Chuzi's burial chamber adorned with intricately carved marble reliefs and vivid painted landscapes. The tomb robbers used chisels and crowbars to strip the walls of ten marble sculptures, causing irreparable damage to the remaining contents of Wang Chuzi's tomb and destroying invaluable archaeological objects in their haste to remove the priceless wall panels. The thieves then slipped out of the tomb carrying the wall friezes and disappeared into the shadows of the night, never to be apprehended.<sup>1</sup>

Five years later, in 1999, a prominent Hong Kong auction house listed a single marble wall relief for sale with Christie's in New York. Vigilant Chinese officials determined that the piece listed for sale was identical to one missing from Wang Chuzi's tomb. China sought the assistance of American officials to have the relief returned under the terms of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention").<sup>2</sup> The United States, complying with its obligations under the 1970 UNESCO Convention, brought a successful forfeiture action against Christie's, and the auction house eventually surrendered the frieze. The artwork was then

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<sup>1</sup> See Jane Levine, *Returning Stolen Cultural Property*, 25 CULTURAL RESOURCE MANAGEMENT 17 (2002), available at <http://crm.cr.nps.gov/archive/25-02/25-2-7.pdf> (last visited Jan. 29, 2003); see also *US Returns Seized Ancient Sculpture to China*, PEOPLE'S DAILY, May 24, 2001, available at [http://fpeng.peoplesdaily.com.cn/200105/24/eng20010524\\_70878.html](http://fpeng.peoplesdaily.com.cn/200105/24/eng20010524_70878.html) (last visited Oct. 21, 2003).

The recovered frieze from Wang Chuzi's tomb has not been the only instance of Sino-American cooperation on the repatriation of Chinese relics. In June 2003, the U.S. Department of Homeland Security recovered six terracotta warriors looted from a Han Dynasty tomb and smuggled out of China the previous year. American officials seized the figures after they were offered for sale in a Sotheby's auction catalog and returned them to China. See Hannah Beech, *Spirited Away*, TIME, Oct. 13, 2003 (Asia ed.), available at <http://www.time.com/time/asia/covers/501031020/story.html> (last visited Oct. 23, 2003); Xinhua News Agency, *US Returns Smuggled Terracotta Figures to China*, JUNE 18, 2003, available at <http://www.newsgd.com/culture/life/200306180012.htm> (last visited Oct. 22, 2003).

<sup>2</sup> See UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 232 [hereinafter "1970 UNESCO Convention"].

repatriated to the People's Republic of China in May 2001.<sup>3</sup> The looting of Wang Chuizi's tomb and the recovery of the marble relief embodies the great challenges that the Chinese government faces in dealing with the looting of cultural property and antiquities, and their subsequent sale in China and abroad. One of the lost sculptures from Wang Chuizi's tomb was recovered years after the theft, but at the price of knowing that the nine other missing reliefs may never resurface on the open market — they are likely gone forever.

Such examples illustrate that China's current legal regime for protecting the nation's cultural property is failing to preserve priceless antiquities and the archaeological heritage of the Chinese people. Without dramatic changes, China may risk losing a vast portion of its past. The purpose of this article is to probe two aspects of the problem. First, this article assesses international treaties and China's domestic laws that protect cultural property and their effectiveness in preventing the loss of Chinese antiquities and archaeological artifacts. Second, this article examines the weaknesses inherent in China's legal regime protecting cultural property and proposes modifications that will provide greater protection for China's cultural legacy.

Part II of this article describes the context surrounding the flow of cultural property out of China and into the hands of art and antiquities collectors around the world. This section focuses on the forces that drive the export of cultural property, the damage to ancient sites, and the losses to scholarship that occur as a result of the illicit removal of such property. Part III examines the implementation, compliance and effectiveness of various international agreements designed to stem the illegal cross-border flow of cultural property. Part IV addresses China's domestic legal regime in place for the preservation and protection of cultural property. This critical analysis reveals the inherent weaknesses of China's legal system, which, as a result, have failed to prevent the rise in the smuggling of antiquities and artifacts out of China. Part V proposes that China reduce the regulation of its domestic market for cultural relics and clarify the confusing and inconsistent elements of its legal regime protecting cultural property. Furthermore, China should institute educational and incentive programs, as well as state-sponsored

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<sup>3</sup> The United States initiated the forfeiture proceeding against the possessors of the marble frieze under the Convention on Cultural Property Implementation Act ("CPIA"), 19 U.S.C.A. §§ 2601-2613, which implements the United States' treaty obligations under the 1970 UNESCO Convention. See Press Release, United States Customs Service, "US Customs Service Returns Rare 10<sup>th</sup> Century Burial Sculpture to China," (May 23, 2001) available at <http://exchanges.state.gov/culprop/custpr3.html> (last visited Jan. 29, 2003); see also Levine, *supra* note 1, at 17-18; see generally Marilyn Phelan, *Public International Law: Cultural Property*, 32 INT'L LAW. 447 (1998) (discussing Greece's successful campaign for the return of looted Bronze Age Mycenaean objects under the CPIA in 1996).

and managed relic auctions, to preserve at-risk archaeological sites and relics.

## II. CULTURAL PROPERTY IN A SHRINKING WORLD

### A. *What is Cultural Property?*

“Cultural property” is necessarily a broad term, as it covers almost every item that has some sort of significance or value to individual humans or societies at large. As with “art” there is no one single accepted definition of what constitutes “cultural property.” However, for the purposes of this article, the term “cultural property” will be used to describe and apply to historical objects that have some scholarly value, historical meaning, or artistic merit. Synonyms for “cultural property” include “cultural patrimony,” “antiquities,” or “artifacts,” and “cultural relics,” the term the Chinese government favors. These terms can be used interchangeably.<sup>4</sup> In a seminal article on law and the international art trade, Professor Paul Bator succinctly defined cultural property as “all objects that are in fact prized and collected, whether they were originally designed to be useful, and whether or not they possess ‘scientific’ as well as aesthetic value.”<sup>5</sup> This article adopts Professor Bator’s definition of “cultural property.” Thus, a Ming Dynasty vase, a fossilized dinosaur egg, and the Great Wall of China constitute “cultural property,” although the latter is decidedly not portable.

The world’s nations are divided into two major categories with regards to cultural property. The first is the group of source nations that possess a rich cultural history and where the majority of collectible artifacts are found. This is a varied group – including China, Egypt, Iraq, Sub-Saharan Africa, and several Latin American nations, as well as Italy and Greece, among others. Many source nations are poorer states with weak central governments that lack the resources or the will to protect and preserve archaeological sites and relics. The second group is the market nations, consisting of countries that import the cultural property of other states. Although these states may have considerable cultural property of their own, collectors domiciled in them seek to obtain collectible cultural property from the source nations. Market nations include rich industrialized states such as the United States,

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<sup>4</sup> See n. 57 *infra* discussing the 1970 UNESCO Convention’s definition of “cultural property.”

<sup>5</sup> Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 285 (1982). This article was later reprinted as a monograph. See PAUL M. BATOR, *THE INTERNATIONAL TRADE IN ART* (1988). Further cites will refer to the 1988 text.

Canada, the United Kingdom, Germany, Japan, and Switzerland.<sup>6</sup> Collectors in those states have the resources to acquire cultural objects and antiquities from the source nations.

Collecting relics, according to Professor John Henry Merryman, “excite[s] a special emotion, give[s] perspective, awaken[s] the sleeping philosopher in us, [and] reduce[s] preoccupations of the busy present to a more appropriate scale.”<sup>7</sup> Because of the rarity and demand for cultural objects in market nations, a brisk international market for their sale and resale has emerged. But as with any class of regulated objects, a thriving global black market for stolen or illicitly obtained cultural property exists in the shadow of the legal market as collectors seek ever more impressive or aesthetically desirable specimens — often through any means necessary.

### B. *The Global Black Market for Antiquities*

The international black market for antiquities has burgeoned alongside economic globalization. In fact, the cross-border trade in illicitly obtained or stolen art and antiquities<sup>8</sup> follows only arms and narcotics in terms of dollar value.<sup>9</sup> Law enforcement agencies estimate that the global black market for illicit art and antiquities tops US\$ 6 billion each year.<sup>10</sup> This number is likely to increase in the future as

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<sup>6</sup> See Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385-86 (1995). A state may, however, be both a source state, and a market state.

<sup>7</sup> John Henry Merryman, *The Public Interest in Cultural Property*, 77 CALIF. L. REV. 339, 349 (1989).

<sup>8</sup> The cultural objects included in the illegal art and antiquities trade can be divided into two groups: those that were stolen from bona fide owners and those that are looted or excavated from a site where the artifacts were resting. See Kathleen Anderson, Note, *The International Theft and Illegal Export of Cultural Property*, 8 NEW ENG. INT’L & COMP. L. ANN. 411, 413 (2002); Michele Kunitz, Comment, *Switzerland and the International Trade in Art and Antiquities*, 21 NW. J. INT’L L. & BUS. 519, 525 (2001); Monique Olivier, Comment, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627, 630-33 (1996); Robin Hardy Villanueva, Note, *Free Trade and the Protection of Cultural Property: The Need for an Economic Incentive to Report Newly Discovered Antiquities*, 29 GW J. INT’LL. & ECON. 548 (1995).

<sup>9</sup> See Ian M. Goldrich, Comment, *Balancing the Need for Repatriation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Golden Phiale*, 23 FORDHAM INT’L L. J. 118, 118 (1999).

<sup>10</sup> See Kunitz, *supra* note 8, at 520. The international art market also provides an avenue for laundering money, particularly using “dirty” money to purchase illegally exported art in a nation, such as Switzerland, which has loose cultural property laws. *Id.*

more and more poor farmers and laborers in source nations recognize the market for such items and sell their cultural heritage to collectors in market nations. The looting of thousands of cultural objects and antiquities from the National Museum in Baghdad and other archaeological sites in Iraq during the recent United States-led occupation clearly illustrates the seductive allure of the black market for desperate populations or organized bands of thieves.<sup>11</sup> Professor Clemency Coggins describes the current situation in source states: “Archaeologically rich countries continue to be looted at an escalating rate. The ‘new’ ancient objects continue to be bought and sold in the antiquities market despite an array of international laws and agreements designed to stem the flow.”<sup>12</sup>

Unfortunately, the illegal trade in antiquities often results in the destruction of archaeological information and material. Many tomb looters use crude methods such as homemade dynamite or pick-axes that damage sites. This often leads to the destruction of important evidence about the daily life of ancient cultures as well as their religious and political practices.<sup>13</sup> Furthermore, vandalism of non-collectible cultural property is rampant as treasure seekers often destroy or damage items without any obvious value. Such objects, however, are often of great use to archaeologists. Professor Coggins elaborates on the archaeological harms of looting:

Once a site has been worked over by looters in order to remove a few saleable objects, the fragile fabric of its history is largely destroyed. Changes in soil color, the traces of ancient floors and fires, the imprint of vanished textiles and foodstuffs, the relation of one object to another, and the position of a skeleton – all of these sources of fugitive information are ignored and obliterated by archaeological looters.<sup>14</sup>

Additionally, the illegal looting and excavating of cultural property has caused great gaps in historical knowledge as falsified export papers often distort the provenance of cultural objects, making it easier for

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<sup>11</sup> See Brooks Barnes & Karen Mazurkewich, *Racing the Black Market*, WALL ST. J., April 16, 2003, at B1; see also Andrew Lawler, *Beyond the Looting*, NAT. GEOGRAPHIC, Oct. 2003.

<sup>12</sup> Clemency Coggins, *Ownership and Protection of Heritage: Cultural Property Rights in the 21<sup>st</sup> Century: Cultural Property and Ownership: Antiquities*, 16 CONN. J. INT’L L. 183, 184-85 (2001).

<sup>13</sup> See Beech, *supra* note 1.

<sup>14</sup> Clemency Coggins, *Archaeology and the Art Market*, 175 SCIENCE 263 (1972).

forgeries to flood the market.<sup>15</sup> Professor Bator summarizes the tension between the art market and archaeological interest, noting that “the workings of the market . . . sets a higher price on art masterpieces than on the acquisition of archaeological knowledge.”<sup>16</sup>

By imposing unrealistic and overly broad legal regimes to stem the flow of cultural property beyond their borders, source states are ultimately reinforcing the black market smuggling of relics. States that have attempted to nationalize all cultural property or impose unrealistic restrictions on ownership, sale, and export of antiquities have merely fostered the black market and encouraged smuggling of cultural property out of that state.<sup>17</sup>

### C. *Cultural Property in China*

China’s position in the world of cultural property is defined by its status as one of the most important source countries of historical artifacts.<sup>18</sup> Because Chinese civilization has existed for thousands of years and has a tradition rich in art, there are quite literally tens of millions of objects that qualify as cultural property in China. Professor Merryman states: “China, with its many centuries of high civilization and its vast area and large population, may be the richest source of cultural property of all.”<sup>19</sup> As one of the world’s last remaining repositories of large numbers of undiscovered cultural objects, China’s antiquities have become increasingly popular with foreign collectors, particularly with overseas collectors in diverse places as Canada, Singapore, Malaysia, and the United States.<sup>20</sup>

In addition to the large overseas market for Chinese cultural objects, China’s centuries-old domestic antiquities market has revived over the past two decades as China’s market economy reforms have taken hold. This should be no surprise as the tradition of antiquarianism dates back hundreds of years in China, reflecting the Confucian

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<sup>15</sup> Borodkin, *supra* note 6, at 383-84.

<sup>16</sup> Bator, *supra* note 5, at 26.

<sup>17</sup> *See id.* at 45.

<sup>18</sup> As China’s economy continues to grow at a rapid pace, China may become both a source and market nation. *See* J. David Murphy, *Hong Kong, 1997, and the International Movement of Antiquities*, 4 INT’L J. CULTURAL PROP. 241, 241 (1995).

<sup>19</sup> John Henry Merryman, *Foreword to J. DAVID MURPHY, PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE’S REPUBLIC OF CHINA*, at xiii, xiv (1995).

<sup>20</sup> *See* J. DAVID MURPHY, *PLUNDER AND PRESERVATION: CULTURAL PROPERTY LAW AND PRACTICE IN THE PEOPLE’S REPUBLIC OF CHINA* 51-53 (1995); *see also* Beech, *supra* note 1.

reverence of and respect for the past. Historian J. Alsop illustrates this point:

Antiques in astonishing variety were pursued as prizes by Chinese collectors during many centuries before Mao Zedong's revolution. Ancient bronzes had been taken from earliest times by tomb robbers for the value of their metal; but they began to be sought in another way – in fact, by antique collectors – in the Song Dynasty. . . . The Song Dynasty further produced a substantial body of antiquarian writing on the subject of ancient bronzes.<sup>21</sup>

Historian Rose Kerr also notes that “by the late 16<sup>th</sup> century when increased prosperity brought luxury goods and upper-class cultural tastes within the reach of a wider body of consumers, the possession and display of antiques and works of art was one of the indispensable pastimes of a gentleman.”<sup>22</sup> Today, a similar situation is occurring as China's market economy and economic growth has allowed an expanding segment of China's population to dabble in antiquarianism.<sup>23</sup> The Chinese mindset towards antiquities is quite different from that in the West, as China has a long history of emulation, reproduction, and “improvement” of antiquities and historical relics, dating to the Song Dynasty.<sup>24</sup> In fact, some Chinese museums today display ancient replicas of even older pieces of art.<sup>25</sup> Additionally, China has a centuries-old tradition of fabrication and forgery of antiquities and valuable texts.<sup>26</sup>

Beijing has realized the importance and value of such cultural objects and has sought to prevent their export through a legal regime designed to keep the most valuable cultural objects in the hands of the Chinese government (discussed *infra* in Part III). Maintaining its cultural property is important to China for historical, cultural, and

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<sup>21</sup> J. ALSOP, THE RARE ART TRADITIONS 249 (1982).

<sup>22</sup> ROSE KERR, CHINESE ART AND DESIGN 222 (1991).

<sup>23</sup> See MURPHY, *supra* note 20, at 28-30.

<sup>24</sup> See *id.* at 30-32. Archaeologists have discovered ancient workshops where even older artifacts were “improved” by encasing them in wax or removing the patinas on bronze objects so that they would appear “new.” *Id.*

<sup>25</sup> See *id.*

<sup>26</sup> See generally WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 9-29 (1995).



educational reasons, as well as economic ones.<sup>27</sup> Chinese officials have learned that well-preserved collections of artifacts and ancient art are lucrative tourist attractions that can provide revenue and jobs for their communities,<sup>28</sup> as China's State Council articulated in 2001.<sup>29</sup> The potential revenue from cultural tourism is so great that China has designated several politically sensitive locations as cultural heritage sites with the United Nations. For example, the Chinese government has listed the Potala, the Dalai Lama's former residence in Tibet, as a World Heritage Site with UNESCO, even though China considers the exiled Dalai Lama to be an enemy of the government.<sup>30</sup> Unfortunately, most tomb looters tend to have more individualistic goals and care little for the benefits that cultural property may bring their communities, particularly if they are from impoverished regions.

There is so much cultural property in China that it is an impossible task for the government to keep track of all of it, much less preserve the antiquities that have been turned over to the government. For instance, there are an estimated 400,000 archaeological sites in China, but only 70,000 of them have been recognized as such.<sup>31</sup> There are widespread reports of leaky, rodent-infested warehouses stuffed with ancient artifacts that are slowly being destroyed by the elements.<sup>32</sup> Local, county, and provincial governments, charged with administering certain sites and objects, lack the resources to provide guards to protect

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<sup>27</sup> See MURPHY, *supra* note 20, at 107. The Chinese government has adopted a position that cultural resource management should be designed to increase revenue through tourism and sales. See also Bator, *supra* note 5, at 27.

<sup>28</sup> Some Chinese provinces have designed promotional campaigns around their cultural treasures to attract tourists. For instance, Henan Province held the International Dinosaur Festival in Nanyang, where a rich bed of fossilized dinosaur eggs was discovered. See Xinhua News Agency, *Henan To Offer Ten New Tourist Programs*, Nov. 7, 1995, available at 1995 WL 7715862.

<sup>29</sup> See People's Republic of China, Decisions of the State Council on Rectifying and Standardizing Order in the Market Economy, April 27, 2001, State Council of the People's Republic of China, available at LEXIS PRCLEG 1822. ("We should further rectify the cultural and tourism market. . . . We will rectify the cultural relic market and standardize the operational order in the tourism industry.") *Id.* ch. 2(6).

<sup>30</sup> See Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183, 191 (2003).

<sup>31</sup> Of the 70,000 officially designated archaeological sites in China, the central government has taken responsibility for 1,269 sites; approximately 7,000 sites are protected at the provincial level; and an astounding 60,000 sites are the responsibility of county and local governments. See *New Actions for Cultural Relics This Year*, People's Daily Overseas Edition, Oct. 7, 2003, available at <http://www.chinacov.com/EN/displaynews.asp?id=99> (last visited Oct. 22, 2003).

<sup>32</sup> See MURPHY, *supra* note 20, at 64-65.

against grave robbers or to adequately preserve objects that have been turned over for safekeeping.<sup>33</sup>

D. *The Challenge of Protecting Chinese Cultural Property*

The task of preserving China's cultural heritage is one of massive magnitude considering the amount of culturally important objects and sites in China. The sheer number of objects and sites makes any sort of control or protection a daunting task. Tomb robbing is by far the most common source of illegal relics in China. Because of China's rich history, the landscape is littered with tombs from various eras—dating from 500 B.C. and earlier, up to the Qing dynasty. While tomb robbing and smuggling of cultural relics have been fixtures of China's past for centuries,<sup>34</sup> the Chinese Communist Party's rise to power in 1949 greatly curtailed the looting and smuggling of China's cultural patrimony, although many priceless relics were lost during the Cultural Revolution. As recently as 1983, Professor Bator noted that there was little or no cultural property leaving China, even illegally.<sup>35</sup>

Today, however, the situation has changed noticeably. Tomb robbing, particularly in the less economically developed inner provinces, provides many Chinese peasants with a way to supplement their meager incomes. These peasants often have no idea of the value of what they have excavated; they often consider the relics to be dusty junk.<sup>36</sup> These peasants, ignorant of the prices that such artifacts may bring at auctions in Hong Kong or New York, often sell relics to black market middlemen for a tiny fraction of the artifact's market value. But even receiving a relative pittance in comparison to an artifact's black market value can double or triple a subsistence farmer's annual income, all for a single night's labor.<sup>37</sup> This problem is only getting worse. China's State Bureau of Cultural Relics estimates that over 220,000 tombs have been robbed since 1998.<sup>38</sup> A troubling side effect of this looting is that the tomb robbers, like those that looted Wang Chuzi's tomb, often destroy invaluable archaeological data by plundering the tombs as quickly as possible and destroy priceless information in the process.<sup>39</sup>

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<sup>33</sup> See MURPHY, *supra* note 20, at 65-67.

<sup>34</sup> See *id.* at 54.

<sup>35</sup> See Bator, *supra* note 5, at 43.

<sup>36</sup> See Beech, *supra* note 1.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See MURPHY, *supra* note 20, at 52-53.

Tomb robbing is only part of the problem. The smuggling of illicitly obtained cultural property across China's borders has made Chinese relics available on the world market. In fact, antiquities are thought to be the most valuable single class of items smuggled out of China.<sup>40</sup> While Hong Kong is no longer the *entrepot* for smuggled antiquities that it was under British rule, both Hong Kong and Guangzhou remain the primary domestic destinations of contraband cultural property.<sup>41</sup> From there, the illegally removed antiquities and artifacts are smuggled on small aircraft, fishing boats, or other means to various other points, including Russia, the Philippines, Malaysia, and Singapore.<sup>42</sup>

Another emerging problem in protecting Chinese cultural property is the theft of relics and antiquities from state-owned museum collections.<sup>43</sup> The number of reported thefts has increased over 30 percent since the 1980s, and many more instances go unreported to authorities.<sup>44</sup> Thefts from institutions are up dramatically as security is often lax, inventories are incomplete, and museum workers are often poorly trained and underpaid, particularly in museums that local, county, or provincial governments fund.<sup>45</sup> Even if museum officials are not directly complicit in plots to steal artifacts or antiquities, they often turn a blind eye to the disappearance of less valuable cultural relics.

China's rapid economic growth in the mid-1990s has further imperiled Chinese cultural property. The most important factor is the rekindled interest in antiquarianism and collecting relics that sprang up with the economic liberalization of the last decade. This rise in demand has led to increased looting and smuggling, as well as the commodification of cultural property. In fact, "antique markets" appeared throughout China in the 1990s, particularly in the more prosperous coastal regions. One Chinese official has noted:

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<sup>40</sup> See, Murphy, *supra* note 18, at 242.

<sup>41</sup> See *id.* at 246-47.

<sup>42</sup> See *id.* at 242-43; see also Claudia Caruthers, Comment, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM L. & POL'Y 143, 160 (1998); see also Lee Siew Hua, *Saving Asia's Ancient Monuments*, STRAITS TIMES, Jan. 29, 1995, at 1. ("Singapore, which as a free port has no restrictions on the sale of stolen art pieces, is luring treasures from as far away as China...") *Id.*

<sup>43</sup> See *Security Chief Arrested for Cultural Relics Theft*, PEOPLE'S DAILY, June 19, 2003, available at [http://english.peopledaily.com.cn/200306/19/eng20030619\\_118545.html](http://english.peopledaily.com.cn/200306/19/eng20030619_118545.html) (last visited Oct. 22, 2003) (reporting the museum security chief was arrested for stealing 158 relics, several of which were classified as Grade One); see also Beech, *supra* note 1.

<sup>44</sup> See MURPHY, *supra* note 20, at 62.

<sup>45</sup> See *id.* at 64-67.

The appearance of markets in cities and villages and the appearance of . . . traders has provided a perfect opportunity for some people to make a fortune. They . . . trade in cultural relics under the guise of trading in crafts and become very rich. Hence, 'antique markets' of various scales have sprung up and are expanding in cities such as Beijing, Shanghai and Guangzhou.<sup>46</sup>

The increased prosperity brought by economic liberalization has revived the Chinese domestic market for artifacts and antiquities that had long been suppressed under Communist rule.<sup>47</sup> With the emergence of such a domestic market for relics in the prosperous coastal areas, subsistence farmers in the interior have started to supplement their meager incomes by searching for antiquities to sell to unscrupulous middlemen. As China's economy grows, the domestic demand for cultural objects will likely increase as collecting becomes more widespread.

Additionally, China's need for improved internal infrastructure—including transportation, housing, and power generation—has destroyed thousands of sites with cultural value and threatens many more. For instance, the massive Three Gorges Dam project alone has imperiled thousands of sites with archaeological importance. During construction of the dam, more than 2,500 tombs and five square kilometers of ruins were excavated; however, this is merely the tip of the iceberg as the Yangtze River valley has dozens of other unexcavated archaeological sites that will be submerged when the project is completed.<sup>48</sup>

In sum, the task of protecting cultural property in China is a herculean task of almost impossible magnitude. The sheer amount of cultural property in China is enormous. It is virtually impossible for the government to halt the illegal flow of cultural property out of – and within China. Because the international legal regime designed to protect cultural property is unlikely to be of much help, China must rely on its domestic laws to preserve its cultural heritage, as once objects have left Chinese territory, they are likely gone forever.<sup>49</sup> However, Chinese law is not yet capable of taking on this formidable task.<sup>50</sup>

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<sup>46</sup> See MURPHY, *supra* note 20, at 51, citing FAZHI RIBAO, *Strengthen Management of the Circulation of Cultural Relics*, Feb. 7, 1992, at 3.

<sup>47</sup> There has always been a trend toward antiquarianism in China, dating to ancient times. Because Confucian thinking held the past in reverence, it is only logical that the imperial Chinese amassed large collections of cultural objects from prior periods. However, Mao Zedong attempted to stamp out such collecting during the Cultural Revolution. See Alsop, *supra* note 21, at 249.

<sup>48</sup> See MURPHY, *supra* note 20, at 51; see also Martin Fackler, *China Races to Save History*, Associated Press, Jan. 20, 2002, available at <http://www.museum-security.org/02/016.html> (last visited Apr. 24, 2003).

<sup>49</sup> Discussed in Parts III.A & B *infra*.

### III. THE INTERNATIONAL LEGAL REGIME TO PROTECT CULTURAL PROPERTY

The international legal regime regulating the cross-border flow of cultural property remains weak, as a lack of consensus between source and market states has undermined efforts to create a single, enforceable regime. While the first international treaties on the treatment of cultural property dealt with the destruction and plundering of artwork and antiquities during times of war,<sup>51</sup> the modern international cultural property regime has attempted to stem the flow of cultural objects out of source nations. However, the two major international instruments designed to restrict the illegal flow of cultural property—the 1970 UNESCO Convention and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“UNIDROIT Convention”)<sup>52</sup>—have been less than successful in eliminating this illicit trade. Both treaties have provisions that are weak and difficult to enforce, and relatively few of the market nations, whose citizens are the major purchasers of illicitly obtained cultural property, are party to either convention, rendering them paper tigers without much actual effect.<sup>53</sup>

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<sup>50</sup> Discussed in Part IV *infra*.

<sup>51</sup> The practice of protecting cultural property during times of conflict emerged in ancient times. The unregulated aspect of warfare, however, made such a goal unrealistic, as cultural property was often treated as spoils of war. One only has to walk through the halls of the Louvre and observe the masterpieces Napoleon seized during his conquests to understand this principle (or the Elgin Marbles from the Athenian acropolis on display in the United Kingdom). Only in the mid-nineteenth century did legal codes for the protection of cultural property, including the Lieber Code formulated during the United States’ Civil War, first emerge. However, these codes were largely ineffective as the massive looting and plundering of cultural property during both World Wars underscored the need for a comprehensive code that would protect cultural property during time of conflict. The 1954 Hague Convention is the current international instrument, albeit a vague one, governing the destruction and plundering of cultural property during periods of armed conflict. *See* Goldrich, *supra* note 9, at 123-29, 133-34.

<sup>52</sup> *See* International Institute for the Unification of Private Law Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 (1995) [hereinafter “UNIDROIT Convention”].

<sup>53</sup> *See, e.g., Attorney-General of New Zealand v. Ortiz*, 3 W.L.R. 571 (1982) *aff’d* 2 W.L.R. 809 (1983) (U.K.) (New Zealand sought repatriation of illegally exported Maori panels under its cultural property export law; British appeals court held that exporter maintained title to panels because title did not vest in government of New Zealand until panels were seized; New Zealand never seized the panels.). *Cf. Republic of Ecuador v. Danusso* (Court of Appeals of Turin 593/82) (1982) (Italy) (Ecuador sought repatriation of illegally exported artifacts under its cultural property law; Italian

Thus, the weakness of the international legal regime on cultural property places an even greater burden on the source nations' domestic laws to regulate the excavation and export of culturally significant articles and specimens. Once cultural property leaves the source nation, the odds are slim that it will ever be returned.<sup>54</sup> In economic terms, the ineffectiveness of the international legal regime for cultural property is a result of the market states' inability, or lack of will, to (1) regulate collectors' desire for cultural property (a failure to regulate the "demand-side" of the equation), and (2) place pressure on source nations to develop enforceable domestic laws (regulating the "supply-side" of the equation). While the international demand for cultural property continues to rise, suppliers will attempt to meet that demand (so long as there are tombs to loot and artifacts to be excavated). Thus, an increase in demand for cultural objects puts pressure on domestic cultural property legal regimes. China is the archetypal example of how the lack of international consensus on and regulation of cultural property erodes the effectiveness of the domestic legal system's response to the problem.<sup>55</sup> Should the international legal regime become more effective in regulating the demand for cultural objects (as it may if more market states sign the 1970 UNESCO and UNIDROIT Conventions), then pressure on the domestic legal regimes will ease, as the demand for illicit cultural property declines.

#### A. 1970 UNESCO Convention

The 1970 UNESCO Convention was the world's first peacetime effort to regulate the illegal trafficking of cultural property, through the creation of a legalistic regime that puts obligations on market states to recover and repatriate illegally exported cultural property.<sup>56</sup> The Convention regulates the export of cultural property by allowing states to enter into reciprocal agreements to enforce each other's cultural property

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appeals court awarded title to Ecuador under Italy's domestic legislation enacting the provisions of the 1970 UNESCO Convention). In these almost identical cases, the difference in outcome can be explained as a result of Italy's decision to sign the UNESCO Convention- largely because of the large amount of cultural property located in Italy- and the United Kingdom's decision, at the time, not to sign the Convention.

<sup>54</sup> One expert estimates that the recovery rate for stolen art is approximately 12 percent. See Constance Lowell, *Art for America's Sake*, WALL ST. J., July 26, 1989, at A10.

<sup>55</sup> Discussed in Part IV *infra*. See LYNDELL V. PROTT & P. J. O'KEEFE, 3 LAW AND THE CULTURAL HERITAGE – MOVEMENT 621-29.

<sup>56</sup> See UNESCO's website for a list of states party to the 1970 UNESCO Convention at [http://www.unesco.org/culture/laws/1970/html\\_eng/page3.shtml](http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml) (last visited Apr. 21 2003).

laws.<sup>57</sup> Although the Convention defines “cultural property” broadly,<sup>58</sup> its provisions apply only to items, articles, or sites that member states designate in advance as “cultural property.” China, a signatory of the 1970 UNESCO Convention, has designated thousands of sites as “cultural property” under the Convention.<sup>59</sup> For instance, in the Beijing Municipality alone, there are more than 2,100 officially designated cultural property sites.<sup>60</sup> The 1970 UNESCO Convention has no enforcement mechanism, it merely requires party states to it to prevent illicit export or import when it is consistent with a given state’s domestic law.<sup>61</sup> After a long period in which interest in the 1970 UNESCO Convention was essentially dormant, several of the major market nations, including both the United Kingdom and Japan, signed and ratified the Convention in 2002.<sup>62</sup>

While the 1970 UNESCO Convention resulted in an aspirational goal to protect states’ cultural property, its implementation has been largely ineffective for several reasons. First, the Convention provides a relatively narrow scope of protection. If states do not specifically designate archaeological artifacts or sites as cultural property, they are left without protection under the Convention.<sup>63</sup> This means that cultural property from undesignated sites is not covered under the 1970

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<sup>57</sup> See 1970 UNESCO Convention, *supra* note 2, art. 13, at 244.

<sup>58</sup> See *id.* art. 1, at 234-36. The 1970 UNESCO Convention sets forth seven categories and four sub-categories of cultural property protected by the Convention’s provisions, so long as the property “is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science.” *Id.* at 234. The seven enumerated categories include: (1) specimens and collections of fauna, flora, and paleontology; (2) property relating to history; (3) products of archaeological excavations; (4) elements of artistic or historical monuments; (5) antiquities over 100 years old; (6) objects of ethnological interest; (7) property of artistic interest including paintings, pictures, sculptures, statuary, engravings, manuscripts, compilations of artistic merit, furniture, and musical instruments. *See id.*

<sup>59</sup> China signed the 1970 UNESCO Convention, but has never specifically enacted any domestic implementing legislation. Some elements of the Convention, however, have been enacted as part of the 1982 Cultural Relics Protection Law and the 2002 Law Protecting Cultural Relics. *See generally* LPCR, *infra* note 78.

<sup>60</sup> See People’s Republic of China, Plans for Protection of the Famous Historical Cultural Metropolis of Beijing, Beijing Municipality, art. 4.1.4, September 1, 2002, available at LEXIS PRCLEG 2460 [hereinafter “Beijing Plan”].

<sup>61</sup> See 1970 UNESCO Convention, *supra* note 2, arts. 4 & 13, at 240, 244.

<sup>62</sup> See UNESCO Calls for Universal Ratification of the 1970 Convention, Following the Example Set By Key Art Market Countries, September 9, 2002, available at <http://www.museum-security.org/02/109.html> (last visited Mar. 22 2003). The United Kingdom signed the 1970 UNESCO Convention in July 2002; Japan did so in October of the same year. Switzerland is considering signing the Convention. *See id.*

<sup>63</sup> See 1970 UNESCO Convention, *supra* note 2, art. 1, at 234-36.

UNESCO Convention and cannot be recovered under its provisions (states party to the Convention may designate an unexcavated site as cultural property).<sup>64</sup> Second, only a few of the major market nations—the United States, and recently, the United Kingdom and Japan—have joined the Convention, while most of the source states of cultural property have signed the Convention. Because other major market states including Germany and Switzerland are not party to the Convention, there is little chance for comprehensive enforcement.<sup>65</sup> Third, the 1970 UNESCO Convention places a remarkable burden on market nations, as it focuses exclusively on remedies, rather than preventative measures (a major reason why many of the major market nations never joined the Convention in the first place). The Convention’s remedy-based focus puts the enforcement costs on the market nations, which are, not surprisingly, unenthusiastic about bearing such costs.<sup>66</sup> It is unclear what effect the United Kingdom’s and Japan’s recent ratifications will have on the effectiveness of the 1970 UNESCO Convention, but so long as other major market states decline to join the regime, a market for illicitly obtained art and antiquities will continue to thrive.

#### B. *UNIDROIT Convention*

The drafters of the UNIDROIT Convention sought to rectify the shortcomings of the 1970 UNESCO Convention by applying the common law rule regarding stolen property to illegally obtained cultural property.<sup>67</sup> The UNIDROIT Convention addresses two areas not dealt with under the 1970 UNESCO Convention: disputes between original owners and good-faith purchasers, as well as the unauthorized cross-border removal of cultural property.<sup>68</sup> First, the UNIDROIT Convention treats *all* unlawfully excavated and lawfully excavated illegally obtained

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<sup>64</sup> China had designated Wang Chuzi’s tomb a “cultural property” site under the 1970 UNESCO Convention, even though it was unexcavated. Such designation allowed China to invoke the Convention when the missing marble frieze resurfaced in the United States (one of the few market states party to the 1970 UNESCO Convention).

<sup>65</sup> Illegally exported cultural property can be sold with impunity in nations that are not party to the 1970 UNESCO Convention. See Stephanie O. Forbes, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 *TRANSNAT’L LAW.* 235, 245 (1996) (criticizing market nations for not signing the 1970 UNESCO Convention).

<sup>66</sup> See Borodkin, *supra* note 6, at 388-89.

<sup>67</sup> See Phelan, *supra* note 3, at 448; Goldrich, *supra* note 9, at 140; Caruthers, *supra* note 42, at 149.

<sup>68</sup> See Goldrich, *supra* note 9, at 140-41.



artifacts, not just those registered or inventoried by a source nation,<sup>69</sup> as stolen property subject to return to the original owner.<sup>70</sup> The purchaser of the stolen property must return the property once the original owner files a successful claim in the courts of the nation in which the purchaser resides.<sup>71</sup> In essence, this imposes a diligence requirement on purchasers of cultural property in states that have ratified the UNIDROIT Convention to ensure the legal provenance of the objects they seek to acquire. As a further incentive for buyers to ensure that their purchases are legal, good-faith purchasers are eligible for compensation once the stolen property is returned to its original owner; those purchasers that do not make a good faith effort to prove the legality of their purchase, on the other hand, are not entitled to any recompense.<sup>72</sup> Second, the UNIDROIT Convention requires repatriation of stolen cultural property, no matter if the state of the possessor has domestic legislation to prevent the importation of illegally exported cultural property (a major weakness of the 1970 UNESCO Convention).<sup>73</sup> Additionally, the UNIDROIT Convention provides an arbitration option for the recovery of stolen or illegally exported cultural objects, in addition to the legal options provided under the Convention.<sup>74</sup>

While the UNIDROIT Convention is a marked improvement over the 1970 UNESCO Convention and has been more effective in providing for the repatriation of illegally obtained cultural property, it has not been ratified by enough market states to make it an effective means by which a source state, such as China (which has acceded to the UNIDROIT Convention), can reclaim illegally exported antiquities and cultural relics.<sup>75</sup> As long as the major market nations refuse to ratify the

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<sup>69</sup> See Villanueva, *supra* note 8, at 574.

<sup>70</sup> The original owner is often the government of the state where the artifact was discovered as many source nations have legislatively nationalized all undiscovered cultural property. Such is the case with China, as the National People's Congress has passed several laws stating that all unexcavated cultural relics are the property of the national government. See Phelan, *supra* note 3, at 448.

<sup>71</sup> See UNIDROIT Convention, *supra* note 52, art. 6(1), 34 I.L.M. at 1332.

<sup>72</sup> See *id.* arts. 4 & 6, 34 I.L.M. at 1332-33.

<sup>73</sup> See *id.* art. 5, 34 I.L.M. at 1332-33.

<sup>74</sup> See *id.* art. 8(2), 34 I.L.M. 1333; Folarin Shyllon, *The Recovery of Cultural Objects by African States Through the UNESCO and UNIDROIT Conventions and the Role of Arbitration*, 5 REVUE DE DROIT UNIFORME 219, 225 (2000).

<sup>75</sup> The UNIDROIT Convention has been ratified by Lithuania, Paraguay, Romania, Hungary, Peru, Bolivia, Italy, Croatia, Finland, Cambodia, and Portugal. It has been acceded to by China, Ecuador, Brazil, El Salvador, Argentina, Norway, and Spain. None of the major cultural property market states have ratified or acceded to the UNIDROIT Convention, making the treaty largely ineffective. See Status Report:

UNIDROIT Convention, there is little hope that the Convention's provisions will significantly impact the cross-border flow of illegally obtained cultural objects.<sup>76</sup> If a critical mass of market states were to adopt the UNIDROIT Convention, it would serve as a strong foundation on which an effective international legal regime for cultural property could be built. Until that time, it merely represents a set of worthy aspirational legal norms with little practical value. Thus, the primary burden of protecting cultural property falls on the source states and their domestic legislation because the international conventions are of little consequence in preventing the cross-border cultural property trade.

#### IV. CHINA'S LEGAL REGIME FOR CULTURAL PROPERTY: KEEPING THE DRAGON IN THE BOX

The Chinese government has constructed a domestic legal regime that regulates the possession and ownership of archaeological artifacts or relics in order to protect its rich cultural heritage. Unfortunately, this cultural property regime, like the 1970 UNESCO and UNIDROIT Conventions,<sup>77</sup> has proven to be largely ineffective. This is evidenced by the steady flow of illegally exported or illicitly obtained Chinese artifacts appearing on the international art market. China's legal regime for cultural property is primarily based on two major laws, the 2002 Revised Law on the Protection of Cultural Relics ("2002 LPCR")<sup>78</sup> and the 1997 Criminal Law,<sup>79</sup> which mandate strict regulation of any discovered

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UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Opened to Signature on 24.VI.1995 available at <http://www.unidroit.org/english/implement/i-95.htm> (last visited Feb. 26, 2003); see also Phelan, *supra* note 3, at 448 (discussing the need for a critical mass of market states to ratify the UNIDROIT Convention in order for it to be effective).

<sup>76</sup> See *id.*

<sup>77</sup> There are reports that China has attempted to negotiate a bilateral agreement with the United States for the return of cultural property. However, as of this time, no agreement has been made public. See Meg Maggio, *China and US Drafting Anti-Smuggling Agreement*, THE ART NEWSPAPER, available at <http://www.theartnewspaper.com/news/article.asp?idart=3715> (last visited Oct. 22 2003).

<sup>78</sup> See PEOPLE'S REPUBLIC OF CHINA, LAW ON THE PROTECTION OF CULTURAL RELICS (adopted at the 30<sup>th</sup> Meeting of the Standing Committee of the 9<sup>th</sup> National People's Congress, Oct. 28, 2002), available at LEXIS PRCLEG 2506 [hereinafter "2002 LPCR"].

<sup>79</sup> See PEOPLE'S REPUBLIC OF CHINA, CRIMINAL LAW (adopted at the 5<sup>th</sup> session of the 8<sup>th</sup> National People's Congress, Mar. 14, 1997) [hereinafter "1997 CRIMINAL LAW"].

cultural relics, as well as harsh punishments for failure to comply with such regulations. On one hand, these efforts to reform China's flawed system for regulating its cultural property are a step in the right direction; however, on the other hand, they perpetuate the extant system's already entrenched flaws and shortcomings.

A. *China's Regulation of Cultural Property*

China, like many other source nations, has taken steps to regulate the cultural property<sup>80</sup> existing within its borders through (1) the nationalization of all cultural artifacts, relics, and antiquities found within its borders and (2) the regulation of privately-held relics. The basis for China's cultural property legislation can be found in its 1982 Constitution. Article 22 of the Constitution provides that it is the state's responsibility to protect "important items of China's historical and cultural heritage."<sup>81</sup> Despite this grant of power to the central government for regulating cultural property, many provinces, autonomous regions, and local governments have taken it upon themselves to pass their own cultural property policies, which often conflict with those that the Ministry of Culture and the State Bureau of Cultural Relics promulgate.<sup>82</sup> For instance, when the Municipality of Beijing issued a plan for protecting cultural property and relics within the municipality's borders in September 2002, it included a provision for protection of "ancient and famous trees" as cultural relics per the 1982

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<sup>80</sup> It is important to note that the Chinese government uses the term "cultural relic" to refer to all types of cultural property, not just certain antiquities.

<sup>81</sup> PEOPLE'S REPUBLIC OF CHINA, CONSTITUTION, ch. 1, art. 22 (1982). In addition, Article 119 of the Constitution grants the governments of autonomous regions the power to "independently administer their own cultural affairs."

<sup>82</sup> Article 8 of the 2002 LPCR sets forth the system of governmental accountability for various cultural relics:

Local People's Governments at various levels shall be responsible for the work of protecting cultural relics in their respective administrative jurisdictions. The departments of local People's Governments at and above the county level that undertake the protection of cultural relics shall supervise and administer cultural relics protection within their respective administrative jurisdictions.

2002 LPCR, art. 8, *supra* note 78; *see also* PEOPLE'S REPUBLIC OF CHINA, RULES FOR THE IMPLEMENTATION OF THE CULTURAL RELICS PROTECTION LAW, art. 8, April 30, 1992 *available at* LEXIS PRCLEG 697 [hereinafter "1992 RULES"]. The vagueness of this language and the difficulty in ascertaining which level of government has administrative jurisdiction over any particular cultural relic and the level of protection required is readily apparent. *See* Anne Carlisle Schmidt, *The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action*, 23 B.C. INT'L & COMP. L. REV. 185, 199-200 (2000).

Cultural Relics Protection Law (“1982 CRPL”).<sup>83</sup> But neither the 1982 CRPL nor the 2002 LPCR provide for the protection of trees—living or dead.<sup>84</sup> This is but one example of the many inconsistencies in the administration of China’s legal regime to protect cultural property. In addition, the recent promulgation of the 2002 LPCR does not clarify such ambiguities and fails to remedy the flaws in the regime.<sup>85</sup> Chinese legal commentator, Jin Zitong, has critiqued the multitude of conflicting Chinese cultural property laws. Jin notes that there exists “a large number of relevant laws and regulations, the ill-organized legal system, and the lack of coordination between the relevant legal provisions.”<sup>86</sup> The 2002 LPCR addresses, but does not solve, these fundamental problems. For example, one issue that remains unresolved is which governmental level—local, county, provincial, or central—has primary jurisdiction over any particular cultural relic or archaeological site. Currently, jurisdiction is decided based on the rarity and value of the relic or site, which leaves a haze of uncertainty as to which authority shall be responsible for the initial protection prior to a final determination.

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<sup>83</sup> See Beijing Plan, *supra* note 60, art. 16. It should be noted that the Beijing Municipality plan was announced in early-September 2002, before the passage of the 2002 LPCR in October. Thus, the 1982 CRPL was the governing law at the time the Beijing Municipality plan was promulgated. In any case, the 2002 LPCR does not provide for the protection of trees as cultural relics either. See PEOPLE’S REPUBLIC OF CHINA, CULTURAL RELICS PROTECTION LAW (adopted at the 25<sup>th</sup> Meeting of the Standing Committee of the 5<sup>th</sup> National People’s Congress, Nov. 19, 1982) in THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA 1979-1982 313 (1982) [hereinafter “1982 CRPL”].

<sup>84</sup> The only category of protected cultural relic that trees might possibly fall into under the 2002 LPCR would be “important historical sites.” However, the explanatory notes in the 2002 LPCR suggest that such sites should be buildings or be other physical objects related to major historical events. It is unlikely that a tree will qualify as such a site merely because it is several hundred years old. See 2002 LPCR, *supra* note 78, art. 2(2).

<sup>85</sup> See J. David Murphy, *An Annotated Chronological Index of People’s Republic of China Statutory and Other Materials Relating to Cultural Property*, 3 INT’L J. CULTURAL PROP. 159 (1994). Murphy has compiled a comprehensive list of Chinese rules, regulations, laws, circulars, announcements, and administrative measures by various local, county, and provincial governments, as well as the national government dating from 1930 through 1993.

<sup>86</sup> MURPHY, *supra* note 20, at 110-11.

B. *The 2002 Law Protecting Cultural Relics*<sup>87</sup>

In late October 2002, after considerable debate, the Standing Committee of the National People's Congress passed the 2002 LPCR,<sup>88</sup> which replaced the 1982 CRPL.<sup>89</sup> Although the 2002 LPCR and the 1982 CRPL are similar in several ways, there are significant differences between the two, particularly with regards to the alienability of cultural relics and individual ownership of such relics. Because the 2002 LPCR was passed less than two years ago, it is unclear what sort of impact, if any, it will have on China's domestic antiquities market and on stemming the flow of illegally obtained cultural objects out of China. Upon careful analysis, it appears that the 2002 LPCR will likely result in some increased preservation of cultural objects because it permits the private ownership and collection of cultural relics. However, the LPCR will not effectively reduce the illicit trade of Chinese antiquities because the law does create enough incentives for individuals to turn discovered

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<sup>87</sup> For the sake of clarity, this article will discuss the 2002 LPCR as a different piece of legislation from the 1982 CRPL because there are substantive differences between them, although technically, the 2002 LPCR is a revision of the 1982 CRPL.

<sup>88</sup> Beginning in early 2002, the 27<sup>th</sup> session of the Standing Committee of the 9<sup>th</sup> National People's Congress reviewed draft legislation ending the 1982 CRPL's ban on cultural property transactions between private parties. Citing the fact that private collecting is an alternative for state protection cultural objects, Zhou Keyu, Vice-Director of the NPC's Law Committee, introduced the proposed legislation which would eventually become the 2002 LPCR. One of the primary justifications for the 2002 LPCR was articulated by legislator Xie Youqing. "Private transaction of cultural property will help collect those treasures that have been drained" and ease the burden on the state in preserving such objects. *See Chinese Lawmakers Fiercely Debated Whether the Country Should Open Its Cultural Property Market to Private Collectors*, May 8, 2002, available at <http://www.museum-security.org/02/058.html#4> (last visited June 11, 2004).

<sup>89</sup> The 2002 LPCR is largely based upon the legal regime for protecting cultural property that the 1982 CRPL created. The 1982 CRPL, in essence, nationalized almost all cultural property in China, with the exception of relics already held by private individuals (although they were often pressured to sell or "donate" such relics to state-owned museums or institutions). *See* 1982 CRPL, *supra* note 83. The 1982 CRPL set forth a relatively broad definition of "cultural relics" including antiquities, fossils, art, and buildings of historical value, as well as "all cultural relics remaining underground." *Id.* arts. 1-6. Any relics owned by private individuals were protected by the central government. The owners of such objects are strictly regulated by the state and are not allowed to exploit the cultural property in their possession without prior permission from the government. Article 7 of the 1982 CRPL reads that "Cultural relics . . . shall be designated as sites to be protected for their historical and cultural value at different levels according to their historical, artistic, or scientific value." *Id.* art. 7. The CRPL delegated the authority to protect the most valuable relics to the central government while provincial and local governments were charged with protecting lower value relics. *See id.* A similar system, discussed *infra*, exists under the 2002 LPCR.

relics over to the state. The LPCR also continues the jurisdictional and definitional flaws of the 1982 CRPL, rather than remedy them. Finally, the 2002 LPCR fails to promote education or provide sufficient funding to preserve China's cultural legacy. Thus, rather than correct the errant policies for managing China's cultural resources embodied in the 1982 CRPL, the 2002 LPCR merely perpetuates those very policies.

The most significant difference between the 2002 LPCR and the 1982 CRPL is the legalization of private transactions involving cultural relics. Previously, such transactions had been prohibited.<sup>90</sup> Now, Article 50 of the 2002 LPCR permits "citizens, legal persons, and other organizations" to collect cultural relics obtained through any of the following methods: (1) legal inheritance or gift; (2) purchase from cultural relics shops; (3) purchase from cultural relics auction enterprises; (4) exchanges or transfers between individual citizens pursuant to law; and (5) other methods authorized by the central government.<sup>91</sup> The Chinese government, however, has prohibited private transactions involving state-owned relics (including newly discovered relics or artifacts excavated within China's borders), non-state-owned relics in institutional collections, and murals, sculptures and other structural components included in any state-owned immovable cultural relics.<sup>92</sup> A Chinese government official must examine and certify any cultural relics sold in cultural relic shops or through auction enterprises.<sup>93</sup> Per Article 56 of the 2002 LPCR, cultural relics sold through relic shops or up for auction must be examined by the provincial government and a report including the seller and purchaser be sent to the State Bureau of Cultural Relics.<sup>94</sup> If the provincial government cannot determine if a relic is eligible for sale, it must refer the matter to the State Bureau of Cultural Relics for inspection and certification.<sup>95</sup>

Another major change embodied in the 2002 LPCR, is the establishment of officially sanctioned cultural relics shops and auction

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<sup>90</sup> See MURPHY, *supra* note 20, at 93-94.

<sup>91</sup> See 2002 LPCR, *supra* note 78, art. 50.

<sup>92</sup> See *id.* art. 51.

<sup>93</sup> See *id.* arts. 56 & 58.

<sup>94</sup> Auction houses that are involved in the sale of cultural relics are also subject to the requirements of the 1996 Auction Law which requires that "auction enterprise[s] engaged in the auction of cultural relics shall have a registered capital of RMB 10 million or more and employees equipped with the professional knowledge about the auction of cultural relics." PEOPLE'S REPUBLIC OF CHINA, AUCTION LAW (adopted at the 20<sup>th</sup> Meeting of the Standing Committee of the 8<sup>th</sup> National People's Congress, July 5, 1996) art. 13, *available at* LEXIS PRCLEG 525.

<sup>95</sup> See 2002 LPCR, *supra* note 78, art. 56.

enterprises, which merely authorizes the extant, formerly illicit, trade in cultural relics and antiquities that sprang up over the past 15 years.<sup>96</sup> Interestingly, the 2002 LPCR bans cultural relic shops from running auction enterprises and vice versa.<sup>97</sup> Most importantly, however, Article 58 of the 2002 LPCR permits the government to buy any cultural relic submitted for the mandatory inspection before sale pursuant to Article 56,<sup>98</sup> and “[t]he purchase price shall be determined by the representative of the cultural relics collection entity [government institution] and the trustor of the cultural relics through negotiation.”<sup>99</sup> There are further provisions in the 2002 LPCR requiring the relic shops and auction enterprises to keep records on who purchases each cultural relic.<sup>100</sup>

While the 2002 LPCR is a significant departure from the earlier Chinese mindset that all cultural property belongs to the state, it recognizes the prevailing reality that China has a burgeoning market for cultural relics. Yet, even this revised system for tracking cultural property will not remedy the illicit trade in relics and antiquities. One reason is that the right of first refusal for purchase of any or all cultural relics sold by the relic shops or auction enterprises at a price negotiated between the government and the individual. It is unlikely that the government will offer the owner of the cultural property the full market value for the article. This is particularly true when government officials set the compensation. Furthermore, the recordation provision is problematic because many buyers and sellers seek anonymity in cultural property transactions. Thus, the black market trade for such objects will likely remain vibrant as an alternative to the state-sanctioned system for selling cultural relics.

To place the 2002 LPCR in context, one must also understand the Chinese government’s long-standing practice to grade cultural relics. The indeterminacy of the grading system reveals the difficulties faced in fixing China’s legal regime to protect cultural property.<sup>101</sup> The State Bureau of Cultural Relics has long adhered to a classification system that divides cultural relics into two categories—“precious” and “ordinary”—in conjunction with China’s various laws protecting cultural relics. “Precious” relics are further subdivided into three different grades

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<sup>96</sup> See MURPHY, *supra* note 20, at 51.

<sup>97</sup> See 2002 LPCR, *supra* note 78, arts. 53-54. The 2002 LPCR also prohibits Chinese-foreign joint venture entities from establishing cultural relic shops or auction enterprises. See *id.* art. 55.

<sup>98</sup> See *id.* art. 58.

<sup>99</sup> *Id.*

<sup>100</sup> See *id.* art. 57.

<sup>101</sup> See 2002 LPCR, *supra* note 78, art. 3.

(which are used mainly for determining penalties for illicit smuggling or theft of such cultural relics). Grade One “precious” relics are those that are “especially important for historical, artistic, and scientific values.”<sup>102</sup> “Precious” relics that fall under Grade Two are those that have “important” cultural value.<sup>103</sup> Grade Three covers “relatively important” and “precious” relics.<sup>104</sup> Lastly, “ordinary” relics are those that have “certain historical, artistic and scientific value.”<sup>105</sup> Prior to 2001, these vague categories were of little use because it was impossible to differentiate between relics that were “especially important,” “important,” or “relatively important,” and whether the relic in question had “certain historical, artistic, or scientific value.”<sup>106</sup> Curators and art dealers found it impossible to predict in which category any one relic may be classified. A Hong Kong museum curator tersely stated the problem and its consequences: “It is Grade One because the State Bureau of Cultural Relics says it is.”<sup>107</sup>

However, in April 2001, the Ministry of Culture issued a new set of relic grading criteria. Although the basic criteria for categorizing the cultural relics are as vague as similar prior promulgations, this most recent articulation contained an appendix that sets out specific rules for what constitutes a Grade One “precious” relic for various categories including jade ware, stone artifacts, pottery, and chinaware, among others.<sup>108</sup> For instance, weapons that “represent the ordinance level of a historical phase in the history of weapon development; those used in important battles or important events; weapons used by famous persons through the ages” may qualify as Grade One cultural relics.<sup>109</sup>

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<sup>102</sup> People’s Republic of China, Rating Standards for Cultural Relics Collections, art. 1, Order of the Ministry of Culture of the People’s Republic of China, Apr. 5, 2001, art. 1, available at LEXIS PRCLEG 1829 [hereinafter “2001 Rating Standards”]; see also 1992 RULES, *supra* note 82.

<sup>103</sup> See 2001 Rating Standards, *supra* note 102, art. 2.

<sup>104</sup> *Id.* art. 3.

<sup>105</sup> *Id.* art. 4.

<sup>106</sup> See 1992 RULES, *supra* note 82, art. 2; see also Schmidt, *supra* note 82.

<sup>107</sup> See MURPHY, *supra* note 20, at 86.

<sup>108</sup> Other categories examined included bronze ware, ironware, gold and silver ware, lacquers, sculptures, carved stones and tiles, calligraphies and paintings, ink-slabs, bones and tortoise shells, seals and chops, coins, ivory and bone ware, woodcarvings, furniture, enamels, fabrics and embroideries, books, weapons, documents, and legacies of famous persons. See 2001 Rating Standards, *supra* note 102, art. 6.

<sup>109</sup> *Id.* art. 6(22).



Unfortunately, the 2001 regulations set forth criteria only for Grade One relics, which still leaves the grading of Grades Two and Three “precious” relics open to subjective interpretation.<sup>110</sup> Additionally, the 2001 regulations do not clearly define the differences between “ordinary” and “precious” relics. Even though these standards and examples are more specific and may aid in the categorization of some relics, it is difficult to effectively deal with non-fungible objects like antiquities by applying subjective criteria. It is likely that the vagaries of a system based on categorization of relics will continue to plague Chinese efforts to preserve its cultural heritage because of the inherent difficulties associated with classifying unique items. The 2002 LPCR does not further clarify the system of grading, but instead reaffirms the primacy of the extant relic classification system.

The 2002 LPCR also perpetuates the multi-tiered system of administration and care for cultural relics originally set forth in the 1982 CRPL. The classification of cultural relics under the grading system determines which level of government is responsible for the administration and preservation of those relics. The central government protects only the most valuable “precious” relics leaving the remaining relics for local, county, and provincial governments, which are required to preserve and ensure the safety of the lower grade relics in their possession.<sup>111</sup> The 2002 LPCR affords the lower level governmental entities wide latitude in balancing preservation of relics and economic development;<sup>112</sup> the responsibilities of preserving cultural relics placed upon local, county, and provincial governments, which often strain their already limited resources. An additional problem is which level of government has the responsibility of protecting cultural relics and archaeological sites before a determination is made as to categorization of the relics contained therein. Even if such governments had the inclination and the resources to protect cultural relics, the sheer magnitude of the task makes completion near impossible. Foreign researchers have gone to numerous local, county, and provincial museums throughout China and found plundered displays or leaky warehouses crammed with relics that the central government chose not to protect. Instead the local governmental bodies left such relics to the

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<sup>110</sup> See *id.* art. 6(26) (“Examples of the rating standards for second-class [Grade Two] and third-class [Grade Three] cultural relics may be analogized according to the examples of the rating standards for first-class [Grade One] cultural relics.”).

<sup>111</sup> See 1992 RULES, *supra* note 82, arts. 8-10.

<sup>112</sup> See 2002 LPCR, *supra* note 78, art. 9 (“The People’s Governments at various levels shall stress the protection of cultural relics, properly handle the relationship between economic construction, social development, and cultural relics protection, and ensure the safety of cultural relics.”).

local and provincial governments for safekeeping.<sup>113</sup> The 2002 LPCR perpetuates this burdensome system by leaving it in place.<sup>114</sup> Although provisions of the 2002 LPCR require that the income earned from publicly-owned cultural sites and museums be used solely for preserving cultural relics (and not misappropriated for other purposes), they include only vague language hinting at a future increase in budgetary allocations for cultural property protection, and only if the central government's revenue increases—an uncertain proposition.<sup>115</sup> The 2002 LPCR does nothing to ease the burden on local, county, and provincial governments for cultural relic preservation, and instead it imposes new requirements that all museums and other facilities for storing cultural relics be protected with fire prevention and anti-theft systems.<sup>116</sup>

The 2002 LPCR also perpetuates the 1982 CRPL failed ban on the export of “precious” cultural relics, with limited exceptions for exhibitions.<sup>117</sup> The ban on exporting “precious” Chinese antiquities is almost impossible to enforce as it suffers from the same definitional vagueness as to what is a “precious” relic. The 2002 LPCR's definitional ambiguity, however, does afford Chinese officials greater flexibility in deciding whether export permits should be issued for individual relics. “Ordinary” relics may, however, be exported with proper permits from the State Bureau of Cultural Relics.

Professor Bator argues that regulations broadly limiting the export of art or antiquities are easy to circumvent and promote the black market smuggling of antiquities:

The attempt to embargo the flow of art to other countries suffers from . . . a vice. The broader and more inclusive the embargo, the more difficult it is, physically and economically and politically, to enforce effectively. The interdiction of smuggling is an expensive, cumbersome, and inefficient process. The more comprehensively it is attempted, the more expensive, cumbersome, and inefficient it becomes. It is highly vulnerable to corruption. . . . The basic difficulty of most existing export regulation

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<sup>113</sup> See MURPHY, *supra* note 20, at 64-65.

<sup>114</sup> See 2002 LPCR, *supra* note 78, arts. 13-15.

<sup>115</sup> See *id.* art. 10 (“The State financial allocation used in cultural relics protection shall be increased with the increase of financial revenue.”).

<sup>116</sup> See *id.* art. 47.

<sup>117</sup> See *id.* art. 60 (“State-owned cultural relics, valuable non-state owned cultural relics and other cultural relics prohibited from exiting the boundary by the state may not be taken out of China, except those taken out of China for exhibitions pursuant to this Law or upon the approval of the State Council for special needs.”).

is, in sum, that it is overbroad and overinclusive. It is these characteristics that make it ineffective in most cases. Embargo itself perversely fuels the black market; total interdiction is usually financially, politically, and psychologically unfeasible.<sup>118</sup>

Thus, it is highly likely that the relics that would be classified as “precious” under the 2002 LPCR and 1982 CRPL will eventually find their way out of China because strict export regulations are almost impossible to enforce. Consequently, smuggling has been, and remains, a most serious problem. The flow of Chinese cultural antiquities will go unstaunched so long as there is an eager market for such items outside of China. The 2002 LPCR does little to rectify the situation and its vagueness does not solve the problem.

The 2002 LPCR also contains several miscellaneous provisions providing incentives and administrative punishments. First, the 2002 LPCR contains a provision for “moral encouragement or material awards” to be granted to individuals who assist in implementing the LPCR’s policies and provides small monetary rewards for turning discovered cultural property over to the government, donating privately held relics to state institutions, and fighting the smuggling of relics.<sup>119</sup> This language mirrors an almost identical section in the 1982 CRPL.<sup>120</sup> An elaborate scheme of awards, up to a maximum of RMB 5,000, was set forth in 1991 for assistance in preserving relics.<sup>121</sup> However, realistically, these awards are insufficient in comparison to the potential profits that can be made from the illicit export of cultural property. For example, if a farmer finds a rare piece of pottery in his field and turns it over under the current incentive system, the government would only pay him a fraction of what a black market middle man would pay. Clearly, there is no real incentive for anyone to turn over discovered relics to the state, particularly, if all they can expect in return is “moral encouragement” or a nominal finder’s fee.

Second, the 2002 LPCR’s administrative penalty provisions do have more bite than those in the 1982 CRPL. Specifically, Article 64 of the 2002 LPCR refers to the Criminal Law and states that anyone illegally excavating tombs, damaging or destroying state-protected relics, or unlawfully trading or smuggling relics will be subject to criminal liabilities under the 1997 Criminal Law.<sup>122</sup> Additionally, the 2002 LPCR

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<sup>118</sup> Bator, *supra* note 5, at 43.

<sup>119</sup> See 2002 LPCR, *supra* note 78, art. 12.

<sup>120</sup> See 1982 CRPL, *supra* note 83, art. 29.

<sup>121</sup> See also MURPHY, *supra* note 20, at 95.

<sup>122</sup> See 2002 LPCR, *supra* note 78, art. 64.

provides for various civil and administrative penalties including warnings, fines, restitution for damages, civil liability, seizure of any illicitly obtained cultural objects, and disgorgement of proceeds of any illegal sales.<sup>123</sup> Some of the most important administrative penalty provisions contained in the 2002 LPCR apply to government or museum officials who abuse their positions or do not perform their duties capably, a reflection of China's recent crackdown on public corruption. Officials who improperly transfer, embezzle or misappropriate cultural relics are subject to large fines (up to RMB 200,000), dismissal, and may be required to make restitution, in addition to any criminal penalties that may be applied.<sup>124</sup> Similar administrative penalties and fines are applied to individuals or entities that damage immovable cultural relics through pollution;<sup>125</sup> undertake construction projects that damage immovable cultural relics;<sup>126</sup> transfer or mortgage non-state owned immovable relics without permission;<sup>127</sup> transfer prohibited cultural objects to foreigners;<sup>128</sup> establish unauthorized relics shops or auction enterprises;<sup>129</sup> fail to turn discovered relics over to the state;<sup>130</sup> or fail to record the transfer of relics with the appropriate governmental entity.<sup>131</sup> Additionally, if relic shops operate auctions, auction enterprises buy and sell relics, or museums engage in buying and selling relics, they will be subject to administrative punishments under the 2002 LPCR.<sup>132</sup>

### C. *The 1997 Criminal Law and Cultural Property*

As smuggling of cultural property out of China became rampant in the late-1980s and early-1990s, China enacted a series of harsh criminal penalties for those involved in the illicit removal of cultural relics. Unfortunately, the 1997 Criminal Law's provisions are as vague

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<sup>123</sup> See 2002 LPCR, *supra* note 78, arts. 65-77.

<sup>124</sup> See *id.* arts. 70 & 78.

<sup>125</sup> See *id.* art. 67.

<sup>126</sup> See *id.* art. 66.

<sup>127</sup> See 2002 LPCR, *supra* note 78, art. 68.

<sup>128</sup> See *id.* art. 71.

<sup>129</sup> See *id.* art. 75.

<sup>130</sup> See *id.* art. 74.

<sup>131</sup> See 2002 LPCR, *supra* note 78, art. 72.

<sup>132</sup> See *id.* art. 73.

and confusing as those found in the 2002 LPCR and 1982 CRPL. Articles 324 to 329 of the 1997 Criminal Law deal with “crimes of obstructing cultural and historical relics control.” These sections address the criminal equivalents to the administrative penalties set forth in the 2002 LPCR, including damaging or destroying cultural property,<sup>133</sup> private selling,<sup>134</sup> selling for profit,<sup>135</sup> selling by a museum,<sup>136</sup> or illegal excavation of ancient tombs or remains.<sup>137</sup>

The 1997 Criminal Law also sets out a scheme for determining the appropriate penalties for violating these provisions. These sanctions include prison sentences, fines, criminal detention,<sup>138</sup> confiscation of property, and, in some cases, even death.<sup>139</sup> The degree of punishment depends on the grade of the relic in question and the “seriousness” of the offense. “Serious” offenses are punishable with long prison sentences or death, in particularly “heinous” cases. Article 328 is the only section that specifically delineates what sort of behavior can upgrade an ordinary offense into a “serious” one. Such behavior includes illegally excavating at state protected sites, being a ringleader of a criminal syndicate that engages in illegal excavation, repeated illegal excavation, and illegal excavation that causes serious damage to the cultural property.<sup>140</sup> Articles 324 and 326 have harsher penalties for “serious” offenses, but do not specify what constitutes a “serious” offense under those particular code sections.<sup>141</sup> Presumably, the same types of factors such as recidivist activity and heading a conspiracy to break the laws set forth in those code sections would upgrade a normal violation of these sections to a “serious” crime. Only particularly egregious “serious” violations would constitute “heinous” cases in which the death penalty would be applicable. Interestingly, Article 326 includes language specifying even harsher penalties for offenses that are “exceptionally serious.”<sup>142</sup>

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<sup>133</sup> See 1997 CRIMINAL LAW, *supra* note 79, art. 324.

<sup>134</sup> See *id.* art. 325.

<sup>135</sup> See *id.* art. 326.

<sup>136</sup> See *id.* art. 327.

<sup>137</sup> See 1997 CRIMINAL LAW, *supra* note 79, art. 328.

<sup>138</sup> Criminal detention is a period of incarceration of over a month, but less than six months, where the prisoner can go home one or two days each month, but must return to serve the rest of his sentence. See *id.* art. 43.

<sup>139</sup> See *id.* art. 264.

<sup>140</sup> See *id.* art. 328.

<sup>141</sup> See 1997 CRIMINAL LAW, *supra* note 79, arts. 324 & 326.

<sup>142</sup> See *id.* art. 326.

However, there is no mention of how an “exceptionally serious” offense differs from a “serious” one. There is also no mention of how an “extremely serious” offense differs from a “heinous” offense or if an “extremely serious” offense also subjects its perpetrator to application of the death penalty. The statute is not clear as to any of these issues. Furthermore, Articles 324, 325, and 328, include language that those sections apply only to “precious” relics, rather than “ordinary” relics.<sup>143</sup> Presumably, this means that the remaining code sections in this chapter of the 1997 Criminal Law are applicable to both “precious” and “ordinary” relics as determined by the State Bureau of Cultural Relics (which is a difficult proposition considering the inherent vagueness of the terms “precious” and “ordinary,” as discussed *supra*).

There are further sections of the 1997 Criminal Law that are applicable to protecting cultural property. Article 264 of the 1997 Criminal Law provides for serious consequences for encroaching on state or private property to steal cultural relics. The section provides that “those committing serious thefts of precious cultural relics . . . are to be given life sentences or sentenced to death in addition to confiscation of property.”<sup>144</sup> Article 264 suffers from the same problem as many of the aforementioned criminal code sections—vagueness. Both “serious” and “precious” are subjective. Furthermore, how the “theft” language of Article 264 operates in conjunction with Articles 324-329 is unclear. None of them use the “theft” language, but focus on more specific acts involving the excavation and sale of artifacts or antiquities. It is not clear if Article 264 was intended to complement Articles 324-329 or to serve as an alternative. It should be noted that Article 264’s provisions only apply to “precious” cultural relics. The theft of “ordinary” cultural relics is covered under Article 263 of the 1997 Criminal Law, the general theft provision. Sentences are much shorter under Article 263, ranging from three to ten years.<sup>145</sup> Additionally, Articles 263 and 264 require only “theft,” not intent to export the stolen relics. Some commentators have speculated that Article 264 was specifically aimed at discouraging the emerging Chinese domestic market for collectible cultural relics.<sup>146</sup>

The 1997 Criminal Law’s general smuggling provision addresses the illicit transportation of the cultural property out of China. Article 151 explicitly forbids the cross-border transportation of “prohibited

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<sup>143</sup> See 1997 CRIMINAL LAW, *supra* note 79, arts. 324-25 & 328.

<sup>144</sup> *Id.* art. 264.

<sup>145</sup> See *id.* art. 263. It is possible to receive a harsher sentence, including the death penalty under Article 263, but only for certain enumerated offenses. Theft of “ordinary” cultural relics does not qualify.

<sup>146</sup> See Schmidt, *supra* note 82, n.175 at 211.

cultural relics” with a minimum sentence of five years for violators.<sup>147</sup> Like the other sections of the 1997 Criminal Law, there are increased penalties for “serious” offenses with penalties including forfeiture of property, life imprisonment, and death.<sup>148</sup> Additionally, government personnel who cause the loss or damage of “precious” cultural relics through negligence can be imprisoned for up to three years or face criminal detention.<sup>149</sup>

The flexibility in sentencing provisions for crimes related to cultural property under the 1997 Criminal Law enables Chinese judges to tailor the punishment to the particular crime, as well as the capability to impose severe sentences to make an example of certain individuals. For instance, in 1994, two peasants were sentenced to six years in prison for illegally attempting to sell six Grade 2 and 148 Grade 3 dinosaur fossils in Henan Province.<sup>150</sup> The court justified such a harsh sentence based on the large numbers of fossils being sold.<sup>151</sup> In 1987, a thief was sentenced to death for breaking into the Emperor Qin Museum in Xi’an and stealing the head of one of the terracotta warriors, a Grade 1 relic according to the State Bureau of Cultural Relics.<sup>152</sup> One of the most celebrated prosecutions for tomb looting occurred in Shaanxi Province during 2001. Four men were sentenced to death and 16 others given lesser sentences for the armed looting of two archaeological sites.<sup>153</sup> The flexibility in the sentencing provisions strengthens the government’s hand as those who violate the law will never know the severity of the punishment that they may receive for violating the law; thus, the indeterminacy of the punishment provides a certain level of deterrence. However, Chinese judges must impose a wide range of penalties for similar crimes in order for such a crime deterrence theory to be effective. On the other hand, Chinese judges may rarely impose the harsh, statutorily prescribed penalties for relatively minor violations relating to

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<sup>147</sup> See 1997 Criminal Law, *supra* note 79, art. 151.

<sup>148</sup> *See id.*

<sup>149</sup> *See id.* art. 419.

<sup>150</sup> *Case of Zhang Biliang and Others Selling for Profit and Speculating in Fossilized Dinosaur Eggs*, Henan Province Xixia County People’s Court (1994) reprinted in 3 RENMIN FAYUAN XUAN SELECTED CASES OF THE PEOPLE’S COURT 43-46 (China Practising Law Institute, ed. 1996).

<sup>151</sup> *See id.*

<sup>152</sup> See People’s Republic of China, Circular of the Supreme People’s Court of the People’s Republic of China, April 1987, at 25.

<sup>153</sup> See *Four Sentenced to Death for Robbing Cultural Relics*, PEOPLE’S DAILY, May 15, 2001, available at [http://english.peopledaily.com.cn/200105/15/eng20010515\\_70022.html](http://english.peopledaily.com.cn/200105/15/eng20010515_70022.html) (last viewed Oct. 22 2003).

cultural property, thus hampering government enforcement of the China's legal regime for controlling cultural property.

In sum, China's domestic legal regime for regulating cultural property is a well-intentioned, but ultimately vague and confused effort, which fails to stem the flow of its cultural heritage to private collectors. The vagueness and lack of standards for the grading and classification of relics is a major problem, as well as the split jurisdictions as to which level of government is responsible for protecting differently graded cultural relics. While the 2002 LPCR represents a step in the right direction with regards to the alienability of relics, the new law does not solve many of the problems that emerged under the 1982 CRPL. Furthermore, the absence of a clear definition for what constitutes "serious," "extremely serious," or "heinous" offenses under the relevant section of the 1997 Criminal Law hinders enforcement. The continued illicit removal of artifacts and antiquities and the resultant black market underscores the ineffectiveness of the current Chinese legal regime to protect the nation's cultural patrimony.

#### V. MAKING THE FUTURE SAFE FOR CHINA'S CULTURAL TREASURES

The legacy of Chinese civilization, four thousand years in the making, is clearly at risk as looters and smugglers continue to sell China's heritage to the highest bidder. The Chinese legal system has proven ineffective at stopping the looting, plundering, and theft of important and irreplaceable cultural objects. The effectiveness of the 2002 LPCR remains to be seen, but it will unlikely be much more effective than the 1982 CRPL. In addition, the 1997 Criminal Law, with its vague and rarely enforced punishments, is widely flouted. In order to begin to remedy these issues, China must set forth more precise definitions for the grading and classification of relics as either "precious" or "ordinary," as well as the subclassifications of "precious" relics. Fixing the classification system will clarify the multitude of unnecessary and confusing ambiguities in the 1997 Criminal Law and make legal enforcement of the 2002 LPCR more effective. China must refine and define the provisions of the 1997 Criminal Law that apply to cultural relics. Defining what constitutes "heinous," "serious," and "extremely serious" offenses for each code section would be a good place to start. Centralization of all relic preservation under the auspices of the Ministry of Culture and the State Bureau of Cultural Relics would ensure uniform administration of relics, rather than delegating the administration to poorly funded, trained, and equipped local, county, and provincial governments to care for them. Although China customarily delegates power to local governments, this centralization is the only way to ensure



uniform enforcement of the cultural property legal regime and preservation of China's cultural heritage.

In addition to governmental reorganization of the extant legal regime, several other steps could be taken to save China's cultural heritage. First, education is the key to preserving China's cultural property in the future. Only by educating the population at a grassroots level as to the value of cultural property and providing the populace with warnings about the consequences of looting tombs or selling illegally obtained cultural objects will the black market be curtailed. Second, providing adequate monetary incentives to bona fide finders of cultural property will keep some artifacts and antiquities off the black market. Third, the legalization of private ownership and trade of cultural relics under the 2002 LPCR is a step in the right direction, but excessive government regulation of cultural relics shops, auction enterprises, as well as the government's right of first refusal to purchase cultural relics should be eliminated in order to induce the sellers of cultural property not to turn to the black market. Fourth, state-sponsored auctions of redundant and lower-grade relics could result in better preservation of relics and provide funds for better museum facilities and further archaeological expeditions.

#### A. *Educational Programs*

Education is a tool that can be used to change attitudes toward cultural relics in several ways. First, education can be utilized by the government to inform the Chinese people, particularly those in rural areas most prone to tomb looting, about the value of cultural property and the need to preserve China's heritage for future generations. Education must focus on more than just the monetary value of the objects, which might inadvertently increase looting. Rather education must focus on increasing the awareness and appreciation of the non-economic value of cultural items to Chinese society.<sup>154</sup> Creating outreach programs between archeologists and local populations creates a link between the community and efforts to preserve relics. Explaining to local populations why cultural property should be preserved and not sold to black market traffickers is of the utmost importance.<sup>155</sup> A campaign of this sort would parallel recent Chinese programs that promote China's cultural identity and nationalism.<sup>156</sup> UNESCO is another resource that China can tap, if it chooses to do so. While Beijing has been reluctant to

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<sup>154</sup> See Schmidt, *supra* note 82, at 219.

<sup>155</sup> See PATRICK J. O'KEEFE, TRADE IN ANTIQUITIES: REDUCING DESTRUCTION AND THEFT 91 (1997).

<sup>156</sup> See *id.* at 94 (discussing Greece's use of antiquities, particularly the Elgin Marbles, as tools for promoting national identity).

allow international organizations to operate in China, UNESCO has led successful educational efforts about cultural artifacts and relics in both Africa and South America.<sup>157</sup>

Second, although disseminating general legal information is an ongoing process, the central government should focus efforts on publicizing the penalty provisions of the 2002 LPCR and 1997 Criminal Law that deal with cultural property. By publicizing the law and the consequences for breaking it, the message that the central government will not tolerate tomb looting or smuggling of cultural objects will be clearly conveyed. For instance, the central government may also choose to publicize certain high profile prosecutions and resultant executions under the 1997 Criminal Law and 2002 LPCR as examples of the ramifications or penalties that result from violations of these statutes. While this is admittedly harsh, it parallels the deterrence approach that the Chinese government has taken with other sorts of illegal activity.

Third, standardized education and training of the professionals who are engaged in dealing with cultural relics on a daily basis will improve the preservation of cultural relics. Groups engaged in the enforcement of China's cultural property legal regime, police, customs officials, and prosecutors, should be specifically targeted in such educational programs, so that they have an idea of what to look for and how the 2002 LPCR and 1997 Criminal Law should be enforced.<sup>158</sup>

Although education does not offer a quick fix to the problem, it is part of the long-term solution to maintaining and preserving China's cultural heritage. Education alone will not work in every situation or community, particularly in those places where the local people feel that they have no other way to make a living or that they have a right to continue excavating antiquities. However, education is the first (and easiest) step that should be taken.

#### B. *Incentive Programs*

While the 2002 LPCR provides for monetary awards to Chinese citizens who turn over discovered artifacts and relics to the state, the nominal amount provided for in the statute creates little to no incentive to do so. The Chinese government should expand the incentive program to reward bona fide finders of cultural property with substantial cash payments or awards for turning over such objects to the government. Although these awards do not have to be anywhere near the fair market value of the discovered relic or artifact, many Chinese people would likely be willing to give the government such property if the offered incentive is close to the amount that they would obtain from black market traffickers. Of course, any incentive program would have to be

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<sup>157</sup> See O'KEEFE, *supra* note 155, at 96.

<sup>158</sup> See *id.* at 89-90.

carefully designed so as not to promote tomb robbing or the plundering of other cultural sites. Any object for which the government pays an incentive must have been found on accident, rather than have been located specifically to collect such a bounty from the government.

As an alternative to monetary incentives, the government could also provide public recognition for the finders of cultural relics. Such recognition could include prominent mention in news reports and permanent plaques listing those who have contributed discovered cultural relics to museums. One famous example is when peasants discovered Emperor Qin Shi Huang's army of terracotta warriors at Xi'an in Shaanxi Province while digging a well in 1974; the three peasants—Yang Zhifa, Yang Buzhi, and Yang Pengyue—all received acclaim throughout China for finding and reporting their discovery to the local cultural center.<sup>159</sup>

### C. *Reducing Government Regulation of the Legal Relics Market*

While the 2002 LPCR marks a significant step forward in the regulation of Chinese cultural relics as it permits private transactions for cultural relics, it will not result in the elimination of the black market. Further deregulation of the cultural relics market is the only way to curtail black market sales. As discussed in Section IV-B *supra*, Article 58 of the LPCR gives the government a right of first refusal to purchase any cultural relic sold through cultural relic shops or auction enterprises at a “negotiated price.”<sup>160</sup> Additionally, the 2002 LPCR requires governmental authorities to record each and every sale of cultural property.<sup>161</sup> The combined effect of these provisions is to create incentives that promote the black market as sellers will be able to sell their relics anonymously at higher prices and not have to worry about possible government acquisition of the relics at a below market price or government recordation of the transaction. Thus, ironically, the 2002 LPCR does not eliminate the black market, but rather entrenches it as sellers will continue to have incentives to circumvent the governmentally regulated system for the sale of relics.

Elimination of the governmental right of first refusal to buy cultural relics and the recordation of transactions is the only way that the black market for Chinese antiquities will be curbed. The reasons for the black market's existence, anonymity and evasion of potential governmental expropriation at a “negotiated price,” would be eliminated,

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<sup>159</sup> See Sonja Larsen, *The Eighth Wonder of the World*, available at <http://www.onid.orst.edu/~wielands/terracotta323.htm> (last visited Apr. 21 2003).

<sup>160</sup> See 2002 LPCR, *supra* note 78, art. 58.

<sup>161</sup> See *id.* arts. 56-57.

creating greater transparency in the marketplace and permitting the Chinese government to assess the effectiveness of its legal and non-legal policies to protect cultural property. Furthermore, the creation of an open, licit domestic market for cultural relics will undercut the profits that motivate black market traffickers to deal in such relics. As the lucrative profits that drive the black market dry up, illicit trading will decline over time.<sup>162</sup>

Admittedly, deregulating the market for cultural relics would likely be unpopular with the leadership of the Chinese Communist Party and may possibly result in a temporary spike in the illegal exportation of cultural relics as long-time owners of such items dump them into the market; inevitably some of the relics in the market will be exported. But, over the long term, greater transparency through deregulation of China's domestic market for cultural relics will likely curtail the black market and reduce the administrative burden on local, county, and provincial governments, permitting them to devote their resources to preserving cultural resources and to educational programs aimed at preventing the removal of antiquities from their resting places. It should be noted, however, that this article does not initially advocate relaxation of the rules regulating the sale of cultural relics to foreigners or the export control regime for relics set forth in the 2002 LPCR. Easing these restrictions should only be done if the proposed domestic reforms have some degree of success.

#### D. *State-Sponsored Auctions*

The sale of state owned redundant or lower quality cultural relics to collectors could serve to further promote the preservation of cultural relics. Such would put millions of lower quality cultural relics that are currently locked away in deteriorating warehouses into the hands of private collectors. Professor Merryman states the rationale behind this proposal: "Source nations that already hold significant supplies of redundant objects in storage, as many are said to do, could begin to release them to a licit market."<sup>163</sup> China would seem to fit this description. As of 1994, the State Bureau of Cultural Relics had an estimated ten million relics in storage, only one percent of which are

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<sup>162</sup> See J. David Murphy, *The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?*, 3 INT'L J. CULTURAL PROP. 227, 235 (1994).

<sup>163</sup> John Henry Merryman, *A Licit Trade in Cultural Objects*, 4 INT'L J. CULTURAL PROP. 13, 37 (1995). Such auctions of already warehoused items would not result in the destruction of archaeological knowledge as such objects have already been removed from the context of their surroundings or they may have no archaeological record at all. See O'KEEFE, *supra* note 155, at 74-75.

believed to be classified as “precious.”<sup>164</sup> Local, county, and provincial governments have millions more relics stored away, although they are of lower quality. If the central government took over administration of all cultural relics, innumerable lower quality pieces could be made available for sale.

State-sponsored auctions are not new to China.<sup>165</sup> As early as 1974, several government ministries proposed the sale of surplus relics overseas to raise foreign currency.<sup>166</sup> Although that proposal never came to fruition, the concept of state-sponsored sales of relics did not disappear. In October 1992, the central government sponsored an auction where 1,250 cultural relics including several Grade Two and Three “precious” relics were put on the block. Unfortunately, the sale was not a success and many of the buyers present were disappointed in the low quality of pieces offered for sale, as well as the unrealistically high reserve prices. Only 641 of the cultural relics offered for sale were sold, and none of the reserve prices for the “precious” relics offered were met.<sup>167</sup> There have also been several auctions of items confiscated from smugglers, some of which have included “ordinary” cultural relics.<sup>168</sup> Several state-owned enterprises have also created a state-owned auction house, China Guardian Auction Co., which has auctioned several lots of cultural relics consigned by government institutions.<sup>169</sup>

Thus, the Chinese government has the expertise and experience to conduct state-sponsored auctions of cultural relics. The relaxation on rules governing private ownership of cultural relics under the 2002 LPCR makes such state-sponsored auctions offering relics to private collectors in China’s domestic and foreign markets feasible. Revenues from such auctions could be used to finance archaeological efforts such as the excavation of Emperor Qin Shi Huang’s tomb in Xi’an, improve the security of Chinese museums, and train curators and other personnel

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<sup>164</sup> See Murphy, *supra* note 162, at 233.

<sup>165</sup> *See id.*

<sup>166</sup> See People’s Republic of China, Circular Concerning the Opinion on Strengthening Cultural Relics Commercial Administration and Implementing the Policy on the Protection of Cultural Relics, State Council of the People’s Republic of China, Dec. 16, 1974.

<sup>167</sup> See MURPHY, *supra* note 20, at 167. The highest price realized at the October 1992 auction was \$200,000 for a jadeite necklace which was consigned by an international seller—not the Chinese government. *See id.*

<sup>168</sup> *See id.* at 179 n.62.

<sup>169</sup> *See id.* at 168-69. It should be noted that China Guardian Auction Co. operates under heavy scrutiny from the State Bureau of Cultural Relics, and the auction house is only permitted to sell certain lots of cultural property to state-owned museums and institutions. Overseas collectors and government-owned institutions have listed many of the lots of cultural relics that China Guardian Auction Co. has sold. *See id.*

proper handling of cultural relics. Furthermore, putting lower-grade relics in the hands of collectors will result in greater preservation of those artifacts as they will be better able to preserve them than the overburdened local, county, and provincial governments because the collectors have every incentive to preserve their purchases. As Professor Bator has noted, "the best way to keep art is to let a lot of it go."<sup>170</sup>

Learning from the lessons of the October 1992 auction, realistic reserve prices must be set and there must be enough high-grade relics included in the sale to spark the interest of bidders. Otherwise, such auctions will be doomed to failure. Furthermore, it would be inadvisable to allow local, county, or provincial authorities to conduct such auctions as there is great potential for collusion and abuse of the system. Centralization of such auctions with oversight from the State Bureau of Cultural Relics and the Ministry of Culture will serve to protect the sanctity of the auctions and regulate those orchestrating the auctions themselves.

## VI. CONCLUSION

China's cultural heritage is at risk. China's present legal regime for protecting cultural property has proven incapable of preventing the widespread looting of artifacts, thefts from museums, and smuggling of antiquities that have accompanied China's transition to a market economy. As international efforts to stem the cross-border flow of cultural property, such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, have been ineffective, a greater burden has been placed on China's domestic law to stop the flood of antiquities out of China. However, China's legal regime to protect cultural property has failed to meet this challenge. While the 2002 LPCR is a step in the right direction with its loosening of ownership restrictions, it does not solve all of the problems of the 1982 CRPL. In fact, the 2002 LPCR appears to perpetuate several of the 1982 CRPL most serious flaws. The imprecise terms for grading artifacts and overlapping jurisdictions for their preservation set forth in the 2002 LPCR add to the problem and make enforcement of the cultural property laws difficult, if not impossible. The definitional ambiguities in the 2002 LPCR also contribute to the difficulty of applying the 1997 Criminal Law in a consistent manner.

Yet, all is not lost. China can reform its legal regime for preserving cultural property, despite the confusing and often contradictory scheme for protecting artifacts and antiquities. If the central government fixes the ambiguities and contradictions in the 2002 LPCR and 1997 Criminal Law, makes a concerted effort to educate the populace as to the value of relics, sets up incentive programs to turn

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<sup>170</sup> Bator, *supra* note 5, at 46.

relics over to the government, loosens the market regulations on the sale of cultural relics in the domestic market, and organizes state-sponsored relics auctions, there is hope that China will be able to preserve its cultural property. But each passing day with no action results in more looted tombs and more priceless artifacts lost to the Chinese people forever. Mao Zedong, who ordered the massive destruction of relics during the Cultural Revolution, once said, "Let the past serve the present." Ironically, now is the time to heed Mao's words before China's cultural heritage disappears just like the marble reliefs torn from the walls of Wang Chuzi's looted tomb.