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The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?

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1 Introduction

“Cultural property” may be loosely defined as a category of property that includes works of art and archaeological, historical and ethnological objects which are generally considered as being the material evidence of a certain stage of civilisation.¹ The trafficking in stolen or illegally-exported art and cultural objects is a problem of immense international proportions – thought to be third only to drug and arms smuggling, or perhaps even in second place.² As respected commentators have observed:

“[T]he publicity surrounding the volume of the art trade, its soaring prices, the aggressive promotion by auction houses and the continual emphasis on the record-breaking sums reached, have done much to promote cultural property as a lucrative field for dishonest activities, and to attract illicitly acquired goods to the auction and sales rooms of the ‘art market’ states”.³

And:

“[t]he respectable part of the art world [can] no longer pretend that the looting of ancient art [is] a matter involving only a few obscure peasants, corrupt local officials and unscrupulous

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dealers. Splendid national treasures, stolen and mutilated, [can] within a few years find their way into the halls of America's most sumptuous museums".⁴

Antiquities are thought to be the largest single class of item smuggled out of the People's Republic of China.⁵ With the memory of the removal to Taiwan in 1949 of the treasures of the National Museum all too vivid in the minds of Chinese officials, they now face the spectre of wholesale removals of artifacts by smuggling networks. The Preamble to a 1982 Standing Committee decision⁶ painted a graphic picture of "economic criminal activities such as seeking exorbitant profits through smuggling ... theft and sale of precious cultural relics ... and state personnel who participate in, protect or connive at these criminal activities...".

Statistics from the China State Bureau of Cultural Relics indicate that over 40,000 tombs were reported plundered in 1989 and 1990 alone.⁷ PRC customs officials themselves claim to have intercepted since the early 1980s 70,000 pieces bound for the "transit states" of Hong Kong and Macau. Apart from clandestine excavations, a significant proportion of the outflow comes direct from museum thefts and even thefts from government facilities used to store pieces confiscated or surrendered to the state.⁸ There are accounts of details and photographs of important relics in Chinese museums being faxed to dealers, in anticipation of later "delivery" through theft and smuggling networks.⁹

It is one of the ironies of the cultural property trade that the financially poor or developing countries are the "art rich", "supply", or "source" countries, while the wealthy, developed countries are most often the "art poor", "market" states. Though in most respects developing countries encourage foreign trade with a view to foreign exchange and domestic development, the pattern does not hold true where cultural property is involved – at least at the official governmental level. Cultural property is usually regarded by developing countries as an inappropriate subject matter for trade. The reasons given are sometimes anthropological and historical, but are very often purely nationalistic, without much regard for whether there are any religious, cultural or social reasons why the relics in question have significance for today's cultures. As Professor Merryman has observed, "...the basic questions about cultural property policy are submerged under layers of prejudice, rhetoric and romance".¹⁰

The question, "Who owns the past?" is a difficult and explosive one, bound up with political, economic, social and legal currents.¹¹ Most developing states face an internal tension that is not often appreciated when issues of trade policy are being considered: on the one hand there are official policies aimed at preventing most, if not all, cultural relics from leaving the state; and, on the other, there are economic forces from without and within that seek to force an outflow by whatever means.¹²

This is perhaps related to another phenomenon identified by de Varine — (predominantly) Europeans have failed to understand the essential values of non-European cultures, while at the same time non-Europeans have been assaulted with non-traditional values as part of the developmental process.

“This has led to a sudden discovery of ‘primitive art’ at the very moment when its creators are turning away from it in a search for the symbols of so-called modern civilization. The trend to invest cultural goods with materialistic values, which began in Europe and the U. S., is thus spreading rapidly to the rest of the world”.¹³

Taking the PRC as an example, this paper highlights some of the legal and practical issues raised by the most prominent method employed by developing countries to stop the outflow of cultural relics, the domestic export embargo.

2 The Inadequacy of International Efforts

One type of nationalist-internationalist dichotomy in the area of cultural property is represented by the opposing positions of those who for economic or other reasons favour freer trade in relics, and those who for political or other reasons favour a retention of national relics within national boundaries. It should be observed that the first group is comprised of several constituents: the “enlightened” art experts who feel that the rules as to the international movement of cultural property should be dictated by considerations of science; the acquirers — dealers, collectors, museums — who are driven by money and prestige; and the participants in the domestic theft and smuggling process who are only driven by money, and for whom, as likely as not, the object has no real cultural meaning — for them “national patrimony” means merely a resource to be exploited.

Even for those who espouse some type of protection of cultural patrimony, there is another form of “internationalism” that merits attention — the various attempts that have been made in international forums to curb the illicit traffic in cultural property resulting from theft or breach of domestic export laws. A treatment of this broad topic is well beyond the scope of this paper; all that will be attempted here is a brief mention of the most notable developments.¹⁴ These include a few international conventions, bilateral treaties and voluntary repatriations; and General Assembly and UNESCO pronouncements. Generally it can be said that their real impact on the illicit trade in artifacts has been minimal.¹⁵ Apart from the usual political difficulties, efforts in this area have, not surprisingly, run full tilt into private property considerations.

Perhaps the most visible international undertaking was the 1970 UNESCO Convention.¹⁶ This was largely an initiative on the part of “source” states to stem the “haemorrhaging” that could only be stopped with the assistance of the developed market states. It is really the only international cultural property treaty in the civil area; international efforts prior to 1970 focussed mainly on the consequences of wars. In contrast with, say, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,¹⁷ the UNESCO Convention is essentially nationalist and retentionist in scope – aiming at enlisting the cooperation of market states to protect the interests of source states; its thrust is not to preserve a “common human culture”.

The PRC acceded to the UNESCO Convention in 1989. Though the PRC is a classic source state and the Convention attempts to curb the traffic in stolen and illegally exported cultural property, the Convention will not likely be of much practical assistance to the PRC. While the developing countries would originally have outlawed all international movement of cultural property, they were forced to abandon that position; and the final version of the Convention must be regarded as reflecting a very moderate compromise position. As it is, very few of the leading market states (or transit states, such as Switzerland) have ratified the Convention. This is perhaps the most glaring reason for its failure.

The weaknesses in the Convention’s provisions can be briefly summarized. The definition of “cultural property”¹⁸ is thought to be too broad and vague, particularly since it relies upon a subjective designation by each state (“specifically designated by each state as being of importance”) rather than on objective criteria. It is not clear whether such designation must result from prior inclusion in some national inventory, or whether the decision can be left until export (the so-called “passport” approach). These difficulties impact directly on the provisions in Article 6 for an export certificate regime.

Portions of the Convention are merely rhetorical, for example articles that simply affirm intentions or declare practices illicit. Article 5 obliges states parties to establish a system of “national services” such as inventories, regulations, institutions, technical services and the like to preserve the cultural heritage. These requirements only raise a double difficulty for developing states, such as the PRC, given the potentially huge volume of sites and artifacts involved and the small resources allocable to the problem.¹⁹ The addition in Article 5 of the qualification, “as appropriate for each country”, signalled the difficulty most developing countries anticipated in finding the means to develop any sort of effective domestic preservation programme.

The main operative provisions of the UNESCO Convention were meant to be those in Article 7(a) – obliging market states to take steps to prevent their museums and similar institutions from acquiring illegally-exported cultural property from another state party; and

Article 7(b) – prohibiting the import of cultural property stolen from a museum, public monument or institution, and obliging market states to take steps to return it. These provisions are prospective only, and cover a rather small class of cases (though arguably Article 7(b) covers objects most likely to be essential to the national patrimony and for which the provenance is likely to be known). A well-developed documentation system is essential for enforcement, and this may well be lacking in the source states. Enforcement measures, in practice, must be consistent with national legislation; indeed, the Convention reverts to a territoriality theory of enforcement – states are free to interpret their own obligations.²⁰

More recently, efforts have been made through Unidroit, initially through a working group of experts and later with full governmental representation (including the PRC) to draft a convention that addresses private law issues raised by the UNESCO Convention. The main concern is the *bona fide* purchaser rule in civil law countries – a legal principle that undoubtedly facilitates the illicit movement of art.

These deliberations have resulted in a preliminary draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects.²¹ The primary aim of the draft convention is to put the responsibility on the buyer to verify that an object is being legally traded; failure to do so will lead to the object being returned. Stolen objects will be returned to the original owner, subject to limitations provisions and compensation being paid to the buyer where necessary diligence was shown. As to illegally exported cultural property, such objects will be returned, but only where their export has injured certain important defined cultural interests of the state requesting their return; the process involves a request to a court in the market state.

The preliminary Unidroit draft is the most imaginative and positive recent step toward finding a solution to illicit trade. The drafting process continues and a new convention in this area is, however, far from a reality. Market states can be expected to remain leery about any perceived exercise of extraterritoriality and restraint on market forces. In addition, it remains to be seen whether the civil law jurisdictions – most notably European market states – will react positively.

3 The Domestic Export Embargo Approach

In the absence of any workable international scheme of enforcement, most developing nations have resorted to embargo legislation of one form or another – usually a prohibition of the export of privately-owned works of art classified in some way as “national treasures” or the like.²²

Beyond the scope of this paper are situations involving simple theft, arguably the least complicated ethically if not legally;²³ and

so-called “rhetorical ownership laws” – domestic laws making designated relics, monuments, contents of tombs and other items the property of the state so that a “national (or notional) theft” will trigger the usual private law remedies.²⁴

Embargo or “national retention” legislation may take the form of a total prohibition, in which case there will be no licit international market for a state’s relics. Other variants may involve a total prohibition of listed objects with a permit requirement for other objects, or a scheme based on export permits for broad classes of goods.

The PRC’s 1982 Cultural Relics Law generally “places under the state’s protection” broad defined classes of cultural property.²⁵ Apart from deeming classes of objects such as unexcavated relics to be the property of the state,²⁶ the PRC regime imposes restrictions on the private sale of relics “in private collections” and forbids private sales to foreigners.²⁷ State organs are involved in the grading, and decisions on the sale, of all cultural relics. Chapter VI of the 1982 Cultural Relics Law reads as follows:

“Taking Cultural Relics out of China

Article 27. Cultural relics to be exported or to be taken out of the country by individuals must be declared to the Customs in advance and examined by the department for cultural administration of a province, an autonomous region or a municipality directly under the Central Government designated by the state department for cultural administration before export certificates are granted. Cultural relics leaving the country must be shipped out at designated ports. Cultural relics which, after examination, are not permitted to leave the country may be requisitioned by the state through purchase.

Article 28. It shall be prohibited to take out of the country any cultural relics of significant historical, artistic or scientific value, with the exception of those to be shipped abroad for exhibition with the approval of the State Council.”²⁸

In addition, “valuable cultural relics” and “ordinary cultural relics” appear as prohibited or restricted exports in the *Prohibited Import and Export Goods List and Restricted Import and Export Goods List* promulgated on 1 March, 1993 by the General Administration of Customs (superceding earlier lists in which cultural relics similarly appeared).

The rationale for this sort of embargo legislation in developing, source states is said to be the need to “protect” the objects of art and the cultural heritage they represent. However, there are in reality many elements involved: the cultural, historic or ethnological value of the relic; archaeological considerations, such as preventing the unscholarly destruction of the only records of a civilization; preservation of the integrity of the work and its physical safety, such as

from vandalism; the economic interests — the benefits for the national economy from regulated sales or, alternatively, tourism; local artistic interest; and nationalistic hoarding instincts.²⁹

The retentive embargo mentality is firmly entrenched in the PRC as in most source states. A senior official of the Palace Museum in Beijing felt that opening up relics outlet channels such as through open auction methods “is to increase opportunities for relics smuggling with terrible results”.³⁰ Similarly a spokesman for the State Administration for Cultural Relics was of the view that “it is not practical to raise funds for relics protection by selling relics”, and “the opening of a free antique market is not the way to curb smuggling, but on the contrary will result in more leaks”³¹ — this despite statistics that the State Administration for Cultural Relics now has approximately 10 million separate relics in storage, of which only about 1% are in the “most precious” category.

There is, however, a substantial body of opinion, based on the economics and realities of the international art market, that the source states, by attempting to implement embargo regimes, are doing nothing more than exacerbating the problem of the illicit outflow of cultural property.

The developing states typically have no real domestic market, and their museums have limited resources with which to acquire artifacts held privately.³² The absence of a licit market in effect ensures the existence of an illicit market. Nafziger has noted the irony of the situation:

“This emerging threat [i. e. cultural nationalism] to the shared values of cultural diffusion and the advancement of scientific knowledge has arisen from the restrictions which were provoked by the threat of promiscuous trafficking in artifacts and pillaging of archaeology. The current regime may be creating more problems than it is resolving.”³³

A situation that encourages an illicit market brings with it criminalisation and corruption.³⁴ Paradoxically the bribe-takers would support strict retention laws and oppose legalisation of export, in order to protect their illicit income.

The museologists argue that retention or “protection” legislation leads to illicit traffic which defeats the purpose of protection insofar as it results in amateur removals, the loss of information, and the damaging of sites and works.³⁵

Embargo or retention legislation is toothless absent the resources to enforce the laws, and meaningless unless there exist the means to preserve, catalogue and display the relics that the state means to protect.³⁶ Having regard to such bureaucratic requirements, it might be said that embargo legislation makes even less sense for developing states than for developed states in that in the former the “protected” resources are very often unowned, found — indeed, ex-

cavated — relics rather than identifiable owned objects as in European countries.

The art world knows that embargo legislation in developing source nations does not prevent export; it only ensures that the traffic goes underground. Arguably, the tighter the export control, the stronger the illicit market, and the process spirals despite rhetoric that retention regimes are necessary to curb the black market. In the end, export controls only add costs — social and otherwise — to the inevitable exports.

4 A Preferred Approach

In large part, the problem of the illicit traffic in cultural property results from economics: demand exceeds supply in market states, and supply exceeds demand in source states. Many observers of the process argue that the solution must also be economically based:

“... the prevailing sentiment in most industrialised, importing nations is still very much in favour of allowing the marketplace to operate without intervention. The rationale for a free market in cultural property can be expressed in economic theory which argues that allocating this property to the buyer who pays the most for it assures that the property will come to rest with the person who has the superior use and thus assuring the maximum benefit to society”.³⁷

Of course the market view that the buyer who pays the most must have the greatest interest in protection fails to consider the intangibles involved, such as the importance of the maintenance and transmission of a domestic culture. The pure economic approach fails to take account of the interests of future generations because they have no impact on current markets. Arguably such market choices are unfair for developing nations where cultural property protection considerations must compete with public welfare needs in a struggle for limited resources.³⁸ Unrestrained market rhetoric cheapens the ethnological, historical and cultural importance of the most significant art objects. Even J. S. Mill argued for inalienability where the laws of property “have made property of things which ought not to be property...”.³⁹

While the operation of the market probably ensures optimum protection in the limited sense that those willing to pay probably are willing and able to conserve, there are numerous other variables that must be taken into account. Certainly trade restrictions must be re-examined on a cost-benefit approach, but the goals — often competing ones — must be made clear. These would include prevention of pillage of sites, protection of the most significant and essential aspects of national patrimony, maintaining a link between art and its

geographical-historical milieu, preservation, both domestic and international display and education, fostering of reciprocal trade, and avoidance of over-extending customs regimes beyond any realistic prospect of enforcement.

Such an approach inevitably necessitates a process of ranking — not just a ranking of values to guide the creation of new legal regimes, but also a ranking of the art objects themselves according to their importance, having regard to the values.⁴⁰ Some argue for an international regime that would oblige importing states to regulate imports according to a universally-recognised scheme of values leading to a categorization of an object's "significance".⁴¹ Realistically, however, given the failure of standardisation efforts at the international level, developments must occur — if they are to occur at all — at the domestic level in the source states.

It is argued that the export policies of the source states must be guided by the same sort of cost-benefit approach, taking into account a scheme of values that ranks art objects according to their cultural significance. What is required is a process of judicious selection that may result in the export of all but the most culturally significant items. A country's comparative poverty becomes an argument against, rather than for, stricter national controls.

The developing art-rich nations should treat cultural property as an exploitable national resource, not to be hoarded absolutely, but to be "mined" as a source of income. As Bator has observed, "the best way to keep art is to let a lot of it go".⁴² The income from the sale of excess relics can be made available to finance preservation of the most culturally significant pieces, training of curators, and scientific exploration efforts. Once international demand is satisfied by the creation of a sizeable licit market, the profit is cut out of illicit trafficking and the concomitant anti-social behaviour is reduced. In a perfect model, money would be channelled toward preservation and study rather than to bribes. Scientists would replace thieves, or at least the illicit "archaeologists" could be "harnessed".⁴³ Enforcement regimes would be kept to a manageable size.

Export legislation in developing source states should allow for significant exchange or lending programmes, not only as a reflection of the notion of "cultural comity" but also because preservation in a market state to ensure the retention of the integrity of the collection is presumably better than loss of the collection through neglect in its state of origin.⁴⁴ In addition, there should be scope to allow the release into trade of less significant or excess material as a trade-off for financial assistance for exploration and preservation.⁴⁵

This sort of approach, which has at its core the substantial relaxation of export controls in accordance with the application of a scheme of values that would dictate the retention of only the most significant objects, would, it is argued, achieve the stated objectives of embargo legislation better than embargo legislation itself.

This must be so in the PRC especially – perhaps now the classic source state, suffering from extensive plundering of graves; theft from archaeological sites and museums; attendant corruption; smuggling networks originating with peasants for whom the relics have economic but not cultural significance; insufficient resources to cope with classification, protection, preservation or enforcement; and a surplus of relics at all levels of cultural importance.

There are indications that the PRC is at least attuned to the economic arguments. As early as the 1960 *Provisional Regulations on the Protection and Administration of the Cultural Heritage*, there appeared a legislative attempt to isolate items of “considerable historical, artistic or scientific value”.

In a 1974 Circular⁴⁶ a group of ministries proposed that:

“The cultural relics department shall guard against the one-sided mentality of caring only about collection while neglecting export and shall adopt a more active approach in assessing and selecting cultural relics that are exportable and supply them to foreign trade departments for export.”

Significantly, in a joint pronouncement the Supreme People’s Court and the Supreme People’s Procuratorate decreed in 1987 that:

“...we should use the ranking of relics as the basis for determination. Consideration should also be given to factors such as quantity, measurable price/value etc. of the cultural relics”.⁴⁷

Chapter IV of the 1982 Cultural Relics Law obliges state museums and other institutions to “classify the cultural relics in their collection by different grades, compile files for the relics kept by them, establish a strict system of control and register the relics with the relevant department for cultural administration”. “Grade One” cultural relics alone are the responsibility of the state department for cultural administration.⁴⁸ It is generally conceded, however, that at the moment the PRC has insufficient resources to devote to a serious, comprehensive and scientific ranking exercise that would allow an orderly determination of appropriate export outflows.

Nonetheless, there are recent indications that the state is prepared to engage in international sales of excess relics. The leading example was the “Beijing International Auction” held in October 1992, the first such event since the Communist takeover. Significantly, the expressed aim was to stem the flow of smuggled items. The auction attracted about 500 potential buyers including Asian and Western dealers and collectors and “around 20 affluent Beijingers”.⁴⁹ A wide range of items was on offer, but only about 15% were pre-1795 pieces. The sale was limited to items classified as Grade 2 or 3. Quality and condition were generally low, and estimates (and presumably reserve prices) unrealistically high. The sale prices were

low and many reserve prices were not reached. The auction — milestone though it was — pointed up the PRC officials' ignorance of current trends in the world art trade and of the significant gulf between the market values of the best pieces and the rest, and their general lack of knowledge of what constitute museum quality relics.

The PRC experience is not untypical of that of many developing source states. In the PRC's case it is perhaps ironic that the recent symbolic effort to relax its retentive policies, represented by the Beijing auction, should only serve to expose its underdeveloped consciousness of the workings of the international art market, itself a result of its official policy of retention. It is to be hoped that the inevitable economic and political changes to come in the PRC will facilitate a move away from an embargo mentality. Such a development can only enhance the PRC's ability to preserve its own cultural patrimony, while at the same time making its cultural heritage available for appreciation by the rest of the world.

缉私通讯



一起特大文物走私案侦破记

●杨力夫 文舒西



去年的一天夜晚，广州海关内港驻从化办事处，在检查一辆运载来料加工出口货物的货柜车中，查获了混藏于人造树叶文物中的文物7大箱，计有古董2217件，其中有属于禁止出口的汉、唐、元、明、清各时期文物1887件，而属于馆藏三级的珍贵文物就有329件。

为了查明案犯和文物的流向，广州海关成立专案小组，经过分析，断定这一宗特大文物走私案件与港澳走私集团有关。关领导决定联系公安部门协同作战。通过取证、审讯，已确定盗运文物出口的司机吴某是此案的主犯。

专案人员认真计算了吴某的运输里程、时间、地点等，决定攻其弱点，从中找到突破口。

“你经常进进出出，难道不懂得走私文物是犯罪吗？”专案人员单刀直入。“就这一次。”吴某答道。专案人员追问：“你3月8日去番禺运货，沿途都去了哪里？”吴答：“番禺—广州—东莞—深圳。”“无需一天的路途，你竟走了4天，你说说什么时候，经过哪里，住哪里？”一连串的发问，使吴某愣住了。随即低头不语。

规范化。去年以来，全省海关共对各关制定的规范性文件、管理措施1000多件进行了全面审查、清理、分析，废除了约20%过期失效的文件，向上级机关提出完善执法规范的意见和建议100多条，新订立了管理制度、操作规程共323份。此外，广东海关还参与了《行政赔偿条例》、《行政强制条例》等法规草案的前期协调、论证工作。全省海关今年以来在省级宣传媒介刊登宣传介绍海关执法的稿件300多篇，印发书册近10万本。

二是狠抓教育培训，增强执法意识。广东各海关在提高关员执法水平的过程中，注意培养关员的整体法律意识、诉讼意识，将学习制度化、经常化，重点吃透法律法规中涉及海关“征、免、验、放、罚、没、扣、退”的有关规定。去年实施《行政诉讼法》

以前，广东各海关共举办60多期骨干培训班，全部干部通过各种方式接受培训并通过考试。

三是加强执法监督检查，严格依法行政，逐步建立起一套执法监督检查的工作制度。在内部监督方面，各关先后成立了监察室、行政执法监督小组和政策法规室。强化对一线岗位的权力制约；在外部监督方面，建立“四公开”（公开政策法规、办事制度和作业程序、海关职业纪律、执法人员身份）、“三监督”（接受工作对象、社会公众和司法机关监督）制度。在社会上聘请监察联络员，设立举报中心、举报电话、举报信箱。九龙海关还印制6万多份公开信发送给工作对象，希望他们配合，做好监督检查工作。

（本栏编辑 亦恬）

Customs Officers seizing relics and arresting smugglers. From the PRC magazine *Customs*. Illustration by courtesy of J. David Murphy.

- 12 Historically, for African and Asian states in particular, the pillaging of cultural relics was equated with colonialism, and the cultural property issue became central to the struggle for independence. Gradually, however, the rhetoric of anti-colonialism has given way to notions of "national patrimony" and even to the relationship of a state's art treasures to the "common heritage of mankind", though still predominantly with a view to nationalistic protection. See D. N. Thomason, "Rolling Back History: The United Nations General Assembly and the Right to Cultural Property" (1990) 22 Case W. Res. J. Intl. L. 47.
- 13 H. de Varine, "The Rape and Plunder of Cultures: An Aspect of Deterioration of the Terms of Cultural Trade Between Nations" (1983) 139 Museum 152.
- 14 See generally Prott and O'Keefe, *supra*.
- 15 See G. Graham, "Protection and Reversion of Cultural Property: Issues of Definition and Justification" (1987) 21 International Lawyer 755; and S. A. Williams, "National Treasure Status: An Objective International Decision, or a Subjective National Categorization?" paper delivered at the IBA Conference, Buenos Aires, 1988.
- 16 See discussions in J. Merryman, "Two Ways of Thinking About Cultural Property" (1986) A. J. I L. 831; and M. F. Bolano, "International Art Theft Disputes: Harmonizing Common Law Principles with Article 7(b) of the UNESCO Convention" (1991-92) 15 Fordham Int. L. J. 129.
- 17 249 UNTS 240
- 18 In Article 1.
- 19 The PRC has recognised the need for such facilities: see, for example, Chapter IV of the *Law of the People's Republic of China on the Protection of Cultural Relics* adopted at the 25th Meeting of the Standing Committee of the Fifth National People's Congress, November 19, 1982 (hereinafter, the "1982 Cultural Relics Law"); however it is extremely doubtful whether sufficient resources will be found in the near term even to approximate the ideals and standards set forth therein.
- 20 See K. S. Jore, "The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit From Ineffective Laws Governing Cultural Property?" (1987) 13 Brooklyn J. Int. L. 55, 68. For criticisms of the UNESCO Convention, see A. P. Prunty, "Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing Its Marbles" (1984) 72 Georgetown L. J. 1155; B. Burnham, "Review" in (1983) 15 NYU J. Int. L. & P. 1021, 1023; and P. Lalive, *supra* at 24, who argues that the Convention "shows a remarkable lack of understanding of, or concern for, the realities of comparative law and private international law". Indeed, Article 7 does not come to grips with the *bona fide* purchaser doctrine found in the civil law systems of many of the market and transit states.
- 21 See L. V. Prott, "The Preliminary Draft Unidroit Convention on Stolen or Illegally Exported Cultural Objects" (1992), 41 I. C. L Q. 160; and R. Crewdson, "Putting Life into a Cultural Property Convention - UNIDROIT: Still Some Way to Go" (1992) 17 Int. Legal Pract. 45.
- 22 See generally L. V. Prott and P. J. O'Keefe, *supra*, esp. chs. 8 and 9; P. J. O'Keefe, "Export/Import Laws - Problems of Drafting and Implementation" in *International Sales of Works of Art* ICC Geneva 1990 at 57. Note that measures "imposed for the protection of national treasures of artistic, historic or archaeological value" are expressly excepted from the GATT regime: Art. XX (f), provided "that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimi-

Notes

- 1 See P. Lalive, "A General View of the Law Relating to Cultural Property" (1988) 13 *International Legal Practitioner* 18. See also the extended definition of "cultural property" contained in Article 1 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, 823 UNTS (hereinafter, "the 1970 UNESCO Convention").
- 2 For background and statistics see K. T. Burke, "International Transfers of Stolen Cultural Property: Should Thieves Continue to Benefit from Domestic Laws Favoring Bona Fide Purchasers?" (1990) 13 *Loyola L. A. Intl. & Comp. L. J.* 427 and studies cited therein; and Degraw, "Art Theft in Perspective" (1987) 31 *Intl. J. Offender Therapy & Comp. Criminology* 1, 3.
- 3 L. V. Prott, "International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives", (1983) 10 *Syr. J. Int. L. & Comm.* 333 at 345; and see generally L. V. Prott and P. J. O'Keefe, *Law and the Cultural Heritage Vol.3 - Movement*, Butterworths 1989.
- 4 P. Bator, "An Essay on the International Trade in Art" (1982) 34 *Stanford L. R.* 275.
- 5 Hereinafter, "PRC". See M. Duckworth, "The Painting Market in Asia: Progress and Promise" *Art Asia* 1992 at 11.
- 6 *Decision Concerning the Severe Punishment of Criminals Who Seriously Undermine the Economy*, adopted 8 March, 1982 by the 22nd Session of the Standing Committee of the Fifth National People's Congress. See also the 16 December, 1974 *Circular Concerning the Opinion on Strengthening Cultural Relics Commercial Administration and Implementing the Policy on the Protection of Cultural Relics*, promulgated by the State Council approving the Opinion of the Ministry of Foreign Trade, the Ministry of Commerce and the State Administration for Protection of Cultural Relics, referring to the problem of the "frenzy of digging up tombs for buried treasures". See also, J. David Murphy, "An Annotated Chronological Index of People's Republic of China Statutory and Other Materials Relating to Cultural Property" (1994) 1 *IJCP* 159.
- 7 *South China Morning Post*, December 10, 1992.
- 8 *Window*, October 30, 1992. According to a February 5, 1993 account in the *South China Morning Post* the Macau police recovered and returned 7 rare Chinese antiques worth Hong Kong \$20 million that had been stolen from a museum in Kaifeng City, Henan Province in 1992.
- 9 *South China Morning Post*, December 10, 1992.
- 10 J. Merryman, "The Retention of Cultural Property" (1988) 21 *U. Cal. Davis L. R.* 477 at 482. And see M. F. Lindsay, "The Recovery of Our Archaeological Heritage" (1990) 22 *Case W. Res. J. Int. L.* 165. Interestingly, even the fledgling archaeological movement in the PRC has been affected by the vagaries of politics — for example, used as a tool of anti-American propaganda and, during the "Great Leap Forward", subordinated to the principle of "hou-chin pao-ku" ("paying more attention to the present than to the past").
- 11 See J. Merryman and A. Elsen, *Law, Ethics and the Visual Arts (2nd ed.)*, Philadelphia: University of Pennsylvania Press, 1987 at 46. See also R. A. Morris, "Legal and ethical issues in the trade in cultural property" [1990] *N. Z. L. J.* 40.

- nation between countries where the same conditions prevail, or a disguised restriction”.
- 23 For an indication of the private law and conflict of laws difficulties surrounding theft of art and relics, see S. Rodota, “The Civil Law Aspects of the International Protection of Cultural Property” cited in Merryman and Elsen, *Law, Ethics and the Visual Arts* Vol.1, at 113; G. Reichelt, “The Protection of Cultural Property”, Study LXX-Doc.1 Unidroit 1986, and Study LXX-Doc.4 1988; S. N. Nott, “Title to Illegally Exported Items of Historic or Artistic Worth”, (1984) 33 I. C. L. Q.203; K. T. Burke, *supra*; P. B. Carter, “Transnational Trade in Works of Art: The Position in English Private International Law” in *International Sales of Works of Art* ICC Geneva 1985; M. F. Bolano, *supra*; *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts Inc.* 917 F.2d 278 (9th Cir 1990); *Winkworth v. Christie Manson and Woods Ltd.* [1980] All E. R.1121.
 - 24 For an indication of the legal problems – including those of expropriation and extraterritoriality – see J. S. Moore, “Enforcing Foreign Ownership Claims in the Antiquities Market” [1988] Yale L. J.466; and J. Merryman, *supra* in (1988) 21 U. C. Davis L. R. 477. Article 4 of the 1982 Cultural Relics Law provides that “all cultural relics remaining underground or in the inland waters or territorial seas within the boundaries of the People’s Republic of China...sites of ancient culture, ancient tombs and cave temples... memorial buildings, ancient architectural structures, stone carvings, etc. designated for protection by the state...and cultural relics in the collection of state organs, armed forces, enterprises owned by the whole people and public institutions shall be owned by the state”.
 - 25 Article 2. The provisions of this legislation are often mirrored in legislation of provinces, autonomous regions and municipalities within the PRC.
 - 26 *ibid.*, Article 4.
 - 27 *ibid.*, Articles 24, 25.
 - 28 See also the *Measures on the Administration of Export Verification for Cultural Relics* announced by the Cultural Department February 27, 1989. These supplement Articles 27 and 28 by providing somewhat more detail on verification (i. e. classification) procedures, designated selling units, and the requisition by purchase.
 - 29 For useful discussions of the underlying value patterns see Bator, *supra*; and J. H. Merryman and A. E. Elsen, “Hot Art: A Reexamination of the Illegal International Trade in Cultural Objects” (1982) 12 J. of Arts Management and Law 5.
 - 30 Relics expert Shan Shiyuan quoted in *Beijing Review*, Vol. 35, no. 46, Nov. 16–22, 1992 at 32.
 - 31 *ibid.*, at 5.
 - 32 Contrast the situation of many Asian source states with that of the source (and market) state of Japan, for example, whose domestic collectors have the resources to compete with foreign buyers, which has tax incentives to induce donations to the state, and whose restrictions on exports are sufficiently narrow to make effective enforcement feasible, with the result that the foreign market is satisfied generally through legal means: see C. F. Sayre, “Cultural Property Laws in India and Japan” (1986) 33 UCLA L. R. 851.
 - 33 J. A. R. Nafziger, “An Anthro-Apology for Managing the International Flow of Cultural Property” (1982) 4 Houston J. of Int. Law 189 at 194.
 - 34 See, for example, explicit references in the *Circular on Cracking Down on Activities Involving Smuggling and Illegal Excavation for Cultural Relics*, issued by the State Council 26 May, 1987, which, interestingly, addresses in

- the same breath the "damaging of state cultural heritage" and the "corrupting of social values" associated therewith. Illicit traffic can occur at the official or unofficial level. During the 1980s in a bid for foreign currency, PRC officials discreetly allowed a flow of antique pottery out through Hong Kong. There is a report of an individual museum official in Hunan province stealing over 1800 cultural relics: Sun Fei, "Using the Criminal Law as a Means of Protecting the Historic Relics of our Motherland" (1983) 1 *Studies in Law* 18, 23.
- 35 In the PRC as in many source states, the real "source" of relics is the peasant classes whose grave-robbing, excavations or thefts are often the first step in a sophisticated smuggling network. In 1986 in Henan province, for example, peasants allegedly robbed 500 graves dating from the First to the Fourth Centuries B. C. Of course, the "extreme" internationalist position holds that illicit trafficking may be a good thing in that amateur digs may disclose relics otherwise never recovered, and smuggling may save works otherwise neglected, thereby "spreading" culture.
- 36 See the very telling admissions in *Trial Measures on the Administration of Exports of Cultural Relics with Special Permission*, approved and promulgated by the State Council July 31, 1979 ("in assessing cultural relics to be exported, any objects whose authenticity is hard to determine at the moment or disputable shall not be exported for the time being so that the outflow of important cultural relics out of carelessness can be avoided"); and see *Measures on the Administration of Export Verification for Cultural Relics*, announced by the Cultural Department February 27, 1989, article 27, as to the rather small staff numbers deemed necessary for a "verification unit". Sun Fei, *supra*, observes that in many cases curators or staff of PRC museums are simply unable even to identify losses after thefts.
- 37 Morris, *supra* at 41. See also P. Bator, *supra*; and J. H. Merryman and A. E. Elsen, *supra* (1982) 12 *J. of Arts Management and Law* 15.
- 38 See generally J. Moustakas, "Group Rights in Cultural Property: Justifying Strict Inalienability" (1989) 74 *Cornell L. R.* 1179.
- 39 J. S. Mill, *Principles of Political Economy, Book II* ch.ii at 218 (W. Ashley ed. 1909) cited in Moustakas, *supra*.
- 40 See J. A. R. Nafziger, *supra*.
- 41 See Bator, *supra* at 330 ff.; W. P. Buranich, "The Art Collecting Countries and Their Export Restrictions on Cultural Property: Who Owns Modern Art?" (1988) 19 *Cal. Western Int. L. J.* 153 and Bolano, *supra*. Some would supplement such a regime with a supranational adjudicative institution to determine "cultural significance": see Prunty, *supra*; or a UNESCO-supervised register to be used, in a manner similar to a land register: see E. C. Schneider, "Plunder or Excavation? Observations and Suggestions on the Regulation of Ownership and Trade in the Evidence of Cultural Patrimony" (1982) 9 *Syr. J. Int. L. & Comm.* 1. An economic analysis would dictate that it is more effective and efficient for the buyer or the market state to police the traffic than the poor source nations: see J. S. Moore, *supra* [1988] *Yale L. J.* 466.
- 42 P. Bator, *supra* at 322.
- 43 For an example of this see A. Hawkins, "The Euphronios Krater at the Metropolitan Museum: A Question of Provenance" (1976) 27 *Hastings L. J.* 1163.
- 44 The importance of cultural exchanges is actually espoused by UNESCO despite its nationalist leanings: see references to the "common heritage of mankind" in the UNESCO Recommendation at the 19th General Conference

- at Nairobi, 1976; see also the 1979 General Assembly Resolution 34/64 suggesting that states have a right only to a "representative" collection.
- 45 There have been recent developments of this sort in the PRC: see, for example, exchange programmes such as the June 1, 1992 PRC-Japan Agreement for the Dunhuang Caves Cultural Relics Protection, Research and Exhibition Centre; and the June 10, 1992 PRC - Italy Establishment of the Xian Cultural Relic Protection and Restoration Centre Agreement. PRC treasures such as terracotta warriors and the gold-threaded jade suit have even been loaned to Taiwan: *Beijing Review*, Vol.35, No. 46, Nov. 16-22, 1992 at 33. A desirable international effort would be a world fund to assist preservation, exploration, scientific study, inventory compilation and the like in developing source states, of a kind similar to the fund established in the UNESCO Convention for the Protection of the World Cultural and Natural Heritage.
 - 46 *Circular Concerning the Opinion on Strengthening Cultural Relics Commercial Administration and Implementing the Policy on the Protection of Cultural Relics*, promulgated December 16, 1974 by the State Council approving the Opinion of the Ministry of Foreign Trade, the Ministry of Commerce and the State Administration for Protection of Cultural Relics, para 3. See also *Trial Measures on the Administration of Exports of Cultural Relics with Special Permission*, approved and promulgated by the State Council July 31, 1979, referring to overstocking, the large number of replicas, and the types of items that ought not to be retained.
 - 47 *Explanation of Several Questions Concerning the Applicable Law in Handling Cases of Stealing, Illegally Recovering, Dealing in, and Smuggling Cultural Relics*, issued by the Supreme People's Court and the Supreme People's Procuratorate, November 27, 1987.
 - 48 See also Chapter VI of the *Beijing Municipal Administrative Regulations on the Protection of Cultural Relics*, adopted at the 37th Meeting of the Standing Committee of the Eighth Beijing Municipal National People's Congress, 7 July, 1987.
 - 49 See accounts in *Beijing Review*, Vol. 35, no. 46, Nov. 16-22, 1992 at 32; and *Window*, October 30, 1992. In February 1991, officials of the PRC's China Historic Museum donated 60 pieces of choice porcelain relics to the Hong Kong Museum of Art in appreciation of anti-smuggling work by Hong Kong's law enforcement agencies: *South China Morning Post*, April 9, 1991. It is interesting to compare and contrast the Russian experience before and after *glasnost*: see J. Berkowitz, "A Look Into Glasnost's Impact on the Soviet Art World" (1991) 11 *Loyola Int. Law J.* 453.