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# Protecting China's Cultural Heritage Sites in Times of Rapid Change: Current Developments, Practice and Law

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## **Abstract**

China's long cultural history is unique and extremely rich, with countless sites providing evidence of this. Apart from the well-known World Heritage Sites these include old suburbs, archaeological sites, monuments, cultural landscapes, shipwrecks etc. In recent years, the Chinese government has rediscovered the great value of China's cultural heritage and introduced numerous legislative acts for its protection. Since the introduction of the "Open Door Policy" of the 1970s significant progress has been made despite the need to completely redevelop China's legal system after the Cultural Revolution. However, the increased efforts of China's authorities in protecting China's heritage are facing the consequences of the country's rapid economic and social development. Old parts of cities are being replaced by modern housing areas, cultural landscapes are disappearing, and many heritage sites are being destroyed by construction projects or disrepair. Heritage protection agencies lack the necessary staff and funds to protect heritage sites from further destruction or from being looted by criminals who supply the illicit art market. This article argues that, in the face of rapid economic development exacting its toll on the remaining Chinese heritage sites, it is urgent to examine how these sites can be preserved and included into the development process without letting them stand in competition to it, as their loss would be a tragedy for all humankind.

## **Key Words**

China, heritage law, cultural property, heritage sites, illicit art trafficking, sustainable development

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## **Introduction**

China's long cultural history is unique and extremely rich with countless sites providing evidence of this. There is hardly any country in the world that can compete with China's richness in such sites, their beauty or historical and cultural importance. Amazing constructions such as the Great Wall, the Forbidden City, and the tomb of the First Qin Emperor with the terracotta warriors and horses are world famous and rank among the greatest monuments ever built. Besides these prominent sites, which are all included in the World Heritage List, there are many more heritage sites that are no less impressive and representative of China's rich culture.<sup>1</sup> Of course this also applies to China's countless natural heritage sites. However, the Chinese government has not always treasured the nation's heritage as much as it should have. The loss of many sites and items during the Cultural Revolution was a great tragedy that left irreparable damage to the country. Even after the end of that dark period, better protection for the remaining sites could not always be guaranteed because of the lack of trained specialists and funds, the lack of cooperation by many provincial authorities, and conflicting interests. Because of those "lost years" the People's Republic of China is still in the process of passing necessary laws to fill the gaps in its renewed legal system. Significant progress has already been made and laws cover many areas, but heritage law is certainly one of the areas that still requires more decisive institutional development and legal protection. However, the increased efforts of China's authorities in protecting China's heritage must compete with the needs of current economic and social development and other factors. The People's Republic of China has been developing very rapidly for some years now and it is unlikely that this process will stop in the foreseeable future.<sup>2</sup> This development also has major impacts on the Chinese legal system. The constant changes in the country involve many new challenges to lawmakers and the authorities which are difficult to meet. The number of new laws passed every year is enormous and there are still many areas in need of legal regulation. Many existing regulations are still being developed and still not being implemented adequately. This is partly caused by the sheer number of laws that the executive organs and courts have to keep up with.

In these times of rapid change, China seems to be rediscovering its unique history and the value of its culture and has begun to place more emphasis on the need to conserve its heritage. While economic matters usually prevail over questions of heritage protection, there seems to be a growing sensibility to heritage concerns for

1 For an in-depth analysis of the meanings and different forms of heritage, see B. Boer and G. Wiffen *Heritage Law in Australia* (Oxford University Press, South Melbourne: 2006) 7 *et seq.*

2 K.C. Yeh "China's Economic Growth: Recent Trends and Prospects" in Chen Shuxun and C. Wolf (eds) *China, the United States, and the Global Economy* (Rand Corporation, Santa Monica: 2001) 69.

several reasons. Many heritage sites are being developed as tourist destinations and create new sources of income. Its long history and culture underline China's claim for leadership in the Asian region and its outstanding position in the global community. Especially in Beijing much effort is being put into the restoration of the city's heritage sites prior to the Summer Olympic Games in 2008 in order to present the nation's capital in the best possible way. Furthermore, the Chinese authorities are aware of the effect of China's heritage on the national pride of the Chinese people and their perspective of the state.

Despite all efforts being made in this area, the problems regarding heritage preservation in China are still manifest. Although the central Chinese authorities have realised the importance of environmental sustainability, such aims must face the needs and realities of China's very high rate of economic growth and its consequences. The old parts of major cities are disappearing and being replaced by modern housing areas, and numerous heritage sites are being destroyed by construction projects. Many sites lack protection and fall into disrepair while others are modified to suit the needs of mass tourism. Trained specialists are still outnumbered in relation to the sheer quantity of heritage sites and illegal excavations. The same applies to natural heritage sites and mixed properties, such as cultural landscapes.

The Chinese authorities seem to have realised the urgency of countermeasures to address this constant loss of heritage. It remains to be seen how effective and sustainable these measures are and if they can really ward off the seemingly inevitable process of the disappearance of China's heritage.

## **Cultural Heritage in China**

Cultural heritage appears in many different forms.<sup>3</sup> This can be immovable heritage such as architectural structures, memorial sites, or cultural landscapes and movable heritage such as paintings, archaeological relics, or documents. Further there is intangible heritage in the form of certain rites, songs, poems, myths, special

<sup>3</sup> In most conventions and laws, as in many books and papers, the term "cultural property" is used. However, in this article the term "heritage" is used as it reflects the idea of trusteeship and passing on heritage to the next generations (see L. Prott and P. O'Keefe "'Cultural Heritage' or 'Cultural Property'" (1992) 1 *International Journal of Cultural Property* 307). Further, the term "heritage" pushes the material value into the background and stresses the immaterial cultural value of an element (N. Pallas *Maritimer Kulturgüterschutz* (Maritime Heritage Protection) (Duncker & Humblot, Berlin: 2004) at 124). It is beyond the scope of this article to provide a theoretical discussion of the concept of heritage, but see M. Evans *Principles of Environmental and Heritage Law* (Prospect Media Pty Ltd, St. Leonards: 2000) ch 2.

knowledge, and even attitudes.<sup>4</sup> To be regarded as heritage, such elements have to be considered as valuable and as worthy of being preserved as an inheritance for the future.<sup>5</sup> Deciding the value of each piece of heritage, and in turn which should be preserved and which should not, is a subjective process, which makes heritage a political concept. This especially applies to the many different forms of heritage sites that can be found in China. They include famous architectural masterpieces such as the Great Wall, grottos with cave paintings, historical cities, where the traditional way of living together can still be found, old temples and palaces, ancient burial sites, areas that have been shaped and cultivated by humankind for a very long time, shipwrecks and sites of historical importance. Though these are only some examples of heritage sites in China, their variety is obvious. This variety constitutes one of the difficulties of their protection, but it also makes their preservation all the more important. The preservation of variety in a civilisation is one of the core issues of heritage protection.

## **Relevant International Conventions on Heritage Protection**

China has signed and implemented several international conventions that are dedicated, or at least relate to, the protection of heritage sites.<sup>6</sup> These conventions include the 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*,<sup>7</sup> the 1972 *UNESCO Convention for the Protection of the World Cultural and Natural Heritage*<sup>8</sup> and the 2001 *UNESCO Convention on the Protection of the Underwater Cultural Heritage*,<sup>9</sup> which covers fixed sites, such as drowned cities and ports, as well as movable heritage, such as shipwrecks and their cargo. They include mechanisms and rules for the protection of cultural heritage sites, such as monuments, historic buildings, or shipwrecks. Furthermore there are some important conventions on the protection of movable cultural heritage, such as the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>10</sup> and the 1995 *UNIDROIT Convention on Stolen or Illegally Exported Cultural*

4 See Boer and Wiffen, note 1 at 7 *et seq.*

5 J. Blake "On Defining the Cultural Heritage" (2000) 49 *International and Comparative Law Quarterly* 61 at 68.

6 For an excellent overall view of the relationship between international treaties and domestic law in the People's Republic of China, see Wang Tieya "The Status of Treaties in the Chinese Legal System" (1995) 1 *Journal of Chinese and Comparative Law* 1.

7 The Hague, 14 May 1954. For the full text, see [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) (1 November 2007).

8 Paris, 16 November 1972, 1037 UNTS 151

9 Paris, 2 November 2001. For the full text, see [http://portal.unesco.org/en/ev.php-URL\\_ID=13520&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html) (1 November 2007).

*Objects*.<sup>11</sup> Many cultural heritage sites include items which can be moved or even stolen. This applies not only to movable items which belong to the site, but also to statues and other larger items which can be damaged or cut up in order to obtain transportable parts to sell on the art market. It is impossible to evaluate the protection of cultural heritage sites without discussing the need for protection of their movable or detachable parts as well.

## The Hague Conventions of 1899, 1907 and 1954, the Geneva Convention IV of 1949 and their Additional Protocols

The 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954 Hague Convention)<sup>12</sup> and its First Protocol,<sup>13</sup> both of which the People's Republic of China entered into in 2000,<sup>14</sup> marked the reaction of the international community to the massive destruction and looting of cultural heritage during the Second World War, which also took place in China during the Second Sino-Japanese War (1937-1945). It was the first international treaty that was exclusively dedicated to the protection of immovable and movable cultural heritage during armed conflicts. It followed the ideas of the Hague Conventions of 1899 and 1907,<sup>15</sup> especially the Hague Convention IV on *The Laws and Customs of War on Land* which was certainly the most important treaty of its time regarding the protection of

10 Paris, 14 November 1970. For the full text, see [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) (1 November 2007).

11 Rome, 24 June 1995. For the full text, see [www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm](http://www.unidroit.org/english/conventions/1995culturalproperty-e.htm) (1 November 2007).

12 See note 8.

13 The Hague 14 May 1954. For the full text, see [http://portal.unesco.org/en/ev.php-URL\\_ID=15391&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15391&URL_DO=DO_TOPIC&URL_SECTION=201.html) (1 November 2007).

14 The 1954 Hague Convention was signed in 1954 by the Republic of China, which continuously represented China in the United Nations until 25 October 1971 and in UNESCO until 29 October 1971. On 25 October 1971, the General Assembly of the United Nations adopted Resolution 2758(XXVI), which recognised "that the representatives of the Government of the People's Republic of China are the only lawful representatives of China to the United Nations". Following this Resolution, the Executive Board of UNESCO decided on 29 October 1971 that the Government of the People's Republic of China is the only legitimate representative of China in UNESCO. In a letter of 29 September 1972, the Minister of Foreign Affairs of the People's Republic of China informed the Secretary-General of the United Nations that the Government of the People's Republic of China will individually decide if it will recognise multilateral treaties that the former Chinese Government signed before the establishment of the Government of the People's Republic of China. The signing and ratifying of multilateral treaties from 1 October 1949 on by Taiwan in the name of "China" were considered illegal and void. The Government of the People's Republic of China would decide after studying those treaties if it was considered appropriate to sign them: [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) (10 September 2006).

cultural heritage property. It obligated all parties to take the necessary steps to spare cultural heritage sites in sieges and bombardments and to notify the opponents of the presence of such sites.<sup>16</sup> Furthermore it prohibited any pillage of private<sup>17</sup> and municipal<sup>18</sup> property. Meanwhile the Hague Conventions of 1899 and 1907 became customary international law and are therefore also binding on all states that are not signatories to these treaties.<sup>19</sup>

Whilst the earlier conventions focused on full-scale wars, the 1954 Hague Convention extended its purview to all kinds of armed conflict. It displayed the view of international law after the Second World War that historic monuments, archaeological sites, and other kinds of cultural heritage property are to be seen as property of all humankind,<sup>20</sup> regardless their ownership or origin. It also provided a definition of cultural property as follows:

...movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.<sup>21</sup>

State Parties are obliged under the 1954 Hague Convention to take preventive measures not only in times of war, but also in peacetime in order to reduce the impacts of armed conflict on cultural heritage.<sup>22</sup> Furthermore, they are obliged to respect cultural property situated within their own territory as well as on the territory of other State Parties while refraining from any act of hostility against such property and not taking any actions that are likely to expose them to destruction or damage in the event of armed conflict.<sup>23</sup>

15 The Hague Convention of 1899 was signed on 29 July 1899 and entered into force on 4 September 1900. The Hague Convention of 1907 (*Hague Convention IV on The Laws and Customs of War on Land*) was signed on 8 October 1907, and entered into force on 26 January 1910. For the full texts, see [www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm](http://www.yale.edu/lawweb/avalon/lawofwar/lawwar.htm) (1 November 2007).

16 *Hague Convention IV on The Laws and Customs of War on Land* 1907, Arts. 27, 56.

17 *Ibid.*, Art. 28.

18 *Ibid.*, Art. 56.

19 See P. Boylan "The Concept of Cultural Protection in Times of Armed Conflict: From the Crusades to the New Millennium", in N. Brodie, N. and K. Walker (eds) *Illicit Antiquities – the Theft of Culture and the Extinction of Archaeology* (Routledge, London: 2002) 48.

20 J. Kastenber "The Legal Regime for Protecting Cultural Property During Armed Conflict" (1997) 42 *The Air Force Law Review* 277 at 277.

21 1954 Hague Convention, Art. 1(1).

22 *Ibid.*, Art. 3.

23 *Ibid.*, Art. 4(1).

Furthermore, a special symbol<sup>24</sup> and an International Register of Cultural Property under Special Protection were created to mark and list important cultural property for the attacking forces. However, such a protection can be withdrawn in cases of “unavoidable military necessity”.<sup>25</sup> Although the 1954 Hague Convention has several weak points,<sup>26</sup> such as the lack of efficient rules for prosecuting violators or the vague requirement of “unavoidable military necessity” for withdrawing special protection,<sup>27</sup> it was clearly a major step in terms of safeguarding cultural heritage.

In 1999 a Second Protocol to the 1954 Hague Convention<sup>28</sup> was adopted which has not been signed by the People’s Republic of China so far.<sup>29</sup> This Protocol set clearer boundaries for the interpretation of “imperative military necessity” and set much stricter limits for attacks on cultural property.<sup>30</sup> This might be the reason for the lack of acceptance of the Second Protocol by many states.

Additional protection of cultural heritage during armed conflicts is provided by the Geneva Convention IV of 1949<sup>31</sup> and Additional Protocols which were all signed by the People’s Republic of China.<sup>32</sup> The Geneva Conventions of 1949, following the horror of the Second World War and the failure of international law in this period, can be seen as a continuation of the previous traditions of international law of war and especially the Hague Conventions.<sup>33</sup> The Geneva Convention IV of 1949 obliged all signatories to seek out and prosecute all persons irrespective of their nationalities who were alleged to have committed or have ordered grave breaches of the Geneva Conventions. Although there were no specific rules on the protection of cultural property, Article 27 of the Geneva Convention IV of 1949 emphasised the protection of non-combatants and civilian property. The two Additional Protocols, which followed in 1977, widened the provisions of the Geneva Convention IV of 1949 to non-international and international armed conflicts.<sup>34</sup> Both prohibit any

24 See 1954 Hague Convention, Art. 16.

25 See *ibid*, Art.11(2).

26 Boylan, note 19 at 49; Kastenber, note 20 at 286; E. Clément “Some Recent Practical Experience in the Implementation of the 1954 Hague Convention” (1994) 3 *International Journal of Cultural Property* 11 at 16.

27 See 1954 Hague Convention, Art. 4(2).

28 The Hague, 26 March 1999. For the full text, see [http://portal.unesco.org/en/ev.php-URL\\_ID=15207&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html) (1 November 2007).

29 At present there are only 41 signatories. For a current list of all State Parties, see UNESCO <http://erc.unesco.org/cp/convention.asp?KO=15207&language=E> (10 September 2006).

30 Boylan, note 19 at 83.

31 Geneva, 12 August 1949. For the full text, see [www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm](http://www.yale.edu/lawweb/avalon/lawofwar/geneva07.htm) (1 November 2007).

32 When depositing its instrument of adherence the Government of the People’s Republic of China stated that it did not recognise the prior signing of those Conventions by the Government of the Republic of China (Taiwan) and that they did not apply *ex tempore* in the Hong Kong Special Administrative Region.

33 Boylan, note 19 at 63.



acts of hostility against historic monuments and cultural or religious property that constitute religious or spiritual heritage to people.<sup>35</sup> These prohibitions also include any military use of such property by either the attacking or the defending forces. Further, grave breaches such as destroying clearly recognised and specially protected historic monuments, works of art, or places of worship are considered to be war crimes which are subject to universal jurisdiction.<sup>36</sup>

## Convention Concerning the Protection of the World Cultural and Natural Heritage

Probably the most important international convention on protection of heritage sites is the *Convention Concerning the Protection of the World Cultural and Natural Heritage* of 16 November 1972 (World Heritage Convention)<sup>37</sup> with currently 183 State Parties. The People's Republic of China ratified the World Heritage Convention in 1985. In its preamble the World Heritage Convention states that it considers "that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world". To meet these dangers the Convention seeks to establish a system of international cooperation and assistance and it expects all State Parties to support each other in their efforts to conserve and identify such heritage.<sup>38</sup> It notes further "that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions",<sup>39</sup> which often cause even more serious damage or destruction. This does not only apply to cases of economies breaking down and heritage sites being looted, but also to cases of rapid economic development which especially applies to China. The city of Shanghai has become one of the most important financial centres in Asia and has currently over 14 million residents. However, this economic rise also led to a massive building boom in the city with most traditional quarters being replaced by skyscrapers and apartment towers. Instead of Shanghai's original buildings that give evidence of Shanghai's past, many parts of the city now consist of modern architecture.

34 Protocol I and Protocol II adopted on 8 June 1977. Both Additional Protocols were received well by the international community with 167 and 163 State Parties respectively.

35 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Art. 53.

36 J. Nafziger "Protection of Cultural Heritage in Time of War and its Aftermath" (2003) 6 *IFAR Journal* 56.

37 Note 8.

38 World Heritage Convention, Arts. 6, 7.

39 *Ibid*, Preamble.

Cultural heritage is defined by the World Heritage Convention as monuments, groups of buildings, and sites of outstanding universal value from the point of view of history, art or science<sup>40</sup> while natural heritage is defined as natural features, geological and physiographical formations, and natural sites of outstanding universal value from the point of view of science or natural beauty.<sup>41</sup> A notable aspect of this Convention is that it explicitly uses the term “cultural heritage” while prior conventions used the term “cultural property”, which reflects the different approach of the World Heritage Convention.<sup>42</sup> All three groups of objects mentioned here have in common that they are immovable, although that term is not used in the definition of cultural heritage. Pallas argues that the lack of use of the term “immovable” indicates that accessories and attached parts to heritage sites are protected by this Convention as well<sup>43</sup> as it recognises that at least parts of some heritage sites can be moved with modern technology. The cultural and natural heritage that meets these criteria may be included in the World Heritage List<sup>44</sup> by the World Heritage Committee<sup>45</sup> that was established by the World Heritage Convention within UNESCO. China became a member of the World Heritage Committee in 1999.<sup>46</sup> Currently 138 of the 183 State Parties have properties included in the World Heritage List. In total 830 properties are inscribed on the World Heritage List, which includes 644 cultural, 162 natural and 24 mixed properties.<sup>47</sup> Thirty-three of these properties are located in China.<sup>48</sup>

The World Heritage Committee also established *Operational Guidelines for the Implementation of the World Heritage Convention*<sup>49</sup>, last revised in 2005. These *inter alia* define the term “outstanding universal value”<sup>50</sup> for cultural and natural heritage and the criteria<sup>51</sup> which have to be met by heritage sites for their inclusions in the World Heritage List. They also include a new category of World Heritage called “Cultural Landscapes”,<sup>52</sup> a concept that is especially relevant to the rural areas of China, as discussed below.<sup>53</sup>

40 See *ibid*, Art. 1.

41 See World Heritage Convention, Art. 2.

42 See Prott and O’Keefe, note 3.

43 Pallas, note 3 at 55.

44 World Heritage Convention, Art. 11(2).

45 *Ibid*, Art. 8.

46 See China’s Periodic Report 2003 at <http://whc.unesco.org/archive/periodicreporting/cycle01/section1/cn.pdf> and the summary of the report at <http://whc.unesco.org/archive/periodicreporting/cycle01/section1/cn-summary.pdf> (both 29 November 2006).

47 See <http://whc.unesco.org/en/list/> (02 October 2006)

48 See *Appendix*.

49 Hereafter “Operational Guidelines”.

50 Operational Guidelines, para. 49–53.

51 *Ibid*, para. 77.

One of the criteria set by the Operational Guidelines for “outstanding universal value” is that a property must also satisfy the conditions of integrity and authenticity<sup>54</sup> regarding design, materials, workmanship, and setting. However, authenticity is not limited to the original form and function, but also includes certain modifications and additions of artistic and historical value which were added over the years.<sup>55</sup> This especially applies to many cultural heritage sites of Chinese and other Asian cultures as many old buildings were built of wood. Only by replacing rotten parts as needed, could such buildings be conserved and retain their ancient character.<sup>56</sup> Many wooden heritage sites even had to be rebuilt completely after burning down, such as parts of the Forbidden City and the Summer Palace. This did not prevent them from being inscribed on the World Heritage List.<sup>57</sup> It should be noted that there is a long tradition in Chinese and other Asian cultures of conserving by copying and rebuilding. These cultures reflect a different sense of the value of originals and copies. This is also influenced by a cyclical view of time that is different to the linear view of time in Western cultures. For example, the Isi Shrine in Japan was originally built in the seventh century AD and is ritually destroyed and rebuilt every twenty years. Although no part is older than twenty years, it is still considered by the Japanese as being ancient.

The right to nominate and delineate heritage that meets the criteria of the Convention belongs to the state on whose territory the property is located.<sup>58</sup> This means that such heritage cannot be included in the World Heritage List without the consent of the State Party concerned. However, the World Heritage Convention also laid down the duty of the State Parties to identify, protect, conserve, and present the heritage situated on their territories that meets the standards of Articles 1 and 2 as well as those of the Operational Guidelines.<sup>59</sup> This must be done by using their own resources where possible and with international assistance where needed. The World Heritage Convention respects the sovereignty of the State Parties and there is no

52 See Operational Guidelines, para 47 and *Guidelines on the Inscription of Specific Types of Properties on the World Heritage List*, paras 6–13.

53 The mixed and most of the natural World Heritage Sites in China could also be re-nominated under the concept of “cultural landscapes”.

54 Operational Guidelines, para 78. To be deemed of outstanding universal value, a property must also meet the conditions of integrity (see paras 87–95) and/or authenticity (see paras 79–86) and must have an adequate protection and management system to ensure its safeguarding.

55 J. Greenfield *The Return of Cultural Treasures*, 2<sup>nd</sup> edition (Cambridge University Press, Cambridge: 1996) at 189.

56 A. Stille *The Future of the Past – How the Information Age Threatens to Destroy our Cultural Heritage* (Picador, London: 2002) at 41.

57 *Ibid*, at 40 *et seq*.

58 World Heritage Convention, Art. 3.

59 *Ibid*, Art. 4; see analysis of Art. 4, 5 by Boer and Wiffen, note 1 at 69 *et seq*.

explicit obligation to put forward nominations of identified heritage sites. However, not doing so and not helping with the inclusion of identified heritage sites in the World Heritage List should at least be seen as contradictory to the aims of the Convention. Further duties under this Convention include policy, legal, scientific, and financial measures to strengthen heritage conservation in each territory in order to set up scientific centres, train specialists, strengthen the legal protection of heritage, and raise public awareness.<sup>60</sup> Generally speaking, the State Parties are obliged to maintain the integrity of the identified outstanding universal values of their listed properties and to give them the highest level of protection possible on a permanent basis.<sup>61</sup> The World Heritage Convention leaves a good deal of freedom to the State Parties to decide how to meet these obligations as appropriate to each country, recognising their individual policies, legal conditions and different availabilities of resources.<sup>62</sup> However, it leaves no doubt that all State Parties are obliged to meet their obligations under this Convention as far as possible,<sup>63</sup> although it should be noted that the World Heritage Convention has no enforcement mechanism.

The duty of State Parties to protect their heritage properties does not completely depend on inclusion in the World Heritage List, but comes from the duty to identify a nation's heritage.<sup>64</sup> Each State Party is responsible for its own heritage and therefore obliged by the World Heritage Convention to protect and conserve it to the utmost of its resources. This includes not only heritage that is listed in the World Heritage List, but also heritage on tentative lists of places, which are considered by the State Parties for nomination as World Heritage Sites at some future time.<sup>65</sup> There are currently 59 properties on the tentative list that has been prepared by the

60 Ibid.

61 Boer and Wiffen, note 1 at 86.

62 For case studies regarding several individual World Heritage Sites in China, see the section *Domestic heritage legislation in the People's Republic of China*, below.

63 In the Franklin Dam Case, *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 133, Justice Mason stated: "Art. 5 itself imposes a series of obligations on parties to the Convention ... Article 5 cannot be read as a mere statement of intention. It is expressed in the form of a command requiring each party to endeavour to bring about the matters dealt with in the lettered paragraphs. Indeed, there would be no point in adding the qualifications 'in so far as possible' and 'as appropriate for each country' unless the article imposed an obligation."

64 In *State of Queensland v Commonwealth of Australia* (1989) 167 CLR 232 at 245, Justice Dawson stated: "The obligation of a State Party to protect, conserve, present and transmit to future generations the cultural and natural heritage situated on its territory does not flow from any listing upon the World Heritage List. It flows from the identification by the State Party of its cultural or natural heritage, an identification which the State Party is under a duty to make. Once identified, even if there is a refusal to enter such a property on the World Heritage List, it does not cease to be part of the cultural or natural heritage and the obligations imposed by the Convention in relation to it remain in force."

65 See Operational Guidelines, paras 62-76.

National Commission of the People's Republic of China for UNESCO.<sup>66</sup> Even if the inclusion of a nominated heritage site has been refused, it is still part of the heritage of the State Party by virtue of the fact that the State has identified it and forwarded its nomination to the World Heritage Committee. Though the State Party might not be eligible for international assistance in this case, its obligation to protect its heritage is still in force.

The Committee also established a List of World Heritage in Danger<sup>67</sup> comprising property on the World Heritage List that requires major operations for its conservation because it is "threatened by serious and specific dangers", such as accelerated deterioration, large-scale public or private projects, rapid urban or tourist development projects, the outbreak or threat of an armed conflict, or serious natural disasters, and for which assistance has been requested.<sup>68</sup> However, the listing of property in the World Heritage in Danger List does not necessarily have to be requested by the State Party in question, nor does such a listing require its consent.<sup>69</sup> In urgent cases, the World Heritage Committee may at any time "make a new entry in the List of World Heritage in Danger and publicise such entry immediately".<sup>70</sup> In case of such a listing, the Committee is obliged to develop a plan of corrective measures and seek the cooperation of the State Party concerned. The State Party is obliged to cooperate, to meet the requests of the Committee and to take all necessary steps to protect the property concerned. However, such measures will only be effective if the State Party is willing to cooperate.

One of the most serious cases concerned the World Heritage Site at Angkor in Cambodia<sup>71</sup> which was placed on the List of World Heritage in Danger at the same time as inclusion on the World Heritage List itself. These monuments, which were built between the 9<sup>th</sup> and 13<sup>th</sup> Centuries, suffered for a very long time from armed conflict, looting, and abandonment before the Authority for the Protection and Management of Angkor and the Region of Siem Reap (known as APSARA) was established with help from UNESCO and with international aid including

66 For the updated tentative list and further information, see <http://whc.unesco.org/en/statesparties/cn> (10 September 2006).

67 World Heritage Convention, Art. 11(4); also see Operational Guidelines, paras 177-191.

68 For several forms of assistance, see World Heritage Convention, Art. 22.

69 After the Nepalese authorities did not manage to efficiently meet the threats to endangered property in the Kathmandu Valley (see the Report of the 24<sup>th</sup> session of the World Heritage Committee (Cairns, 2000), VIII.32), the World Heritage Committee decided in 2003 to inscribe this site in the World Heritage in Danger List, despite opposition from the Nepalese authorities (see Decision 27COM 7B.52 from the 27<sup>th</sup> Session of the World Heritage Committee (Paris, 2003)); see also two news releases from the IUCN, March 2003 at [www.iucn.org/en/news/archive/2001\\_2005/press/pr140303wh.pdf](http://www.iucn.org/en/news/archive/2001_2005/press/pr140303wh.pdf) and [www.iucn.org/en/news/archive/2001\\_2005/press/whpr250303.pdf](http://www.iucn.org/en/news/archive/2001_2005/press/whpr250303.pdf) (10 September 2006).

70 World Heritage Convention, Art. 11(4).

71 See the Report of the 16<sup>th</sup> Session of the World Heritage Committee (Santa Fe, 1992).

substantial support from China. For example, the China Cultural Relics Research Institute took care of preserving and renovating the Chau Say Tevoda which was financed by a donation from China.<sup>72</sup> Through decisive action by the relevant authorities and supporting nations, the situation significantly improved and the monuments in Angkor were removed from the List of World Heritage in Danger in 2004.<sup>73</sup>

World Heritage is not only endangered in times of armed conflict or in developing countries that often depend on certain building projects and lack alternative solutions, but also in developed countries if economic interests stand in direct competition with the preservation of heritage sites. For example, in 2004 the World Heritage Committee decided to inscribe the world-famous Cathedral of Cologne in Germany on the World Heritage in Danger List.<sup>74</sup> The Cathedral of Cologne was inscribed on the World Heritage List in 1996 on the basis of cultural criteria (i), (ii), and (iv) because the World Heritage Committee considered it an “exceptional work of human creative genius” and a “powerful testimony to the strength and persistence of Christian belief in medieval and modern Europe”.<sup>75</sup> The Committee suggested “that protective legislation should be set up which would ensure that new constructions around the property would be in conformity with the architectural significance of the Cathedral”. Despite this suggestion the City of Cologne decided to pass new building plans that included high-rise building projects on the bank of the Rhine River opposite the Cathedral. This would have had significant impact on the visual integrity of the Cathedral as a landmark. After the German authorities failed to provide sufficient information regarding the building projects in question, the Committee decided to inscribe the Cathedral on the List of World Heritage in Danger.<sup>76</sup> While it was removed from this list in 2006,<sup>77</sup> it is nevertheless alarming to see how the City of Cologne struggled with preserving the visual integrity of its World Heritage Site during the course of this conflict. The same applies to Kathmandu Valley and especially Durbar Square in Nepal where the local

72 *People's Daily*, 30 March 2000.

73 See Decision 28COM 15A.23 from the 28<sup>th</sup> Session of the World Heritage Committee (Suzhou, 2004).

74 See Decision 28COM 15B.70 from the 28<sup>th</sup> Session of the World Heritage Committee (Suzhou, 2004).

75 See the Report of the 20<sup>th</sup> Session of the World Heritage Committee (Merida, 1996).

76 For a current review of the situation and the decision of the World Heritage Committee to retain the Cathedral of Cologne on the List of World Heritage in Danger, see WHC-05/29.COM/7A, at 46, 47 of the Report of the 29<sup>th</sup> Session of the World Heritage Committee (Durban, 2005). See also D. Zacharias “Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System” in A. von Bogdandy and R. Wolfrum (eds) *Max Planck Yearbook of United Nations Law Bd. 10* (Martinus Nijhoff Publishers, Leiden: 2006) at 273.

77 See decisions WHC-06/30.COM/7A.30 and WHC-06/30.COM/8C.3 of the Report of the 30<sup>th</sup> Session of the World Heritage Committee (Vilnius, 2006).

authorities were unable or even unwilling to stop the ongoing construction of concrete buildings in the immediate vicinity of the monument sites.<sup>78</sup>

There is currently no Chinese property on the List of World Heritage in Danger. However, the World Heritage Committee expressed its great concern regarding planned dam and mining projects within and near the World Heritage area of the Three Parallel Rivers of Yunnan Protected Areas.<sup>79</sup> It is feared that these projects could threaten the integrity and values of the property. In order to prevent this from happening, the World Heritage Committee requested China to submit detailed plans of the proposed dam and mining projects and to present reports on their possible impacts on the World Heritage Site. After a monitory mission from IUCN<sup>80</sup> and the World Heritage Centre, the World Heritage Committee will make further decisions at its 31<sup>st</sup> session in 2007.<sup>81</sup>

### The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 14 November 1970 (UNESCO Convention),<sup>82</sup> which was signed by China in 1989, is directed against the illicit trade in cultural property that is designated by each state as being of importance for archaeology, prehistory, history, literature, art or science.<sup>83</sup> It was designed to reinforce the solidarity between the signatory states and especially between states that suffer from illicit export of cultural heritage and states that import such items.<sup>84</sup> Its purpose is not to stop the interchange of cultural heritage among nations completely,

<sup>78</sup> See note 69.

<sup>79</sup> See the Advisory Body Evaluation from IUCN at [http://whc.unesco.org/archive/advisory\\_body\\_evaluation/1083.pdf](http://whc.unesco.org/archive/advisory_body_evaluation/1083.pdf) (29 October 2006).

<sup>80</sup> The International Union for the Conservation of Nature and Natural Resources (World Conservation Union).

<sup>81</sup> See related decisions 28COM 15B.9 from the 28<sup>th</sup> Session of the World Heritage Committee (Suzhou, 2004), 29COM 7B.7 from the 29<sup>th</sup> Session of the World Heritage Committee (Durban, 2005) and 30COM 7B.11 from the 30<sup>th</sup> Session of the World Heritage Committee (Vilnius, 2006).

<sup>82</sup> See note 10.

<sup>83</sup> For a detailed definition of cultural property for the purposes of the UNESCO Convention, see Art. 1.

<sup>84</sup> R. Skeates *Debating the Archaeological Heritage* (Duckworth, London: 2000) at 40; E. Clément "The Aims of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and Action Being Taken by UNESCO to Assist in its Implementation" in K. Tubb *Antiquities Trade or Betrayed – Legal, Ethical and Conservation Issues* (Archetype Publications, London: 1995) 38. For a comprehensive commentary on the UNESCO Convention, see P. O'Keefe *Commentary on the 1970 UNESCO Convention on Illicit Traffic* (Institute of Art and Law, Leicester: 2000).

as such interchange for scientific, cultural, and educational purposes is regarded by the UNESCO Convention as being important for the increase of knowledge, enrichment of cultural life, and increase of mutual respect and appreciation among nations.<sup>85</sup> Only the illicit import, export, and transfer of ownership of cultural heritage are targeted by this Convention. For these purposes the UNESCO Convention obliges the signatory states to take all necessary measures to prevent museums and similar institutions from acquiring cultural property that has been illegally exported from another country, to prohibit the import of such items, and to take appropriate steps to recover and return these items upon request to its state of origin.<sup>86</sup> Such international cooperation is especially crucial to China, as antiquities are believed to be the largest single class of item smuggled out of the country.<sup>87</sup> Furthermore, State Parties are obliged to establish a national inventory of protected cultural property, supervise archaeological excavations and protect areas of archaeological value.<sup>88</sup> They must promote the development and establishment of appropriate institutions required for preserving and presenting cultural property, take educational measures to stimulate and develop interest and respect for cultural heritage, and establish rules to support the principles and obligations of the UNESCO Convention.<sup>89</sup> Under this Convention, export of such property is permitted only with an appropriate certificate to be introduced by the State Parties. Every antique dealer is obliged to maintain a register of all his or her cultural heritage items with descriptions, origins, and details of the suppliers and to inform every customer of export restrictions.<sup>90</sup> All persons who take part in violating such import and export restrictions must be subject to penalties or administrative sanctions to be implemented by the State Parties.<sup>91</sup>

The adoption of the UNESCO Convention clearly heralded a significant improvement in the protection of cultural property. However, it has a major weakness. Like many other international legal instruments, the UNESCO Convention does not promote uniform national legislation. It leaves it to the signatories to apply their own domestic law.<sup>92</sup>

85 UNESCO Convention, Preamble.

86 UNESCO Convention, Art. 7.

87 J. 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.

88 Issues regarding excavations and protection of archaeological sites in China are discussed later.

89 UNESCO Convention, Art. 5.

90 UNESCO Convention, Art. 10.

91 UNESCO Convention, Art. 8.

92 J. Lehmann "The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the UNIDROIT Draft Convention" (1997) 14 *Arizona Journal of International and Comparative Law* 527 at 542.



There have been numerous successful legal cases regarding Chinese cultural relics, despite it being usually very complicated to claim back looted heritage items, even under the existing international conventions.<sup>93</sup> When an item is removed from its context, it is hard to prove that it has been illegally excavated because looters will certainly not keep records of their operations.<sup>94</sup> This is why it is nearly impossible to identify an object from a looted site.<sup>95</sup> Another approach by the Chinese authorities is to seek the cooperation of other signatories of the UNESCO Convention<sup>96</sup> or seek import restrictions on cultural relics illegally exported from China. In particular, the import restrictions outlined in the request from China to the United States of America in 2004 would certainly help in cutting off one of the most important markets for illegally exported Chinese cultural heritage items<sup>97</sup> if the restrictions were introduced and properly enforced.<sup>98</sup>

### The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

The *UNIDROIT Convention on Illicit Import, Export, and Transfer of Cultural Objects of 24 June 1995 (UNIDROIT Convention)*<sup>99</sup> is aimed at private transactions relating to movable cultural heritage<sup>100</sup> and applies to international claims for the restitution

93 For example, see J. Levine “Returning Stolen Cultural Property – Tomb of Wang Chuizi Marble Wall Relief” (2002) 2 *Cultural Resource Management* 17. In this case the looted items were identified in a catalogue of an auction house and several experts managed to prove the origin of the looted relief because of its material, style and matching size of the hole that was left after the removal of the relief. Regarding non-retroactivity of the UNESCO Convention and exemptions suggested by China in cases of important cultural property, see A. Vrdoljak *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press: 2006).

94 L. Prott “National and International Laws on Protection of the Cultural Heritage” in K. Tubb, note 84 at 65.

95 P. O’Keefe “Conservators and Actions for Recovery of Stolen or Unlawfully Exported Cultural Heritage” in K. Tubb, note 84 at 73.

96 See a review of the recent Chinese-Italian agreement on the prevention of cultural heritage theft, *Xinhua News Agency* 20 January 2006 [http://news.xinhuanet.com/english/2006-01/20/content\\_4079364.htm](http://news.xinhuanet.com/english/2006-01/20/content_4079364.htm) (17 October 2006)

97 It is estimated that the US market consumes about half of all Chinese antiquities sold world-wide, see K. Mazurkewich “End of an Era” *The Asian Wall Street Journal* 4 March 2005.

98 See a summary of the request of the People’s Republic of China to the Government of the United States of America under Article 9 of the 1970 UNESCO Convention, available at <http://exchanges.state.gov/culprop/cn04sum.html> (10 September 2006) and a related letter of support by the Lawyers’ Committee for Cultural Heritage Preservation to the Cultural Property Advisory Committee of the US Department of State [www.culturalheritagelaw.org/chinaarticle.pdf](http://www.culturalheritagelaw.org/chinaarticle.pdf) (10 September 2006).

99 See note 11.

100 B. Boer, R. Ramsay, D. Rothwell *International Environmental Law in the Asia Pacific* (Kluwer Law International, London: 1998) 85; see also Boer and Wiffen, note 1 at 42 *et seq*; A. Vrdoljak, note 93 at 273 *et seq*.

of stolen cultural objects<sup>101</sup> and the return of illegally exported cultural objects.<sup>102</sup> The People's Republic of China became a State Party in 1997.

Unlike the UNESCO Convention, the UNIDROIT Convention aims to harmonise the regulations of its signatories and provides a jurisdictional basis and standards which can be used in dispute resolution.<sup>103</sup> The UNESCO Convention leaves it to its State Parties to develop appropriate legal regulations. However, the UNESCO Convention and the UNIDROIT Convention are designed to complement each other and cover two separate areas. While the UNESCO Convention focuses on measures taken by states, the UNIDROIT Convention focuses on the private antique market.<sup>104</sup>

The UNIDROIT Convention establishes a right of return of stolen objects to the original owner. One of the most important sections regarding Chinese heritage sites is Article 3(2), which considers all "unlawfully excavated or lawfully excavated but unlawfully retained" cultural objects stolen "when consistent with the law of the state where the excavation took place". In China the law states that all cultural heritage items on Chinese territory, excavated, still undiscovered or buried, are owned solely by the state.<sup>105</sup> Therefore, the UNIDROIT Convention puts China in a very good position for reclaiming stolen and illegally excavated cultural heritage items from other signatories. However, only 27 states have become members of the UNIDROIT Convention so far<sup>106</sup> which affects the efficacy of this Convention significantly.<sup>107</sup>

For the purpose of this Convention it is not necessary that the cultural object in question was registered by the requesting state before it was stolen or illegally exported. However, without prior registration it is very difficult if not impossible to track down an illegally exported object and prove its origin. Furthermore, the

101 In Art. 2 of the UNIDROIT Convention cultural objects are defined as "those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science". A list of categories is attached in the Annex to this Convention. The definition and categories match those in the UNESCO Convention.

102 Art. 1(b) of the UNIDROIT Convention defines "illegally exported" as the removal 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. See also L. Prott *Commentary on the UNIDROIT Convention* (Institute of Art and Law, Leicester: 1997).

103 C. Fox "The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: an Answer to the World Problem of Illicit Trade in Cultural Property" (1993) 9 *The American University Journal of International Law & Policy* 225 at 366.

104 On the compatibility between the UNESCO and UNIDROIT Conventions, see L. Prott "UNESCO and UNIDROIT. A Partnership against Trafficking in Cultural Objects" (1996) 1 *Uniform Law Review* 56.

105 *Law of the People's Republic of China on the Preservation of Cultural Relics* (Cultural Relics Law), Art. 5.

106 For an updated list of signatories, see [www.unidroit.org/english/implement/i-95.pdf](http://www.unidroit.org/english/implement/i-95.pdf) (10 September 2006).

107 The United States of America has not yet become a member state, although its market consumes about half of all Chinese antiquities sold world-wide (see Mazurkewich, note 97).

UNIDROIT Convention provides good faith purchasers with a right to claim equitable compensation in case cultural property in their possession is reclaimed under this Convention, as long as they took all necessary steps to ensure that the item was not illegally obtained.<sup>108</sup> The good faith customer can even hold the dealer liable if he or she cannot prove that the background of the item was properly checked. This Convention not only protects the rights of original owners and good faith customers, but it also discourages the illicit art trade without damaging free trade in art.<sup>109</sup> At the same time, it encourages the development of a more honest market while forcing the customer to make more intense enquiries about the source of an object before purchasing it.<sup>110</sup>

## The Convention on the Protection of the Underwater Cultural Heritage

Another international treaty that focuses on cultural heritage is the *Convention on the Protection of the Underwater Cultural Heritage* of 2 November 2001 (Underwater Cultural Heritage Convention)<sup>111</sup> which is the first international treaty explicitly dedicated to ensuring and strengthening the protection of underwater cultural heritage.<sup>112</sup> This includes “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years”.<sup>113</sup> Other international instruments, especially the *United Nations Convention on the Law of the Sea* of 1982,<sup>114</sup> also contain general provisions on these matters, but they do not provide sufficient protection.<sup>115</sup> However, the Underwater Cultural Heritage Convention does not prejudice the rights, jurisdiction, and duties of State Parties under international law.<sup>116</sup>

108 UNIDROIT Convention, Art. 4, 6.

109 Lehmann, note 92 at 531.

110 N. Brodie, J. Doole and P. Watson *Stealing History: The Illicit Trade in Cultural Material* (The McDonald Institute for Archaeological Research, Cambridge: 2000) 40.

111 See note 9.

112 For a comprehensive review of this Convention, see Pallas, note 3 at 360 et seq.

113 For the complete definition, see the Underwater Cultural Heritage Convention, Art. 1 (a).

114 21 ILM 1261 (1982).

115 *United Nations Convention on the Law of the Sea*, Art. 149: All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of humankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin. *United Nations Convention on the Law of the Sea*, Art. 303 (1): States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose ...

116 Underwater Cultural Heritage Convention, Art. 3.

The Underwater Cultural Heritage Convention obliges State Parties to take all appropriate measures in conformity with the Convention to preserve underwater cultural heritage for the benefit of humanity by using the best practicable means at their disposal. Furthermore, commercial exploitation of underwater cultural heritage is prohibited by the Convention. All State Parties are obliged to cooperate to ensure long-term preservation of all relevant recovered items and to encourage responsible non-intrusive access to observe or document cultural heritage for creating public awareness, appreciation, and protection of such heritage.<sup>117</sup> Furthermore, the State Parties must require nationals or vessels flying their flags to report all discoveries of or activities directed at underwater cultural heritage,<sup>118</sup> must prevent the dealing in, the possession of, or the entry into their territory of all illicitly exported or recovered underwater cultural heritage,<sup>119</sup> and raise public awareness regarding these issues.<sup>120</sup> In order to raise the international standard of protection, they must also cooperate in training in underwater archaeology and conservation of underwater cultural heritage, and, on agreed terms, in the transfer of technology.<sup>121</sup>

The People's Republic of China has not yet signed the Underwater Cultural Heritage Convention, but Chinese specialists in this area expect their country to become a State Party as soon as the Chinese authorities complete the revision of the existing national legislation in this field to make it consistent with the Convention.<sup>122</sup>

However, the Convention has not so far been broadly ratified<sup>123</sup> which reduces its effectiveness significantly.<sup>124</sup> Unfortunately at the same time the intensity of activities of treasure hunters has not decreased, while their methods become increasingly more effective due to improved technology and finance. China is one of the countries that suffers the most from such activities, because the South China Sea hosts some of the busiest sea routes since ancient times, with numerous shipwrecks. Furthermore, the Chinese authorities still have no clear knowledge of their number and location<sup>125</sup> which makes it one of the most popular areas for treasure hunters.

117 Ibid, Art. 2.

118 Ibid, Art. 11(1).

119 Ibid, Art. 14.

120 Ibid, Art. 20.

121 Ibid, Art. 21.

122 *China Daily* 2 July 2004; Embassy of the People's Republic of China in Australia <http://au.china-embassy.org/eng/zgk/wh/t76123.htm> (17 October 2006).

123 For an updated list of State Parties, see UNESCO <http://erc.unesco.org/cp/convention.asp?language=E&KO=13520> (17 October 2006).

124 For a critical review of this Convention, see R. Blumberg *International Protection of Underwater Cultural Heritage* (2005) at [www.state.gov/g/oes/rls/rm/51256.htm](http://www.state.gov/g/oes/rls/rm/51256.htm) (17 October 2006).

125 *China Daily*, 2 July 2004.

## **Domestic Heritage Legislation in the People's Republic of China**

Heritage protection has a long tradition in China. Between 1928 and 1938 several laws on this matter were passed before the outbreak of the Sino-Japanese War, including the *Act on Preservation of Articles of Historical, Cultural and Artistic Value*; *Tentative Regulations Governing Types and Forms of Articles of Historical, Cultural and Artistic Importance*; *Directives on Ban on Shipping of Articles of Historical, Cultural and Artistic Value*; and the *Statute for Preservation of Scenic Sites, Points of Historical Importance, and Articles of Historical, Cultural and Artistic Value*<sup>126</sup> which *inter alia* introduced disciplinary punishment for responsible officials if property protected under this law was damaged or destroyed because of inadequate protective measures.<sup>127</sup> These laws were clearly influenced by Western countries. In 1946 the Third Revolutionary War broke out and ended with the founding of the People's Republic of China in 1949 and the retreat of the defeated leader of the Kuomintang forces, Chiang Kai-shek to the island of Taiwan. During this retreat a total 11,729 items<sup>128</sup> from the collection of the Central Museum of China were shipped to Taiwan and remain there to the present. In the years to come Chinese authorities issued orders and regulations to restrict the export of cultural relics and to improve their protection.

In 1966 the Great Proletarian Cultural Revolution started, which certainly can be seen as one of the darkest chapters in Chinese history and as a disaster for cultural life in China as a whole. Initiated by the Communist Party Chairman Mao Zedong to secure his power base and enforce his ideology, it was a campaign against so-called bourgeois values and bureaucracy in the Communist Party and the state.<sup>129</sup> The Red Guard was encouraged to fight all traditional values and élites. Everything that was suspected to be élitist, bourgeois, or even academic was threatened during this era.<sup>130</sup> Even schools and other educational establishments were considered to be élitist and were closed. However, in 1967 the Central Committee of the Chinese Communist

126 E. Wang "China" in *Preservation of Cultural Heritage: Australia, China, Japan, Korea, Malaysia, New Zealand, Philippines, Thailand, Vietnam* (Cultural and Social Centre for the Asian and Pacific Region, Seoul: 1971) 90.

127 *Statute for Preservation of Scenic Sites, Points of Historical Importance, and Articles of Historical, Cultural and Artistic Value* (Republic of China, 1928-1938), Art. 8.

128 Wang, note 126 at 106

129 See Tang Tsou *The Cultural Revolution and Post-Mao Reforms – A Historical Perspective* (University of Chicago Press, Chicago: 1986).

130 Wang Shaoguang "Between Destruction and Construction: The First Year of the Cultural Revolution" in Kam-yee Law (ed) *The Chinese Cultural Revolution Reconsidered* (Palgrave Macmillan, Basingstoke: 2003) at 25 *et seq.*

Party issued an order concerning the preservation of relics and old books which brought some small relief for China's heritage.

Unfortunately many cultural heritage sites and items were deliberately destroyed during the Cultural Revolution and all existing protection mechanisms were abandoned as well as most of the legal system and existing laws. This changed with the introduction of the Open Door Policy in 1978 and the adoption of the fourth constitution since the founding of the People's Republic of China. The 1982 *Constitution of the People's Republic of China* (1982 Constitution) was adopted to incorporate the new policy after the end of the Cultural Revolution and is still in force with amendments in 1988, 1993, 1999 and 2004. The new policy focused especially on providing social stability, furthering economic development, and opening to the outside world.<sup>131</sup> However, there was hardly any national legislation in force after the Cultural Revolution.<sup>132</sup> Between 1957 and 1976 the only laws passed were the 1975 Constitution and the *National Outline for Agricultural Development*. Following the adoption of the Open Door Policy, the People's Republic of China made supreme efforts to introduce legislation for all social, economic, and other sectors. High-ranking government officials expressed their will to guide and protect the socialist market economy<sup>133</sup> by law and follow the principle of governing by law.<sup>134</sup> Although some areas still lack legal regulation and there is still a need for many more trained lawyers, the progress that has been made in recent years is significant. However, because of the rapid development of law some legal areas are more developed than others. Heritage law is clearly one of the areas that still need further efforts to provide effective protection for China's great cultural heritage.

## Legal and Policy Efforts to Protect Cultural Heritage Sites in China

Since the adoption of the Open Door Policy and especially in recent years, Chinese citizens and authorities have manifested a rekindling of interest in China's rich cultural heritage.<sup>135</sup> During the Cultural Revolution the question of what to

131 Chen Jianfu "China: Constitutional Changes and Legal Developments" in A. Tay and C. Leung *Greater China: Law, Society and Trade* (The Law Book Company Limited, Sydney: 1995) 149.

132 Ibid at 151.

133 The 1993 Amendment inter alia replaced the term "planned economy" in the 1982 Constitution with the term "socialist market economy".

134 For a review of several related speeches by Jiang Zemin, see *People's Daily* 25 March 2000.

135 Preserving China's cultural heritage also became an issue in China's Ninth Five-Year Plan (see Report on the Outline of the Ninth Five-Year Plan (1996-2000) for National Economic and Social Development and the Long-range Objectives to the Year 2010) and Tenth Five-Year Plan. During the Tenth Five-Year Plan 2.2 billion yuan (US\$275 million) was invested in cultural heritage protection which is 20.5 per cent more than the investment during the previous Five-Year Plan. (see *China Daily* 8 October 2005)

preserve was influenced mainly by ideological considerations and many relics that were regarded as evidence of feudal and pre-revolutionary times were destroyed. The current efforts to preserve the Chinese heritage are certainly a countermovement to those politics. However, apart from an apparent genuine historical interest in the heritage of China, the Chinese authorities recognise its political and financial potential. Marketing the Chinese heritage sites as tourist destinations generates new sources of income and stressing the uniqueness of the Chinese heritage promotes national pride. The Government of the People's Republic of China, as with many governments, is interested in fostering patriotism and national unity. One way of achieving this is the promulgation of national symbols like heritage sites. These include memorials, historic landmarks, tombs and archaeological sites to commemorate people, places, and events that have played an important part in the history of the country. It can even justify claims to a dispossessed homeland by providing proof of historical presence.<sup>136</sup> In addition, these heritage sites emphasise the national identity of China in the global community.

There are four levels of legislation in the People's Republic of China. The highest level is the 1982 Constitution. The next level consists of laws passed by the National People's Congress and its Standing Committee, and international conventions that the Standing Committee approved and to which China is a State Party. On the third level are regulations, orders, and decisions by the State Council and on the fourth level those of provinces, autonomous regions, and municipalities.<sup>137</sup> The emphasis that the Chinese Government places on its cultural history can clearly be seen by the prominent position that it has been given at the beginning of the preamble of the 1982 Constitution:

China is one of the countries with the longest histories in the world. The people of all nationalities in China have jointly created a splendid culture and have a glorious revolutionary tradition.

The will and duty to preserve China's heritage is also established in the 1982 Constitution:<sup>138</sup>

The state promotes the development of literature and art, the press, broadcasting and television undertakings, publishing and distribution services, libraries, museums, cultural centres and other cultural undertakings, that serve the people and socialism,

136 P. Hoagland "China" in S. Dromgoole (ed) *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (Kluwer Law International, The Hague: 1999) 26.

137 Zho Guobin "Constitutional Law" in Wang Chenguang and Zhang Xianchu (eds) *Introduction to Chinese Law* (Sweet and Maxwell, London: 1997) 43, 44.

138 *Constitution of the People's Republic of China* 1982, Art. 22.

and sponsors mass cultural activities. The state protects places of scenic and historical interest, valuable cultural monuments and relics and other important items of China's historical and cultural heritage.

Several institutions have been established in China to coordinate and take care of heritage protection. The most important institution is the State Administration of Cultural Heritage under the State Council. It is responsible for all national cultural heritage and museum affairs and for drafting policies and regulations on these matters. The China Institute of Cultural Property is mainly responsible for coordinating training of all national personnel assigned to cultural heritage. All organs that are set up by local governments at various levels for the protection of cultural heritage in their areas are directed by the State Administration of Cultural Heritage<sup>139</sup> and are set up in strict hierarchy. From governments of small towns up to governments of provinces and autonomous regions, all local people's governments have to report to the people's governments at the next higher level, which makes all of them state administrative organs under the unified leadership of the State Council.<sup>140</sup> Management and preservation of cultural heritage, and research, are done by these authorities in cooperation with museums, specialised centres and universities.

The centrepiece of the protection of cultural heritage in China is the *Law of the People's Republic of China on the Preservation of Cultural Relics* (Cultural Relics Law) which was adopted by the Standing Committee of the National People's Congress in 1982. It was last amended in 2002 at the 30th session of the Standing Committee of the Ninth National People's Congress and was extended at that time from 33 to 80 articles. In addition to this law, the rules for its implementation were introduced by the State Council in 2003. There are also countless legal instruments and specific regulations enacted by local governments and authorities over the years. Some of these regulations were developed in cooperation with foreign institutions, such as the *Principles for the Conservation of Heritage Sites in China*, which were formulated in cooperation with the Getty Conservation Institute and the former Australian Heritage Commission.

The Cultural Relics Law places particular types of cultural heritage of historical, artistic, revolutionary or scientific value, within the boundaries of the People's Republic of China, under the protection of the state, such as ancient architectural structures, cave temples, buildings, works of art, handicraft articles, old manuscripts

139 Paper by Prof Huang Kezhong presented at the "China-Italy UNESCO seminar on technologies for conservation of world heritage" held in Beijing on 17-19 October 2000.

140 Zho Guobin, note 137 at 56.



and books, and typical material objects reflecting the social system, social production or the life of various nationalities in different historical periods.<sup>141</sup>

One of the most important provisions of this law lays down that all cultural relics remaining underground, in China's waters, or in collections of state organisations shall be owned by the state. The same applies to all sites of ancient culture, ancient tombs and cave temples and other structures designated for protection by the state under this law.<sup>142</sup> Certain exemptions may only be made in cases where private ownership was handed down from generation to generation.

To provide more effective protection, cultural heritage sites protected under this law are classified under three different levels of protection according to their historical and cultural value. This can be either protection on county level, provincial level, or national level. Newly discovered cultural heritage sites are to be reported to the local cultural heritage department or the local museum, where they are classified or only registered. However, there are hardly any penalties for not reporting heritage sites. In case of classification, they are usually placed under a certain level of protection while sites that are only registered are usually not provided with special protection measures. Such registration only means that the authorities know about the location and type of site.<sup>143</sup> Most heritage sites in China are not under legal protection. The decision about the grade of the historical and cultural value of sites lies within the responsibility of the authorities at the appropriate levels.<sup>144</sup> The relevant authorities are further obliged to set up sufficient specialised organs and staff for the protection of heritage sites within their region and establish and release records of all classified heritage sites along with the intended protective measures.

To date, more than 400,000 immovable cultural properties have been identified in China. Over 1,200 cultural heritage sites have been placed under national protection, about 7,000 under provincial protection, and over 60,000 under county or city protection.<sup>145</sup> Thirty-three sites are inscribed on the World Heritage List including 24 cultural and 4 mixed sites.<sup>146</sup> In 2005, 103 cities and 22 towns were designated by the State Council as "Cities and Towns of Recognized Historical and Cultural Value".<sup>147</sup>

141 Cultural Relics Law, Art. 2. For further details, see *Principles for the Conservation of Heritage Sites in China* 2000, Art. 2.

142 Cultural Relics Law, Art. 5.

143 He Shuzhong "The Mainland's Environment and the Protection of China's Cultural Heritage: A Chinese Cultural Heritage Lawyer's Perspective" (2000) 5 *Art Antiquity and Law* 19.

144 Cultural Relics Law, Art. 13.

145 Statistics supplied by ICOMOS China in 2005.

146 See *Appendix*.

147 Speech by Zhang Bai, Vice Director General of the State Administration of Cultural Heritage and President of ICOMOS China, 5 July 2005 [www.china.org.cn/e-news/news050705-1.htm](http://www.china.org.cn/e-news/news050705-1.htm) (17 October 2006).

The law also imposes restrictions on any construction projects and plans that may affect cultural heritage sites protected at any level. This applies to any removal or dismantling of sites protected for their historical and cultural values and any construction work that may affect such sites.<sup>148</sup> In addition, the 1989 *Urban Planning Law of the People's Republic of China* includes provisions to ensure that any cultural heritage is included in all urban planning provisions for the area in which it is located.<sup>149</sup> Basically, any repairing and maintaining of protected cultural heritage must be done under the principle of keeping the site in its original state.<sup>150</sup> In the case of major sites, this is often done in cooperation with international institutes and organisations.<sup>151</sup>

Archaeological excavations may only be undertaken for the purpose of scientific research and must be approved by the relevant authorities. Apart from some isolated cases, they are usually done by state institutions, but individuals may take part with special permission. However, no unit or individual is allowed to take any discovered relics into their own possession. They instantly have to be handed over to assigned units designated by local departments for cultural administration if they are not sent to scientific research institutions. Administrative or criminal penalties may apply.

### *Heritage Preservation and Economic Development*

Despite the laws and action taken by the Chinese Government, there are many problems regarding the protection of cultural heritage sites in China. Some of the most serious threats to China's heritage are caused by rapid economic development.<sup>152</sup> The conflict between heritage protection and development projects can be illustrated by the Three Gorges Dam project which will be the largest dam ever built. The construction site of this dam is located on the Yangtze River, China's

148 Cultural Relics Law Arts. 15–20.

149 1989 *Urban Planning Law of the People's Republic of China*, Art. 14: When formulating urban planning provisions, emphasis shall be given to ... protecting historical and cultural relics, the city's traditional style and features, regional characteristics and natural scenery. Art. 15: When formulating urban planning provisions, the principles followed shall ... advance scientific, technological, cultural and educational institutions.

150 Cultural Relics Law Art. 21.

151 Recent Chinese-foreign cooperation projects include projects at the Forbidden City, Beijing; the Daming Palace Sites, Xi'an; the Mogao Caves, Dunhuang; the Longmen Grottoes, Luoyang; and the Mountain Resort and Outlying Temples, Chengde: China Internet Information Center, 06 July 2005 [www.china.org.cn/english/2005/Jul/134181.htm](http://www.china.org.cn/english/2005/Jul/134181.htm) (17 October 2006).

152 For detailed statistics on economic development in the People's Republic of China, see National Bureau of Statistics of China *China Statistical Yearbook – 2005* (China Statistics Press, Beijing: 2005). For up-to-date statistics, see the constantly updated data by the National Bureau of Statistics of China at [www.stats.gov.cn/english/](http://www.stats.gov.cn/english/) (17 October 2006).

longest river with a total length of 6,300 kilometres. At the Eastern end of the Three Gorges, the Yangtze has been dammed and an area of 632 square kilometres will be flooded.

This dam has been constructed for several reasons. The main reason is the constant growth in demand for power supply in China which is fuelled by the rapid economic development of the country.<sup>153</sup> As the Three Gorges Dam is calculated to provide about 10% of the energy for China, it will not only support the economic growth of South Central China, but will also support the reduction of air pollution in China as fewer conventional coal-fired power plants will be needed. Furthermore, the dam is planned to increase the navigability of the Yangtze River and decrease the danger of flood disasters which are very common in this area.

The Three Gorges Dam project is certainly very attractive in terms of economic benefits. However, its construction has massive impacts on several levels. About 30,000 hectares of farmland will be flooded over a length of more than 600 kilometres. Due to a rising of the water level up to 135 metres above sea level, 1.4 million people must be relocated. Whole towns will disappear in the flood, extraordinary scenery will be lost, and important heritage property will be destroyed.<sup>154</sup>

Over 1,300 sites of archaeological value have been discovered in the Three Gorges area so far. These include sites from the Paleolithic Period, graves from the Warring States Period (475–221 BC), and farmland sites from the Tang (618–907 AD) and Song (960–1279 AD) dynasties.<sup>155</sup> Signs of population in this area can be traced back to the Old Stone Age.

To save as many heritage sites and items as possible from the floods, a very large program, called the “Three Gorges Relics Rescue Program”, was initiated for their relocation, involving about 100 archaeological teams. Many sites such as the Temple of Zhang Fei from the Three Kingdoms Period (220–280 AD) have to be moved brick by brick. However, even if much heritage can be saved, many invaluable objects will be lost. Any heritage sites and objects that have not been detected before the water level reaches them will never be found. Furthermore, an area of immense scenic beauty that has been populated for thousands of years will be lost. With its terraces, specific architecture, long cultural history, relics, and ancient settlements, this area or at least parts of it would most probably have met the criteria for cultural landscapes, set by the *Operational Guidelines for the Implementation of the World Heritage Convention* and the *Guidelines on the Inscription of Specific Types of Properties on the World*

153 *People's Daily* 12 August 2004.

154 On environmental impacts, see Wang Xi “The Three Gorges Project and Major Environmental Issues” (1997) 2 *Asia Pacific Journal of Environmental Law* 373.

155 *China Daily* 23 March 1999.

*Heritage List.*<sup>156</sup> It is very likely that major parts of the Three Gorges area would have been inscribed on the World Heritage List if the Chinese authorities had decided to forward a nomination of the area to the World Heritage Committee instead of flooding it.

This example illustrates the conflict between heritage protection and large-scale infrastructure projects in China. However, most of the impact on cultural heritage is felt at the local level through urban redevelopment. China has more than 600 officially designated historic cities, but considering China's history, most cities, towns and villages have a long heritage of human settlement.<sup>157</sup> However, most of them suffer from a constant loss of heritage sites. Especially in the Eastern regions, the traditional ways of life are changing. No other city in China has changed its face faster or more completely during the last two decades than Shanghai. This causes profound and often rapid changes in the character of towns where the population density is high and diverse influences on the contemporary culture can be found.<sup>158</sup> Change is needed for development in cities and it is important that newly adopted cultural trends are reflected in urban life. However, especially in times of rapid change it is crucial to manage such change in such a way as to preserve the cultural heritage. As cultural heritage sites are a non-renewable resource, it is necessary to integrate them into the process of change and not let them stand in competition to it. However, even integrating them into such processes bears dangers if heritage sites are surrounded by inappropriate architecture, are reconstructed, are used in inappropriate ways, or are affected in other ways by the impact of nearby development projects. Many different considerations must be taken into account regarding such projects.

In most redeveloped urban areas, traditional housing areas are being replaced by uniform-looking high-rise estates made of concrete slabs. Many cities in China are growing at an enormous pace, which is why there is a constant need for more housing. In recent years little emphasis was placed on preserving the cities' heritage apart from designated sites. However, it seems that several Chinese authorities have realised the advantage in saving the identities of China's cities<sup>159</sup> and the need to

156 This is discussed in more detail below.

157 Speech by Richard Engelhardt, UNESCO Regional Advisor for Culture in Asia and the Pacific, at the UNESCO World Bank Conference on "China-Cultural Heritage Management and Urban Development: Challenge and Opportunity" in Beijing on 5-7 July 2000.

158 B. Feilden and J. Jokilehto *Management Guidelines for World Cultural Heritage Sites* (2<sup>nd</sup> ed, ICCROM, Rome: 1998) 93.

159 In Shanghai the Housing and Land Bureau, the Urban Planning Bureau and the Committee of Cultural Heritage Structures are currently implementing protection measures for areas and buildings of historical and cultural importance built before 1949. (*Xinhua News Agency* 30 September 2004). This is also being done in the lead up to the World Exhibition in Shanghai in 2010.

build further development around existing structures.<sup>160</sup> It is crucial that all relevant government agencies realise that economic development does not have to stand in competition with heritage preservation. City planning must be guided by the long-term perspective in order to secure the development of a town in a manner that sustains its heritage.<sup>161</sup>

The largest project of this kind is dedicated to the preservation of the Hutongs (narrow alleyways) and Siheyuans (single-storey stone courtyard houses) in Beijing. These areas are unique to China. Most of the Hutongs were built during the Ming and Qing Dynasties. Although they are an important part of the appearance of Beijing, their area has been severely reduced from 17 million square metres in 1949 to 3 million square metres today.<sup>162</sup> In this connection, the World Heritage Committee noted that the urban development pressure in Beijing could also affect the local World Heritage Sites and requested the strengthening of legal protection in the buffer zones.<sup>163</sup> A large part of Beijing's architectural heart has been bulldozed, but about 10,000 families are still living in houses worthy of heritage protection.<sup>164</sup>

The restoration of the old houses is difficult, as many of them have not been repaired for a very long time. There is often no running water or heating system and fire prevention is nearly non-existent. This makes efficient restoration measures difficult and expensive. It is often difficult to find a compromise between concern for improving the living conditions of the residents and conserving the heritage. In 2004 the Ministry of Construction promulgated new regulations regarding protection of urban cultural heritage, especially preservation of historical streets and blocks, which restrict the power of individual cities to set their own control mechanisms.<sup>165</sup> According to these regulations, cities are required to establish specific protection areas for historical and cultural streets, blocks and buildings.<sup>166</sup> Even before this, in 2002, the municipal government in Beijing made a *General Plan for the Preservation of the Imperial City of Beijing*. This began with placing twenty-five historical and cultural blocks under special protection.<sup>167</sup> All construction activities in these areas are required to be supervised, including damage to, demolition or

160 *China Daily* 18 October 2004.

161 *The Beijing Consensus*, proclaimed at the UNESCO World Bank conference on "China-Cultural Heritage Management and Urban Development: Challenge and Opportunity" in Beijing on 5-7 July 2000.

162 *China Daily* 18 October 2004.

163 Decisions 27COM 7B.43 from the 27<sup>th</sup> Session of the World Heritage Committee (Paris, 2003) and 28COM 15B.54 from the 28<sup>th</sup> Session of the World Heritage Committee (Suzhou, 2004).

164 *China Daily* 16 October 2006.

165 *China Daily* 2 February 2004.

166 See Ministry of Construction regulations, effective from 1 February 2004.

167 See note 165.

renovation of historical buildings, but also of gardens and ancient trees in order to preserve the overall appearance of old streets and blocks. The regulations also set limits on the height of buildings to be built or rebuilt in the protected areas and require a traditional cyan-and-grey colour and sloping-roofs for all types of architecture.<sup>168</sup> In addition to the preservation of the Hutongs, the restoration plan for Beijing focuses on many inscribed heritage sites, the ancient city water system, the traditional contour of the old city and the remains of the old city walls and towers, the former location of which is mainly represented by a 30 metres wide green belt. So far forty historical and cultural sites and areas have been selected for special protection under this plan, of which thirty sections are located in the ancient city area.<sup>169</sup> However, it must be noted that despite support from the central government for this plan, and detailed legislative measures, constant violations of the relevant regulations can nevertheless be seen and the existing rules are being implemented very slowly.<sup>170</sup>

All of these activities accompany the preparations by the municipal government of Beijing for the Olympic Summer Games that will be held in Beijing in 2008. The five-year project of the *Humanism Olympic Cultural Heritage Protection Plan* was started in 2003 and includes investments of at least 600 million Yuan in order to present Beijing's traditional side.<sup>171</sup> In addition to work in the old town of Beijing, the preservation program focuses on the restoration of several of the city's heritage sites, including major work on the Temple of Heaven, the Imperial Ming Tombs, the Summer Palace, sections of the Great Wall and the Forbidden City.<sup>172</sup> However, the World Heritage Committee has noted that the current restoration works at these properties are being carried out in a hasty manner and has expressed its concern regarding the "lack of documentary evidence and clearly formulated principles to guide the conservation works".<sup>173</sup>

One of the main problems is the sheer number of heritage sites in Beijing. The city looks back on a history of more than 3,000 years, for 850 years of which it was the capital of China under three dynasties. It is listed as one of the country's historic

168 *Xinhua News Agency* 21 September 2002.

169 *People's Daily* 08 October 2002.

170 For more information on the serious threats to the contour of the old city and ongoing penetrations of the green belt by construction projects, see Beijing Cultural Heritage Protection Center [www.bjchp.org/english/mzpl\\_view.asp?NewsID=77](http://www.bjchp.org/english/mzpl_view.asp?NewsID=77) (17 October 2006). This website also provides information on the slow implementation of the relevant regulations.

171 For more insights and suggestions regarding the protection plan, see [www.bjchp.org/english/mzpl\\_view.asp?NewsID=69](http://www.bjchp.org/english/mzpl_view.asp?NewsID=69) (17 October 2006).

172 *Business Beijing* April 2005.

173 Decision 30COM 7B.63 from the 30<sup>th</sup> Session of the World Heritage Committee (Vilnius, 2006). See also Decision 29COM 7B.49 from the 29<sup>th</sup> Session of the World Heritage Committee (Durban, 2005).

cities and six World Heritage Sites are located within the city or in close proximity to it.<sup>174</sup> This level of heritage identification also means that the government has to invest many more resources in the preservation of the city's heritage sites than cities of comparable size in other countries. It is hoped that these investments and efforts to maintain the Imperial City of Beijing and its great number of heritage sites will be continued after the Olympic Summer Games in 2008. At least there appears to be the political will to finally give Beijing's heritage the attention that it deserves and to secure its sustainability.

Local governments do not necessarily welcome the discovery of new cultural heritage sites within the boundaries of their municipality, particularly where the site is not likely to attract streams of tourists. Local governments are obliged by law to allocate resources for the protection of designated heritage sites and take protective measures. Often newly discovered sites stand in the way of planned building or other development projects. In the worst case this may lead to the destruction of the heritage site by the property developer, the workers who fear for their jobs, or even the authorities who want to push development in their municipalities. Two recent cases show the seriousness of such problems in China.

At the end of 2004, in Shanxi Province, bulldozers destroyed a Ming Dynasty (1368–1644) beacon tower and dozens of tombs that are believed to be from the Han Dynasty (206 BC–220 AD). The construction company acted without approval from the local heritage protection authorities. The required archaeological survey was considered to be too expensive for the company. By law, such archaeological surveys are required to be included in construction budgets and done prior to commencing construction. Clearly the company obtained approval to commence from the local government. After the destroyed tombs were discovered, the work at the construction site was stopped immediately and archaeological investigations were started by the authorities.<sup>175</sup> Despite clear legal regulations, neither the heads of the construction company nor the responsible members of the local government who issued the approval faced punishment as the construction company's investment was too important to the municipality.

An even more disturbing case occurred in May 2005. During construction works for a housing project at the Helinge'er county site in Inner Mongolia, a hundred Chinese tombs more than 2,000 years old were destroyed. The destruction was fully backed by the local government, although the site was one of the best preserved and largest sites in China, dating back to the Warring States period during the Eastern Zhou Dynasty (770–221 BC) and placed on the list of important national sites to be

174 The Forbidden City, sections of the Great Wall, the Ming Tombs, the Peking Man Site, the Temple of Heaven, and the Summer Palace.

175 *China Daily* 08 January 2005.

preserved by the Chinese Government in 2001. Despite all legal concerns, the county authorities decided to go ahead with the project without submitting a cultural heritage assessment that is required by the Cultural Relics Law. Officials from the Cultural Relics Department of Inner Mongolia tried to stop the construction, but county government and police refused to cooperate. When officials from China's Cultural Relics Bureau travelled from Beijing to the site to save the remains of the tombs, they were threatened by the workers who put up resistance. The construction continued. Despite the very drastic violations of national law, no one was arrested.<sup>176</sup>

These cases illustrate how difficult it is for the central authorities to enforce the law in remote counties if the local authorities refuse to cooperate. Unfortunately corruption is still an issue in the more remote areas of China. Many local authorities do not comply with their duties but are not held liable. Until the central and provincial governments are willing to enforce the law against county and town governments as well as companies and individuals, the heritage protection laws will lose much of their efficacy.

### *Management Problems*

In addition to the problems with enforcing relevant laws, there are several problems regarding the management of heritage sites in China. Some of the major problems are the lack of resources and insufficiency of personnel. In 2004 there were in total 3,965 institutions related to cultural relics with 77,101 staff in China, including protection, preservation and research agencies and museums.<sup>177</sup> This is a very small number bearing in mind the vastness of this country and its numerous heritage sites. Cultural heritage is continuously being damaged or looted because of the lack of protection. Further, there are simply not enough staff for studying sites and taking preservation measures, completing registers on heritage and educating people.<sup>178</sup> This is also the reason why heritage protection authorities often cannot take measures in advance before construction projects commence, but only learn of such projects when the damage is already done.

Another crucial issue is the lack of professional education of the staff. Most staff that are working in the heritage protection sector do not have a university education nor special training for such jobs. The staff that do have an academic background often come from different disciplines unrelated to heritage protection. Especially in times of rapid change, particular expertise is crucial to ensure the ability of staff to adapt to new problems. In addition to the importance of training personnel

176 *The Australian* 25 May 2005.

177 National Bureau of Statistics of China, note 152 at Ch 22-1.

178 He Shuzhong, note 143.



dedicated to heritage preservation, is community education. Many people in rural areas would not recognise the importance of a discovered site. Further, it is important to educate the people about the relevant laws and the importance of heritage preservation in their area and try to involve them. Education is one of the most crucial elements of a strategy for focusing on long-term results.<sup>179</sup>

Other management problems simply occur from the vastness of China, the sheer number of heritage sites and the remote locations of many sites. Provision of resources and funding is even more difficult in such areas. The same applies to the insufficient numbers of relevant government staff in areas with a lower population density. Many sites are not even discovered and reported because they are simply too remote. And even if they are reported, control and maintenance measures are very hard to provide on a regular basis.<sup>180</sup>

Sometimes it is the size of a heritage site itself that causes problems. This especially applies to the Great Wall with a total length of 6,300 kilometres. It was built between the 7<sup>th</sup> Century BC to the 15<sup>th</sup> Century AD and extends across nine provinces. Over the years, one third of the wall has disappeared, one third is partially intact and only one third is still in reasonable shape. Although a special law for its protection is planned, there are many problems regarding its maintenance. The problems regarding preservation measures were ignored by the Chinese authorities for a long time as the Great Wall was considered too long, too old and too difficult to maintain.<sup>181</sup> The task was left to the local governments, which have often failed miserably. Instead of financing preservation measures, whole sections of the Great Wall have been knocked down by farmers who are paid by construction companies to build roads with the gathered material, as this is much cheaper than trucking in material.<sup>182</sup> Such action is often approved by the local authorities, which is one of the reasons why hardly ever anyone is prosecuted.

Other problems are caused by mass tourism. The Great Wall receives about 10 million visitors every year, with 5 to 6 million visiting its sections in Beijing.<sup>183</sup> Some sections were completely knocked down to make way for roads and tourist facilities. Other sections were rebuilt and “modernised” to attract more tourists, such as in Badaling, north-west of Beijing.<sup>184</sup> In order to capitalise on the Great Wall, much of its authenticity has been lost in that area. This also applies to the new trend of

179 L. Watters and Wang Xi “The Protection of Wildlife and Endangered Species in China” (2002) 14 *Georgetown International Environmental Law Review* 489 at 513.

180 He Shuzhong, note 143.

181 *Daily Times Pakistan* 13 September 2004.

182 *Ibid.*

183 *Xinhua News Agency* 27 July 2002.

184 On issues regarding authenticity of heritage sites and their reconstruction or restoration, see Feilden and Jokilehto, note 158 at 59 *et seq*; Stille, note 56 at 40 *et seq*.

building hotels inside heritage sites. Original sections of the Great Wall are threatened more by mass tourism than by erosion. By climbing the wall, tourists often break out already loosened stones and contribute to further destruction of the Great Wall. There is certainly need for better cooperation between the cultural heritage departments and the tourism administration to decrease such impacts.

Besides lack of restoration measures, inappropriate restoration of buildings and monuments is a severe problem in China.<sup>185</sup> Many sites are being restored by using inappropriate materials and techniques. One of the reasons for this is the loss of the original artistic knowledge that used to be passed on through centuries, but started to disappear after 1911. Also instead of using the original materials, nowadays much is replaced with concrete and industrial paint.

An impact of another kind can be observed at the mausoleum for China's first emperor Qinshihuang that is located near Xi'an in the Shaanxi Province and which was inscribed on the World Heritage List in 1987. This mausoleum hosts the world-famous Terracotta Warriors and receives millions of visitors every year. The Terracotta Warriors are fully painted when they are excavated. However, the painting decomposes as soon as it is exposed to air which is why special conservation methods have to be used.<sup>186</sup> Unfortunately, effective protection measures are often complicated by the lack of resources and technical know-how and the lack of cooperation by the local authorities which often reject international offers for help in order to prevent any foreign influence.<sup>187</sup> Furthermore, the streams of tourists increase the humidity in the exhibition areas which causes further damage to the exhibits, while the numerous organically-based objects, such as packaging waste and food scraps, that are left behind by bring bacteria and mould.<sup>188</sup> The Shaanxi Provincial People's Congress has adopted special regulations for the preservation of the mausoleum,<sup>189</sup> but many issues still remain unresolved.<sup>190</sup>

185 See Stille, note 56 at 67 *et seq.*

186 For further details on the preservation of the Terracotta Warriors, see C. Blänsdorf, E. Emmerling and M. Petzet (eds) *Die Terrakottaarmee des Ersten Chinesischen Kaisers* (The Terracotta Army of the First Emperor of China) (ICOMOS, München: 2001) and Wu Yongqi, Zhang Tinghao, M. Petzet, E. Emmerling and C. Blänsdorf (eds) *The Polychromy of Antique Sculptures and the Terracotta Army of the First Chinese Emperor – Studies on Materials, Painting Techniques and Conservation* (ICOMOS, München: 2001).

187 Stille, note 56 at 50 *et seq.*

188 American University, Trade and Environment Database [www.american.edu/TED/terracotta.htm](http://www.american.edu/TED/terracotta.htm) (17 October 2006).

189 The Shaanxi Provincial *Regulations on Protection of the Mausoleum of Qinshihuang* were adopted by the Standing Committee of the 10th Shaanxi Provincial People's Congress in July 2005; see also *Xinhua News Agency* 1 October 2005.

190 For a review of problems regarding the preservation and presentation of sites in Luoyang, see Stille, note 56 at 63–67. He describes the dismantling of tombs and their reassembling at a museum where their paints dramatically fade due to poor air circulation and other factors.

Sometimes even the side effects of tourism can cause great harm to cultural heritage sites. The ancient town of Lijiang in Yunnan Province was inscribed on the World Heritage List in 1997, but has been a tourist destination at least since the 1980s. Unfortunately, the flow of tourists has not only generated new sources of income, but has caused massive social transformations in the municipality. Between 1987 and 1999, numbers of original residents decreased by 35 per cent and were replaced by merchants and people from other areas with whom the local Naxi population could not compete. The former functioning economic system of this area was deeply disturbed by the appearance of merchants and mass tourism. The central square of the town changed from a place for daily life to a tourist market which has caused many conflicts between the ordinary life of the locals and the needs of mass tourism. It is sad and ironic that the originality and traditional ways of Lijiang are feared to disappear because the town has become a tourist attraction.<sup>191</sup>

### *Cultural Landscapes*

Another fascinating feature of China consists of its very diverse rural areas with their individual traditions, ways of life, and working methods. One of the most significant aspects of the people in the rural areas of China is their intense interaction with their environment, which has resulted in the shaping of very diverse and fascinating cultural landscapes.<sup>192</sup> The work in the fields is largely done by hand in most areas because of the topography, which has resulted in the development of highly specialised techniques and a very close relationship between the people and their environment.<sup>193</sup> Arable land has always been rare and valuable in China, which is why the people have had to use their resources as effectively as possible. Architecture and life in the rural villages has also been shaped by these factors.

The term “cultural landscape” is not limited to the visible influencing of the landscape by people or the dependence of people on the land.<sup>194</sup> It relates to the relationship between landscape and people, their interdependence and mutual influencing,<sup>195</sup> and the endeavour of people to gain control over ecological processes

191 ICOMOS [www.international.icomos.org/risk/china\\_2000.htm](http://www.international.icomos.org/risk/china_2000.htm) (17 October 2006).

192 See Operational Guidelines, para 47 and Inscription Guidelines, paras 6–13.

193 J. Müller *Kulturlandschaft China: Anthropogene Gestaltung der Landschaft durch Landnutzung und Siedlung* (China's Cultural Landscape: Anthropogenic Landscaping through Land Use and Settlement) (Justus Perthes Verlag, Gotha: 1997) 5.

194 See definition in the *Operational Guidelines for the Implementation of the World Heritage Convention*, para 47: Cultural landscapes are cultural properties and represent the “combined works of nature and of man” designated in Article 1 of the Convention. They are illustrative of the evolution of human society and settlement over time, under the influence of the physical constraints and/or opportunities presented by their natural environment and of successive social, economic and cultural forces, both external and internal.

195 *Guidelines on the Inscription of Specific Types of Properties on the World Heritage List*, para 8; Müller, note 193 at 20.

to cultivate the land.<sup>196</sup> Besides those intentionally created and designed cultural landscapes, the *Operational Guidelines for the Implementation of the World Heritage Convention* also recognise organically evolved landscapes and associated cultural landscapes.<sup>197</sup> However, the cultural identity of cultural landscapes is based in most cases on the unique characteristics that developed from human design.<sup>198</sup> This development can be observed in the transformation of landscape by humans, eg by terracing, paddy fields or changing of watercourses. Furthermore, it is reflected in rural architecture and the way of living of the local residents. People are required to adapt their ways of building to the requirements of the landscapes and to the materials they offer. Furthermore, they are required to adapt their way of living to the conditions of their environment. All these factors lead to a strong bond between the residents and their home area and they generate specific talents and needs.<sup>199</sup> This applies to China more than to most other countries in the world because of its remote settlements, vastness, and geographical characteristics. This connection between regionalisation of rural architecture and the landscape marks a clear contrast to the more uniform urban architecture.

Preservation of cultural landscapes is threatened by human mobility, commercialisation, and economic influences on rural areas by the expansion of metropolitan areas, which have heavy impacts on the fragile secluded economies of small rural villages. As cultural landscapes are the product of a particular way of living, changes in ways of living will cause an impact on the landscape as well.<sup>200</sup> The impact of these factors has proven to be very strong. Since many cities in China have already lost their cultural identities by replacing local architecture with standardised Western features, it has to be doubted that the traditional village scapes in rural China can be preserved.<sup>201</sup> This especially applies to villages close to cities, but the growing number of seasonally migrating workers also takes these effects to the more remote areas.

The disappearance of cultural landscapes will also have an impact on the biodiversity in the region. Especially in regions where the cultivation of land is very difficult, the people have had to develop specialised techniques to adapt to the local agro-ecological conditions. Their practical knowledge and efforts to secure ecological stability and avoid erosion in order to ensure sustainable cultivation of the available land is crucial to the preservation of the local ecosystems and the diversity of

196 Müller, note 193 at 333.

197 For definitions of the three main categories, see *Guidelines on the Inscription of Specific Types of Properties on the World Heritage List*, para 10.

198 Müller, note 193 at 333.

199 *Ibid*, at 20, 21.

200 Feilden and Jokilehto, note 158 at 74.

201 Müller, note 193 at 334.

cultivated plants. Only through their work in the individual ecological habitats could they become familiar with the differences in the demands, the flexibility, and the reactions of the cultivated plants.<sup>202</sup> Without the ongoing work of the local farmers, this knowledge and the cultural landscapes, which have developed over centuries, will be lost in a very short time. Unfortunately the present development is towards more uniform land use, which makes the farmers increasingly dependent on fertilisers, pesticides, and seeds. This expected loss of cultural heritage would also endanger many animal and plant species.

The pressure on the rice and corn producing regions is growing as the productivity of agriculture in China is declining.<sup>203</sup> China is home to approximately 1.3 billion people, which is about 20 per cent of the world's population. However, it possesses only about 7 per cent of the earth's arable land, with only 15 per cent of its own territory being arable.<sup>204</sup> This is a very small percentage compared to other countries<sup>205</sup> and cultivated land continues to decrease every year because of salinisation, soil erosion, deforestation, and conversion of land from agricultural to urban use.<sup>206</sup> The most important legal instrument in China to protect cultivated land is the 1986 *Law of the People's Republic of China on Land Management*. Its main purpose is to ensure that the total amount of cultivated land within the jurisdiction of provinces, autonomous regions, and municipalities is not further reduced. However, the law is ineffective as the area of cultivated land in China is still rapidly decreasing every year.<sup>207</sup> In order to reverse this development, it is crucial that land use decisions are made with the consent of the community affected. A participatory process is important to ensure the sustainability of land use decisions,<sup>208</sup> yet in most cases local governments do not seek the consent of the community.<sup>209</sup>

202 Ibid, at 336.

203 K. Anderson and A. Strutt "China's Economic Growth, Policy Reforms and WTO Accession: Implications for Agriculture in China and Elsewhere by 2005" Notes for a paper prepared for the IATRC Conference on China's Agricultural Trade and Policy: Issues, Analysis, and Global Consequences, San Francisco, 25-26 June 1999.

204 See statistics of the Environment Department of the World Bank 2004 at <http://siteresources.worldbank.org/INTEEI/Data/20799751/China.pdf> (17 October 2006).

205 See 1997 statistics by the Sustainable Development Department (SD), Food and Agriculture Organization of the United Nations (FAO) at [www.fao.org/sd/EPdirect/EPan0009.htm](http://www.fao.org/sd/EPdirect/EPan0009.htm) (17 October 2006).

206 B. Boer "The Rise of Environmental Law in the Asian Region" (1999) 32 *University of Richmond Law Review* 1503 at 1542.

207 *China Daily* 25 February 2004.

208 G. Davis "Sustainable Development and Land Use Law: Land Use Planning in Furtherance of Sustainable Development in Asia" (1998) 3 *Widener Law Symposium* 119 at 162.

209 *China Daily* 22 March 2004.

## Protection of Underwater Cultural Heritage

Not only are heritage sites on land in need of decisive protection measures, but also heritage sites that are under water. China's seas have a wealth of underwater heritage as they host some of the busiest maritime trading routes of ancient times, several sea battlefields, and some of the oldest underwater heritage on earth. In 2005 in Kuahuqiao, located in Zhejiang province, an 8000-year-old waterlogged settlement, including a dugout canoe, was discovered, providing evidence of the oldest technology for building this type of watercraft in China, and perhaps in the world.<sup>210</sup> The South China Sea covers the remains of large-scale sea battles such as the battle of Yamen between the Yuan Dynasty and the South Song Dynasty in 1279 in the Pearl River Delta, during which about 2,000 warships were sunk. Furthermore, wrecks along the maritime trading routes in the Chinese Seas can provide valuable information on the economic and cultural links between neighbouring countries, such as China, Japan, Korea, and the South-East Asian area. Research on these links has just begun, although an enormous number of sites have already been discovered. The number of unidentified shipwrecks and the long coastline make the South China Sea an especially popular destination for illegal salvage parties. The number and value of items that are illegally salvaged and sold every year is nearly impossible to guess.

The archaeological treasures of the China Seas are not only endangered by looting, but also by the destruction that is often caused during such operations. An infamous example is that of the approximately 250-year-old shipwreck of the Dutch East Indiaman *Geldermalsen*<sup>211</sup> which was discovered in the 1980s near the coast of Vietnam on the marine ceramic route in the South China Sea. It had carried about 320,000 pieces of ceramics of which about 160,000 pieces were salvaged. The wreck and two Chinese junks close to the wreck were salvaged during a commercial operation and the gathered pieces earned approximately US\$20 million at auction. However, during this operation most of the archaeological and heritage value of the shipwreck was destroyed. It is believed that the wreck of the *Geldermalsen* was dynamited by the salvage party after only half of the cargo was salvaged in order to keep the location of the wreck site unknown. Unfortunately this is not an uncommon procedure by salvage parties, especially those operating illegally.<sup>212</sup>

210 Leping Jiang / Li Liu "The discovery of an 8000-year-old dugout canoe at Kuahuqiao in the Lower Yangzi River, China" (2005) 79 *Antiquity* <http://antiquity.ac.uk/projgall/liu/index.html> (17 October 2006).

211 For a detailed study of this case, see G. Miller "The Second Destruction of the *Geldermalsen*" (1992) 26 *Historical Archaeology* 124.

212 *China Daily* 02 July 2004.

During the 1980s the Chinese authorities realised that more decisive action had to be taken in order to defend China's underwater cultural heritage against looting and illicit relics trafficking. In 1987 China founded the Underwater Archaeology Centre at the National Museum of China which is the country's only specialised organisation in this field and which is responsible for most official underwater research expeditions in China. Furthermore, China decided to impose serious restrictions on private expeditions regarding underwater cultural heritage and to transfer all competence to the State Administration of Cultural Heritage and the administrative departments of cultural heritage at several local levels.<sup>213</sup> Only these authorities, in cooperation with the National Museum, are authorised to take action in relation to any underwater cultural heritage. In addition to the Cultural Relics Law as the centrepiece of heritage protection in China, the *Regulations Concerning the Management and Protection of Underwater Cultural Relics* were promulgated by the State Council of the People's Republic of China in 1989 as the first law especially dedicated to underwater cultural heritage.

These Regulations apply to all cultural relics of any origin of historic, artistic, and scientific value which are located in the Chinese inland and territorial waters and which were submerged before 1911 or have to do with important historical events, revolutionary movements or renowned personages.<sup>214</sup> They also apply to relics of Chinese origin outside the Chinese territorial waters and to those of unidentified origin outside the Chinese territorial waters, but under Chinese jurisdiction according to Chinese law. The competent authorities in charge of registration, management, and protection of underwater cultural heritage also decide about its significance and determine underwater protection units and underwater reserves at national or provincial levels in which any activity that may jeopardise the safety of the underwater cultural heritage, such as fishing and demolitions, is prohibited.<sup>215</sup> Archaeological exploration and excavation activities may only obtain permission if they are dedicated to the protection of cultural heritage and scientific research. Any private archaeological exploration or excavation activities in waters under Chinese jurisdiction have to be authorised by the authorities. Any unauthorised exploration, excavation, or damaging of underwater cultural heritage may be investigated under the provisions of the criminal law or followed by administrative sanctions.

According to these regulations China claims ownership of all Chinese underwater cultural heritage and of all relics of foreign origin that are located within Chinese territorial waters.<sup>216</sup> However, in the case of a claim of ownership of foreign

213 1989 *Regulations Concerning the Management and Protection of Underwater Cultural Relics*, Art. 4.

214 *Ibid*, Art. 2.

215 *Ibid*, Art. 5.

216 *Ibid*, Art. 3.

underwater relics which have not been officially abandoned by the state of origin, that state might dispute China's claim. This also means that China does not recognise private ownership of underwater cultural relics within China's jurisdiction at all. Any hiding, sharing secretly, and illicit trafficking of underwater cultural relics may be prosecuted under the criminal law or punished with administrative sanctions.<sup>217</sup> However, individuals who possess such relics are encouraged to hand them over to the state for which they may be awarded with moral encouragement or material reward.<sup>218</sup> Any units or individuals who have discovered underwater cultural relics are obliged to report them to the State Administration of Cultural Heritage or to the local administrative departments of cultural heritage and hand over all relics that they have found.<sup>219</sup>

However, China's long coastline and the number of archaeological sites make it hard to establish and enforce protection mechanisms. The Chinese authorities need to increase the number of trained personnel dedicated to the identification, maintenance, and protection of underwater cultural heritage sites and items. Furthermore, the penalties for violations of the rules laid down in the *Regulations Concerning the Management and Protection of Underwater Cultural Relics* need to be applied resolutely in order to deter offenders and make offences as unattractive as possible. In addition to this, financial rewards to those who report newly discovered sites should be given more generously and should be related to the commercial value of the discovered heritage item.<sup>220</sup> Except for illicitly operating salvage parties that operate on a professional basis, most offenders are usually poor. Instead of selling the location of a site they discover on the black market or looting the site themselves and causing irreparable destruction to the site, a generous financial reward would probably decisively influence their decisions.<sup>221</sup> Such rewards can also be used in respect of reports of offences, which would certainly contribute to better protection of underwater cultural heritage.

### Illicit Excavation and Trafficking of China's Cultural Heritage

Another very important issue regarding the protection of heritage sites in China is the on-going fight against illicit trafficking of China's cultural heritage. The illicit relics market is usually supplied with illegally excavated or stolen cultural objects. The removal of an artefact from an archaeological site prior to its scientific

217 Ibid, Art. 10.

218 Ibid.

219 Ibid, Art. 6.

220 Hoagland, note 136 at 28.

221 Ibid, at 36.



evaluation may also affect the later scientific evaluation of the site and possible new archaeological insights.<sup>222</sup> In short, the theft of artefacts means not only the loss of the item, but also serious damage to the site. The return of an item may undo a theft from a collection, but it cannot undo destruction of context if the item was illegally excavated.<sup>223</sup> The loss of artefacts from archaeological sites prior to their compulsory scientific examination has several causes, including looting, lack of knowledge or poor work by researchers, sanctioned commercial salvage operations, or recreational collecting.<sup>224</sup>

During the last few decades more than 200,000 ancient tombs have been looted in China.<sup>225</sup> However, exact numbers are hard to estimate as many of the looted sites were not even registered. The damage to sites that are illegally excavated is extensive. Much of the aesthetic and historic value is destroyed by the physical removal or even destruction of heritage items.<sup>226</sup> Looters usually lack the necessary knowledge to recognise the value of heritage objects, as many items are heavily corroded and in a state of deterioration. It is estimated that only about five to ten per cent of the cultural relics located inside or around a shipwreck are discovered during a commercial excavation.<sup>227</sup> The remaining heritage value is irretrievably destroyed. There are several approaches to prevent this from happening, as discussed below.

### *Legal Regulations Regarding Trade in Cultural Heritage*

Similar to heritage sites, movable heritage items are classified in China. The two basic categories distinguish between valuable and ordinary cultural relics. Valuable ones are further classified into three grades, with each being protected by different rules. In grade one, only precious cultural relics that are “especially important” are classified. Grade two covers “important” relics and grade three includes relics that are “relatively important for historical, artistic and scientific values”. Ordinary cultural relics are those with “historical, artistic and scientific value”.<sup>228</sup> As with heritage sites, these classifications are carried out by the heritage preservation authorities at local, provincial or central administrative level. Today there are more than 10 million classified valuable heritage items in the possession of the state.

222 Ibid, at 25.

223 P. O’Keefe *Trade in Antiquities – Reducing Destruction and Theft* (Archetype Publications, London: 1997) at 18.

224 Hoagland, note 136 at 25.

225 Xinhua News Agency 5 July 2005.

226 For a report on several recent cases, see Xinhua News Agency 11 May 2006 [http://news.xinhuanet.com/english/2006-05/11/content\\_4535158.htm](http://news.xinhuanet.com/english/2006-05/11/content_4535158.htm) (10 September 2006).

227 O’Keefe, note 95 at 15.

228 See the Rating Standards for Cultural Relics Collections of the Ministry of Culture of the People’s Republic of China 5 April 2001.

The Cultural Relics Law of 1982 extensively restricted the export, sale and possession of cultural heritage objects. This was emphasised by the Chinese government in 1987 with the *Notice on the Punishment of Theft or Smuggling and Cultural Relics* that called on all relevant authorities to increase their efforts on fighting illicit trafficking of cultural heritage. The approach was typical of “embargo” legislation that is often implemented by source states of cultural heritage and which prohibits the private ownership and transfer of cultural relics in nearly all cases. The amended 2002 Cultural Relics Law lifted this embargo to an extent. Now private persons and organisations are permitted to obtain cultural relics from certain auction enterprises, private transactions, and other authorised outlets.<sup>229</sup> Auction houses and relics shops need to be officially certified and licensed and all relics have to be examined by the relevant authorities prior to sale. The rules for the export of cultural heritage items are even stricter as, for example, foreign companies and Chinese-foreign joint ventures are completely excluded from transactions and auctions involving cultural relics. Certain relics, such as those dating before 1795,<sup>230</sup> are invariably excluded from export while all other relics need special permits.<sup>231</sup>

This of course does not apply to any state-owned heritage items, such as parts of institutional collections and state-owned heritage sites. Further, all cultural heritage items excavated within the Chinese borders, still undiscovered or buried, are invariably owned, as indicated above, by the state.<sup>232</sup> Such items cannot be legally obtained by private persons at all.

However, despite all legislative efforts, the illicit dealing in cultural heritage in China is still widespread and the constant demand for new items brings much harm to China’s heritage sites.

### *Difficulties of Law Enforcement*

The consequences of this demand for cultural heritage items and the problems regarding the enforcement of the law become very clear in canvassing the following case.<sup>233</sup>

During a flood in summer 1998 a large archaeological site was uncovered by receding water in Qixing Town in Xiangxiang City in the Province of Hunan. Almost immediately farmers started to excavate the site under commission from antique

229 Cultural Relics Law Art. 50.

230 1795 marked the end of the reign of three of the most powerful Qing emperors, Kangxi, Yongzheng and Qianlong.

231 For general rules regarding foreign trade, see the *Foreign Trade Law of the People’s Republic of China* of 1994.

232 Cultural Relics Law Art. 5.

233 Case presented as reported by He Shuzhong, note 143. The case was also mentioned by Manus Brinkman, Secretary General, International Council of Museums, Paris, France [www.ibaculturalheritage.com/Section1/brinkman.asp](http://www.ibaculturalheritage.com/Section1/brinkman.asp) (17 October 2006).

dealers. Quickly the number of looters rose to several hundreds. The authorities at Qixing Town and Xiangxiang City were soon informed about this illegal excavation, but they refused to take any action. Several weeks later, reporters from a Chinese TV station shot a documentary at the site and interviewed some of the looters. They openly expressed their happiness about the discovery of the site and did not show any signs of awareness of wrongdoing. They even felt supported by the local authorities because the authorities did not stop the excavation. The authorities at Qixing told the reporters that it was not within their responsibilities to stop such an excavation while the cultural heritage department of Xiangxiang did not consider it an archaeological site at all. Only after the announcement by the reporters that the video footage would be aired soon if the excavation was not stopped immediately, did the director of the cultural heritage department of Xiangxiang stop the looting and finally report the case to the heritage departments of the governments of Hunan Province and the city of Xiangxiang. Following this report, a representative of the Hunan Provincial Cultural Heritage Department and several archaeologists visited the site and proclaimed it a major archaeological site to be protected at county level by the government of Xiangxiang. Furthermore, he ordered the Qixing government to stop the looting immediately, inform all farmers in the area of the laws on the protection of cultural heritage sites, and ordered the arrest of the main suspects involved in the illegal excavation. However, no one was arrested. As the dry season started and the flood withdrew further, more cultural relics appeared. At the end of 1998 about 3,000 farmers took part in the looting over an area of some 100,000 square metres. Again, the authorities of Qixing and Xiangxiang failed to take any action. It was not until government authorities and news departments received a report about this case from private activists that the situation improved. In January 1999, seven months after the looting started, the directors of the Hunan Provincial Cultural Heritage Department and the Police Department came to the site and again ordered the looting to stop, the relevant laws be communicated to the local people and the main suspects arrested. During the following police action, 14 looters were arrested and about 3,000 relics recovered in searched houses, though many items were still missing. No action was taken against the responsible local authorities or the antique dealers involved. Meanwhile, many archaeologists are busy excavating the site. They estimate that it is possibly the largest kiln site ever discovered in China and that the history of kiln use in China has to be rewritten.<sup>234</sup>

This case illustrates the lack of respect for, or ignorance of, the laws regarding cultural heritage in many parts of China and the difficulties many central and

234 For other similar cases, see He Shuzhong "Illicit Excavation in Contemporary China", in N. Brodie, J. Doole, Jennifer and C. Renfrew, Colin (eds) *Trade in Illicit Antiquities: the Destruction of the World's Archaeological Heritage* (McDonald Institute for Archaeological Research, Cambridge: 2001) 20-22.

provincial authorities in China have in enforcing their decisions at lower levels of government. Although valuable heritage sites are lost in such situations, the relevant authorities responsible for such destruction usually do not have to fear any punishment. Unfortunately this applies not only to acts of negligence, but also to wilful acts of destruction.

The control over lower levels of government is a general political problem in China, especially in more remote areas. However, at least measures should be taken against private people involved in such actions.

Education seems to be an attractive way to combat the problem of illicit trafficking in cultural heritage as it is non-threatening and positive.<sup>235</sup> Recreational collectors are good targets for educational measures. Many private collectors do not have the necessary knowledge of the cultural property law and many lack awareness of wrongdoing regarding purchasing from illicit antique dealers. By educating them, it may be possible to let them participate in public archaeological projects and engage their interests rather than exclude them.<sup>236</sup> Their expertise and dedication to cultural heritage may be a valuable resource for heritage protection authorities. Further, archaeological knowledge is a solely public good that cannot be used up after it is supplied.<sup>237</sup> A spreading of such knowledge in this way would further help the cause of archaeology in particular and heritage conservation in general. Furthermore, a better communication of the relevant laws among farmers in areas with many heritage sites could improve the situation. This should be combined with regular publicity being given to prosecutions of looters. Most farmers do not know about the Chinese laws on cultural heritage. Knowledge of relevant prosecutions would certainly help them to realise the seriousness of such offences.

Commercially operating illicit excavators and dealers, on the other hand, must be treated in a different way. Education is not as likely to be effective as illicit trafficking of cultural relics can be a major source of income. Its economic value for individuals must not be underestimated as, for example, Chinese farmers can earn immense sums compared to their regular income if they sell excavated relics on the black market.<sup>238</sup>

The removal of any parts or items from state-owned archaeological sites in China constitutes a theft from the state. The Cultural Relics Law lays down that anyone illicitly trading or smuggling protected cultural relics, illegally excavating tombs and damaging or destroying protected heritage sites or items will be prosecuted under the

235 T. King "Some Dimensions of the Pothunting Problem" in G. Smith and J. Ehrenhard (eds) *Protecting the Past* (CRC Press, Boca Raton: 1991) 88.

236 Ibid, at 90.

237 Hoagland, note 136 at 25.

238 A. Schmidt "The Confuciusornis Sanctus: An Examination of Chinese Cultural Property Law and Policy in Action" (2000) 23 *Boston College International and Comparative Law Review* 185 at 195.

criminal law<sup>239</sup> or punished with administrative penalties.<sup>240</sup> The problem with these provisions is the lack of enforcement in certain areas of China by the local governments and police authorities. As many looters are organised and have developed very efficient methods, it is often difficult to catch them in the act. The difficulties are even greater with respect to antique dealers who pay the looters and sometimes even tell them which sites to loot. They are hardly ever punished or prosecuted as they can more easily evade prosecution than ordinary looters. There is undoubtedly a need for much more decisive action by the state against the initiators. Without the demand of antique dealers for illegally excavated relics, the looters would not have a market.

Apart from punishment, the Cultural Relics Law also includes provisions for turning discovered cultural relics over to the authorities, donating privately owned items to the state and tackling smuggling. Rewards can be monetary or moral encouragement.<sup>241</sup> However, such rewards usually bear no relation to the value of the relics. It is very unlikely that a relic will be turned over to the authorities if the market price is much higher than the reward. Furthermore, such rewards are only of interest to an honest person who discovers a relic by accident. Professional looters who act with awareness of the illegality of their actions are certainly not attracted by such offers. They risk grave penalties for plundering tombs<sup>242</sup> in prospect of the enormous profit that can be made from such operations. In order to protect heritage sites from further destruction by such looters, only the strengthening of security mechanisms and more decisive use of the existing laws would be of assistance. However, it is impossible to provide sufficient security personnel to protect all archaeological sites in China because of their sheer numbers. Illegal excavators will always find ways to retrieve relics from sites.

In some cases, damage is done even by staff assigned to cultural heritage sites and museums. Due to relatively low wages paid by many government departments, employees are sometimes approached by antique dealers, as it is easy for them to retrieve relics from storerooms or museums. In 2004, the security chief for the Cultural Relics Protection Department of the World Heritage Site in Chengde in Hebei Province was sentenced to death after stealing more than 250 invaluable relics and replacing some of them with fakes. Most of the stolen relics could not be retrieved. He had been employed at the site since 1992 and had been stealing relics for over a decade. Four other men who were involved were given jail sentences.<sup>243</sup>

239 For details, see the 1997 *Criminal Law of the People's Republic of China*.

240 Cultural Relics Law Art. 64.

241 Cultural Relics Law Art. 12.

242 For a recent case, see Thanh Nien [www.thanhniennews.com/worlds/?catid=9&newsid=19475](http://www.thanhniennews.com/worlds/?catid=9&newsid=19475) (10 September 2006).

243 *BBC News* 18 August 2004.

This shows how crucial it is that staff at museums are qualified, reliable, and reasonably paid as museums play an important role in the protection and preservation of movable cultural heritage. Presently, there are more than 2,200 museums on various themes, including 1,548 museums dedicated to cultural relics with a total of 39,266 staff.<sup>244</sup> They not only store and present collected heritage items, but they also take part in identifying and maintaining heritage sites in China.

However, many Chinese museums drastically lack funds. They often also lack safety equipment, such as smoke detectors or alarm systems against theft. This also applies to temperature control mechanisms, as many relics need a certain temperature, humidity and low illumination for their proper preservation.

### *The Need for Compulsory Registers of Movable Heritage Items and Stronger International Cooperation*

An important step towards better protection of heritage sites from looting is the establishing of compulsory registers of movable heritage items, as this helps with the identification of looted items. Such a register for heritage items in public and private hands could place a severe damper on the illicit trade in relics. This should be accompanied by mandatory certifications for each item because the absence of an appropriate certification could seriously impair the market value of illegally obtained relics. The fear that an item of questionable origin will be confiscated, may cause the customer to reconsider purchasing it.

In China, existing registers relating to cultural heritage are still far from being complete, though their completion should become a prime aim of the Chinese authorities. Even many items in museums are not registered or photographed, which makes recovery very difficult if they are stolen. The same applies to private collections. Further, a register for particular objects that are systematically looted should be established. Such a register can be set up like the ICOM Red Lists of cultural objects from Africa, Latin America and Iraq which clearly indicate to museums, auction houses and collectors worldwide that the listed categories of items are protected by national legislation.<sup>245</sup> Without a compulsory register being established, the laws and international conventions on the protection of cultural heritage cannot be effectively enforced.<sup>246</sup>

244 National Bureau of Statistics of China, note 152 at ch 22-1.

245 <http://icom.museum/redlist> (26 November 2006).

246 For example, see the Object ID standard, which is fully compatible with the forms and databases from Interpol <http://object-id.icom.museum> (26 November 2006).

## Conclusion

China has made considerable progress in strengthening the protection of its heritage sites in recent years. Relevant institutes and heritage departments have been established and developed<sup>247</sup> and the number of protected sites has been increasing. However, the challenges facing the heritage departments at all levels are not to be underestimated as rapid economic development is taking its toll. One of the main problems is the constant loss of urban heritage. Especially in large metropolitan cities such as Shanghai, streets change their appearance every few years and whole suburbs are built or reshaped in a short period of time. Old parts of major cities are being replaced by modern housing areas which increasingly consume major parts of the surrounding areas as well. Former rural areas close to cities are turned into suburbs and small villages are replaced by standardised housing built of concrete slabs. This is accompanied by a massive loss of identity in those areas as their original structures are destroyed. All of this is caused by the constant growth of cities and the large numbers of migrant workers who travel to metropolitan cities from rural areas all over China. Much damage has already been done to urban heritage in China. Nearly every city looks back on a long history, but often there is literally nothing left of it.<sup>248</sup> While municipalities such as Beijing realise the need for appropriate action, it is very difficult to find the right combination of urban development and heritage preservation. The same applies to the need for sustainability of the booming tourism industry in China. As economic development has priority in China<sup>249</sup> it is important to include urban heritage in the development process rather than let it stand in competition to it. The situation regarding cultural landscapes in China is even more critical. As economic development and changes in the social fabric put more pressure on rural municipalities, it will be increasingly difficult to preserve China's cultural landscapes. They are dependent on a certain way of life which is why such changes could mean their extinction. The existing regulations are still far from being sufficiently effective to oppose the current developments.

Despite the new and certainly improved 2002 Cultural Relics Law, the situation for China's heritage sites is still serious. There are not enough funds and staff to ensure proper protection. Even identified heritage sites which are placed under special protection often suffer from a lack of effective protection mechanisms and

247 For current numbers of institutions and personnel related to culture and cultural relics in the People's Republic of China, see National Bureau of Statistics of China, note 152 at ch 22 – Culture, Sports and Public Health.

248 See Stille, note 56 at 64 *et seq.*

249 See speech from Ma Kai, Minister of the National Development and Reform Commission, on 19 March 2006 about the key points of the Eleventh Five-Year Plan [http://english.gov.cn/2006-03/23/content\\_234832.htm](http://english.gov.cn/2006-03/23/content_234832.htm) (17 October 2006).

clear lines of responsibility. When classifying heritage sites, the relevant authorities should include decisions about the required personnel, funding, and techniques for preservation of the site. Otherwise effective preservation is not possible. Further, more emphasis has to be placed on educating staff of relevant authorities, recreational collectors, antique dealers, and farmers about relevant legal provisions and the needs of heritage protection. Education may not lead to prompt success, but it is important for achieving long-term results.<sup>250</sup>

Furthermore, compulsory registers of heritage sites and privately and state-owned items must be established in order to improve international cooperation in addressing illicit trafficking of cultural relics. Only by doing so and conscientiously enforcing the existing laws, can illegal excavations and stealing from heritage sites be prevented. This would significantly raise the chances of looters and their customers being caught and the looted items seized.

The most crucial aspect is the need for clearer responsibilities and a functional hierarchical system for heritage protection. As long as local governments do not have to fear serious consequences for ignoring orders from state or provincial authorities, effective enforcement of existing laws cannot be ensured. Cooperation with local police departments, in particular, must be improved. The main problem is not the lack of effective laws, but the lack of enforcement of the existing ones.

The central Chinese authorities are well aware of these issues<sup>251</sup> and much progress has already been made. The current efforts are hopeful indications of further improvement in the preservation of China's cultural heritage sites. Further harm to such magnificent sites would not only be a loss to China, but also to the cultural heritage of all humankind.

250 M. Dutra "Sir, How Much is that Ming Vase in the Window? Protecting Cultural Relics in the People's Republic of China" (2004) 5 *University of Hawaii Asian-Pacific Law & Policy Journal* 62 at 95.

251 See the Participants' Report of the Cultural Heritage Protection Cooperation Office, Asia/Pacific Cultural Centre for UNESCO (ACCU), at the Consultative Meeting on Regional Cooperation in Cultural Heritage Protection in Asia and the Pacific in Nara, 29 February-3 March 2000.



## Appendix

### World Heritage Properties in China

The following properties in China have been inscribed on the World Heritage List. The list is sorted by year of inscription and states their categories.

Imperial Palaces of the Ming and Qing Dynasties in Beijing and Shenyang, Cultural (1987, 2004)

Mausoleum of the First Qin Emperor, Cultural (1987)

Mogao Caves, Cultural (1987)

Mount Taishan, Natural & Cultural (1987)

Peking Man Site at Zhoukoudian, Cultural (1987)

The Great Wall, Cultural (1987)

Mount Huangshan, Natural & Cultural (1990)

Huanglong Scenic and Historic Interest Area, Natural (1992)

Jiuzhaigou Valley Scenic and Historic Interest Area, Natural (1992)

Wulingyuan Scenic and Historic Interest Area, Natural (1992)

Ancient Building Complex in the Wudang Mountains, Cultural (1994)

Historic Ensemble of the Potala Palace, Lhasa, Cultural (1994, 2000, 2001)

Mountain Resort and its Outlying Temples, Chengde, Cultural (1994)

Temple and Cemetery of Confucius and the Kong Family Mansion in Qufu, Cultural (1994)

Lushan National Park, Cultural (1996)

Mount Emei Scenic Area, including Leshan Giant Buddha Scenic Area, Natural & Cultural (1996)

Ancient City of Ping Yao, Cultural (1997)

Classical Gardens of Suzhou, Cultural (1997, 2000)

Old Town of Lijiang, Cultural (1997)

Summer Palace, an Imperial Garden in Beijing, Cultural (1998)

Temple of Heaven: an Imperial Sacrificial Altar in Beijing, Cultural (1998)

Dazu Rock Carvings, Cultural (1999)

Mount Wuyi, Natural & Cultural (1999)

Ancient Villages in Southern Anhui – Xidi and Hongcun, Cultural (2000)

Imperial Tombs of the Ming and Qing Dynasties, Cultural (2000, 2003, 2004)

Longmen Grottoes, Cultural (2000)

Mount Qingcheng and the Dujiangyan Irrigation System, Cultural (2000)

Yungang Grottoes, Cultural (2001)

Three Parallel Rivers of Yunnan Protected Areas, Natural (2003)  
Capital Cities and Tombs of the Ancient Koguryo Kingdom, Cultural (2004)  
The Historic Centre of Macao, Cultural (2005)  
Yin Xu, Cultural (2006)  
Sichuan Giant Panda Sanctuaries, Natural (2006)

