

# “Purchased in Hong Kong”: Is Hong Kong the Best Place to Buy Stolen or Looted Antiquities?

Steven Gallagher\*

**Abstract:** The looting of antiquities from archaeological sites has received widespread coverage in the media. Concerns about the loss of heritage have resulted in international multilateral and bilateral agreements intended to prevent the illicit trade in looted antiquities. China has suffered from the looting of its archaeological sites for centuries, but the problem has been exacerbated in recent years because of the increased demand for Chinese antiquities and the consequent sharp increase in market prices. China has requested international assistance to combat the illicit trade in its heritage. It is strange therefore that one of China’s special administrative regions—Hong Kong—also one of the world’s major art markets, retains a “legal absurdity,”<sup>1</sup> which may protect the buyer of stolen or looted goods from claims for the return of stolen items. This statutory provision may result in the bizarre outcome that goods stolen from a museum or looted from an archaeological site and then purchased from a shop or market in Hong Kong may be protected from claims for their return; this protection may apply even if the loser is the Chinese state.

**Keywords:** antiquities, stolen property, market overt, China, Hong Kong, law

## INTRODUCTION

Although the global art market has seen a cooling of demand in recent years in response to economic and financial concerns, the market for Asian art and antiquities, and, in particular, Chinese art and antiquities, continues to have strong demand and produce record sale prices. This is evidenced by the frequency of “Asia week” events

---

\*Faculty of Law, Chinese University of Hong Kong, People’s Republic of China;  
Email: [stevegallagher@cuhk.edu.hk](mailto:stevegallagher@cuhk.edu.hk)

**ACKNOWLEDGMENTS:** The author would like to thank the anonymous reviewers who provided very useful suggestions for improvement, many of which have been incorporated into this article.

<sup>1</sup>Palmer and McKendrick 1998, 337.

held by auction houses and dealers around the world and by the released sales figures from the major auction houses. There are two main reasons for this strong market: Asian art and antiquities have long been, and remain, coveted by Western museums and collectors, but the increased demand for Asian art and antiquities, and Chinese art and antiquities, in particular, has also been fuelled undoubtedly by the economic rise of the People's Republic of China. As with the people of many emerging economies, wealthy Chinese citizens are keen to celebrate their heritage and culture. Consequently, many of China's new wealthy elite are using their new-found wealth to evidence their cultural appreciation and for investment purposes. Some have also been driven by patriotic recognition of the devastation that occurred to China's cultural heritage in the past under colonialism and during armed conflict to buy back their heritage for private or public collections. Unfortunately, another aspect of the appreciation of Chinese art and antiquities, which is of grave concern to the Chinese state, is the usefulness of such property to launder money and aid capital flight, moving funds out of Mainland China in contravention of the strict monetary controls in place for Mainland Chinese citizens.

The demand for Asian art and antiquities is not only limited to Chinese art forms but also extends to art and antiquities from throughout Asia—for example, India, Myanmar, Cambodia, Thailand, Indonesia, Malaysia, and Vietnam. Again, art from these states has long been appreciated by collectors in the West, but the burgeoning economies of these states and the concentration of wealth in the hands of individuals has seen domestic and regional demand increase and drive the international market.

## THE HISTORICAL LOOTING OF ANTIQUITIES IN CHINA

Unfortunately, the problem of illicitly obtained and traded antiquities has existed since man began collecting. In ancient China, wealthy scholars would collect antiquities that had been taken from tombs. In Europe, the few celebrated examples, and many legends, of China's artistic products were prime motivators in the sixteenth century to send trading expeditions to Asia, taking advantage of improved navigational and shipbuilding techniques, which made such adventures feasible, if still hazardous. As the Chinese valued their own art and did not always consent to its sale and export, there was always an illicit market for Chinese antiquities to meet the demand from collectors and connoisseurs in the homelands of the colonial powers. Looting of archaeological sites may have been carried out by impoverished locals who supplied those Chinese merchants who were keen to meet this demand. At other times, looting was carried out on a semi-official status by forces under the flags of foreign colonial powers—for example, the infamous looting of the Old Summer Palace in Peking and the Yuanmingyuan Garden (the Royal Garden of Perfect Brightness) in 1860 when the palace was overrun by British and French forces.

After World War I and the beginnings of the end of formal colonial exploitation in China, Chinese scholars claimed that looting was continuing under a form of

academic colonialism with foreign-sponsored archaeological expeditions and museum collecting missions, which returned antiquities to museums and universities in Europe, the United States, and Japan. For example, in 2016, it was noted that Sven Hedin, the Swedish explorer and archaeologist whose career spanned from the end of the nineteenth century to the mid-twentieth century and who discovered the ancient city of Loulan in 1900, had sent most of his important archaeological finds back to Sweden until his 1926 expedition when outcry from Chinese scholars forced Hedin to compromise. In response to the concern that foreign academics were removing antiquities, China's first laws to protect its archaeological heritage were proposed in 1935 under the Republic of China entitled Rules Relating to the Participation of Foreign Academic Organisations and Private Individuals in the Excavation of Relics.<sup>2</sup> Of course, the looting of archaeological sites on a casual or directed basis has always been carried out by local residents just trying to provide for their families, with little concern for the ruins of the past and simply keen to exploit the tastes of collectors whether domestic or foreign—a practice that continues today.

### THE CAUSES OF THE ILLICIT TRADE IN ASIAN ANTIQUITIES

From the early 1990s, the increased demand for Asian art and antiquities has not only fuelled the legitimate market but has also fuelled a trade in illicitly obtained and exported antiquities.<sup>3</sup> Today, Asia's wealth of heritage is a problem for those trying to prevent looting of antiquities as there are so many sites and they are often of such a size and extent that they are difficult to physically protect. Sites may extend onto private land, and local residents may be poor subsistence farmers who see more direct benefit in the sale of artifacts than in the protection of their heritage for the interest of wealthy compatriots or tourists. The relatively low incomes of citizens combined with the relatively large sums available for these items has led to the large-scale looting of known sites and treasure hunting for other sites.

Other factors that may contribute to the loss of heritage today include the lack of protection afforded by legal and regulatory systems, as protecting heritage has not always been seen as a priority in legislation, and even if laws are in place to protect heritage, they may not be easy to enforce. In addition, government, local administrators, and law enforcement may lack the will to enforce these laws, and there may also be complicity in looting and export by central and local government officials and military and law enforcement personnel, as the latter are often poorly paid and have the manpower and logistical capabilities to move substantial antiquities

---

<sup>2</sup>Rules Relating to the Participation of Foreign Academic Organisations and Private Individuals in the Excavation of Relics, 16 March 1935, [http://www.unesco.org/culture/natlaws/media/pdf/china/china\\_rules\\_16\\_03\\_1935\\_eng\\_orof.pdf](http://www.unesco.org/culture/natlaws/media/pdf/china/china_rules_16_03_1935_eng_orof.pdf) (accessed 6 November 2017).

<sup>3</sup>See, e.g., Pendergast 1991, 89–90; Murphy 1995, 155.

relatively easily across the porous borders of Southeast Asia.<sup>4</sup> There have even been recorded instances of theft by low paid archaeologists from sites and museum staff from museums.

Most Asian states have now enacted protective laws and regulations for their heritage. These are usually based on the general “found-in-the-ground” rule, which holds that any antiquities discovered in the state are the property of the state, as well as imposed strict restrictions on the export of art and antiquities. Many states in Asia are also parties to international agreements intended to counter the trade in illicitly obtained and illicitly exported antiquities and have implemented educational programs to emphasize the importance of heritage to the local people. However, the looting of archaeological sites in Southeast Asia continues to be a problem. The problem in Southeast Asia may also have been exacerbated as international attention on the looting of archaeological sites and the trafficking of antiquities has focused on the destruction of archaeological sites in the Middle East and the plundering of sites by terrorist organizations such as Daesh (also known as the Islamic State of Iraq) to fund their operations.<sup>5</sup> Understandably, but unfortunately, this international focus may have diverted the gaze and concerns of international agencies away from the problems in Southeast Asia. Although the international agencies involved in trying to prevent the illicit trade in antiquities may not have realized that their gaze has shifted from Southeast Asia, it has been claimed that the terrorist groups and illicit marketers they are targeting are aware of this, as it has also been suggested that the focus on the Middle East, Europe, and the Americas has made Asia the preferred trafficking route for looted antiquities from the Middle East.

## LOOTING IN, AND THE ILLICIT EXPORT OF ANTIQUITIES, FROM CHINA

The problem of looting and the illicit export of antiquities has been a particular problem for the People’s Republic of China. It is impossible to know how much of China’s archaeological heritage was looted and exported during the nineteenth and twentieth centuries. In the nineteenth century, China suffered under the incompetence of the Qing Empire, internal strife, and attempted rebellions and colonial exploitation. In the twentieth century, the country struggled with internal conflicts and invasion, including the First Revolution (1911), the Second Revolution (1913), the time of the warlords, the civil war between the Nationalists and the Communists (1927–49), and the invasion by the Japanese before and during World War II. Many treasures were looted and lost during these terrible times. With the Communist Revolution and success in 1949, country began to focus on the future rather than on the evidence of the past, and when Mao launched his disastrous Cultural Revolution (1966–76), much that remained of China’s heritage in public or private

<sup>4</sup>See Brodie 1999; Mackenzie and Davis 2016, 187.

<sup>5</sup>E.g., see Russell D. Howard, “How ISIS Funds Terror through Black Market Antiquities Trade,” *USNI News*, 27 October 2014, <https://news.usni.org/author/russhoward> (accessed 6 November 2017).

collections was destroyed or looted and sold off. So great was the loss that some commentators have noted that the Nationalists actually saved much of China's heritage from destruction by the Red Guards when they carried off many of the treasures from the imperial collections in Beijing and Nanjing in their retreat to Taiwan where it now resides in splendor in Taipei's National Palace Museum.<sup>6</sup>

From the early 2000s, the Chinese government began to recognize the economic value of heritage tourism and encouraged its citizens to holiday at home and enjoy the heritage of China rather than leaving China to spend money in other countries.<sup>7</sup> The Chinese government has also recognized the political value of asserting the wealth of its art, antiquities, and cultural heritage as part of its national identity. In 2015 during a trip to Shanxi province, President Xi Jinping identified antiquities as part of the great revival of China, urging local cultural administrators to "let antiques speak" since this would strengthen national pride and the country's sense of history.<sup>8</sup> This economic and political recognition has resulted in a sea change in government policy with a new commitment to heritage represented by unprecedented spending on museum building and extensive domestic legislation intended to protect heritage.<sup>9</sup> The Chinese government has also encouraged heritage activism internationally—for example, with regard to underwater cultural heritage in the seas surrounding China and further afield and, domestically, by styling itself as "the cradle of intangible cultural heritage."<sup>10</sup>

However, the problem of looting in archaeological sites is ongoing in China. Before the recent boom in the domestic market for Chinese antiquities, David Murphy has noted that statistics from the State Bureau of Cultural Relics indicated that over 40,000 tombs were reported plundered in 1989 and 1990 alone.<sup>11</sup> Murphy notes that the looted antiquities were then destined for export through the "transit states" of Hong Kong and Macau and that China's customs and excise service has claimed to have intercepted 70,000 pieces bound for these jurisdictions since the early 1980s. Apart from these clandestine archaeological excavations, a significant proportion of the outflow of antiquities from China comes direct from museum thefts and even thefts from government facilities used to store pieces confiscated or surrendered to the state.<sup>12</sup> There are accounts of details and photographs of

<sup>6</sup>Wee Kek Koon, "Thank Goodness for Taipei's National Palace Museum," *South China Post Magazine*, 17 November 2016, <http://www.scmp.com/magazines/post-magazine/short-reads/article/2046516/thank-goodness-taipeis-national-palace-museum> (accessed 6 November 2017).

<sup>7</sup>Du Cros and McKercher 2002; Wang and Bramwell 2012.

<sup>8</sup>Jun Mai, "With an Eye to National Identity, Beijing Vows to Stem Loss of Cultural Treasures," *South China Morning Post*, 20 February 2017, <http://www.scmp.com/news/china/policies-politics/article/2072199/eye-national-identity-beijing-vows-stem-loss-cultural> (accessed 6 November 2017).

<sup>9</sup>See, e.g., Newell 2008.

<sup>10</sup>"China Moves to Protect Intangible Heritage," *China.org.cn*, <http://www.china.org.cn/english/culture/47102.htm> (accessed 6 November 2017).

<sup>11</sup>Murphy 1993; He 2000.

<sup>12</sup>Murphy 1993; He 2000.

important relics in Chinese museums being faxed to dealers in anticipation of later “delivery” through theft and smuggling networks.<sup>13</sup>

With the increased interest in, and demand for, Chinese antiquities, the problems of looting in China have only worsened. News stories have highlighted the problem by publishing estimates from within China that there may be as many as 100,000 full-time tomb raiders in the country.<sup>14</sup> Such figures mean that claims of law enforcement success, as in the detention of 175 people as alleged tomb raiders in May 2015 when 1,000 police from six provinces recovered 1,168 artifacts worth more than 500 million yuan in China’s biggest antiquities trafficking case since the founding of the People’s Republic, may be a mere drop in the proverbial ocean. The Chinese authorities have signaled their determination to protect their heritage with the severity of the penalties that may be applied to those caught looting or illicitly exporting antiquities. The death penalty is no longer freely applied to these crimes, but, in 2016, 25 tomb raiders were sentenced for their activities in Liaoning province. The leader and four others were given life sentences, with terms of between 3 and 15 years for the other gang members.<sup>15</sup>

In response to concerns that Chinese auction houses were facilitating the illicit sale of antiquities that had disputed provenance as they may have been looted in the past from China, the State Administration on Cultural Heritage issued regulations in October 2016 on its website to “ban domestic auctions of Chinese cultural relics that were looted illegally in history.”<sup>16</sup> The new regulations banned the auction of “historically looted Chinese relics” and introduced a priority for the Chinese government to buy these items from those who had consigned them to auction at an agreed price.<sup>17</sup>

As mentioned before, another concern for the Chinese government is the use of art and antiquities for money laundering and capital flight. As art and antiquities may be small, of relatively high value, and easily transported past customs officials who do not have the specialist knowledge required to distinguish precious objects from cheap imitations, they are a useful method for Chinese citizens to avoid the country’s strict monetary controls. Money laundering may be perpetrated

---

<sup>13</sup>Murphy 1993; He 2000.

<sup>14</sup>Celine Ge, “China’s Ancient Treasures under Siege from Army of Tomb Raiders,” *South China Morning Post*, 4 December 2015, <http://www.scmp.com/lifestyle/article/1885832/chinas-ancient-treasures-under-siege-army-tomb-raiders> (accessed 6 November 2017).

<sup>15</sup>Alice Yan, “Chinese ‘Tomb Raider’ and Gang Jailed for Plunder of Ancient Relics,” *South China Morning Post*, 5 January 2016, <http://www.scmp.com/news/china/society/article/1898077/chinese-tomb-raider-and-gang-jailed-plunder-ancient-relics> (accessed 6 November 2017).

<sup>16</sup>The State Council, The People’s Republic of China, “China Reserves Right to Recover Illegally Looted Cultural Relics,” 5 November 2016, [http://english.gov.cn/state\\_council/ministries/2016/11/05/content\\_281475483630384.htm](http://english.gov.cn/state_council/ministries/2016/11/05/content_281475483630384.htm) (accessed 21 November 2017).

<sup>17</sup>Nectar Gan, “China Bans Looted Antiques from Going under Hammer at Mainland Auction Houses,” *South China Morning Post*, 2 November 2016, <http://www.scmp.com/news/china/policies-politics/article/2042322/china-bans-looted-antiques-going-under-hammer-mainland> (accessed 6 November 2017).

using legitimately obtained art and antiquities and stolen and looted items. The usefulness of art and antiquities to hide and move black money has always been an important factor in demand not only in Asia but also in Europe and the Americas—for example, the use of pre-Columbian artifacts to facilitate drugs deals and money laundering has been well documented.<sup>18</sup> In response to this threat, the Chinese government has placed more restrictions, including anti-money laundering regulations, on the auction houses and sales in Mainland China.

In addition to its attempts to prevent money laundering and capital flight generally, the Chinese government has also indicated to its two special administrative regions (SARs), Macau and Hong Kong, that they should assist the Mainland in dealing with these problems. This has resulted in a downturn in Macau's casino revenue and further regulation of Hong Kong's financial and banking industries. However, Hong Kong's art and antiquities market continues to operate in an unregulated fashion.

### HONG KONG'S ART AND ANTIQUITIES MARKET

Hong Kong has long been recognized as a major market for Asian art and antiquities. Its position in the market has benefited in recent years from the increased demand for Asian art from Mainland collectors, thus justifying the Fine Art Asia Fair's claim that "Hong Kong is the established hub of art business in Asia."<sup>19</sup> Hong Kong's success as an art market is based on a number of factors. The British colony of Hong Kong was founded because of its natural harbor, and its geographical position is very useful for trade in the Asia-Pacific region. A legacy of colonial rule is that Hong Kong is a free port with little or no duty payable on goods coming into or out of Hong Kong or passing through its efficient logistics system. The ease of travel into and through Hong Kong for visitors also makes Hong Kong a convenient entry or exit point for Mainland China and overseas collectors and dealers. Hong Kong also benefits from its SAR status with the "one country two systems" commitment until 2047, which means that Hong Kong retains its common law jurisdiction and the principle of the rule of law, encouraging faith in commercial transactions and consumer rights. Thus, buyers of art and antiquities can feel reassured that the courts of Hong Kong will uphold their rights using established common law principles to enforce contracts and deals with fakes, forgeries, and misrepresentations. Hong Kong's proximity to the Mainland and the established art and antiquities market has made it a target for attempts by the international art and antiquities trade to secure part of the seemingly insatiable and immensely lucrative Mainland Chinese market. It is also very easy to establish a business in Hong Kong for locals, Mainland Chinese, and foreigners. This ease of establishment in Hong Kong, coupled with the restrictions on the major non-Chinese auction houses that

<sup>18</sup>See, e.g., "Spain returns Colombian treasure seized from drug gangs," *BBC News*, 2 September 2014, <http://www.bbc.com/news/world-latin-america-29024437> (accessed 6 November 2017).

<sup>19</sup>"Why Exhibit at Fine Art Asia," [http://fineartasia.com/why\\_exhibit\\_in\\_hk.htm](http://fineartasia.com/why_exhibit_in_hk.htm) (accessed 6 November 2017).

are based in Mainland China, has meant that many auction houses have established offices in Hong Kong, including notably two of the largest, Christie's and Bonham's.

However, Hong Kong's art market has proved embarrassing for China as the country has changed its public attitude to its heritage. During the heated arguments surrounding the attempt by Christie's in Paris in 2009 to sell two bronze fountain heads of a rat and hare looted in 1860 by the British and the French from the zodiac fountain of the Old Summer Palace in Beijing, it was noted that the last auction sales of any of the fountain heads had taken place in Hong Kong in 2000.<sup>20</sup> At that time, Christie's offered the monkey and ox heads, and Sotheby's offered the tiger head. The Chinese authorities criticized these sales, focusing on the involvement of businesses from the former colonial powers, which furthered the humiliation of the colonial exploitation of China by the sale of its looted heritage. However, the successful buyer of the heads was the Poly Art Museum in Beijing, an outcome that led Beijing to state that such purchases should not take place in the future at the risk of legitimizing such sales.<sup>21</sup>

Beijing's embarrassment with the Asian antiquities trade has been further fuelled by the realization, as previously noted, that capital flight and money laundering operations have often been facilitated using highly valued, easily moved, and easily sold art and antiquities. Although Mainland auction houses have been subject to more stringent regulation to attempt to combat these abuses,<sup>22</sup> the art and antiquities market in Hong Kong remains largely unregulated and may have benefited from the restrictions on the sale of art and antiquities in Mainland China because of a transfer of demand. The lack of regulation in the Hong Kong antiquities market is of further concern because Hong Kong has also long been identified as a transit and market state for the illicit trade in antiquities obtained from Mainland China and elsewhere in Asia.<sup>23</sup> All of the factors that make Hong Kong a major international market for legitimately obtained art and antiquities also make it ideal for those involved in the illicit trade—for example, its geographic position, well-established logistics infrastructure, and free port status.

Although the United Nations has estimated that the illicit trade in antiquities ranks third internationally behind drugs and firearms, it is very difficult to obtain figures on the illicit trade in art and antiquities.<sup>24</sup> It seems fair to assume that the boom in the legal trade in art and antiquities brings an associated boom to the illicit trade in looted antiquities to meet demands that the legal trade cannot meet. When China had more restrictive laws on the export of art and antiquities, Hong Kong was often identified as a convenient port to smuggle items out of the Mainland and into the major art markets. However, anecdotally, it has been claimed

---

<sup>20</sup>So 2000.

<sup>21</sup>Wang 2012.

<sup>22</sup>Gan, "China Bans Looted Antiques."

<sup>23</sup>Murphy 1993, 1995.

<sup>24</sup>Calvani 2008.



that, while Hong Kong was a British colony, there was often cooperation between customs officials in Hong Kong and in the People's Republic of China to attempt to prevent some of this trade with seizures of smuggled artifacts on the border as they were passing into Hong Kong or the seemingly more common unofficial policy of Hong Kong's colonial officers to refuse to allow these items to enter the colony across the land border with Mainland China so that the traffickers would be apprehended as they returned.<sup>25</sup> Unfortunately, it seems that the rate of success for seizures has actually fallen after the handover. In 2010, in response to an enquiry for statistical data on the seizure of Chinese antiquities, Customs and Excise could only provide details of one seizure in 2006 of 638 pieces of "Arts & Craft (antique)," with an estimated value of HK\$ 2.3 million. In 2016, the reply to a similar enquiry was that Customs and Excise "did not keep such figures." It may be postulated that this indicates that no antiquities are being smuggled from the Mainland into Hong Kong, but it is submitted that this is unlikely. In fact, Hong Kong has been described by a local senior police officer as a "way station for much of China's exported artifacts on their journey to collections abroad."<sup>26</sup>

There have been well-documented cases of Hong Kong's involvement in the sale of China's stolen treasures. In 2002, "the Buddha of Infinite Life," an artifact that had been stolen by a Chinese museum security chief in Chengde, China, was sold at auction in Hong Kong for US\$295,000.<sup>27</sup> Also in 2002, a Xi'an antiquities dealer, Wang Cangyan, was arrested after he had arranged for the transport of dozens of figurines looted from the tomb of Empress Dou to Hong Kong, smuggling them across the border in a consignment of modern porcelain.<sup>28</sup> Some of the figures were returned by the shopkeeper in Hong Kong, and some were discovered on sale at Sotheby's in New York and subsequently returned, but many were never recovered.

More recently, in 2015, a Dutch antiquities collector lent a Song Dynasty (960–1279) gilded Buddha statue to the Hungarian Natural History Museum in Budapest. The figure was X-rayed to reveal the remains of a human body inside. The consequent publicity led to claims that the statue and the mummified monk inside had been in a temple in the Fujianese village of Yangchun in southeast China. The villagers of Yangchun claimed that their statue was stolen in 1995. The villagers, backed by China's State Administration of Cultural Heritage are claiming the statue back. The collector has not provided any receipt for the purchase of the statue, and, at present, the only provenance is the claim that the collector was shown that he saw the statue in late 1995 in Amsterdam after a businessman had "purchased it at a market in Hong Kong."<sup>29</sup>

<sup>25</sup>Murphy 1993, 1995.

<sup>26</sup>Bull 2013.

<sup>27</sup>Taylor 2006. Hannah Beech, "Spirited Away," *Time Magazine*, 13 October 2003, <http://content.time.com/time/world/article/0,8599,2056101,00.html> (accessed 6 November 2017).

<sup>28</sup>Beech, "Spirited Away."

<sup>29</sup>Jack Phillips, "Villagers Take Collector to Court over 'Mummified' Buddha Statue," *The Epoch Times*, 18 July 2017, [https://www.theepochtimes.com/villagers-take-collector-to-court-over-mummified-buddha-statue\\_2269544.html](https://www.theepochtimes.com/villagers-take-collector-to-court-over-mummified-buddha-statue_2269544.html) (accessed 6 November 2017).

Hong Kong has also been used for the trafficking of art and antiquities from other Asian states and as a source state when those trying to legitimize stolen or looted art or antiquities are trying to manufacture provenance to disguise the checkered past of stolen or looted items. Evidence of its usefulness as a trafficking waypoint was uncovered in the investigations into the activities of Manhattan art dealer Subhash Kapoor, when it was discovered that many of the 3,000 artifacts identified as having been looted from India, Pakistan, Cambodia, and Tibet had been transported by Law Shang, a logistics operation in Hong Kong, as part of their journey to Europe and America.<sup>30</sup> The use of Hong Kong as a source state in manufacturing provenance was also evidenced in the case of the Kushan Buddhas, which had been looted from archaeological sites in India (one of which was returned to India by the National Gallery of Australia in early 2016). As part of the attempt to hide the illicit source of the Buddha, a letter had been provided purporting to show that the Buddha had been purchased by a British collector in Hong Kong.<sup>31</sup> Hong Kong's role in the illicit trade in art and antiquities is further encouraged by deficiencies in Hong Kong's legal and regulatory framework.

### HONG KONG'S LEGAL AND REGULATORY SYSTEM

Hong Kong has a common law legal system. The colony of Hong Kong was ceded in perpetuity to the British in 1842 by the first of the so-called "unequal treaties," the Treaty of Nanking. The British established a common law system that was expressly retained by Hong Kong in its Basic Law (Article 8) when it was returned to China in 1997.<sup>32</sup> As a common law system created under British rule, it has many aspects of British law in its legislation and common law. However, from its founding as a colony, Hong Kong's law has been developed in line with the law of England except where this was "inapplicable to the local circumstances."<sup>33</sup> Thus, laws were introduced that recognized local Chinese custom and that restricted the application of English law in the colony.

<sup>30</sup>Adam Matthews, "The Man Who Sold the World," *GQ Magazine*, 5 December 2013, <http://www.gqindia.com/get-smart/pop-culture/man-who-sold-world/> (accessed 6 November 2017); Tom Mashberg and Max Bearak, "The Ultimate Temple Raider? Inside an Antiquities-Smuggling Operation," *New York Times*, 23 July 2015, [http://www.nytimes.com/2015/07/26/arts/design/the-ultimate-temple-raider-inside-an-antiquities-smuggling-operation.html?\\_r=2](http://www.nytimes.com/2015/07/26/arts/design/the-ultimate-temple-raider-inside-an-antiquities-smuggling-operation.html?_r=2) (accessed 6 November 2017).

<sup>31</sup>Michaela Boland, "NGA's Stolen Buddha Slowly Homing in on Return to India," *The Australian*, 22 July 2016, <http://www.theaustralian.com.au/news/nation/ngas-stolen-buddha-slowly-homing-in-on-return-to-india/news-story/a6289912e44664c5ce1ce7deb3b4a305> (accessed 6 November 2017); Jason Felch, "The End of the Beginning: NGA Returns Kushan Buddha and Two Kapoor Objects," *Chasing Aphrodite*, 18 September 2016, <http://www.chasingaphrodite.com/2016/09/18/the-end-of-the-beginning-nga-returns-kushan-buddha-and-two-kapoor-objects> (accessed 6 November 2017).

<sup>32</sup>Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 4 April 1990.

<sup>33</sup>Supreme Court Ordinance, 1844, s. 3.

Unfortunately, one transplant from England that was not considered inapplicable was the statutory provision that is known as “market overt.” This is a notorious English concept, sometimes described as “an obsolescence,” a construct that granted buyers good title to property they had purchased subject to the practices of the market they were attending if they had acted in good faith.<sup>34</sup> Intended to provide confidence and protect buyers at mediaeval markets in England, it now serves to protect those purchasing multi-million dollar art and antiquities in Hong Kong.

Market overt was abolished in England in 1995 by the Sale of Goods (Amendment) Act 1994 because it had long been recognized as encouraging the trade in stolen goods and had been described as a “thieves’ charter.”<sup>35</sup> Market overt is a rule of law that provides if a buyer purchases stolen goods in open market subject to the customs of that market, which usually includes the purchase being during the hours of daylight<sup>36</sup> and for a reasonable price, the buyer obtains good title to the goods.<sup>37</sup> In England, the privilege of market overt was afforded markets created under grant or prescription. By the early 1990s, there was one notorious market where the rule was regularly invoked and that was Bermondsey Antiques Market in London.<sup>38</sup> After a long campaign by police officers and concerned citizens, Parliament abolished the anachronistic provision in England. However, the rule of market overt is still in existence in Hong Kong, enshrined in section 24 of the Sale of Goods Ordinance.<sup>39</sup> In fact, the rule is wider in Hong Kong than it was in England because it applies to any shop or market in Hong Kong as long as the goods are of a type that would be sold during the normal course of business in that shop or market.<sup>40</sup>

### WHY DOES MARKET OVERT MAKE HONG KONG THE BEST PLACE TO BUY LOOTED ART AND ANTIQUITIES?

In 1993, David Murphy highlighted the lack of legal and regulatory protection afforded looted antiquities in Hong Kong. As a major art and antiques center, it might be expected that Hong Kong would have a well-developed legal and regulatory framework to ensure the integrity of such business conducted in Hong Kong, but it does not. China is a party to both international conventions intended to combat the trafficking of illicitly obtained art and antiquities—the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which was ratified in 1989, and the 1995 Convention on Stolen or Illegally Exported Cultural Objects, which was ratified

<sup>34</sup>Davenport and Ross 1993.

<sup>35</sup>Sale of Goods (Amendment) Act 1994, c. 32.

<sup>36</sup>Reid v. Commissioner of Police of the Metropolis, [1973] QB 551.

<sup>37</sup>For a detailed explanation of the rule and its history and development, see Pease 1908; Murray 1960; Weinberg 1981; Davenport and Ross 1993; Smith 1997; MacDougall 2009.

<sup>38</sup>Lang v. Jones and Skinner, (1991) 10 Tr LR 113.

<sup>39</sup>Sale of Goods Ordinance, Cap. 26.

<sup>40</sup>Murray (1960) notes that the rule originally covered shops in the city of London. Pease 1915.

in 1997—but Hong Kong is not a party to either convention.<sup>41</sup> As Emiline Smith has noted, China maintains very stringent export laws when it comes to cultural property, whereas Hong Kong does not have any import restrictions other than those relating to cargo manifestation: “This creates a convenient gap between the national legislations of two countries, one which some participants in the cultural property trade more than happily make use of.”<sup>42</sup>

Unlike many jurisdictions today, Hong Kong does not treat what international law would consider to be cultural property, cultural objects, or cultural heritage as being different from any other form of property. Hong Kong has only one law that mentions cultural heritage, the Environmental Impact Assessment Ordinance, and this law is intended to protect Hong Kong’s heritage from damage from construction projects—somewhat unsuccessfully, it may be argued.<sup>43</sup> There are also building and development-related laws that focus on protecting the built heritage of Hong Kong. The only ordinance of Hong Kong that is intended to offer protection to antiquities is the Antiquities and Monuments Ordinance, which is intended to protect archaeological sites, antiquities, and relics, but only those antiquities and relics that have been discovered in Hong Kong.<sup>44</sup>

Thus, the only laws of Hong Kong that may be of use to counter the trafficking of illicitly obtained antiquities are laws intended to affect all property—for example, offences in the Theft Ordinance, the common law, or possibly violations of customs manifest requirements.<sup>45</sup> Therefore, if looted antiquities have been imported into Hong Kong and are discovered in Hong Kong, the possible offences that might be prosecuted, apart from a failure to declare such imports on an import manifest, are as follows. If a thief or looter is caught in Hong Kong, then he may be prosecuted for theft even if the goods were stolen in another jurisdiction,<sup>46</sup> as long as the taking of the goods would constitute an offence in that jurisdiction.<sup>47</sup> Possibly of more use in the fight against the trafficking of illicitly obtained antiquities would be a prosecution for handling stolen goods. This would be possible if anyone was proved to be in possession of goods, or to have been in possession of goods, that had been stolen in another jurisdiction and it could be proved that the possessor knew or believed that the goods were stolen when he obtained them.<sup>48</sup> The Hong Kong police may search for and confiscate any goods found on the thief or handler, or in the premises in which they are detained, if they believe they are relevant to the

---

<sup>41</sup>Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 14 November 1970, 823 UNTS 231; Convention on Stolen or Illegally Exported Cultural Objects, 24 June 1995, 2421 UNTS 457.

<sup>42</sup>Smith, forthcoming.

<sup>43</sup>Environmental Impact Assessment Ordinance, Cap. 499.

<sup>44</sup>Antiquities and Monuments Ordinance, Cap. 53.

<sup>45</sup>Murphy 1993. Theft Ordinance, Cap. 210.

<sup>46</sup>Theft Ordinance, s. 2.

<sup>47</sup>Theft Ordinance, s. 26(1).

<sup>48</sup>Theft Ordinance, s. 24.

investigation,<sup>49</sup> or if they obtain a warrant, they may search the premises and make relevant confiscations.<sup>50</sup> On conviction of anyone for the theft of the goods or for handling stolen goods, the court may make an order for the return of the goods to the original owner if they have been found or for a compensation amount to be paid to the legal owner from the funds of the thief.<sup>51</sup>

However, even if no criminal prosecutions are brought and the stolen or looted goods are identified in Hong Kong, the original owner may use a basic rule of the common law to seek recovery of their goods. This is a simple rule of ownership that makes it difficult to sell stolen property; it is a maxim or principle of the common law that “*nemo dat quod non habet*” (“no one may give what he does not have”).<sup>52</sup> Therefore, even if a thief sells stolen goods to a buyer who has no knowledge they are stolen and the buyer pays a fair price for them, believing the thief to have the right to sell them, the buyer cannot obtain “good title”—ownership that defeats the claim of others, including the original owner—as the thief does not have good title to pass on. The original owner may then be able to rely on the tort of conversion—the principle that no one may use another’s property as their own unless they have permission to do so—to recover the stolen goods. An action in conversion may be successful in forcing the purchaser to return the stolen item even when the purchaser has acted in good faith and has paid a fair price for the item. Therefore, the original owner may reclaim the stolen goods from the purchaser. The purchaser’s recourse is to try to get their money back from the thief under the principles of contract law, which is always dependent on whether they can find the thief and if the thief has any money. The rule will apply to all subsequent purchasers as no one can sell with good title since the thief could never pass this to the first purchaser.

When stolen property is recovered, after it has passed through the hands of many good faith purchasers, there is a whole chain of aborted sales that may result in litigation to recover purchase monies. The *nemo dat* rule applies in most common law jurisdictions, although it may be subject to time limits for recovery. In Hong Kong, the rule has been incorporated into section 23 of the Sale of Goods Ordinance and is not subject to a time limit, although the original owner may have to bring the action for conversion within six years of first discovering the present possessor of the item, if the present possessor is not the first purchaser from the thief.<sup>53</sup> Therefore, any goods stolen or looted in any jurisdictions where such actions are a crime may be subject to an action for recovery under the tort of conversion in Hong Kong since stolen goods, no matter when the theft occurred, are subject to the general

<sup>49</sup>Police Force Ordinance, Cap. 232, s. 50(6).

<sup>50</sup>Theft Ordinance, s. 28.

<sup>51</sup>Theft Ordinance, s. 30; Criminal Procedure Ordinance, Cap. 221, s. 83X.

<sup>52</sup>The maxim gives us the rule: “[N]emo plus iuris transferre potest quam ipse habet,” which may be translated as “no one can transfer a greater right than he himself has.”

<sup>53</sup>Limitation Ordinance, Cap. 21, s. 5.

principles of the common law and to certain statutory exceptions in the Sale of Goods Ordinance—for example, the seller has the power of sale granted by court order or by common law or statutory provision and sale under voidable title.<sup>54</sup>

The *nemo dat* rule is therefore a useful tool in preventing the illicit trade in antiquities in Hong Kong as purchasers should be wary of losing their purchases if they have not undertaken rigorous due diligence procedures. However, Hong Kong's incorporation of market overt in its Sale of Goods Ordinance may allow purchasers to relax their due diligence. The rule of market overt in Hong Kong may provide that anyone buying stolen art and antiquities from a shop or market in Hong Kong where they are openly on display and where such goods are usually sold would be able to keep the goods and would not be subject to an action for recovery by the original owner if they had no knowledge of the defects in the goods' provenance and have acted in good faith.<sup>55</sup> In this case, "good faith" is clarified as something done honestly even though it may have been done negligently.<sup>56</sup> The rule should be effective even if the looted item is taken to another jurisdiction that does not recognize the rule since the issue of ownership should be decided according to the principles of the conflict of laws, and the law governing the transfer of ownership would be the law where the transaction took place (*lex situs*). Thus, if an item were stolen in the United Kingdom, brought to Hong Kong, sold to a shopkeeper or market trader in Hong Kong, purchased from a shop or market in Hong Kong by a buyer in good faith, and then taken by the buyer back to the United Kingdom, the original owner in the United Kingdom would not be able to claim the stolen item back since Hong Kong's market overt rule would have created good title for the purchaser, even though the United Kingdom has abolished the market overt rule.<sup>57</sup>

This remnant of mediaeval English market law was included in the law of Hong Kong to protect buyers at a time when travel and communication within the colony was not easy and buyers would find it difficult to check the provenance of goods. If buyers could not buy freely without concerns over title, then commerce would have suffered. This reasoning echoes the original problem with which the mediaeval rule was created to deal—a problem that existed for all legal systems. If items are stolen and sold, how does the law decide ownership and apportion loss? Menachem Mautner describes the problem thus: "Here we meet the Eternal Triangle of the Law: an honest man (A), a rascal (B), and another honest man (C). Typically, the rascal imposes upon both of them ... and leaves the law the problem of deciding which of them shall bear the loss."<sup>58</sup>

For our purposes, the triangle may involve a rascal who is the original thief or looter or the handler or receiver of stolen or looted goods. The rascal steals or loots

<sup>54</sup>Sale of Goods Ordinance, ss. 23(2)(b), 25.

<sup>55</sup>As clarified by the Court of Appeal in *Au Muk Shun v. Choi Chuen Yau*, [1988] 1 HKLR 413.

<sup>56</sup>Sale of Goods Ordinance, s. 2(2).

<sup>57</sup>See *Winkworth v. Christie Manson and Woods Ltd*, [1980] Ch 496.

<sup>58</sup>Mautner 1991, 95.

the goods or buys them knowing they are stolen or looted and sells them to the honest buyer. If the items are identified as stolen or looted while in the possession of the honest buyer, the law now has to decide whether the honest buyer may retain them or whether they should be returned to the loser. Factors that should not be considered by the law, but which may affect the policy behind the law, are the lack of care taken by the original owner, the availability of insurance to cover the loss, and the desire to protect the good faith purchaser and promote trade without the hindrance of detailed due diligence procedures for dealers and purchasers.<sup>59</sup>

## CONCLUSION

Sadly, Hong Kong's reputation as an international art and antiquities market is not matched by its legal framework to prevent the jurisdiction being used as a market or transit state for stolen or looted art and antiques. It has been suggested that it would require a major overhaul of Hong Kong's legal and regulatory system and a major shift in government policy, as expressed to law enforcement and customs officials, to adequately protect the rights of original owners. However, simply abolishing the "legal absurdity" of the market overt rule would do much to remove doubts over Hong Kong's reputation as a legitimate art and antiquities market.<sup>60</sup> The Law Reform Commission of Hong Kong recommended this in 2002 noting that "[a]ll major jurisdictions in the common law world have either abolished or rejected at the outset the market overt rule."<sup>61</sup>

The market overt rule has no place in modern Hong Kong where it is relatively easy to pursue due diligence. The knowledge that a buyer has little to worry about even if goods are discovered to be stolen after purchase and even if he has not actively pursued enquiries about the source of the goods may cause buyers to decide not to bother with any due diligence procedures. Furthermore, if honest buyers might be tempted to relax their guard, it is quite easy to see that those not so worried about legitimacy might see the rule as a useful tool to establish good title to goods that have been purchased with knowledge of their checkered past since knowledge of the troubled history of art and antiquities may be very difficult to prove and good faith, as has already been noted, is something done honestly even though it may have been done negligently.<sup>62</sup>

Some commentators have argued that the rule plays an important part in balancing the rights of the good faith purchaser and those of the loser, arguing that the owners of items should take more care or should insure their property and

<sup>59</sup>See discussions in Burgess 2015.

<sup>60</sup>Palmer and McKendrick 1998, 337.

<sup>61</sup>Law Reform Commission of Hong Kong, "Contracts for the Supply of Goods," February 2002, <http://www.info.gov.hk/hkreform> (accessed 6 November 2017), 239, para. 9.115.

<sup>62</sup>Sale of Goods Ordinance, s. 2(2).

noting “that the policy objective underpinning the market overt rule is to promote trade in goods.”<sup>63</sup> However, this is based on the idea that the good faith purchaser is more deserving of protection than the loser of property who does not protect it. Furthermore, as noted by the Law Reform Commission of Hong Kong, “[i]t is unrealistic to expect an owner to be able to find his lost goods by searching the shops and markets of Hong Kong.”<sup>64</sup>

It is also inappropriate for a modern financial and commercial center such as Hong Kong, with extensive and rigorous due diligence measures in place for its financial and banking industries and keen to exploit its position and enhance its reputation as one of the world’s leading art and antiquities markets, that it should retain this archaic and anachronistic rule from mediaeval England. This is especially ridiculous when the same rule has been abandoned in England because of fears of enabling “a thief’s paradise.”<sup>65</sup> The retention of the rule may lead to embarrassing issues over the ownership of stolen art and antiquities and will only serve to promote illicit trade rather than reaffirm confidence in the legitimacy of Hong Kong’s art and antiquities market. The abolition of the rule will place the risk of acquiring stolen art and looted antiquities squarely on the buyer and, thus, promote due diligence in dealers and purchasers. If a good faith purchaser does buy stolen or looted art or antiquities from a shop or market in Hong Kong, he or she will be able to recover the purchase monies from the dealer unless he cannot find the seller, which would imply a degree of casualness and a lack of due diligence on the part of the purchaser.

The failure to follow the Law Reform Commission of Hong Kong’s recommendations in 2002 illustrate the slow process of law reform in Hong Kong generally and the lack of political will for change in this area. At present, the only hope for reform would be an indication from Beijing that such a move was desired, which would likely ferment rapid action, as was evidenced in 2016 with the moves to legislate to abolish the ivory trade in Hong Kong following Beijing’s lead. There are limits to the market overt rule as it cannot be relied on by the owner of a shop or market stall who purchases goods from someone bringing them to their premises.<sup>66</sup> It also would seem doubtful that “shop or market” would include an auction; thus, purchasers from the international auction houses holding a sale in Hong Kong may have to be more careful than those purchasing from a shop or market in Hong Kong. However, if the consignor of a work of art or an antiquity has purchased the piece from a shop or market in Hong Kong, he or she will have good title and will be able to pass this to the purchaser in the auction sale. It may be coincidence, but the Kushan Buddha that was returned to India by the National Gallery of Australia in early 2016 had provenance to a supposed

<sup>63</sup>Loi 2009, 835, 845.

<sup>64</sup>Law Reform Commission of Hong Kong, “Contracts for the Supply of Goods,” 239, para. 9.116.

<sup>65</sup>Howells 1995, 31.

<sup>66</sup>R v. Tai Shing Jewellery Co., [1983] 2 HKC 441.



purchase in Hong Kong in the 1960s, and the Dutch collector who purchased the mummified monk in 2015 has claimed it was purchased from a market in Hong Kong. Moreover, it has become commonplace to see provenance statements in auction and sales catalogues that include “purchased from a shop in Hong Kong” with or without details of the shop.

## BIBLIOGRAPHY

Brodie, Neil. 1999. “Illicit Antiquities: The Situation in South-East Asia.” Paper presented at the Art Crime Protecting Art, Protecting Artists and Protecting Consumers Conference, Australian Institute of Criminology, Sydney, Australia, 2–3 December.

Bull, Toby. 2013. “Property of a Hong Kong Gentleman, Art Crime in Hong Kong—Buyer Beware.” Association for Research into Crimes against Art, Art and Cultural Heritage Conference, Amelia, Italy, 21–23 June, <http://art-crime.blogspot.hk/2013/08/2013-arca-art-and-cultural-heritage.html> (accessed 7 November 2017).

Burgess, Harriet. 2015. “The Market Overt Rule: A Time for Reform?” *Irish Jurist* 53: 154–61.

Calvani, Sandro. 2008. “Frequency and Figures of Organised Crime in Art and Antiquities.” Paper presented at the ISPAC International Conference, 12 December, [http://www.sandrocalvani.it/docs/20081221\\_Speeches\\_081212.pdf](http://www.sandrocalvani.it/docs/20081221_Speeches_081212.pdf) (accessed 7 November 2017).

Davenport, Brian, QC, and Anthony Ross. 1993. “Market Overt.” *International Journal of Cultural Property* 2, no. 1: 25–46.

Du Cros, Hilary, and Bob McKercher. 2002. *Cultural Tourism: The Partnership between Tourism and Cultural Heritage Management*. New York: Haworth Hospitality Press.

He, Shuzhong. 2000. “Protection of China’s Cultural Heritage.” *Journal of Art, Antiquity and the Law* 5: 19–30.

Howells, Geraint. 1995. *Consumer Contract Legislation—Understanding the New Law*. London: Blackstone.

Loi, Kelly C. F. 2009. “The Market Overt Rule: Rationale, Reform and Reconsideration.” *Hong Kong Law Journal* 39, no. 3: 835–60.

MacDougall, Bruce. 2009. “The Market Overt Method to Obtain Ownership of Lost or Stolen Goods: Comment on *Manning v Algard Estate* [2008] BSCS 1129.” *International Journal of Cultural Property* 16, no. 1: 85–93.

Mackenzie, Simon, and Tess Davis. 2016. “Temple Looting in Cambodia: Anatomy of a Statue Trafficking Network.” In *Art Crime: Terrorists, Tomb Raiders, Forgers and Thieves*, edited by Noah Charney, 179–99. Basingstoke: Palgrave Macmillan.

Mautner, Menachem. 1991. “‘The Eternal Triangles of the Law’: Toward a Theory of Priorities Involving Remote Parties.” *Michigan Law Review* 90, no. 1: 95–154.

Murphy, J. David. 1993. “The People’s Republic of China and the Illicit Trade in Cultural Property: Is the Embargo Approach the Answer?” *Asia Pacific Law Review* 2, no. 2: 53–69.

Murphy, J. David. 1995. *Plunder and Preservation: Cultural Property Law and Practice in the People’s Republic of China*. Oxford: Oxford University Press.

- Murray, Daniel E. 1960. "Sale in Market Overt." *International and Comparative Law Quarterly* 9, no. 1: 24–52.
- Newell, Phillip. 2008. "The PRC's Law for the Protection of Cultural Relics." *Art, Antiquity and Law* 13, no. 1: 1–58.
- Palmer, Norman, and Ewan McKendrick. 1998. *Interests in Goods*, 2nd ed. London: Informa Law.
- Pease, J. G. 1908. "The Change of the Property in Goods by Sale in Market Overt." *Columbia Law Review* 8, no. 5: 375–83.
- Pease, J. G. 1915. "Market Overt in the City of London." *Law Quarterly Review* 31: 270–88.
- Pendergast, D. M. 1991. "And the Loot Goes On: Winning Some Battles, But Not the War." *Journal of Field Archaeology* 18: 89–95.
- Smith, Emiline C. H. Forthcoming. "Cultural Property in Transit: A Case Study of Hong Kong." Working thesis, University of Glasgow, Glasgow.
- Smith, Peter M. 1997. "Valediction to Market Overt." *American Journal of Legal History* 41, no. 2: 225–49.
- So, Jenny F. 2000. "Cultural Property: Owner's Rights and Obligations." *Hong Kong Visual Arts Yearbook 2000*: 10–19.
- Taylor, Jason M. 2006. "The Rape and Return of China's Cultural Property: How Can Bilateral Agreements Stem the Bleeding of China's Cultural Heritage in a Flawed System?" *Loyola University Chicago International Law Review* 3, no. 2: 233–55.
- Wang, Audrey. 2012. *Chinese Antiquities: An Introduction to the Art Market*. Farnham: Lund Humphries, in association with Sotheby's Institute of Art.
- Wang, Yi, and Bill Bramwell. 2012. "Heritage Protection and Tourism Development Priorities in Hangzhou, China: A Political Economy and Governance Perspective." *Tourism Management* 33, no. 4: 988–98.
- Weinberg, Harold R. 1981. "Market Overt, Voidable Titles, and Feckless Agents: Judges and Efficiency in the Antebellum Doctrine of Good Faith Purchase." *Tulane Law Review* 56, no. 1: 1–41.