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Asian Journal of International Law / *FirstView* Article / May 2013, pp 1 - 23

DOI: 10.1017/S2044251313000052, Published online: 13 May 2013

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### How to cite this article:

Stefan GRUBER The Fight Against the Illicit Trade in Asian Cultural Artefacts: Connecting International Agreements, Regional Co-operation, and Domestic Strategies. Asian Journal of International Law, Available on CJO 2013 doi:10.1017/S2044251313000052

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# *The Fight Against the Illicit Trade in Asian Cultural Artefacts: Connecting International Agreements, Regional Co-operation, and Domestic Strategies*

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## **Abstract**

Looting and illicit trafficking of cultural artefacts pose major threats to Asia's cultural heritage. This not only causes a continuing loss of cultural objects but also the destruction of large numbers of archaeological and historical sites as objects are often looted from tombs or cut off from larger pieces in order to obtain transportable parts for sale on the international art market. In addition, items are stolen from collections and museums or are trafficked in violation of export bans. This article explores the relevant international conventions dealing with the prevention of the illicit export of cultural artefacts and their repatriation, examines how those legal instruments are implemented in Asia and extended in bilateral agreements between market and source countries, and how particularly regional co-operation between Asian nations, international solidarity and assistance, and relevant domestic approaches can assist in improving the situation.

This article explores the main issues regarding the fight against illicit trafficking in cultural artefacts, the pillaging of cultural heritage sites, and art theft in Asia from a legal perspective. It highlights the relevant international conventions for preventing the theft of and for retrieving stolen relics, and assesses some of the existing domestic legal regimes and relevant bilateral and regional agreements regarding the protection of cultural objects. It assesses how those legal regimes, agreements between market and source countries, and regional co-operation along with practical measures can assist in staunching the drain on cultural relics abroad. In addition, related preventive

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measures are discussed, such as the enhanced protection of cultural heritage sites, regulation of archaeological excavations, and registration of valuable items.

The importance of conserving the heritage of a nation and other communities cannot be stressed enough. Asia encompasses a wide range of significant cultures that share many features, but are otherwise culturally distinct. Heritage sites and cultural objects serve to hold many Asian societies together by promoting the survival of cultural identities, pasts, and traditions. They reflect the individual cultural backgrounds and identities of states, ethnic communities, and other culturally distinct groups. Many Asian countries have even embedded the duty of the state to conserve their societies' heritage in their constitutions.<sup>1</sup>

Cultural relics and other movable heritage property are particularly important to the conservation of a nation's or other culturally distinct group's heritage. They assist in understanding cultural heritage and a region's or community's history; give evidence of the past where no written records exist; reflect the creativity, craftsmanship, and sophistication of our forebears; promote a nation's culture when being displayed in exhibitions abroad; and provide joy to the public by displaying them.<sup>2</sup>

How sensitive the topic of looted relics is became evident during the auctioning of the estate of the French fashion designer Yves Saint Laurent in Paris in 2009. The British auctioneers Christie's auctioned two Chinese bronzes from the Qing Dynasty (1644–1911) that had been looted from the Old Summer Palace in Beijing in 1860. During the Second Opium War (1856–60), the invading British and French troops pillaged and burnt down the Old Summer Palace as retaliation for the mistreatment of prisoners by the Chinese and to humiliate the Qing government. Its destruction and looting left a deep scar on China's memory and is a grim reminder of the ruthlessness of the colonial powers of that era. The ruins of the Old Summer Palace have been declared a historic site and are conserved as a warning to the Chinese people to never allow foreign powers to dominate their country again, and also serve as a memorial of the humiliation and violence that the Western powers inflicted on China.<sup>3</sup>

The two bronzes are part of an ensemble of twelve bronze Chinese zodiac heads from a water clock fountain in the Garden of Eternal Spring. Five of them have been purchased and returned to China by donors, while the whereabouts of five others are still unknown.<sup>4</sup>

Chinese lawyers tried to stop the auction, but an injunction was denied by the French courts.<sup>5</sup> Despite vehement protest by Chinese officials, Christie's decided to go

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1. See e.g. *Constitution of the People's Republic of China* (1982), art. 22; *Constitution of the Republic of Korea* (1948), art. 9; *Constitution of the Republic of the Philippines* (1987), art. 14.
  2. See further Ben BOER and Stefan GRUBER, "Heritage Discourses" in Kim RUBENSTEIN and Brad JESSUP, eds., *Environmental Discourses in International and Public Law* (Cambridge: Cambridge University Press, 2011), 375.
  3. Michael DILLON, *China: A Modern History* (London: I.B. Tauris, 2010) at 103.
  4. See further Jeanette GREENFIELD, *The Return of Cultural Treasures*, 3rd ed. (Cambridge: Cambridge University Press, 2007) at 254.
  5. "Chinese Lawyers Apply for Injunction to Stop Sale of Stolen Relics" *China Daily* (22 February 2009), online: China Daily <<http://www.chinadaily.com.cn>>; "Beijing Can't Stop Saint Laurent Sale" *Forbes.com* (23 February 2009), online: Forbes.com <<http://www.forbes.com>>.

ahead with the auction and sold the bronzes to a Chinese antique collector for 31.4 million euros. China's State Administration of Cultural Heritage condemned the auction immediately after the sale and announced their intention to punish Christie's,<sup>6</sup> while the incident also spawned anti-French protests among Chinese citizens. However, the winner, who also acted as an advisor to the National Treasures Fund,<sup>7</sup> announced that he placed the winning bid only to sabotage the auction and refused to pay, calling his actions "a patriotic act of protest".<sup>8</sup> Convinced that he had fulfilled his duty as a Chinese citizen,<sup>9</sup> he further stated that "[t]hese cultural relics belong to China ... [t]hey were looted by the West in time of war and illegally taken abroad".<sup>10</sup> After Christie's decided not to rule out a new auction of the two bronzes, the owner, Pierre Berge, chose to keep them.

The case clearly reflects the importance that societies attach to their cultural relics, which is why related discussions easily become quite emotional. It also shows that the true value of cultural relics goes far beyond their economic value. They are often the focus of political and cultural pride, or are symbols for times of victory, defeat, great suffering, or important occasions in the history of a society.

Many Asian countries with their high level of cultural diversity and long history were not only affected by pillaging in colonial times and during wars. Today's means of transportation and logistics have made the problem of illicit art trafficking even more severe. This is also due to the large variety of political systems, the number of heritage sites in remote locations, intensive trade across the many borders, and sometimes the lack of control of the authorities in the region.

## I. THE DEMAND FOR STOLEN AND PILLAGED CULTURAL RELICS

There has always been an enormous black market for illegally obtained cultural relics. According to Interpol, the illicit art trade is the third most profitable criminal trade in the world, outdone only by the drug and arms trade.<sup>11</sup> Although this assessment is not generally accepted, and precise numbers are impossible to collect due to the nature of the trade,<sup>12</sup> the dimensions of the international illicit art trade industry cannot be overestimated with its multi-billion dollar revenue per year.<sup>13</sup>

6. Roland ARKELL, "Christie's Face Chinese Threats as Buyer Refuses to Pay" *Antiques Trade Gazette* (9 March 2009), online: *Antiques Trade Gazette* <<http://www.antiquestradegazette.com>>.

7. *Ibid.*

8. *Ibid.*

9. LIM Le-Min and John LIU, "Chinese Buyer of Saint Laurent's Qing Bronzes Refuses to Pay" *Bloomberg* (2 March 2009), online: *Bloomberg* <<http://www.bloomberg.com>>.

10. Arkell, *supra* note 6.

11. See related information by the Cultural Property Crimes Program of Interpol on the website of the US Department of Justice and the US National Central Bureau of Interpol, online: <[http://www.usdoj.gov/usncb/programs/cultural\\_property\\_program.php](http://www.usdoj.gov/usncb/programs/cultural_property_program.php)>.

12. Neil BRODIE, "An Archaeologist's View of the Trade in Unprovenanced Antiquities" in Barbara HOFFMAN, ed, *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge: Cambridge University Press, 2006), 52 at 54.

13. See the various papers in Stefano MANACORDA, ed, *Organized Crime in Art and Antiquities* (Milan: ISPAC, 2009), and particularly Sandro CALVANI, "Frequency and Figures of Organized Crime in Art

With its organized<sup>14</sup> and well-funded structures it is mostly in the hands of organized crime and often benefits the same profiteers from drug trafficking and dealing in arms.

The amount of cultural relics being illicitly trafficked in and out of the country, especially in Southeast and East Asia, becomes clear when considering that antiquities are believed to be the largest single class of item smuggled out of China.<sup>15</sup> Despite countless sites never having been registered, and their looting therefore never having been recorded, it is estimated that more than 200,000 ancient tombs have been looted in China in the last few decades.<sup>16</sup> Most of the looted items end up on the illicit art market where they are bought by private collectors or, in some cases, by museums. Over ten million Chinese cultural relics are estimated to be located in other countries, with ninety percent of them being part of private collections.<sup>17</sup> It is estimated that more than 1.6 million looted Chinese cultural relics are housed in forty-seven museums worldwide, of which the British Museum has the largest collection, with a total of 23,000 Chinese relics.<sup>18</sup> Similarly grim is the situation in Cambodia. During the reign of terror of the Khmer Rouge, temples were pillaged, mindlessly demolished to build roads with the material, or simply destroyed for the sake of vandalism. This is reflected by the current pursuit by the United States Department of Homeland Security, upon request by the Cambodian government, to seize from Sotheby's in New York a tenth-century Cambodian sandstone statue that was sawn off from its pedestal and looted from the Prasat Chen Temple in Koh Ker in northern Cambodia during the civil war.<sup>19</sup> The matching feet of this statue and its counterpart, which is on display at the Norton Simon Museum in Pasadena, are still at the temple.<sup>20</sup> After the end of the civil war in Cambodia, large-scale pillaging of heritage sites and illicit art trafficking became a major problem, which still exists today.<sup>21</sup>

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and Antiquities", 28; Noah CHARNEY, "Buyer Beware" *ARTINFO* (11 August 2008), online: ARTINFO <<http://www.artinfo.com/news/story/28263/buyer-beware/>>.

14. See also Duncan CHAPPELL and Kenneth POLK, "Unraveling the 'Cordata': Just How Organized is the International Traffic in Cultural Objects?" in Stefano MANACORDA and Duncan CHAPPELL, eds, *Crime in the Art and Antiquities World* (New York: Springer, 2011), 99; Simon MACKENZIE, "The Market as Criminal and Criminals in the Market: Reducing Opportunities for Organized Crime in the International Antiquities Market" in Manacorda and Chappell, 69.
15. David MURPHY, "The People's Republic of China and the Illicit Trade in Cultural Property: Is the Embargo the Answer?" (1994) 3 *International Journal of Cultural Property* 227 at 228; Charles A. PALMER, "Recovering Stolen Art: Avoiding the Pitfalls" (2003) 82 *Michigan Bar Journal* 20 at 21.
16. "200,000 Ancient Tombs Plundered in Past Decades" *Xinhua* (5 July 2005).
17. "More Than 10 Million Chinese Cultural Relics Lost Overseas" *People's Daily Online* (30 January 2007), online: People's Daily <<http://english.people.com.cn/>>.
18. "British Museum Holds Highest Number of Looted Chinese Relics" *People's Daily Online* (25 October 2010), online: People's Daily <<http://english.peopledaily.com.cn/>>. About collections with items looted over the past centuries, see generally Russell CHAMBERLIN, *Loot! The Heritage of Plunder* (London: Thames and Hudson, 1983).
19. Jason FELCH and Tina SUSMAN, "Federal Agents Might Seize Khmer Statue" *Los Angeles Times* (6 April 2012), online: Los Angeles Times <<http://articles.latimes.com/>>; Tom MASHBERG and Ralph BLUMENTHAL, "Mythic Warrior Is Captive in Global Art Conflict" *New York Times* (28 February 2012).
20. Ralph BLUMENTHAL and Tom MASHBERG, "Officials Are Set to Seize Antiquity" *New York Times* (4 April 2012).
21. "Cambodian Illicit Artifact Trade Booms as War Ends" *Kyodo News International* (8 February 1999), online: The Free Library <<http://www.thefreelibrary.com/>>.

Where guards have been assigned to specific sites, especially in the Angkor region, the scale of looting has decreased in some areas.<sup>22</sup> However, there are still countless unprotected sites in Cambodia, and hundreds of them have been illegally excavated and looted in recent times.<sup>23</sup>

The high number of illegally smuggled relics is not only because of high demand on the buyers' side, but it is also due to the fact that they are treated as a "free resource" by the suppliers. That applies particularly to relics looted from sites in remote areas with only minimal protection, and to small regional museums with inadequate records of the items displayed. Once they are pillaged or stolen, the smugglers only have to invest in transportation, falsified documents, and labour, and in some cases engage in bribery, to export the items.

A further reason for the importance of the region for illicit art trafficking is its topography and availability of large ports throughout the region. Ports such as Hong Kong and Singapore are easily accessible and constantly handle an enormous amount of goods, which are impossible to adequately check. If there is a mutual agreement between the suppliers, auction houses, and customs officers, stolen or pillaged relics can only be identified and tracked with great difficulty once proper documents have been issued. Documents do not change the fact that relics are stolen, but it is very difficult to prove that fact. Customs officers are often not trained to assess the true value and origin of relics, and are not familiar with the regulations and export restraints of neighbouring countries.

Equally significant is the role of auctioneers and art dealers, for example in Hong Kong, Macau, and Bangkok. Such companies may earn most of their profits through legitimate activities, but the number of dubious transactions and auctions are immense.<sup>24</sup> As Tess Davis states: "We've spoken with looters, middlemen and dealers, and have even posed as collectors. The exact path of pillaged objects is admittedly difficult to trace. But when they do surface, more often than not, it is in the legitimate art world."<sup>25</sup> Furthermore, recognized auctioneers and traders are in many cases safe from sanctions by the authorities if some of their transactions turn out to be legally doubtful, because the high volume of turnover and consequent taxes payable are often too important to the local municipalities.

There are two ways by which the illicit art market is being supplied: either by pillaging heritage sites or by stealing relics from museums and other collections.

### A. Pillaging of Cultural Heritage Sites

The pillaging of heritage sites—either proclaimed or as yet unidentified ones—secures a constant supply of fresh items for the art market. This applies to parts of

22. Kate McGEOWN, "Race to Save Cambodia's Heritage" *BBC News* (9 June 2004), online: BBC <<http://news.bbc.co.uk>>.

23. For further information about the illicit trade of Khmer art, see Masha LAFONT, *Pillaging Cambodia: The Illicit Traffic in Khmer Art* (Jefferson, NC: McFarland & Co., 2004).

24. See e.g. Scott SAYARE, "Chatter of Swindles and Scams at Auction House" *New York Times* (26 April 2010).

25. Tess DAVIS, "Cambodia's Looted Treasures: Plundered Temples Mean the History of Many is Lost for the Pleasure of a Few" *Los Angeles Times* (25 April 2012).

heritage sites being broken up in order to gain sellable parts, looted tombs, the remains of ancient battlefields, and any other sites that include removable items that can be sold on the illicit art market.

The looting of relics is the most difficult art-related crime to control, especially when items are directly taken out of the ground. In such cases, the looted objects were never recorded and are not known to anyone other than the looters.<sup>26</sup> Once it has been removed and sold off, it is extremely hard to identify an item and prove that it has been illegally excavated.<sup>27</sup> Many items basically were not known to anyone before they were dug up and can therefore not be specifically identified. Further, it is very difficult to prove in what year items were dug up. If the authorities cannot prove that they were discovered recently and have not been in circulation for years, such relics are not even protected by current laws that declare any relics still buried as being the property of the country in whose territory they are located, as in Thailand,<sup>28</sup> for example.

The damage done goes beyond the material value of the looted items when they are removed from heritage sites or the site of the discovery.<sup>29</sup> Returning an item stolen from a collection may make up for its theft, but in cases of illegally excavated objects it means a permanent loss of its historical context.<sup>30</sup> When items are removed from a site before a scientific evaluation was able to take place, it affects not only eventual further archaeological insights about the relic, but also about the site itself.<sup>31</sup> In addition to the loss of the artefact, the scientific, cultural, and often aesthetic value of the heritage site is also significantly decreased by the removal of heritage items.<sup>32</sup>

Another important issue is the connection between organized crime syndicates and illicit art trafficking. Despite most looting being done by individuals untrained in the identification of cultural valuables, the dealers and investors behind the illicit art market are using very sophisticated methods to gain maximum profit from their activities. Many pillaging operations are directed by principals who let others bear the risk of being caught during the looting process. In fact, the mechanisms of the art market indicate that the acquisition of relics with unknown origins and the looting of heritage sites are part of a well-structured and organized business focused primarily on the generation of profit.<sup>33</sup> However, the involvement of uneducated looters bears further risks for heritage sites.

26. Charney, *supra* note 13.

27. Lyndel V. PROT, "National and International Laws on Protection of the Cultural Heritage" in Kathryn TUBB, ed., *Antiquities Trade or Betrayed—Legal, Ethical and Conservation Issues* (London: Archetype Publications, 1995), 65.

28. *Act on Ancient Monuments, Antiques, Objects of Art and Natural Museums* (Thailand), B.E. 2504 [1961], s. 24.

29. Magnus FISKESJO, "Tomb Raiders and Destruction of History" *China Daily* (23 June 2010), online: *China Daily* <[http://www.chinadaily.com.cn/cndy/2010-06/23/content\\_10005909.htm](http://www.chinadaily.com.cn/cndy/2010-06/23/content_10005909.htm)>.

30. Patrick J. O'KEEFE, *Trade in Antiquities—Reducing Destruction and Theft* (London: Archetype Publications, 1997) at 18.

31. Porter HOAGLAND, "China" in Sarah DROMGOOLE, ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (The Hague: Kluwer Law International, 1999), 19 at 26.

32. Stefan GRUBER, "Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law" (2007) 10 *Asia Pacific Journal of Environmental Law* 253 at 292.

33. Patty GERSTENBLITH, "Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past" (2007) 8 *Chicago Journal of International Law* 169 at 169.

They mostly lack the necessary training and knowledge to even recognize valuable artefacts or to remove them without causing damage. This applies especially to items directly taken out of the ground, as they are often heavily corroded and in a state of deterioration.<sup>34</sup> Unrecognized items are often destroyed during looting operations.

Buying looted artefacts might seem to be a petty crime to some art collectors, but they do not appear to take into account that criminal organizations and individuals are profiting from such transactions. Due to the high margins in the illicit art trade, it is often used for laundering profits from drug trafficking, arms dealing, and other illegal activities.<sup>35</sup> Movable cultural objects are of increasing commercial value on the art market, are readily saleable, and are potential targets for investment and financial speculation.<sup>36</sup> By purchasing looted relics, buyers directly support existing organized crime structures. However, illicit art trafficking is not only known for being used for money laundering by criminal organizations, but has also been identified as an important funding source for many terrorist organizations.<sup>37</sup> Therefore, the criminal seriousness of being involved in the illegal art trade must not be in any way underestimated. The criminal relevance of buying antiquities with doubtful provenance thus goes far beyond the act of purchasing a piece of ancient art, and might in some cases also be targeted by legal instruments dealing with organized crime, money laundering, or the financing of terrorism.

### B. *Theft of Cultural Relics from Collections*

The theft of cultural items from museums and other collections should generally be treated differently from pillaging. Such items are mostly specifically targeted by the thieves, who are mainly professionals and often gain co-operation from museum guards or other staff. Stolen relics are much more difficult to sell, as they are usually recorded and therefore easy to identify. This often excludes their sale at auctions, as that would normally be too risky. Many items are sold only to wealthy collectors who are aware of their origins, but are willing to accept that fact in order to extend their private collections. Due to the usually obvious illegality of those activities, only a small percentage of the real market value can be achieved. Alternatively, the items are sometimes traded for other illicit goods. Some more famous pieces of art are even held for ransom in circumstances where they might not be able to be sold.<sup>38</sup>

34. Gruber, *supra* note 32 at 292.

35. See e.g. Dafydd NELSON, "Economic Woes, Art Theft, and Money Laundering: A Perfect Recipe" in Noah CHARNEY, ed., *Art and Crime: Exploring the Dark Side of the Art World* (Santa Barbara, CA: Praeger Press, 2009), 197.

36. Guido CARDUCCI, "'Repatriation', 'Restitution' and 'Return' of 'Cultural Property': International Law and Practice" in Mille GABRIEL and Jens DAHL, eds., *Utimut: Past Heritage-Future Partnerships, Discussions on Repatriation in the 21st Century* (Copenhagen: International Work Group for Indigenous Affairs, 2008), 122 at 122–3.

37. Roger ATWOOD, "The Loot Route" *ARTnews* (February 2008), online: Roger Atwood <<http://www.rogeratwood.com/articles.php?id=128>>; Matthew BOGDANOS, "The Terrorist in the Art Gallery" *New York Times* (10 December 2005); "Antiquity Smuggling Finances Terror" *Associated Press* (19 March 2008), online: Heritage Watch <<http://www.heritagewatchinternational.org/antiquity-smuggling-finances-terror.html>>.

38. See e.g. the theft of one of the versions of Edvard Munch's *The Scream*, which was recovered after two years after being stolen in Oslo by masked gunmen. Kevin SULLIVAN, "Stolen 'Scream' Painting Recovered after 2-Year Search" *Washington Post* (1 September 2006).

In many parts of Asia the situation can differ depending on the location of the site. While most Western museums have detailed descriptions and photos of their items, which are distributed to the authorities as soon as a theft is discovered, many museums, especially in rural Asia, lack such detailed catalogues. In those regions, theft from collections is much harder to prevent and repair afterwards. When an item is stolen, it is difficult to prove its origin once it is shipped out of the area. Thefts also occur, of course, in prestigious and well-known museums. For example, in May 2011 several objects were stolen when thieves broke into the well-protected Palace Museum in Beijing.<sup>39</sup> While one man was arrested soon after and most items were recovered, albeit some damaged, some items are still missing.<sup>40</sup>

However, in addition to art theft being motivated only by monetary incentives, there is also a political component to it that must be mentioned. Similarly to the pillaging of heritage sites, art theft is known to be used to fund political or terrorist organizations.<sup>41</sup> This became evident, for example, after the looting of the Baghdad Museum following the invasion by American troops in 2003. Many items were offered for sale by intermediaries close to the Iraqi branch of al-Qa'ida. The same applies to many items on sale from Afghanistan, Pakistan, and the Palestine region, where the art trade is often partly controlled by Hezbollah or Islamic Jihad.<sup>42</sup> Therefore, in many cases the benefits from preventing art theft may go further than just protecting the relics themselves.

## II. INTERNATIONAL CONVENTIONS REGARDING THE ILLICIT TRAFFICKING OF CULTURAL HERITAGE

There are several important tools available to fight illicit art trafficking at the international level. The two international conventions which deal with the restitution of illegally exported cultural relics are the 1970 UNESCO Convention,<sup>43</sup> and the 1995 UNIDROIT Convention<sup>44</sup>.

### A. *The 1970 UNESCO Convention and Bilateral Agreements*

The most important international convention regarding the repatriation of cultural property is the 1970 UNESCO Convention. It was designed to target the “illicit import, export, and transfer of ownership of cultural property” that is “specifically

39. “Man Detained in Palace Museum Theft” *People’s Daily Online* (12 May 2011), online: People’s Daily <<http://english.peopledaily.com.cn>>.

40. “Rewards Offered for Palace Museum Stolen Relics” *Xinhua* (18 May 2011), online: People’s Daily Online <<http://english.people.com.cn>>.

41. Matthew BOGDANOS, “Opinion: Illegal Antiquities Trade Funds Terrorism” *CNN* (7 July 2011), online: CNN <<http://articles.cnn.com>>.

42. Laura DE LA TORRE, “Terrorists Raise Cash by Selling Antiquities” (2006) 4 *Government Security News* 1; Atwood, *supra* note 37.

43. *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 U.N.T.S. 231 (entered into force 24 April 1972) [1970 UNESCO Convention].

44. *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, 24 June 1995, 2421 U.N.T.S. 457 (entered into force 1 July 1998) [1995 UNIDROIT Convention].

designated by each state as being of importance for archaeology, prehistory, history, literature, art or science”,<sup>45</sup> and to reinforce the solidarity between states that suffer from illicit export of cultural heritage and importing states.<sup>46</sup> Since its adoption in 1970, it has been acceded to by a number of Asian countries, including Cambodia, China, Japan, the Republic of Korea, and Vietnam.<sup>47</sup> Although the United States became a member in 1983,<sup>48</sup> other art trading states hesitated for years before joining the Convention, justifying their hesitation on its suggested incompatibility with free-trade principles.<sup>49</sup>

Though the 1970 UNESCO Convention leaves it to the States Parties to apply their laws in order to meet its provisions, they are obliged to contribute to, *inter alia*, “the formation of draft laws and regulations designed to secure the protection of the cultural heritage and particularly prevention of the illicit import, export and transfer of ownership of important cultural property”, establish institutions concerning the preservation of cultural property, supervise excavations, and take “educational measures to stimulate and develop respect for the cultural heritage of all States, and spreading knowledge of the provisions of this Convention”.<sup>50</sup> And finally, States Parties are obliged:

[T]o recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property.<sup>51</sup>

The most important task of the 1970 UNESCO Convention is to encourage the States Parties to co-operate and fill the Convention with life,<sup>52</sup> mainly through bilateral agreements. A key role falls to the US, which is believed to be the destination of an estimated half of all Chinese cultural relics sold worldwide.<sup>53</sup> However, some recent developments are very promising. Following a request in 2004 by the Chinese authorities under the 1970 UNESCO Convention, China and the US entered into a bilateral agreement in early 2009, imposing “import restrictions on certain archaeological material from the People’s Republic of China”.<sup>54</sup> Those import

45. 1970 UNESCO Convention, *supra* note 43, art. 1.

46. Robin SKEATES, *Debating the Archaeological Heritage* (London: Duckworth, 2000) at 40.

47. An updated list of all States Parties is available on the website of UNESCO at <<http://portal.unesco.org>>.

48. The US codified the 1970 UNESCO Convention into domestic law as the *Convention on Cultural Property Implementation Act* (United States of America), 19 USC §§ 2601–2613 (1983); see further Patty GERSTENBLITH, *Art, Cultural Heritage, and the Law*, 2nd ed. (Durham, NC: Carolina Academic Press, 2008) at 622–33.

49. Lyndel V. PROT, “UNESCO International Framework for the Protection of the Cultural Heritage” in James A.R. NAFZIGER and Ann M. NICGORSKI, eds., *Cultural Heritage Issues: The Legacy of Conquest, Colonization, and Commerce* (Leiden: Martinus Nijhoff Publishers, 2009), 265.

50. 1970 UNESCO Convention, *supra* note 43, art. 5.

51. *Ibid.*, art. 7(b)(ii).

52. See particularly 1970 UNESCO Convention, *supra* note 43, art. 9.

53. Karen MAZURKEWICH, “End of an Era” *The Asian Wall Street Journal* (4 March 2005), 1.

54. *Memorandum of Understanding Between the Government of the United States of America and the Government of the People’s Republic of China Concerning the Imposition of Import Restrictions on*

restrictions apply to all undocumented artefacts from the Paleolithic Period<sup>55</sup> to the end of the Tang Dynasty,<sup>56</sup> and to monumental sculptures at least 250 years old. The agreement includes several detailed categories, including coins, vessels, sculptures, wall paintings, textiles, paper, and many objects made out of metal, glass, or wood.<sup>57</sup>

This bilateral agreement followed the model of a similar bilateral agreement between the US and Cambodia signed in 2003,<sup>58</sup> which was extended and amended in 2008<sup>59</sup> and superseded previous regulations from 1999.<sup>60</sup> It covers artefacts from the Bronze Age through the Khmer era, which are specified in a list by the US Customs and Border Protection, the Department of Homeland Security, and the Department of the Treasury.<sup>61</sup> The import of such relics is restricted unless “the Government of the Kingdom of Cambodia issues a certification or other documentation which certifies that exportation was not in violation of its law”.<sup>62</sup>

China and Cambodia are among the countries that suffer the most from illicit art trafficking and looting. Both agreements include provisions that require the US and both source countries to co-operate and support each other in their endeavours. China, for example, is expected to “make every effort to stop archaeological material looted or stolen from the Mainland from entering the Hong Kong Special Administrative Region and the Macau Special Administrative Region with the goal

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*Categories of Archaeological Material from the Paleolithic Period Through the Tang Dynasty and Monumental Sculpture and Wall Art At Least 250 Years Old*, 14 January 2009, online: Bureau of Educational and Cultural Affairs, US Department of State <<http://exchanges.state.gov/heritage/culprop/cbfact.html>> [US-China Agreement].

55. Around 75,000 BCE.
56. 907 CE.
57. The list of items from China restricted by the US Customs and Border Protection, Department of Homeland Security and Department of the Treasury, effective from 16 January 2009, is available at *Import Restrictions Imposed on Certain Archaeological Material from China* (United States of America), 74(11) Fed Reg 2838–2844 (16 January 2009), online: US Government Printing Office <<http://www.gpo.gov/fdsys/pkg/FR-2009-01-16/html/E9-848.htm>>.
58. *Memorandum of Understanding Between the Government of the United States of America and the Government of the Kingdom of Cambodia Concerning the Imposition of Import Restrictions on Khmer Archaeological Material*, 19 September 2003, online: Bureau of Educational and Cultural Affairs, US Department of State <<http://exchanges.state.gov/heritage/culprop/cbfact/pdfs/cb2003mou.pdf>>.
59. *Memorandum of Understanding Between the Government of the United States of America and the Government of the Kingdom of Cambodia Concerning the Imposition of Import Restrictions on Archaeological Material from Cambodia from the Bronze Age Through the Khmer Era*, 26 August 2008, online: Bureau of Educational and Cultural Affairs, US Department of State <<http://exchanges.state.gov/heritage/culprop/cbfact/pdfs/cb2008mouext.pdf>> [US-Cambodia Agreement].
60. *Import Restrictions Imposed on Certain Khmer Stone Archaeological Material of the Kingdom of Cambodia*, 64 (231) Fed Reg 67479–67481 (2 December 1999), online: Bureau of Educational and Cultural Affairs, US Department of State <<http://exchanges.state.gov/heritage/culprop/cbfact/pdfs/cb1999eadl.pdf>>.
61. The list of items from Cambodia restricted by the US Customs and Border Protection, Department of Homeland Security, effective from 22 September 2003, can be accessed at *Import Restrictions Imposed on Archaeological Materials from Cambodia* (United States of America), 68(183) Fed Reg 55000–55005 (22 September 2003), online: : US Government Printing Office <<http://www.gpo.gov/fdsys/pkg/FR-2003-09-22/html/03-24085.htm>>. For the extended list, effective from 19 September 2008, see *Extension of Import Restrictions Imposed on Archaeological Material from Cambodia* (United States of America), 73(183) Fed Reg 54309–54313 (19 September 2008), online: US Government Printing Office <<http://www.gpo.gov/fdsys/pkg/FR-2008-09-19/html/E8-22034.htm>>.
62. *US-Cambodia Agreement*, *supra* note 59, art. I A.

of eliminating the illicit trade in these regions”.<sup>63</sup> Equally, “the Government of the Kingdom of Cambodia shall endeavour to enhance its collaborative efforts with the Government of the Kingdom of Thailand to control the illicit movement of Cambodian archaeological materials across their shared border”.<sup>64</sup> Those regions play prominent roles in auctioning and shipping Chinese and Cambodian artefacts. Further, China and Cambodia are expected to increase their efforts to educate their citizens and customs officers on the importance of protecting their cultural heritage and to increase funding and other support for its safeguarding.<sup>65</sup> China is further obliged to improve the regulations governing its internal market for antiquities.<sup>66</sup> Other provisions provide for increased collaboration on the scientific level and the exchange of cultural artefacts for the purposes of research.

Such bilateral agreements cannot stop the illicit trade in artefacts entirely, but they mark an important step towards the enhanced safeguarding of the cultural heritage of people in source countries under the 1970 UNESCO Convention. Increased efforts by customs officers to track down undocumented relics undoubtedly decrease the market value of and demand for stolen and looted artefacts, when owners of cultural items of “dubious” origin are made to fear having them seized when shipping them across borders. Further, they inspire related discussions in other countries and raise awareness of the problem. It is especially important that the US, as the largest market country for looted antiquities, commits to such actions.<sup>67</sup> Other nations might be inspired to follow its example and take similar steps.

Countries profiting from the trade in illicit antiquities are often rather reluctant to co-operate and improve the status quo, as this would upset local stakeholders and jeopardize jobs and income within the domestic art market.<sup>68</sup> They have very little to gain from signing relevant international treaties or complying with them.<sup>69</sup> Nevertheless, things seem to be slowly improving in at least some market countries. For example, Switzerland, which joined the 1970 UNESCO Convention in 2003, has long been a major marketplace and hub for international art trafficking<sup>70</sup> and did very little to alleviate the situation. In 2005, Switzerland introduced a new law regulating “the import of cultural property into Switzerland, its transit and export as well as its repatriation from Switzerland”.<sup>71</sup> It provides, *inter alia*, for the repatriation of cultural property imported illicitly from a country that entered an agreement with Switzerland.<sup>72</sup> To date, Switzerland has only entered relevant agreements with five

63. *US-China Agreement*, *supra* note 54, art. II 6.

64. *US-Cambodia Agreement*, *supra* note 59, art. II G.

65. *US-China Agreement*, *supra* note 54, art. II; *US-Cambodia Agreement*, *supra* note 59, art. II.

66. *US-China Agreement*, *supra* note 54, art. II; *US-Cambodia Agreement*, *supra* note 59, art. II (11).

67. Asif EFRAT, *Governing Guns, Preventing Plunder: International Cooperation Against Illicit Trade* (New York: Oxford University Press, 2012) at 115.

68. *Ibid.*, at 48.

69. *Ibid.*

70. Barbara HOFFMAN, “Introduction to Parts II and III: Cultural Rights, Cultural Property, and International Trade” in Barbara Hoffman, ed., *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge: Cambridge University Press, 2006), 89 at 91.

71. *Federal Act on the International Transfer of Cultural Property* (Switzerland) (2005) art. 1(1).

72. *Ibid.*, art. 5–9.

countries,<sup>73</sup> none of them in Asia. However, it is hoped that the new law marks an indication of a long-term change in the country's policy and that the Swiss government will expand its agreements. This would be another significant step in the international fight against illicit art trafficking.

### B. *The 1995 UNIDROIT Convention*

The 1995 UNIDROIT Convention is also important in combating illicit art trafficking.<sup>74</sup> Although they cover different areas, the two Conventions are intended to complement each other.<sup>75</sup> In fact, the 1995 UNIDROIT Convention was designed to fill the gap left by the 1970 UNESCO Convention, and their goals are closely related. The 1995 UNIDROIT Convention strives for “the restitution of stolen cultural objects”<sup>76</sup> and “the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage”.<sup>77</sup> However, their scope differs significantly. While the 1970 UNESCO Convention mainly concerns actions at state level, the 1995 UNIDROIT Convention focuses on private transactions related to movable cultural heritage.<sup>78</sup> Their structures differ significantly as well. Where the language of the 1970 UNESCO Convention is rather vague and “promotes inconsistency both at the level of incorporation into domestic law and in the courtroom”,<sup>79</sup> the 1995 UNIDROIT Convention “provides a jurisdictional basis and standards to be used in dispute resolutions”<sup>80</sup> and is “therefore less liable to flights of imaginative interpretation to avoid serious obligation”.<sup>81</sup>

Under the 1995 UNIDROIT Convention, the owner of a stolen or illegally exported cultural object can make a claim for restitution from the new owner.<sup>82</sup> This applies especially to claims against antique dealers if they cannot prove that they checked the background of an item properly before selling it. Those provisions are meant to not only discourage antique dealers from participating in the illicit art market,<sup>83</sup> but also to

73. Colombia, Egypt, Greece, Italy, and Peru.

74. For an in-depth analysis of and commentary on the 1995 UNIDROIT Convention, see Lyndel V. PROTTE, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995* (Leicester: Institute of Art and Law, 1997).

75. Lyndel V. PROTTE, “UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects” (1996) 1 *Uniform Law Review* 56 at 56; Protte, *supra* note 49 at 266.

76. The term “cultural objects” is defined in 1995 UNIDROIT Convention, *supra* note 44, art. 1.

77. *Ibid.*

78. Protte, *supra* note 49 at 266; Ben BOER and Graeme WIFFEN, *Heritage Law in Australia* (South Melbourne: Oxford University Press, 2006) at 42.

79. Jennifer LEHMANN, “The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention” (1997) 14(2) *Arizona Journal of International and Comparative Law* 527 at 542.

80. *Ibid.* at 548. For a general discussion of the role of the 1995 UNIDROIT Convention in international arbitration, see Emily SIDORSKYA, “The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: The Role of International Arbitration” (1996) 5 *International Journal of Cultural Property* 19.

81. Protte, *supra* note 49 at 267.

82. 1995 UNIDROIT Convention, *supra* note 44, art. 3(1).

83. Lehmann, *supra* note 79 at 531.

encourage purchasers to question the origin of items more intensely.<sup>84</sup> However, the *bona fide* possessor is entitled to compensation “provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object”.<sup>85</sup>

Although the 1995 UNIDROIT Convention focuses on private transactions, it is nevertheless of importance for items stolen from museums and other collections, relics pillaged from heritage sites, and still-buried artefacts. Many countries, such as China and Laos, have enacted legislation stating that any cultural relics that are undiscovered, buried, or have been excavated, are owned by the state.<sup>86</sup> The Convention recognizes such laws by considering “unlawfully excavated or lawfully excavated but unlawfully retained” cultural objects stolen “when consistent with the law of the state where the excavation took place”.<sup>87</sup> Therefore, States Parties can reclaim their illegally excavated and exported cultural heritage items in the same way as private persons if their law is consistent with the 1995 UNIDROIT Convention.

An effective international system of laws against illicit art trafficking covering claims for restitution from states and private persons alike is crucial in order to protect heritage sites and to prevent further pillaging and art theft. Unscrupulous antique dealers and collectors must be discouraged from participating in draining the cultural heritage of other countries for their own profits. However, much more solidarity between importing and exporting states is needed to achieve those aims.

The 1995 UNIDROIT Convention is still far from having a similar importance to the 1970 UNESCO Convention. To date, the only countries in East and Southeast Asia which have ratified the Convention are Cambodia and China.<sup>88</sup> However, they are two of the most important source nations for cultural artefacts in Asia and therefore of specific importance to the success of the 1995 UNIDROIT Convention, as both countries continue to suffer significantly from a constant drain of both their tangible and intangible heritage.

### III. REGIONAL BILATERAL AGREEMENTS

In addition to international treaties and bilateral agreements between source countries and importing states, the illicit trade in antiquities must also be tackled at the regional level. International and regional co-operation and legal instruments need to complement each other, as illicit art dealers and thieves in many jurisdictions operate

84. Neil BRODIE, Jenny DOOLE, and Peter WATSON, *Stealing History: The Illicit Trade in Cultural Material* (Cambridge: The McDonald Institute for Archaeological Research, 2000) at 40.

85. 1995 UNIDROIT Convention, *supra* note 44, art. 4(1).

86. See e.g. *Law of the People's Republic of China on Protection of Cultural Relics* of 2007, arts. 7, 8 [PRC Cultural Relics Law]; *Decree of the President of the Lao People's Democratic Republic on the Preservation of Cultural, Historical and Natural Heritage* (1997), art. 22, online: UNESCO Bangkok <[http://www.unescobkk.org/fileadmin/user\\_upload/culture/cultureMain/Instruments/Lao\\_PDR\\_Presidential\\_Decree\\_English\\_.pdf](http://www.unescobkk.org/fileadmin/user_upload/culture/cultureMain/Instruments/Lao_PDR_Presidential_Decree_English_.pdf)>; also see *Law on Cultural Heritage* (Socialist Republic of Vietnam) [Law #28/2001/QH10], arts. 6, 7, online: UNESCO Bangkok <[http://www.unesco.org/culture/natlaws/media/pdf/vietnam/vn\\_law\\_cltal\\_heritage\\_engtof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/vietnam/vn_law_cltal_heritage_engtof.pdf)>.

87. 1995 UNIDROIT Convention, *supra* note 44, art. 3(2).

88. An updated list of all States Parties to the 1995 UNIDROIT Convention is available on the website of UNIDROIT at <<http://www.unidroit.org/english/implementation/i-95.pdf>>.

via several borders. In numerous cases, illegally exported antiquities are not shipped directly to the importing state and corresponding art dealer or collector, but are transported via another destination. Due to insufficiently patrolled borders, particularly at border crossing points in rural regions, it is not difficult to smuggle excavated or stolen items into another country expeditiously. Once items are smuggled into a neighbouring country, it is much more difficult to identify and retrieve them. The authorities often lack the expertise to recognize the value of foreign cultural artefacts, and sometimes they do not even have the legal authority to seize items and return them to their source countries. Further, regular police and customs officers would rarely know about the relevant provisions of a neighbouring country. As objects are often smuggled and traded via several countries, the legal situation can be very complex. Many jurisdictions have different regulations regarding acquisition and possession in good faith.<sup>89</sup> Organized art traffickers are well aware of those circumstances and make good use of them.

In order to decrease cross-border smuggling, there is a great need for enhanced bilateral co-operation at a regional level between Asian countries, particularly transit and source countries, although their roles may alternate in many cases. Only by combining their efforts in targeted operations can the situation be improved. A good example is one particular agreement between Cambodia and Thailand from 2000<sup>90</sup>. The agreement seeks to:

[A]dd to the effectiveness of the cooperation between their two countries in combating criminal activities which involve movable cultural property through the introduction of measures for impeding illicit transnational trafficking in movable cultural property whether or not it has been stolen, the imposition of appropriate and effective administrative and penal sanctions and the provisions of a means for restitution.<sup>91</sup>

The agreement contains several duties for both countries regarding the prevention of smuggling, the restitution of discovered stolen objects, the establishment of a system of export certificates, and the use of all means at their disposal to promote those aims, including an increased fostering of public awareness.<sup>92</sup> It further includes provisions on sanctions for the illicit import or export of movable cultural heritage,<sup>93</sup> procedures for the return of objects, and the exchange of any “information that will assist in combating against illicit trafficking and cross-border smuggling of movable cultural property, and to return it to the country of origin,<sup>94</sup> including the distribution by each Party of “information concerning laws which protect its movable cultural property to the other Party and to an international data base agreed upon between the Parties”.<sup>95</sup>

89. Carducci, *supra* note 36 at 123.

90. *Agreement Between the Government of Cambodia and the Government of the Kingdom of Thailand to Combat Against Illicit Trafficking and Cross-border Smuggling of Movable Cultural Property and to Restitute it to the Country of Origin* (signed and entered into force 14 June 2000), online: UNESCO <<http://www.unesco.org>> [*Cambodia-Thailand Agreement*].

91. *Ibid.*, Preamble.

92. *Ibid.*, art. 2.

93. *Ibid.*, art. 3.

94. *Ibid.*, art. 4(4).

95. *Ibid.*, art. 4(5).

Such agreements are essential in the fight against cross-border illicit art trafficking. If they are used in the right way, they may prove to be very effective. Only if neighbouring countries work together can art dealers operating internationally not benefit from differing legal systems and differences in the enforcement mechanisms and registers, and prevent intelligence being shared.

Most illegally exported cultural relics from China are believed to be smuggled over the border with its Special Administrative Zones—Hong Kong and Macau. Hong Kong especially has been the main transit place for Chinese antiquities for decades.<sup>96</sup> Even though the two territories were returned to China in 1997 and 1999, respectively, they have different legal systems, which differ significantly regarding provisions for the export of Chinese cultural relics. In fact, looted and illegally exported Chinese antiquities are traded openly in Hong Kong with often only half-hearted attempts to provide them with an appearance of legitimacy.

Unfortunately, the co-operation between the Chinese and Hong Kong authorities in this regard is rather ineffective, which is partly due to the “one country, two systems” policy. In most cases, looted cultural relics are nearly impossible to track down once they cross the border to Hong Kong, and even harder to identify once they have been shipped via Hong Kong International Airport, the world’s busiest cargo airport,<sup>97</sup> or via the Port of Hong Kong, the world’s third-busiest container port.<sup>98</sup> The busy traffic via the border with Mainland China, the different regulations regarding the trade with and export of Chinese cultural relics, and the easy accessibility of two gigantic transportation hubs make Hong Kong an ideal location for dealers in Chinese antiquities. Apart from a high number of smaller antique shops<sup>99</sup> and auctioneers, all major international auctioneers have branches in Hong Kong<sup>100</sup> that trade extensively in Chinese cultural relics. Even items from the Old Summer Palace appear frequently in art auctions in Hong Kong.<sup>101</sup> This very unsatisfactory situation is, *inter alia*, addressed in the US-China Agreement, as discussed above.<sup>102</sup>

Another tool capable of complementing binding agreements between neighbouring countries is soft law instruments. They are capable of fostering regional solidarity and

96. J. David MURPHY, “Hong Kong, 1997, and the International Movement of Antiquities” (1995) 4 *International Journal of Cultural Property* 241; Mei Wan CAMPBELL, “Laws in the People’s Republic of China Protecting its Cultural and Intellectual Properties” in Marilyn E. PHELAN, ed., *The Law of Cultural Property and Natural Heritage: Protection, Transfer, and Access* (Evanston, IL: Kalos Kapp Press, 1998), 9–30.

97. CAPA-Centre for Aviation, “Hong Kong International Airport a Regional and Global Force” (10 July 2012), online: CAPA-Centre for Aviation <<http://centreforaviation.com/analysis/hong-kong-international-airport-a-regional-and-global-force-77710>>.

98. “Top 10 Busiest Ports in the World” *Marine Insight* (14 June 2012), online: Marine Insight <<http://www.marineinsight.com/marine/top-10-busiest-ports-in-the-world/>>.

99. For background information, see Mazurkewich, *supra* note 53 at P1.

100. James POMFRET and Ben BLANCHARD, “Chinese Art Market on Tenterhooks Amid Bronzes Row” *Reuters* (9 March 2009), online: Reuters <<http://www.reuters.com>>.

101. See e.g. Madeleine O’DEA, “Looted Imperial Treasure Hits the Block at Christie’s Hong Kong” *ARTINFO* (8 December 2010), online: ARTINFO <<http://www.artinfo.com/news/story/36537/looted-imperial-treasure-hits-the-block-at-christies-hong-kong/>>.

102. *US-China Agreement*, *supra* note 54, art. 2(6).

co-operation by expressing common goals and providing guidance for the development and implementation of regulations and policy. One example is the approach by the Association of Southeast Asian Nations (ASEAN)<sup>103</sup> that is expressed in the ASEAN Declaration on Cultural Heritage of 2000:

ASEAN Member Countries shall exert the utmost effort to protect cultural property against theft, illicit trade and trafficking, and illegal transfer. As parties to this Declaration, ASEAN Member Countries shall cooperate to return, seek the return, or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site, or similar repositories, whether the stolen property is presently in the possession of another member or non-member country.<sup>104</sup>

ASEAN Member Countries are urged to take measures to control the acquisition of illicitly traded cultural objects by persons and/or institutions in their respective jurisdictions, and to cooperate with other member and non-member countries having serious problems in protecting their heritage by properly educating the public and applying appropriate and effective import and export controls.

#### IV. ACTIONS ON A NATIONAL LEVEL

Maybe even more important to the protection of Asia's cultural property are actions on a national level. The 1970 UNESCO Convention and 1995 UNIDROIT Convention and other international agreements mainly deal with the restitution and repatriation of property that has already been looted or stolen and smuggled out of the country. By far the most efficient way of cracking down on the illicit art market and keeping relics at their original places is to act within the source countries and regions. In order to be successful, measures at several levels must be combined. They include heritage conservation legislation and penalties against offenders, enhanced protection of cultural heritage sites and collections, educational programmes, and the regulation of the domestic art market. As mentioned above, the 1970 UNESCO Convention obliges the States Parties to increase their efforts in those areas and enact appropriate legislation. In order to assist States Parties in the development of effective legislative instruments and the application of the 1970 UNESCO Convention and 1995 UNIDROIT Convention, an expert group convened by UNESCO and UNIDROIT developed the Model Provisions on State Ownership of Undiscovered Cultural Objects in 2011.<sup>105</sup> However, as the 1970 UNESCO Convention leaves it to each country to apply its own law as appropriate, the influence of international law on domestic regulations and policy relating to the illicit trade in antiquities is rather limited. Due to the wide range of legal systems, and also varying regional conditions in Asia, domestic law concerning heritage conservation differs between countries, although there are also many similarities.

103. The member countries of ASEAN are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

104. *ASEAN Declaration on Cultural Heritage*, Bangkok, Thailand, 24–25 July 2000, *ASEAN Documents Series* (25 July 2000), art. 10.

105. *Model Provisions on State Ownership of Undiscovered Cultural Objects*, online: UNESCO <<http://www.unesco.org>>.

### A. National Cultural Heritage Conservation Law

On a national level there are different approaches to the problem of illicit art trafficking, which can be placed into two main categories. There is either a ban on the export of cultural property or there are regulations in place that categorize artefacts and restrict the export of specific categories. China provides one of the best examples of a process that made a transition from classic embargo legislation to a categorization and controlled export of cultural items, as described below.<sup>106</sup>

The previous Law of the People's Republic of China on the Protection of Cultural Relics of 1982<sup>107</sup> placed heavy restrictions on the private ownership and transfer of cultural property, and prohibited their export and sale, as well as possession in most cases. The present Law of the People's Republic of China on Protection of Cultural Relics of 2007<sup>108</sup> (PRC Cultural Relics Law) takes a different approach, and allows the trade and export of cultural relics within strict limits. Private persons and organizations are permitted to purchase cultural relics from cultural relics shops and auctioneers,<sup>109</sup> which must be officially certified and licensed.<sup>110</sup> Companies or individuals with no official approval are not permitted to participate in any business related to cultural relics.<sup>111</sup> Furthermore, all relics must "be examined and verified by the administrative department in charge of cultural relics under the people's government of the relevant province, autonomous region, or municipality directly under the Central Government" before any sale or auction may be undertaken.<sup>112</sup> Antique dealers and auctioneers<sup>113</sup> are required to keep records of all their transactions relating to cultural property.<sup>114</sup>

Of course there are items which are not allowed to be transferred to other persons due to their cultural value. A good example of similar regulations is the cultural heritage law of Indonesia, which specifies that "transfer of ownership of specific items of cultural property comprising of heirlooms owned by Indonesian citizens can only be conducted [by] the State".<sup>115</sup> Some items are only allowed to be possessed by citizens because they have been owned by their families for generations. However, the respect for ownership that has been passed on by someone's forebears does not necessarily mean that such items are allowed to be sold.

In order to protect the country from a further drain on its cultural heritage, the Chinese authorities imposed strict rules on the involvement of foreigners in any trade

106. Gruber, *supra* note 32 at 293.

107. *Law of the People's Republic of China on the Protection of Cultural Relics*, 19 November 1982.

108. *Law of the People's Republic of China on the Protection of Cultural Relics*, 29 December 2007 [PRC Cultural Relics Law].

109. *Ibid.*, art. 50.

110. *Ibid.*, art. 53 for cultural relics stores, and art. 54 for auction enterprises.

111. *Ibid.*, art. 55.

112. *Ibid.*, art. 56(1).

113. For further discussion of issues related to art auctions in China, see J.D. MURPHY, "Art Auctions in China" (1996) 1(1) *Art, Antiquity and Law* 37.

114. *PRC Cultural Relics Law*, *supra* note 108, art. 57.

115. *Compilation of Law and Regulation of the Republic of Indonesia Concerning Items of Cultural Property* (2003), art. 7.

with relics or their export. Foreign companies and Chinese-foreign joint ventures are prohibited from participating in the establishment of any shops or auction enterprises trading with cultural artefacts.<sup>116</sup> Whether cultural property may be exported from China depends on their grading by the heritage conservation authorities at the relevant level, although it should be noted that there is a good deal of room for the exercise of discretion regarding the distinction and grading of heritage items. Any artefacts to be exported must be examined by the relevant authorities and issued with exit permits.<sup>117</sup>

Laws from other Asian countries take a similar approach. The Law for the Protection of Cultural Property<sup>118</sup> of Japan of 1950, last amended in 2007, states that:

[A]ny important cultural property shall not be exported; this shall not apply, however, in case the Commissioner of the Agency for Cultural Affairs has given permission therefore in recognition of its special necessity from the viewpoint of international exchange of culture or from other considerations.<sup>119</sup>

Similarly to the PRC Cultural Relics Law, Japan's cultural heritage regulations use categories to determine the value of artefacts and to decide if the authorities should authorize their export. Another example, especially for legislation in Southeast Asia, is provided by the relevant regulations of the Law on the Protection of Cultural Heritage<sup>120</sup> of Cambodia of 1996. They have similarly comprehensive provisions on the classification of cultural artefacts,<sup>121</sup> and have declared all classified items imprescriptible.<sup>122</sup> In addition to the regulations of Cambodia's cultural heritage conservation law, its customs law states that the Cambodian government may "prohibit or restrict, subject to conditions, the import or export of certain goods for any of the following purposes: ... The protection of national treasures of artistic, historic or archaeological value".<sup>123</sup> This regulation complements the more specialized regulations mentioned and, in theory at least, leaves broad room for manoeuvre to the Cambodian authorities to react to new developments and trends in illicit art trafficking.

The Chinese regulations under the PRC Cultural Relics Law also raise important issues on excavations. No excavations may be carried out without prior approval from the relevant authorities or for purposes other than for scientific research.<sup>124</sup> Such provisions are nearly identical in a number of other Asian legislative systems, such as, for example, the Republic of Korea.<sup>125</sup> Further, not even official excavators can take discovered artefacts into their own possession and no such items can be

116. *PRC Cultural Relics Law*, *supra* note 108, art. 55(3).

117. *Ibid.*, arts. 60–3.

118. *Law for the Protection of Cultural Property* (Japan) (1950).

119. *Ibid.*, art. 44.

120. *Law on the Protection of Cultural Heritage* (Cambodia) (1996).

121. *Ibid.*, art. 11ff.

122. *Ibid.*, art. 19.

123. *Ibid.*, art. 8.

124. *PRC Cultural Relics Law*, *supra* note 108, art. 27ff.

125. See e.g. *Cultural Heritage Protection Act* (Republic of Korea), art. 55.

legally obtained by private persons at all. The PRC Cultural Relics Law provides that any discovered objects must be handed to the authorities for registration and examination with no delay if they were not excavated by an authorized research institution that also conducts the first evaluation and examination of the artefacts.<sup>126</sup> Similar provisions can be found, for example, in the relevant regulations in Laos and Vietnam.<sup>127</sup> Early registration of discovered items and guidance by the authorities significantly discourages theft during excavations by involved companies and workers. Unannounced inspections in nearby antique shops, and the homes of known art dealers where items might be stored,<sup>128</sup> are another very useful tool in order to thwart the quick sale of stolen items. Further, the strict limitation of any involvement by foreigners<sup>129</sup> at least makes it easier to keep potential exporters at a distance.

Of course there will always be loopholes and collaborators found in the ranks of the authorities. Even the strictest rules on excavations cannot entirely stop discovered items from being taken from the site. In addition, many officials lack interest in enforcing relevant provisions as they do not appreciate the importance of the issue or are even benefiting from the illicit trade in relics. Corruption is a serious problem in this context, due to the large amount of money involved and the fact that several officials and other people involved regard related offences as “lesser” crimes. Therefore, it is crucial to stress the connections between illicit art trafficking and other forms of organized crime and to raise additional awareness of the seriousness of the subject and its consequences for society among officials, art dealers, buyers, and all other stakeholders.

### B. *Protection of Heritage Sites*

The most effective method in the battle against illicit art trafficking is enhanced protection of heritage sites and museums and preventing cultural relics from being removed. Many cultural heritage sites include detachable parts or elements that can be broken off. This applies especially to tombs as they contain many removable parts. Therefore, the protection of heritage sites and the battle against illicit art trafficking and illegal excavations must be seen as closely connected.<sup>130</sup>

Many sites had either not been discovered by the authorities prior to their looting or were not sufficiently protected. In the face of the number of looted sites, Newell described China as a country that “is a virtual antiquities warehouse”.<sup>131</sup> Although the location of archaeological sites is often known, many of them remain

126. *PRC Cultural Relics Law*, *supra* note 108, art. 34.

127. *Decree of the President of the Lao People’s Democratic Republic on the Preservation of Cultural, Historical and Natural Heritage* (1997), art. 22; *Law on Cultural Heritage* (Socialist Republic of Vietnam), art. 41.

128. See e.g. *Law on the Protection of Cultural Heritage* (Cambodia), art. 34.

129. See further *Measures of the People’s Republic of China for the Administration of the Foreign-Related Archaeological Activities* (1991).

130. Gruber, *supra* note 32 at 257.

131. Phillip NEWELL, “The PRC’s Law for the Protection of Cultural Relics” (2008) 13 *Art, Antiquity and Law* 1 at 1.

unexcavated due to their number. Some items and sites even have to be reburied, either due to a lack of resources for their proper excavation, such as the oldest Buddhist altar in Xian,<sup>132</sup> or to protect them from looters.

Many threats to cultural heritage sites from illicit excavation result from poor site management and lack of protection. A recent and prominent example is the cultural landscape of the Orkhon Valley in Mongolia, which was inscribed on the World Heritage List in 2004.<sup>133</sup> Prior to its inscription, there had been numerous and mostly unco-ordinated archaeological expeditions. The excavated sites were often left uncovered, which attracted numerous looters, and countless looted relics have ended up on the illicit art market. Even larger items are at risk from looting, as they can be damaged or cut up in order to obtain transportable parts for sale on the international art market. Many statues have been decapitated to sell their heads, reliefs are cut from walls, and small statues attached to temples are sawn off completely.

Such problems can only be fought by assigning more and better educated staff to the protection of heritage sites. This also applies to museum guards. Regarding the theft from the Palace Museum in Beijing in May 2011 mentioned above, experts see part of the problem being caused by inadequate supervision and the variable competence of security guards.<sup>134</sup> Further, many security guards working on night shifts are temporary workers with little professional experience and less pay than permanent museum guards.<sup>135</sup> In China, there have been attempts to tighten security recently; for example, in September 2011, the Ministry of Public Security and the State Administration of Cultural Heritage called on all Chinese police and cultural authorities to further strengthen the protection of museums, examine museum security systems, and improve training for museum guards, as “[p]eople who have been encouraged by the high profits that can be attained through the theft and smuggling of ancient relics tend to set their targets on various museums”.<sup>136</sup>

Similarly to problems of the wilful destruction of cultural heritage, which is either tolerated or unofficially authorized by local authorities, looting is nearly impossible to prevent without the commitment of local governments to enforcing the law. This is highly problematic, as all counter-measures against looting depend heavily on the effective implementation of the regulations by the local authorities. When local authorities choose to ignore the law and tolerate looting, effective protection is impossible.<sup>137</sup> Besides the rigorous enforcement of regulations by higher levels of government and other branches of the authorities on those at lower levels, international assistance can be of great importance. Assistance in the form of monetary and scientific support, training, and intelligence allows for a higher level of

132. Greenfield, *supra* note 4 at 274.

133. World Heritage Committee, *Decisions Adopted at the 28th Session of the World Heritage Committee (Suzhou, 2004)*, UNESCO Doc WHC-04/28 COM/26 (Paris, 29 October 2004), Decision 28COM 14B.35.

134. Xueqing JIANG and Yuchen ZHANG, “Forbidden City’s Stolen Reputation” *China Daily* (13 May 2011), online: [China Daily](http://www.chinadaily.com.cn) <<http://www.chinadaily.com.cn>>.

135. *Ibid.*

136. “China Tightens Museum Security Amid Theft” *Xinhua* (7 September 2011).

137. See e.g. Gruber, *supra* note 32 at 293–5.

protection, particularly in regions with lower income and infrastructure,<sup>138</sup> and might require fewer resources in the end than targeting and retrieving artefacts after they were stolen and trafficked.

### C. Registration of Items

Another important measure is the increased registration of items.<sup>139</sup> Many museums in non-metropolitan regions of Asia have inadequate artefact registration systems. When artefacts are stolen and exported, the museums cannot prove that the items are from their collections without adequate photos and descriptions. This only applies, of course, in situations where stolen items are discovered at auctions. Without proper registration, items cannot even be included in an international search list, which significantly limits the chances of reclaiming them. This also concerns items in private collections, which should be registered in the same way as artefacts in the hands of museums.

It is important to use standardized registration forms in order to cover all relevant features of artefacts and to make the descriptions internationally compatible. The agreement between Cambodia and Thailand mentioned above includes a provision for a joint database of stolen artefacts, which makes co-operation much more effective.<sup>140</sup> On an international level, the Object ID standard,<sup>141</sup> for example, has proved to be a useful tool. With missing items listed on such databases, it is much harder to sell them at official auctions. This not only assists customs officers to identify looted cultural relics, but also harms their market value significantly, as the risk rises for potential buyers to have their items confiscated.

## V. CONCLUSION

This article has argued that the problems related to illicit art trafficking in Asia are as diverse as the measures necessary to cut off the resources of the illicit art market and to improve the protection of the region's cultural heritage. The mere recovery of looted or illegally trafficked items does not necessarily undo the damage done. It is often very difficult to identify the original owner of cultural relics and to repatriate those items. Furthermore, objects looted from archaeological sites make the restoration of the archaeological context problematic, particularly if the site of the discovery cannot be proven beyond doubt. Therefore, it is essential to stop looting on site and prevent the trafficking of cultural artefacts before they are shipped abroad and enter the international art market.

As indicated in this article, the issues of illicit art trafficking must be approached on many different levels. Of particular importance are regional agreements and

138. See also Stefan GRUBER, "Poverty and the Loss of Cultural Heritage Sites" in Yves LE BOUTHILLIER, Miriam Alfie COHEN, José Juan GONZÁLEZ MARQUEZ, Albert MUMMA, and Susan SMITH, eds., *Poverty Alleviation and Environmental Law* (Cheltenham: Edward Elgar, 2012), 284.

139. See e.g. Gao SHENG, "Recovering Illegally Removed Cultural Property and Improving Cultural Property Protection: A Chinese Perspective" (2009) 14 *Art, Antiquity and Law* 1 at 7–8.

140. *Cambodia-Thailand Agreement*, *supra* note 90, art. 2(1)(c).

141. For further information on the Object ID standard, see the website of the International Council of Museums at <<http://archives.icom.museum/object-id/index.html>>.

collaboration between Asian nations in order to make cross-border smuggling more difficult. Also important are agreements between source nations and market countries that introduce import restrictions on valuable cultural relics, outline mutual obligations, and foster co-operation. While the domestic authorities in source countries have at least the theoretical power to tackle several problems related to looting and the illicit export of items within their territory, they are dependent on international co-operation, particularly concerning the blocking of international smuggling routes and cracking down on foreign domestic markets for illegally exported antiquities. The consequent enforcement of export bans of source nations by market countries, a resulting dropping market value of looted cultural relics, and an increased risk of prosecution, will leave less incentive to participate in illicit art trafficking and looting.

One similar case where international actions worked is the ban of the trade in ivory and a number of endangered species under the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>142</sup> of 1973 (CITES). However, while the ban proved to be generally successful and allowed several areas of the elephant population in Africa to recover,<sup>143</sup> the situation was exacerbated significantly in recent years, mainly through the involvement of Asian crime syndicates, which are now controlling a large share of the illicit trade in ivory, with China being the most important market.<sup>144</sup> In this case, China is a market country, opposed to the illicit trade in antiquities and obliged to prevent further drain on the biodiversity of the source countries. Several Chinese experts blame the lack of enforcement and co-operation between government departments for the situation and urge a complete ban of all trade in ivory in China.<sup>145</sup> While international assistance is crucial for the success of stopping any illicit trade across borders, this example emphasizes the need for continuous co-operation and long-term political commitment.

At national and local levels, far-reaching actions are needed to improve the situation in Asia, as many local governments suffer from the same shortcomings. Heritage protection agencies are usually underfunded, while local authorities often underestimate the seriousness of the situation, are sometimes just ignorant of the relevant provisions, or choose to turn a blind eye in return for all kinds of favours. Both ignorance and corruption are driving forces behind the looting and trafficking of cultural artefacts. Consequently, priority must be given to the strengthening of heritage protection agencies and to the introduction of more extensive protection schemes and legal provisions, both regionally and nationally, while existing laws

142. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 U.N.T.S. 243 (entered into force 1 July 1975).

143. See e.g. Andrew M. LEMIEUX and Ronald V. CLARKE, "The International Ban on Ivory Sales and its Effects on Elephant Poaching in Africa" (2009) 49 *British Journal of Criminology* 451.

144. See e.g. Emma REYNOLDS, "Worst Year for Elephants since Ivory Trade Banned with at least 2,500 Slaughtered for Ivory" *Daily Mail* (29 December 2011), online: [Daily Mail](http://www.dailymail.co.uk) <<http://www.dailymail.co.uk>>; Alexandra WEXLER, "Chinese Demand Revives Ivory Trade" *Wall Street Journal* (20 September 2011), online: [Wall Street Journal](http://online.wsj.com) <<http://online.wsj.com>>.

145. "Illegal Ivory Trade Flourishes once again" *Shanghai Daily* (17 February 2012), online: [China.org](http://www.china.org.cn) <<http://www.china.org.cn>>.

must be enhanced and implemented rigorously. Monetary, scientific, and logistical international assistance and stronger solidarity by market countries are also essential components of that process. Furthermore, the education of staff and private persons promises long-term results, as their knowledge can be used in further training and can make protection measures much more effective. It is also crucial to educate art collectors on the mechanisms of the illicit art market and the destruction that it is causing. This should be combined with stronger regulation of the art market in both source and market countries, and the exercise of combined political power against international auctioneers who repeatedly ignore the law in Asian countries or trade in antiquities of dubious origin.<sup>146</sup> The immense harm caused and the heavy involvement of organized crime syndicates in illicit art trafficking in Asia calls for much more decisive and long-term action by the international community and domestic authorities at all levels to prevent the further exacerbation of the matter.

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<sup>146</sup>. See further Gerstenblith, *supra* note 33 at 195.