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# Switzerland & the International Trade in Art & Antiquities

*Michele Kunitz\**

## I. INTRODUCTION

The streets and galleries of Italian border towns like Como, Bergamo and Chiavenna are dotted with some of the most fertile antique shops in Europe. Eighteenth and nineteenth century manuscripts, antique jewelry, furniture and paintings are all there for the having for visitors with sufficient means to afford the luxury and elegance of the wares. But regardless of means, a visitor seeking not merely the antique but the truly ancient will be disappointed by these shops. For those items, one must submit to a brief search or gentle wave at the border, and look instead to the nearly identical streets and galleries just a few minutes away in Switzerland. There, in Lugano, Ascona and Locarno, among similar manuscripts and paintings, the same visitor will often be treated to the perfectly legal purchase of objects of antiquity, almost certainly looted from archaeological sites in Italy, Turkey, Egypt, Tunisia, Greece, Jordan and elsewhere.<sup>1</sup> This is merely the tip of an iceberg that accounts for the second or third largest illicit market in the world.<sup>2</sup> The antiquities trade provides billions of dollars of revenue for

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<sup>1</sup> Interview with Anthony Tuck, Italian archaeologist, University of Evansville, in Evansville, IN (Oct. 17, 1999); see also Walter V. Robinson, *Art: Antiquities Owned by a Prominent Boston Museum Appear to be Stolen, Raising Troubling Questions About the Practices of Museums*, ORANGE COUNTY REG., Jan. 3, 1999, available at 1999 WL 4277741.

<sup>2</sup> Some estimate that art theft is second only to the drug trade. See Jojo Moyes, *A Global Hit: The Antiques Rogues Show*, INDEPENDENT, Nov. 30, 1996, at 1; J.A.R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19 THE INT'L LAWYER 835 (1985). Other experts estimate the art trade to be third, behind only the narcotics and arms trades; see

collectors, dealers, and auction houses. Moreover, this legal market provides a highly successful method for laundering money made through other illicit transactions.<sup>3</sup> Experts estimate that the stolen art and antiquities market is worth anywhere from \$800 million to \$6 billion annually.<sup>4</sup> After theft from their source countries, stolen artifacts are cleaned and laundered through various countries, most notably Switzerland.<sup>5</sup> Once furnished with sufficient documentation, artifacts move into the even larger market of the legitimate art auction world.<sup>6</sup> By many accounts, this market is rapidly increasing.<sup>7</sup>

Switzerland's role as perhaps the single most important player in this illicit trade is well acknowledged.<sup>8</sup> Even the Federal Bureau of Cultural Heritage in Switzerland concedes that Switzerland is the chief country for the laundering of art from Mediterranean source countries.<sup>9</sup> Nevertheless,

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Steve Lopez & Charlotte Faltermayer, *The Great Art Caper: Is the Heist of the Century About to be Solved? Two Cons may Hold the Answer*, TIME, Nov. 14, 1997, at 74, 82; Deborah Pugh et al., *The Greed that is Tearing History Out by its Roots*, GUARDIAN, June 13, 1992, at 13. Still others claim that combined with copyright crimes, art and antiquities theft dwarf the drug trade. See DAVID MCKEAN, COMMUNICATIONS AND CULTURE: SHOULD THE UNITED STATES PROTECT CULTURAL RESOURCES? 15 (1992) (quoting Harry Hillman Chartrand, Chief Economist for Kultural Econometrics International of Ottawa, Ontario, Canada).

<sup>3</sup> For a discussion of the motivations and ways in which the art trade is used to launder money for drug transactions, see Jennifer Sultan, *Combating the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork*, 18 NW. J. INT'L. L. & BUS. 759, 768 (1998) (explaining that one of the great incentives that people have for participating in the art market is that it is an easy way to launder money. The drug dealers can use money from drug transactions to buy and sell art and show large profits without arousing much suspicion).

<sup>4</sup> Accounts of the actual worth of the illicit art and antiquities market vary according to methodology. Obviously, because of the nature of an illicit trade, there is no real way to accurately measure the value of the market. Compare the following annual sales estimates: \$860 million to \$6 billion, Anthony J. Del Piano, *The Fine Art of Forgery, Theft, and Fraud: Corruption in the World of Art and Antiques*, 8 CRIMINAL JUSTICE at 16, 17 (1993); \$6 billion, *Art for Money's Sake: Experts Say Thefts Total as Much as \$4.5-\$6 Billion Yearly*, ATLANTA J. & CONST., Nov. 26, 1995 at K9; \$1 billion, Paul Majendie, *Interpol Fights Art Thieves with Computers*, CHICAGO TRIB., Nov. 16, 1995, at 7E, available at 1995 WL 6266006.

<sup>5</sup> Mark Bourrie, *Culture Canada: Syria Regains Stolen Treasures*, INTER PRESS SERVICE, May 1, 1999, available at 1999 WL 5948408.

<sup>6</sup> Sotheby's and Christie's, the world's two largest art auction houses reported \$3.2 billion and \$2.4 billion respectively in sales for the period September 1989 to August 1990. These figures represent a thirty-nine to forty percent increase over the previous year. See Heidi Berry, *The Big Uneasy: Auction Houses Brace for a Downturn*, WASH. POST, Sept. 20, 1990, at T14. This does not include the billions of dollars worth of private deals that stores and dealers make with collectors.

<sup>7</sup> See Sultan, *supra* note 3, at 759.

<sup>8</sup> See LYNDEL V. PROTT & P.J. O'KEEFE, 3 LAW AND CULTURAL HERITAGE: MOVEMENT, 384 (1989).

<sup>9</sup> JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 247 (1989).

through its protection of the *bona fide* purchaser, loose transfer of title laws and laissez-faire enforcement of protectionist legislation, Switzerland maintains its position as the center of traffic for the laundering of art and artifacts.

Recently, Switzerland has proposed a law that would significantly tighten its regulation of the antiquities trade. The draft law seeks to comport Swiss law with the broad goals of international conventions on the protection and transfer of cultural property. However, given Switzerland's past reluctance to curtail the illicit trade in antiquities, it remains unclear whether this measure will pass or if passed, whether the law would be adequately enforced.

The primary aim of this Comment is to detail the history of international law as it pertains to cultural property and draw attention to the Swiss role in fostering the illicit trade of cultural property. Principally, the Comment will focus on the illegal art trade and the laundering of items through Switzerland. Many argue that various international treaties and regulations are required to combat the problem.<sup>10</sup> This Comment will argue that Switzerland and conduit countries like it ought to reform their property laws and take an active role in the international discussion on cultural heritage. Part II will describe the market and problems associated with the transfer of cultural property from source countries. Part III of the Comment will detail the international treaties that have attempted to deal with the global problem of the art trade and movement of cultural property. Further discussion of the Swiss law and the *bona fide* purchaser law will be handled in Part IV of the Comment. Part IV will also include specific cases as illustrations of the problem. Finally, Part V will discuss pending measures as well as other potential methods to reform the market in art and cultural property.

## II. DESCRIBING THE PROBLEM

The market in art and cultural treasures has increased dramatically in the last decade,<sup>11</sup> and as stated above, the market is worth up to \$6 billion annually.<sup>12</sup> With such a large market, looters, storeowners and dealers have incredible economic incentives to get involved in both the illicit and legiti-

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<sup>10</sup> See Spencer Kinderman, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT'L L. REV. 457 (1993); Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 411 (1995).

<sup>11</sup> See Jean Eaglesham, *Insure to Beat the High-Value Burglars: A Specialist Policy Can Protect Your Wealth*, FIN. TIMES, June 1, 1996, at 3 (noting that art theft more than doubled in the preceding five years).

<sup>12</sup> See Del Piano, *supra* note 4. However, the estimates that Del Piano made were made in 1993. With theft still increasing and recovery rates still low, one has to think that the market is now exponentially larger.

mate sides of the art trade. Part of the allure of the art trade versus other illegal businesses is the relative ease in which these activities are accomplished. Compared with drug trafficking, the penalties and obstacles are almost laughable. To illustrate the point, the United States of America, although hardly blameless in the international illicit art market, is relatively sensitive to cultural property issues. Even so, the U.S. penal code portrays an incredible lack of parity in punishing art crimes and drug related crimes, often requiring drug offenses to carry mandatory jail sentences.<sup>13</sup> While drug smugglers typically go to prison for lengthy terms, an American caught trying to smuggle 154 pre-Columbian artifacts into the country valued at \$288,000 might not be given any jail time at all.<sup>14</sup> In fact, the art smuggler in this example was given only a \$1000 fine and 200 hours of community service.<sup>15</sup> While the penalties are light, the profits are often astronomical.<sup>16</sup>

One of the most serious problems that the growth of the art market has wrought is the destruction of the archaeological record.<sup>17</sup> The value of cultural property is substantially different for the art collector and the archaeologist. The collector accumulates art for a variety of reasons, but primary among them are the aesthetic and monetary values that the objects hold. The monetary market for art objects is based on age, quality, and rarity. Additionally, other factors, including trends in modern art affect the worth of objects on the market.<sup>18</sup>

Perhaps the exorbitant prices that cultural objects fetch on the art market represent the greatest worth of the pieces. However, dollar value has no

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<sup>13</sup> See *Collectors or Looters?* ECONOMIST, Oct. 17, 1987, at 117, 118.

<sup>14</sup> See *id.*

<sup>15</sup> *Id.*

<sup>16</sup> See John Neary, *Project Sting*, ARCHAEOLOGY, Sept./Oct. 1993, at 52, 54. (noting that a farmer from New Mexico might sell a pot for \$200 to \$1000 that then can be sold in Europe for upwards of \$400,000. Thus, profits for the dealers and middlemen can reach 2000% of invested capital).

<sup>17</sup> See Borodkin, *supra* note 10, at 378.

<sup>18</sup> For example, during the middle part of this century, interest in Cycladic folded arm figurines exploded because artists such as Henry Moore, Pablo Picasso and Constantin Brancusi were so influenced by the primitive art. The figurines date back to the third century BC and come from the Cyclades Islands in the Aegean Sea. The figurines appear remarkably modern in the present age, and are responsible for shaping our notion of modern art. See David W. Gill and Christopher Chippindale, *Material and Intellectual Consequences of Esteem for Cycladic Figures*, 97 AM. J. ARCHAEOLOGY 601 (1993).

With the increased interest in the figurines, the market for forgeries boomed. As a result, when objects that were thought to be genuine reached the market, the price ballooned. In 1988 Sotheby's put up a folded-arm figurine for auction. The expected price for the figurine hovered between \$400,000 - \$600,000. Art dealer Edward H. Merrin bought it for \$2.09 million and sold it six months later for close to \$1 million dollars in profit (\$3 million). See William Grimes, *The Antiques Boom - Who Pays the Price?*, N.Y. TIMES MAGAZINE, July 16, 1989, at 18.

bearing on archaeological value. The discipline of archaeology depends entirely on the analysis of context, including the exact provenance of materials, while aesthetic judgment plays a subordinate role in the study of cultures through archaeology. All of the information that a given piece can reveal is in relation to the other objects that are around it and the relative position of the piece when found. By contrast, the illicit art market relies on the chance or deliberate discovery of objects themselves, which are plundered without regard for context and then funneled into loosely organized channels of exchange. When materials are taken from their source countries, often they are looted from archaeological sites that are being excavated or are turned over by farmers plowing their fields. In either case, valuable information is lost regarding the object's provenance. For pieces that are looted from archaeological sites, all the hard work in careful excavation that archaeologists do to place each object within its context is destroyed. For the archaeologist who depends upon context to study and understand an object, a lack of knowledge of the context renders a piece virtually useless. The information that is lost through such destruction is immeasurable, invaluable and irreplaceable. Similarly, when farmers or other townspeople remove objects from fields and place them within the stream of commerce of the illicit art market, they destroy opportunities for archaeologists to locate new sites and further information from the artifacts themselves.<sup>19</sup> In addition to the destruction of archaeological sites, the removal of cultural treasures from the country of origin robs a nation of an essential aspect of its heritage.

Thus far, the term cultural property has simply been bandied about interchangeably with antiquities and art. However, it is useful to draw a distinction between art and cultural property.<sup>20</sup> The notion of cultural property entails more than art; it includes items of cultural significance. Generally, cultural property enfolds the aspects of national history with the imagination of the culture.<sup>21</sup> It is also a concept clearly defined by international law through the United Nations.<sup>22</sup>

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<sup>19</sup> Farmers' incentives to report finds are generally small. In addition to the financial gain that they might realize from the sale of an item, they often fear the interference of archaeologists. If artifacts draw the attention of archaeologists, often the government will seize the land for excavation. This creates obvious financial pitfalls for a farmer who needs the land for crop production.

<sup>20</sup> For a full discussion of the cultural property debate, see Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 *FORDHAM INT'L L.J.* 1033 (1993).

<sup>21</sup> See Evangelos I. Gegas, *International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property*, 13 *OHIO ST. J. ON DISP. RESOL.* 129, 131-32 (1997).

<sup>22</sup> See United Nations Education, Scientific & Cultural Commission Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 *U.N.T.S.* 232, 234-36 [hereinafter UNESCO Convention]

What complicates a definition of cultural property, in a legal sense, are the two distinct types of ownership interests attached to it.<sup>23</sup> In a very simple sense, cultural property possesses the common property aspect afforded to all owned items; a person or entity physically possesses the artifact. In addition, communities, ethnicities and countries also claim cultural property.<sup>24</sup> The object symbolizes the entire life of the society.<sup>25</sup> These intangible aspects of culture entitle the community to general claims upon the artifact. For the United States items such as the Liberty Bell and the Washington Monument typify something that is uniquely American. However, peoples from source nations can look all over Europe, the United States and Asia and see similarly important monuments dispersed throughout the museums and cities.<sup>26</sup> The two interests collide when the property "owner" of the item and the culture from where it came diverge. Although the types of disputes that are discussed in this Comment arise when artifacts are taken out of a source country into the public or private collections of a distant collecting country, the issue of cultural property may also be a concern when stolen items are sold to collectors native to the source country itself. Then the debate shifts to a discussion of where items of cultural property belong, how should they be treated, studied and displayed, and how far back one has to go to claim the culture of prior civilizations.<sup>27</sup>

A further definition that is worth noting is "art trade." Generally, the illegal art market is divided into two categories: art theft and the illegal export of cultural property.<sup>28</sup> Art theft refers simply to the removal of histori-

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(defining cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science" and which belongs in special designated categories). See *infra* Part III, for a full discussion of this convention.

<sup>23</sup> See Gegas, *supra* note 21, at 32.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> For example, much of the Athenian Parthenon frieze plaques resides in the British Museum in London. In fact, the portion in the United Kingdom is called the Elgin Marbles, for the British lord who brought them to England. Similarly, the Metropolitan Museum of Art in New York houses a number of mummies of ancient pharaohs and other artifacts from Egypt, and Turkey's temple at Pergamum is now housed in a Berlin Museum. For these items to reside outside of lands that they represent is equally as offensive as the thought of Betsy Ross's American Flag in a museum in Sweden.

<sup>27</sup> Recently, a conflict over religious and cultural control became a particularly hot issue in Israel. When I visited there in 1997, there was tremendous strife concerning a tunnel in Jerusalem. The Israeli government, which is in control of Jerusalem and the tunnel, wanted to open it to the public. Many Muslims were up in arms over the opening of the tunnel, for it leads to one of Islam's most sacred mosques: The Dome of the Rock. The dispute over the cultural preservation and ownership of the tunnel and its environs led to rioting, violence, and a severe setback, if not a halt, to the Middle East peace process.

<sup>28</sup> See JOHN E. CONKLIN, ART CRIME 6 (1994).

cal works of art that have been stolen from their proper owner.<sup>29</sup> The proper owners may be private citizen collectors, museums, churches, galleries and auction houses. Illegal exportation denotes the removal of artifacts from a country that bans the export of their cultural property.<sup>30</sup> This sort of crime is generally perpetrated by the pillaging of ongoing excavations, and the predation of farmers in archaeologically rich areas. The looting of archaeological sites and other such theft account for the vast majority of the illicit art market.<sup>31</sup> For the purposes of this Comment, it is not necessary to create a great distinction. In both cases, items are smuggled into Switzerland, and it is at that point that Swiss law becomes an issue. However, it is important to recognize that although high profile and extraordinarily expensive items generally frame the debate, smaller, less expensive materials make up the largest part of this market, but are no less significant culturally or archaeologically.

A whole section of the debate that is currently raging is the return of Nazi-looted art. While this category of art may seem included by the focus on illegal export, the Comment will refer to Nazi-looted art and its progeny separately because of the complex and vast problems associated with this area.<sup>32</sup>

### III. INTERNATIONAL EFFORTS TO PROTECT CULTURAL HERITAGE

Given that the illicit art and antiquities market is such a pervasive problem, what is being done to stop the pillaging of cultural treasures? Scholars began discussing the issues of the illicit art market as early as the middle of the 19th century.<sup>33</sup> However, because of ineffective legal regimes

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<sup>29</sup> See William G. Pearlstein, *Claims for the Repatriation of Cultural Property: Prospects for a Managed Antiquities Market*, 28 LAW & POL'Y. INT'L BUS. 123, 127 (1996).

<sup>30</sup> See *id.* at 123.

<sup>31</sup> See CONKLIN, *supra* note 28, at 4.

<sup>32</sup> In addition, because this issue involves war and particularly despicable behavior by the conduit countries such as Switzerland, France and Germany, it would be less than fair to include the instances that are surfacing fifty years later, rather than to focus on the current problems. For a critical look at the issue of Nazi looted art and the problems associated with claims made by the original owners, see HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* (1997). For a collection of scholarly essays on the issue, see generally *THE SPOILS OF WAR - WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* (Elizabeth Simpson ed., 1997). This volume comprises the papers presented at a conference at the Abrams/Bard Graduate Center for Studies in the Decorative Arts.

<sup>33</sup> See A. HENRY RHIND, *THEBES: ITS TOMBS AND THEIR TENANTS* (1862). For more modern discussions, see John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985); John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989). For current information, statistics and articles on the illicit art market, see The Illicit Antiquities Research Centre website at <http://www-mcdonald.arch.cam.ac.uk/IARC/home.htm>.



in most of the source countries during the early periods of scholarly debate on the trade, many of the actions were not illegal.<sup>34</sup>

Since the end of the Second World War, international consciousness regarding cultural heritage has been rising incrementally. Following the massive destruction wrought during the war, the international community saw the need to protect treasures and works of art from the ravages of war.<sup>35</sup> As a result, concerned countries convened and negotiated the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention"). While the systematic conspiracy of the Nazi regime to expropriate all of the artwork in Jewish collections and Europe in general for their own profit brought attention to the destructive impact that war has on art and cultural objects, sensitivity to cultural heritage remained minimal.

Into the 1960's, dealers, collectors and museums neither asked nor cared about the provenance of a given object.<sup>36</sup> However, beginning in the late 1960's, the political landscape began to change. A rise in patriotism and national cultural pride gave birth to increased efforts of source countries to recoup their treasures. The international community took notice and came together to pass the United Nations Education, Scientific & Cultural Commission Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention of 1970").

Although several countries passed the UNESCO Agreement of 1970, the antiquities market continued to flourish.<sup>37</sup> Finally, a new hope for protection and control of cultural objects looms large on the landscape: The International Institute for the Unification of Private Law Convention on the Cultural Objects ("UNIDROIT").<sup>38</sup>

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<sup>34</sup> For example, Greece did not pass a law prohibiting the exportation of cultural property until the 20<sup>th</sup> century. This makes their claims for some of the most impressive and valuable pieces of cultural patrimony legally out of their reach. Much of the looting of the largest and grandest ancient pieces occurred in the golden age of imperialism in prior centuries. See generally, Merryman, *supra* note 33.

<sup>35</sup> See John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 835-41 (1986).

<sup>36</sup> During the 1960s, "you did not ask anybody where [antiquities] came from. If you like [sic] them, you bought them." *Collectors or Looters?*, *supra* note 13, at 118 (quoting Thomas Hoving, Director of the Metropolitan Museum in New York, 1968).

<sup>37</sup> See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 280 n.8 (1982) [hereinafter Bator, *Essay*].

<sup>38</sup> Final Act of the Diplomatic Conference for the Adoption on the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]. The European Union has enacted separate measures to deal with the movement of cultural property. Switzerland is not a part of the European Union, so I will not expand on it here. For a full explanation of the E.U. Directives, see Sultan, *supra* note 3, at 777-86.

### A. The Hague Convention

The Hague Convention prohibits all parties from engaging in theft, pillage, or misappropriation of cultural property.<sup>39</sup> The Convention provides that each member nation must protect the cultural property in its own boundaries and the territories of other nations.<sup>40</sup> It also requires in times of war that parties to the Convention protect the cultural property of occupied lands, regardless of whether the territory enacted laws for the protection of its own heritage.<sup>41</sup> Furthermore, the contractual obligations of the parties to the Hague Convention are not dependent upon one another.<sup>42</sup> The occupying force is obliged to aid the occupied territory in the preservation of its cultural property.<sup>43</sup> Even if the occupied nation is unable to protect the objects itself, the Hague Convention has a positive requirement that the occupier must take the requisite steps to secure the cultural property.<sup>44</sup>

These affirmative requirements laid a strong foundation for easing the destruction caused by war. However, the Hague Convention does not address the issue of remediation.<sup>45</sup> Furthermore, the treaty does not provide adequate measures for enforcement of the regulations.<sup>46</sup> One of the problems with the Convention is that it creates disparities between member countries in the regulation of penalties.<sup>47</sup> After prosecution for an offense, each country is left to develop its own penalties and sanctions.<sup>48</sup> Other limitations to the Hague Convention include: lack of a model for dispute resolution, poor participation in peacetime activities, and the lack of a homogeneous body of law to attack the trade in illicit art.<sup>49</sup> Most recently, the

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<sup>39</sup> Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention].

<sup>40</sup> See *id.* art. 4, at 242.

<sup>41</sup> *Id.* at 244.

<sup>42</sup> See Joseph F. Edwards, *Major Global Treaties for the Protection and Enjoyment of Art and Cultural Objects*, 22 U. Tol. L. Rev. 919, 947 (1991).

<sup>43</sup> Hague Convention, *supra* note 39, art. 5(1), at 244.

<sup>44</sup> *Id.* art. 5(2), at 244.

<sup>45</sup> Stanislaw Nahik, *International law and the Protection of Cultural Property in Armed Conflict*, 27 HASTINGS L.J. 1069, 1083 (1976).

<sup>46</sup> See Arlene Krimgold Fleming, *A Shield From Marauders: The U.S. Can Help Stop Wartime Destruction of the World's Heritage*, WASH. POST, July 5, 1992, at C4.

<sup>47</sup> See Hague Convention, *supra* note 39, art. 27, at 260.

<sup>48</sup> *Id.*

<sup>49</sup> For a comprehensive criticism of the Hague Convention, see Nahik, *supra* note 45, Fleming, *supra* note 46 (noting that the innovative provision that was included in the Hague Convention, the peacetime register of cultural objects, was not well maintained by most participants), and Jennifer H. Lehman, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, The UNESCO Convention, and the UNIDROIT Draft Convention*, 14 ARIZ. J. INT'L & COMP. L. 527, 535 (1997) (arguing that one of the major problems with the Hague Convention is that there is no arbitration model outlined in the articles and that it provided no coherent legal regime).

Hague Convention has been applied to the conflicts in the Persian Gulf<sup>50</sup> and the Balkans.<sup>51</sup> Almost all of the major collecting and source countries participated in the Hague Convention, including Switzerland, Germany and France.<sup>52</sup> Of notable absence were the United Kingdom and the United States.<sup>53</sup>

#### B. The UNESCO Convention of 1970

The UNESCO Convention of 1970 appeared as the “end product of a long line of efforts to stop the pillaging and looting of archaeological sites, and the theft of cultural property of extreme importance.”<sup>54</sup> To complement the Hague Convention, the UNESCO Convention focused on the peacetime illicit trade in cultural property.

The Preamble to the UNESCO Convention extols the virtue of cultural property as a belonging of mankind that requires all nations to feel the moral imperative to protect such a heritage.<sup>55</sup> A primary goal of the Convention is “to establish a balance between the desire to retain cultural property within the country of its origin and to allow for a free flow of cultural objects between nations in the spirit of cultural exchange.”<sup>56</sup> Although the UNESCO Convention aims to combat the evils of the illicit expatriation of the cultural property, the Convention has produced mixed results. Again it seems that a lack of enforcement mechanisms hampers its success.<sup>57</sup> In addition, the UNESCO Convention suffered from ambiguous language and broad provisions.<sup>58</sup> Finally, some have criticized the UNESCO Convention

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<sup>50</sup> See David A. Meyer, *The 1954 Hague Cultural Property Convention and its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349, 371-77 (1993).

<sup>51</sup> See Lehman, *supra* note 49, at 532 n.47.

<sup>52</sup> LYNDEL V. PROTT, COMMENTARY ON THE UNIDROIT CONVENTION ON STOLEN AND ILLEGALLY EXPORTED CULTURAL OBJECTS 1995 at 106-10 (1997) [hereinafter PROTT, UNIDROIT].

<sup>53</sup> See *id.*

<sup>54</sup> Lyndel V. Prott, *International Control of Illicit Movement of the Cultural Heritage: The 1970 UNESCO Convention and Some Possible Alternatives*, 10 SYR. J. INT'L L. & COM. 333, 338 (1983).

<sup>55</sup> See UNESCO Convention, *supra* note 22, at 232.

<sup>56</sup> Karen S. Jore, *The Illicit Movement of Art and Artifact: How Long Will the Art Market Continue to Benefit from Ineffective Laws Governing Cultural Property?*, 13 BROOK. J. INT'L L. 55, 59 (1987).

<sup>57</sup> See PAUL M. BATOR, THE INTERNATIONAL TRADE IN ART, 94-108 (1981) [hereinafter BATOR, TRADE]. Bator was a delegate to the Convention and is deeply critical of the ratification process. He argues that the compromises were too great in areas of enforcement and thus, the Convention lost its effectiveness.

<sup>58</sup> *Id.* See, e.g., “The States Parties to this Convention recognize that illicit import, export, and transfer of cultural property is one of the main causes of the cultural impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting each country’s cultural property against all the dangers resulting therefrom. To this end, the States Parties undertake

of 1970 for its inequitable division of benefits and responsibilities.<sup>59</sup> Claims of source countries are protected wholeheartedly while the collecting countries are left to finance the litigation and transaction costs.<sup>60</sup> As a result, purchasing nations have little or nothing to gain from participating in the Convention. Many of the collecting nations that have gotten involved have only done so by using signing on as leverage for political bargaining.<sup>61</sup> To date, ninety-two countries have signed the UNESCO Convention, of which Britain is the latest, having signed only this year.<sup>62</sup> Britain joins the United States as one of the only collecting countries to implement the UNESCO Convention; the other major art collecting countries have not signed the agreement, including: Switzerland, Germany, Sweden and Japan.<sup>63</sup> While most disparage the UNESCO Convention for not being a cohesive and effective body of law, the Convention undoubtedly changed the atmosphere globally for the trade of antiquities.<sup>64</sup>

The UNESCO Convention effectively makes it illegal to remove cultural property from a member country without its permission.<sup>65</sup> It contains the above-mentioned Preamble and 26 Articles, of which the first thirteen are considered to be the "core."<sup>66</sup> The Articles that provide the greatest substantive provisions are 7 and 9 and deal with stolen artifacts and illegally exported artifacts respectively.<sup>67</sup> The rest are generally dismissed as rhetorical.<sup>68</sup> Although Article 4 involves the important substantive issue of the classification of cultural property, the language is vague and indetermi-

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to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations." UNESCO Convention, *supra* note 22, art. 2, at 231.

<sup>59</sup> See Borodkin, *supra* note 10, at 389.

<sup>60</sup> See *id.*

<sup>61</sup> See Alexandre Stille, *Was This Statue Stolen?*, NAT'L L.J., Nov. 14, 1988, at 1.

<sup>62</sup> See Dalya Alberge, *Britain Acts to Prevent Illicit Trade In Art*, THE TIMES (London), Mar. 15, 2001, available in LEXIS, New File.

<sup>63</sup> PROT, UNIDROIT, *supra* note 52. While the U.S. is one of the only market countries to sign the agreement, it took thirteen years for the government to ratify the UNESCO Convention regime. See Convention on Cultural Property Implementation Act, 19 U.S.C.S. § 2601 (1983).

<sup>64</sup> Countries that participate in the UNESCO accord take very seriously the issue of importing looted items. Individual collectors must at least have a semblance of legitimacy when they are purchasing antiquities. This is a great change from the period directly preceding the Convention. See *supra* text accompanying note 36; see also Lyndel V. Prott, *National and International Laws on the Protection of Cultural Heritage*, in ANTIQUITIES: TRADE OR BETRAYED, 57, 59 (Kathryn W. Tubb, ed. 1995) [hereinafter Prott, *National*].

<sup>65</sup> See UNESCO Convention, *supra* note 22, art. 6, at 240.

<sup>66</sup> See Kinderman, *supra* note 10, at 470, (quoting Paul Bator, in BATOR, TRADE, *supra* note 57, at 100-03. Bator states that the rest of the provisions are simply administrative and have almost no substantive value.)

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

<sup>68</sup> See *id.* at 471-72.

nate.<sup>69</sup> Other provisions that deal with concrete subjects such as penalties (Article 8) provide that consequences should be imposed upon nations who violate Articles 6 and 7, but leave open the nature and severity of the punishment.<sup>70</sup> Finally, Article 7 has been read to include only items stolen from museums and not stolen cultural property generally.<sup>71</sup> The Convention defines cultural property extremely broadly, encompassing almost everything that can be considered artistic.<sup>72</sup> The result is a virtual embargo on all items that are over 100 years old and the creation of a black market.<sup>73</sup>

### C. The UNIDROIT Convention of 1995

In 1984, UNESCO, concerned with the effectiveness of the 1970 Convention, asked UNIDROIT (International Institute for the Unification of Private Law) to create a uniform body of law to curb the illicit traffic of cultural property.<sup>74</sup> The Convention met several times in the period from 1988 to 1995, when the final draft was adopted on June 24, 1995 at the Diplomatic Conference held in Rome.<sup>75</sup> The UNIDROIT Convention was aimed at reducing the profitability of the art trade and facilitating the return of stolen cultural property.<sup>76</sup> A primary concern in the negotiations of the UNIDROIT Convention was the problem of the *bona fide* purchaser.<sup>77</sup> Additionally, one of the failings that UNESCO recognized and sought to remedy through UNIDROIT was the exclusion of private collections from the definitions of covered cultural property. The Convention's debates raged with contentious discussions on the divergent positions that collecting and source countries held.<sup>78</sup> This departure from the relatively quiet Conventions of years past reflected the more diverse makeup of the parties.<sup>79</sup> In

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<sup>69</sup> See UNESCO Convention, *supra* note 22, art. 4, at 238.

<sup>70</sup> *Id.*, art. 8, at 241.

<sup>71</sup> See PROT, UNIDROIT, *supra* note 52, at 15; see also UNESCO Convention, *supra* note 22, art. 7, at 240.

<sup>72</sup> See *id.* art. 1, at 236.

<sup>73</sup> See Bator, *Essay*, *supra* note 37, at 315. "Embargo, whether explicitly or administratively imposed, is the dominating philosophy of almost all the states rich in antiquities and archeological materials, including the Mediterranean region, the Middle East, and the nations of Central and South America." *Id.*

<sup>74</sup> Prot, *National*, *supra* note 64, at 61.

<sup>75</sup> PROT, UNIDROIT, *supra* note 52, at 12.

<sup>76</sup> See Prot, *National*, *supra* note 64, at 61.

<sup>77</sup> See *infra* Part IV for a full discussion of the *bona fide* purchaser issue.

<sup>78</sup> See PROT, UNIDROIT, *supra* note 52, at 13.

<sup>79</sup> See *id.* at 12.

fact, Switzerland played a continuous role in the meetings.<sup>80</sup> On June 26, 1996, Switzerland signed the UNIDROIT Convention.<sup>81</sup>

Like the UNESCO Convention, UNIDROIT defines cultural property broadly.<sup>82</sup> However, it includes objects that are not specifically designated as cultural objects by the member states.<sup>83</sup> The Convention also has provisions that differentiate items that are stolen and those that are illegally exported.<sup>84</sup> The Convention creates a private right of action for stolen objects by allowing individuals to file complaints.<sup>85</sup> The claim is to be filed in the court where the object is located.<sup>86</sup> Whereas, a state is the only party that can make a claim for illegally exported cultural property.<sup>87</sup> This distinction is seemingly one of the concessions to the collecting countries.<sup>88</sup> While this may seem to bar a great percentage of the looted material from individual suit, the UNIDROIT Convention was careful to define the looting of archaeological sites under Article 3, and therefore it is considered stolen rather than illegally exported.<sup>89</sup>

Contrary to the provisions of the past, UNIDROIT demands that stolen property be returned to the owner, regardless of whether the possessor was a *bona fide* purchaser.<sup>90</sup> This provision is in direct contravention of the laws of many of the collecting countries.<sup>91</sup> The time period for filing a claim includes a period of time after location of the object and within a time frame of its disappearance.<sup>92</sup> One of the key factors that brought countries such as Switzerland into the discussion is a provision to compensate possessors for returning objects to their owners. The UNIDROIT Convention provides for such compensation when the possessor proves that the purchase was *bona fide*.<sup>93</sup> The compensation is to be paid by the party bring-

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<sup>80</sup> See *id.* at 13.

<sup>81</sup> UNIDROIT HOMEPAGE, available at <http://www.unidroit.org/english/implement/I-main.htm> (visited Nov. 8, 1999). Switzerland got in just under the wire. The final day for nations to become signatories was June 30, 1996.

<sup>82</sup> See UNIDROIT Convention, *supra* note 38, art. 2 and Annex, at 1331, 1339.

<sup>83</sup> See *id.*

<sup>84</sup> *Id.* art. 3-7, at 1331-34.

<sup>85</sup> Sultan, *supra* note 3, at 791.

<sup>86</sup> UNIDROIT Convention, *supra* note 38, art. 8(1), at 1334.

<sup>87</sup> *Id.* art. 5, at 1332-33.

<sup>88</sup> The vast majority of cultural property in the black market is material that is looted from archaeological sites. See Sultan, *supra* note 3, at 765. If looting of cultural property were regarded as illegal export, collecting countries would open the greatest percentage of the market only to institutional suit.

<sup>89</sup> UNIDROIT Convention, *supra* note 38, art. 3, at 1331-32.

<sup>90</sup> *Id.*

<sup>91</sup> See Steven F. Grover, *The Need for Civil-Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study*, 70 TEX. L. REV. 1431 (1992).

<sup>92</sup> See UNIDROIT Convention, *supra* note 38, art. 3, at 1331-32.

<sup>93</sup> *Id.*, art. 4, at 1332. For a possessor to show himself to be a *bona fide* purchaser, he must prove that he practiced due diligence in the transaction. The Convention outlines the

ing the claim; however, sometimes the dealer or conduit may be forced to pay restitution.<sup>94</sup>

Although UNIDROIT and UNESCO have attempted to resolve the disconnect between private law and public international law, the prevailing rule of *lex situs* governs the transfer of property. *Lex situs* is a long-standing principle of private international law which means that the validity of a transfer of property and the rights of those claiming title are regulated by the law where the property is located.<sup>95</sup> Because of this principle, the efficacy of international attempts to regulate the flow of artifacts between countries is largely dependent on the individual laws of the member countries.

The chief problem in reconciling the private laws of the various countries arises in the fundamental difference in interpretation between common law and civil law countries.<sup>96</sup> Common law countries such as England and the United States do not protect a *bona fide* purchaser from gaining title to stolen goods.<sup>97</sup> Under this model, a person who does not have good title to an object cannot pass good title to another. Even when a purchaser is misled into thinking that he is getting good title to an artifact, he or she cannot pass good title on to another good faith purchaser.<sup>98</sup> Therefore, a good faith purchaser is not safe from claims of title from the owner if the artifact was purchased from the non-owner, regardless of whether the selling non-owner was a good faith purchaser as well.

Conversely, in civil law countries such as Switzerland, France and Germany, a *bona fide* purchaser can gain title from anyone, provided that the statute of limitations has run on the item.<sup>99</sup> Incidentally, the statute of limitations begins to run in each of these countries when the item is stolen, not when the owner discovers the piece is missing.<sup>100</sup> Despite the fact that Italy is a major source country for artifacts and one of the most active in trying to reclaim cultural property from other nations, it inexplicably also

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factors that the courts shall use to determine whether a purchaser exercised due diligence: "regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that reasonable person would have taken in the circumstances." *Id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See* Gegas, *supra* note 21, at 147-48.

<sup>96</sup> *See id.* at 148-49.

<sup>97</sup> *E.g.*, PROTTE & O'KEEFE, *supra* note 8, at 248-52.

<sup>98</sup> *Id.*

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

<sup>100</sup> *Id.* at 251.

favors the *bona fide* purchaser immediately after a sale, making it extremely difficult for original owners to recover their goods.<sup>101</sup>

Despite the remarkable improvement in the legal status of nations or owners trying to reclaim their possessions and the valiant attempts of UNIDROIT to curb the flow of illicit artifacts, the market is still worth the billions of dollars outlined above. Many of the collecting countries did not sign the UNIDROIT Convention,<sup>102</sup> and those that have signed the Convention have yet to ratify it.<sup>103</sup> Thus, the Swiss shops on the Italian border and all over Switzerland are still filled with cultural treasures from all over the world.<sup>104</sup>

#### IV. SWITZERLAND AND ITS LAWS

In the recent past, Switzerland has always been seen as a haven for the transition of the illicit antiquities trade to the "legitimate" art market.<sup>105</sup> Switzerland earned a great deal of this reputation for its recalcitrance in joining the international debate over how to curb the looting of cultural property.<sup>106</sup> Furthermore, the Swiss have been quite successful in promoting themselves as a conduit nation; the art trade industry in Switzerland was valued at \$2 billion nearly a decade ago.<sup>107</sup> Launderers seek out the Swiss dealers who routinely look the other direction and take great steps to conceal the illicit past of the looted objects.<sup>108</sup> First, current Swiss law facilitates the transfer of title from a person knowingly selling an illicit artifact to

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<sup>101</sup> Italy combats the potential movement of its cultural property by imposing strict laws on the movement of any cultural property over 50 years in age. See Law of June 1, 1939, n.1089, entitled Tutela delle cose di interesse artistico e storico [Protection of Things of Artistic or Historic Interest], Gazz. Uff. Aug. 8, 1939, n. 184. For a discussion of Italian law on cultural property and the UNIDROIT Convention, see Stephanie Doyal, *Implementing the UNIDROIT Convention on Cultural Property into Domestic Law: The Case of Italy*, 39 COLUM. J. TRANSNAT'L L. [forthcoming Spring 2001].

<sup>102</sup> See list of UNIDROIT signatories, UNIDROIT Convention, *supra* note 38, at 1326. The two largest auction houses, Sotheby's and Christie's, have been vocal against the UNIDROIT Convention. See *Unplundering Art*, ECONOMIST, Dec. 20, 1997. Neither the United States nor the United Kingdom signed the treaty, nor have they become parties. See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> Switzerland steadfastly refused to sign the UNESCO Convention. See PROTTE & O'KEEFE, *supra* note 8, at 548. While the Swiss signed the UNIDROIT Convention almost five years ago, proponents have been unable to overcome the pressures from powerful lobbies that prevent ratification.

<sup>105</sup> See Del Piano, *supra* note 4; see also BONNIE BURNHAM, *THE ART CRISIS* 45 (1975) (detailing famed Swiss auctions which were held to create the aura of a good faith transaction).

<sup>106</sup> See PROTTE & O'KEEFE, *supra* note 8, at 580.

<sup>107</sup> See GREENFIELD, *supra* note 9, at 247.

<sup>108</sup> See BURNHAM, *supra* note 105.



a "good faith purchaser."<sup>109</sup> Second, Switzerland shares a border with one of the major victims of art theft and looting, Italy, and is close to other art-rich countries. Third, the Swiss, until recently, were not been active members of the international conventions to combat the illegal art trade.<sup>110</sup> Switzerland's laws favoring the *bona fide* purchaser, its proximity to source countries and its general unwillingness either to fully participate or enforce international regulation of cultural property all have created an atmosphere most attractive to art and money launderers.

Earlier in the article, the concept of the *bona fide* purchaser ("BFP") rule appeared briefly.<sup>111</sup> However, it is useful to expand upon the Swiss interpretation of the BFP. According to the *Swiss Civil Code*, the true owner loses the title to a work if it is stolen from him and bought by a BFP.<sup>112</sup> The title does not pass immediately. Under Swiss law, the statute of limitations for a true owner to make a claim is five years.<sup>113</sup> Thus, a BFP will gain title only if five years have passed since the item was stolen.<sup>114</sup> The law is not sensitive to the owner's awareness of the loss; the statute of limitations may run and the owner may lose title before he knows the object is missing.<sup>115</sup> Thus, an object that is illegally exported from a country can be brought into Switzerland and hidden for five years, after which time the purchaser of the object obtains better title to the antiquity than the true owner.<sup>116</sup>

The complement to the Swiss law of the BFP is the Swiss definition of a BFP. Article 2 of the *Swiss Code of Obligations* clearly protects the rights of the BFP unless he abuses his right.<sup>117</sup> Article 3 states that *bona fides* is presumed where the purchaser used good faith.<sup>118</sup> This somewhat

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<sup>109</sup> See PROTTE & O'KEEFE, *supra* note 8, at 548.

<sup>110</sup> See PROTTE, UNIDROIT, *supra* note 52, at 15.

<sup>111</sup> See *supra* Part III.

<sup>112</sup> Code Civil Suisse [CC] tit. XX, art. 714 (Switz.), tit. XXIV, arts. 933-34, translated in IVY WILLIAMS, SIEGFRIED WYLER & BARBARA WYLER, *THE SWISS CIVIL CODE: ENGLISH VERSION* (1987). For American interpretation of the Swiss law, see *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F.Supp. 1374 (S.D.Ind. 1989) and Patty Gerstenblith, *The Kanakariá Mosaics and the United States Law on the Restitution of Stolen and Illegally Exported Cultural Property*, in *ANTIQUITIES: TRADE OR BETRAYED*, 105 (Kathryn W. Tubb, ed. 1995).

<sup>113</sup> CC, *supra* note 112, tit. XXIV, art. 934.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* Some have argued that all of the laws favoring the BFP would be far more palatable and effective in the effort to return stolen goods if the statute of limitations were to toll five years from discovery that the item is missing. For an explication of the comparative European laws and an argument for a discovery rule, see Grover, *supra* note 91.

<sup>116</sup> This is a convenient sort of law for a country (Switzerland) that prides itself on its banking secrecy laws. The system seems designed for precisely the type of abuse that it fosters. Once an item is brought into Switzerland, a smart but wary collector will simply keep the piece hidden in a numbered vault until the five years has expired.

<sup>117</sup> PROTTE & O'KEEFE, *supra* note 8, at 250; Code des Obligations [Co] 2 (Switz.).

<sup>118</sup> *Id.* Co 3.

confusing definition does provide that in order to make a claim as a BFP, the purchaser must have taken the reasonable steps that the circumstances dictate. This further explanation of the BFP and Swiss law seems to say that there is a presumption in favor of the BFP; however, it is a rebuttable presumption. The plain reading of the law would suggest that a true owner *can* make a case that the purchaser is not *bona fide*; however, this was never done in the past.<sup>119</sup>

The BFP is not always favored over all others in Swiss contractual law. A BFP who finds a defect, such as a claim by a previous owner, may also have a claim against the seller of the item who warranted the piece.<sup>120</sup> However, a BFP has only one year in which to file a claim for breach, while an original owner has five years.<sup>121</sup> This provides a greater incentive for Swiss collectors and dealers to hide items away for a period of time after purchase.

Taken together with Swiss banking secrecy laws, the Swiss Civil Code provides a perfect atmosphere for opportunists to obtain good title to an illegally exported or stolen artifact or work of art.<sup>122</sup> People in the illicit trade of art are often using it to launder money from drug transactions, embezzlement, and tax evasion.<sup>123</sup> Launderers can use their ill-gotten gains to finance theft or to purchase illegal items from thieves and smugglers.<sup>124</sup> Then possessors of the items can store the works in private bank vaults or at tax-free warehouses at Swiss airports and border crossings.<sup>125</sup> Magically, after five years the stolen artwork legally belongs to the opportunist.

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<sup>119</sup> See PROTTE & O'KEEFE, *supra* note 8, at 250. Generally, Swiss courts apply the laws on contract when there is an issue of breach of warranty, in which case, like in the U.S. courts, damages are the remedy. See *id.* Recently, the Swiss High Court favored a true owner against a BFP. See Assurance X v. A.M., ATF 1132.5 (Apr. 1, 1997) (Fr.).

<sup>120</sup> See PROTTE & O'KEEFE, *supra* note 8, at 278.

<sup>121</sup> *Id.*

<sup>122</sup> See PROTTE & KEEFE, *supra* note 8, at 384 (quoting S. Rodotà, *Explanatory Memorandum*, in Council of Europe, THE ART TRADE 1, 8 (1988)).

There can be no ignoring the various highly refined techniques used to "create" bona fide situations even for the purchase of works of art which have been stolen or illegally excavated or exported. The "cooling off" of works of art in [Switzerland] until prescription regulations lapse, as well as the secrecy surrounding auctions, facilitate this process of getting around the law.

*Id.*

<sup>123</sup> See PROTTE & O'KEEFE, *supra* note 8, at 383.

<sup>124</sup> See *id.* at 384.

<sup>125</sup> See *id.* The tax-free warehouses at the airports are a common way both for smugglers to get items into the country and for others to claim that the item was in Switzerland, and therefore that Swiss law should apply. For an example of this type of transaction, see *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F.Supp. 1374 (S.D.Ind. 1989), *aff'd*, 917 F.2d 278 (7<sup>th</sup> Cir. 1990). In that case, an American court gave the simplest explication of the Swiss law regarding the transfer of cultural property. Unfortunately, the court relied solely on the opinions of a single expert: Arthur von Mehren.

For proof that these factors have provided an invitation for the movement of illicit art, one only needs to look to the statements of the Swiss government. When asked its position on the protection of cultural heritage, the Swiss government said that "its lack of export controls had strengthened its position with regard to the art trade and that its neutrality and political stability had enabled it to earn a reputation as a safe place for the conservation of valuable cultural property."<sup>126</sup> The litany of prized treasures that has passed through Switzerland either for short or extended stays, as well as the list of art dealers who have exploited this philosophy, are long and distinguished.<sup>127</sup>

Although Switzerland has given critics many reasons to disparage it, there are situations where the strict application of Swiss law can lead to positive developments for victims of theft. An important case is *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*<sup>128</sup> In that case, an American art dealer, Peg Goldberg, arranged to buy Cypriot mosaics from a Turkish archaeologist through several middlemen in the summer of 1998.<sup>129</sup> While negotiations occurred in The Netherlands, the transaction took place in Switzerland.<sup>130</sup> The mosaics were stored in a tax-free warehouse outside of Geneva, but also outside of Swiss customs.<sup>131</sup>

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Dr. Mehren's description of Swiss law, while clear, was overly optimistic about the prospects of Swiss law protecting the owner over the BFP. However, the courts did not find the defendant's argument that it should apply Swiss law persuasive and applied Indiana law instead. *See id.*

<sup>126</sup> PROTTE & O'KEEFE, *supra* note 8, at 573 (relying on UNESCO Doc. 20C/84, 4 Report of the Special Committee of Governmental Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1964) and UNESCO Convention of 1970, Sep. 15, 1978.) O'Keefe also mentions that others have darker and more shocking statements about practices in Italy and Switzerland, chiefly, D.J. HAMBLIN in POTS AND ROBBERS (1970). Hamblin states that Etruscan pieces in Italy were being cut to properly fit into bags and suitcases for smuggling into Switzerland. Furthermore, Hamblin asserts that an entire subculture of Italian specialists earn a living in Switzerland reassembling such works. *See id.*

<sup>127</sup> The Madonna del Cossito is a thirteenth century panel painting that was stolen from a church in Rome before being listed by a Swiss dealer at an auction in Lichtenstien; the Bury St. Edmunds Cross lay for some time in a Zurich bank vault; Raphael's La Muta and two Piero della Francesco works from Urbino appeared in Geneva; a Michaelangelo fragment from Milan turned up in Chiasso; Etruscan frescoes from Tarquinii were recovered in Bern; Socrates' head was stolen from Tivoli and appeared in New York after it was purchased in Switzerland; and the list goes on. *See* PROTTE & O'KEEFE, *supra* note 8, at 572. Although these works are the famous pieces that nab international headlines, major thefts account for only a small portion of the trade into Switzerland. Most of the items that are smuggled in and sold in Switzerland are of values too small to grab headlines, but aggregate to a staggering amount. *See* Tuck, *supra* note 1.

<sup>128</sup> *Autocephalous*, 717 F.Supp. at 1374. *See supra* note 125 and accompanying text.

<sup>129</sup> *Autocephalous*, 717 F.Supp. 1374.

<sup>130</sup> *Id.*

<sup>131</sup> Gerstenblith, *supra* note 112, at 106.

The mosaics remained in Switzerland for several days while the Swiss bank and Goldberg awaited funds from the United States.<sup>132</sup> After the sale Goldberg took the mosaics back to the States and attempted to sell them at a profit of close to \$20 million.<sup>133</sup> Shortly thereafter Cyprus brought action to recover the mosaics.<sup>134</sup> These artifacts were unusually easy to identify as they had already been published in a *Dumbarton Oaks* catalogue.<sup>135</sup> The U.S. District court, where this case was first decided, had some complex choice-of-law issues to consider. Goldberg insisted that Swiss law should apply because the transaction took place in Geneva, while the Cypriots maintained that U.S. law should apply. In this case, the law and forum choice is determinative.<sup>136</sup> Swiss interpretation of its law and U.S. law favor opposite parties in such a dispute, the purchaser and the owner respectively. Generally, the *lex situs* rule would apply to the transaction and Swiss law should prevail. However, Swiss law does allow for an "in transit" exception to the *lex situs* rule.<sup>137</sup> The exception requires courts to apply the law of the item's destination rather than the place of transfer when "the goods though physically present, have only a fortuitous and transitory or casual connection with the legal order in question."<sup>138</sup> While the Swiss enforcement of its BFP law has been unapologetic to true owners, the exception to the *lex situs* rule provides an "opportunity" for an owner to recover his lost materials.<sup>139</sup>

Further evidence of changes in Swiss law and attitudes toward their complicity in the illicit trade in cultural property is the landmark case *As-*

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 107-8 (citing A.H.S. MEGAW AND E.J.W. HAWKINS, *THE CHURCH OF THE PANAGIA KANAKARIÁ AT LYTHRANKOMI IN CYPRUS: ITS MOSAICS AND FRESCOES 14*, (Dumbarton Oaks Studies, 1977)). Furthermore, source country support for archaeological research may ultimately be a valuable mechanism for source countries to protect their cultural property. As source countries assist in the documentation of archaeological contexts, the archaeologists provide written proof for the context of artifacts, solidifying source country claims should a conflict over ownership occur as in the case of the Cypriot mosaics.

<sup>136</sup> See *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F.Supp. 1374 (S.D.Ind. 1989), *aff'd*, 917 F.2d 278 (7<sup>th</sup> Cir. 1990). If the U.S. court were to take into account the Swiss interpretation of their own laws, then the choice of law would be determinative. Swiss courts have almost never trumped the rights of the BFP. See *PROTT & O'KEEFE*, *supra* note 8, at 250.

<sup>137</sup> *Id.* The U.S. court interpreted the Swiss law *arguendo* and determined that even if it were to apply, the owner would prevail. See *Autocephalous*, 717 F. Supp. at 1400.

<sup>138</sup> *Id.* at 1395 (quoting Dr. von Mehren's trial testimony).

<sup>139</sup> However, as just illustrated, the "in transit" exception only applies in the most narrow of circumstances, where goods are only nominally related to Switzerland and Swiss law. In those cases, Swiss law does not provide specific relief for true owners, it simply requires application of the destination country's laws, however helpful or harmful those laws may be.

*Assurance X v. A.M.*<sup>140</sup> In this case, the Swiss High Court dealt a handy blow to the core of the BFP doctrine. The court held that a person knowledgeable in the market is expected to prove good faith once questioned, and that failure to do so will rebut the presumption of good faith.<sup>141</sup> The court further stated that the standard for good faith was subjective and depended upon the relative knowledge of the purchaser.<sup>142</sup> So, a novice would only be required to ask questions if he suspected dubious origin, but a dealer would be required to gather far more information regarding the provenance and importation of the artifacts.<sup>143</sup>

In *Assurance*, the court held for the first time that the purchaser, a dealer in ancient weapons, had not been diligent enough in his inquiries of the seller.<sup>144</sup> Therefore, the court determined that the purchaser was not in good faith and did not attain good title to the weapons in question.<sup>145</sup> Although the ancient weapons in this case were stolen and resold inside Switzerland, it appears that the court intended the holding to bind all purchases on the secondary market. In fact, the court took the reasoning of car theft cases and applied the concept to all objects that are possibly stolen or resold in secondary or black markets.<sup>146</sup> This case was decided, however, nearly two years ago, and has yet to be tested in the international art trade context.

Finally, Switzerland has put a previously unprecedented effort into internal investigations and committees to recommend concrete action for Switzerland to join the rest of Europe in adopting a comprehensive plan to curb the flow of international artifacts through its borders.<sup>147</sup> One of these efforts is the Working Group on UNIDROIT and UNESCO of the Federal Council.<sup>148</sup> The group was convened shortly after Switzerland signed the UNIDROIT Convention in 1997. The report details the present state of Swiss law as it relates to the two Conventions that Switzerland could implement, UNESCO and UNIDROIT. Amongst the various options that the group considered, it recommended adopting both UNESCO and

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<sup>140</sup> *Assurance X v. A.M.*, ATF 1132.5 (Apr. 1, 1997) (Fr.).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See id.*

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

<sup>145</sup> *See id.*

<sup>146</sup> *See id.*

<sup>147</sup> In the last decade, Switzerland has had several internal proceedings on whether to participate internationally and ratify the UNESCO and UNIDROIT Conventions. *See* Switzerland's Federal Office for Culture, Service on International Transfer of Cultural Objects, available at [http://www.kultur-schweiz.admin.ch/arkgt/kgt/f\\_kgt\\_e.htm](http://www.kultur-schweiz.admin.ch/arkgt/kgt/f_kgt_e.htm) (visited Apr. 25, 2001) [hereinafter SITCO]. While working groups generally have recommended ratification and participation by Switzerland, political forces have significantly slowed the process.

<sup>148</sup> *See* International Transfer of Cultural Objects, Report of the Working Group of the Federal Council of Switzerland, Apr., 1999.

UNIDROIT.<sup>149</sup> Additionally, the committee urged the government to adopt a central registry, through which potential buyers could check on the title and status of the pieces they seek to purchase, securing good title.<sup>150</sup> Following this Report, Switzerland's Federal Office for Culture published a discussion paper and held hearings regarding the possible implementation of UNESCO Convention provisions.<sup>151</sup>

In late 2000, Switzerland published a *Draft Regarding Law on Transfer of Cultural Objects* ("LTCO").<sup>152</sup> The draft recognized that although Switzerland is the fourth largest art dealer in the world, it stands alone as the only major art-dealing country with neither federal regulations nor binding international agreements governing the art trade.<sup>153</sup> To remedy this problem the new LTCO seeks to bring Swiss law into accord with international standards on the movement of cultural property.

The content of the new law draws heavily from the UNESCO Convention, but is certainly mindful of Swiss concerns. Chief among the goals of the law is the protection of Swiss cultural property. This is certainly a valid goal. Seen in a broader context, however, the problem of theft of Swiss cultural treasures is not especially significant when compared to its role in the theft of other nations' cultural property.<sup>154</sup> The law generally adopts the UNESCO definition of "cultural property," but adds that "the object must be *significant* for religious or secular reasons for archaeology, prehistory, literature, art, or science."<sup>155</sup>

Regarding the agreements on importing other countries' cultural property, the new law is decidedly *neutral* (as Switzerland is in so many areas). The law does not create any regulation on the movement of cultural property into Switzerland per se; it simply allows for Switzerland to enter into bilateral agreements with other states when they request return of an ob-

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<sup>149</sup> See *id.* at 32.

<sup>150</sup> See *id.* at 25.

<sup>151</sup> See UNESCO Convention of 1970, available at [http://www.kultur-schweiz.admin.ch/arkgt/kgf/f\\_kgt\\_e.htm](http://www.kultur-schweiz.admin.ch/arkgt/kgf/f_kgt_e.htm) (last visited Apr. 25, 2001).

<sup>152</sup> See Swiss Federal Department of Home Affairs, *Draft Regarding Law on Transfer of Cultural Objects*, available at [http://www.kultur.schweiz.admin.ch/arkgt/files/v1\\_rohst\\_e.pdf](http://www.kultur.schweiz.admin.ch/arkgt/files/v1_rohst_e.pdf) (last visited Apr. 25, 2001).

<sup>153</sup> *Id.* at 1.

<sup>154</sup> See Statistics on Stolen Cultural Property, Interpol website, available at <http://www.interpol.com/Public/WorkOfArt/statistics/StatPlace1999.asp>.

<sup>155</sup> See Swiss Federal Department of Home Affairs, *supra* note 152, at 3. The draft also describes a distinction between "cultural objects" and "cultural objects in the narrower sense", which only includes "archaeological or paleontological objects; components of monuments, sacred and profane structures, or archaeological sites; objects of anthropological or cultic significance, and sacred objects as well as archival assets." *Id.* In keeping with its first priority, the protection of Swiss cultural property, the new law also adopts the notion of a national registry of culturally significant Swiss items. See *id.* at 4.

ject.<sup>156</sup> The new law would, however, allow for quicker action than international treaties in times of armed conflict.<sup>157</sup>

Some of the stronger proposed changes confront the very problems with Swiss law of which the international community and this Comment have been critical. States must file claims for the return of items within one year of discovering the missing item, but in no case more than thirty years after the theft or illegal export occurred.<sup>158</sup> This presents a remarkable change from the current statute of limitations of five years.<sup>159</sup> Additionally, the draft describes a provision that would classify storage of cultural property within customs areas as importation and thus governed by the new law.<sup>160</sup> Furthermore, the proposed law would place obligations on art dealers and auctioneers. Sellers must perform due diligence, inform their customers of both Swiss and foreign import and export regulations, report suspicious offers, and keep records on the soliciting of cultural property in the narrow sense.<sup>161</sup>

While these are bold steps towards eradicating the incentives for using Switzerland as a conduit for illegal trade, the law has yet to be passed. Furthermore, even if this law is passed, with the strength and power of international art dealers and auction-houses, it is unclear whether Switzerland has the political will to implement this law.

#### V. CHANGE IN SWITZERLAND OTHER STEPS FOR THE FUTURE

Pressure to join in the international community of culturally concerned nations has been increasing at a rapid pace over the last decades. In fact, in 1996 Switzerland agreed, although begrudgingly, to join the UNIDROIT Convention, its first attempt at cooperation in nearly four decades. Over the last five years the blanket of neutrality and dignity under which Switzerland rests has begun to unravel. With the recent spate of bad press concerning their collusion with the Nazis during World War II and their unwillingness to return billions of dollars belonging to Holocaust survivors, Switzerland has been looking for ways to increase their status as an honored and respectable country. Increased globalization in all markets provides Switzer-

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<sup>156</sup> *Id.* at 4.

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* at 5; *see also* Swiss Federal Department of Home Affairs, *supra* note 152, at 6 (discussing the proposed changes to the *Swiss Civil Code* (Articles 728 and 934), and the *Code of Obligations* (Article 210), which extend time limits in order to protect original owners against usucaption).

<sup>159</sup> *See id.* This standard is in keeping with European Community standards. The law also provides for the good faith purchaser to be reasonably compensated by the requesting state. This section only applies to countries that request return of an item under one of the previously mentioned situations (treaty or war), and does not apply to individuals. *See id.*

<sup>160</sup> *See id.* at 5.

<sup>161</sup> *See id.* at 5-6.

land with an incentive to alleviate one of the major criticisms leveled by detractors: their position as the central transit state for the cleansing of looted and stolen artifacts from all over the world.

It is incumbent upon the Swiss to take action and lead the other European nations and the U.S. towards a cooperative and uniform regime to protect cultural property and art. There are a few steps that Switzerland can take to redeem itself: (1) ratify the UNESCO and UNIDROIT Conventions; (2) legally remove the presumption that all possessors are *bona fide* and require specific acts on the part of purchasers to gain the title of BFP; and (3) adopt a discovery rule for the statute of limitations in actions to recover stolen cultural property and art.<sup>162</sup> In addition to the steps that conduit and collecting nations can and should take to curb the illicit trade in art, they should expect that source countries would take steps to remove the incentive for an illicit market and encourage a regulated legitimate market in antiquities.<sup>163</sup> The source countries *need* to take a more reasonable and less restrictive approach to national policies on the export of documented antiquities.

Ratification of the UNESCO and UNIDROIT Conventions would be the first step in reconciling Switzerland's sordid history in World War II and its past lack of regard for the non-economic motivations in cultural property issues. For Switzerland to ratify the Conventions, it would show the source countries a little bit of its own *bona fides*. UNESCO provides the framework of countries with which to work and UNIDROIT provides the legislation to enforce curbing measures. The art-rich nations of the world will not take steps to open up the market without commitments from collecting nations that they will enforce and regulate the art trade. Furthermore, with the increased globalization of the world, attempts to unify private law are important tools for growth. The recently proposed LTCO does not speak to ratification specifically, but does endorse many of the same goals as the UNESCO Convention.

In keeping with the above justifications for ratification, official reform of the BFP rule in Switzerland is mandatory for them to show good faith in their attempts to curb the illicit market. If Switzerland could be persuaded to simply modify its presumption in favor of a neutral position on the BFP, which it seems to be doing, purchasers would share the burden on due diligence, however, the precious security of their transaction, their primary concern, would remain intact. Not only would purchasers gain secure title to an object through performing due diligence, but, if the law specified the requirements of a BFP exactly, there would cease to be a legal question of

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<sup>162</sup> See Grover, *supra* note 91 (arguing that the international community needs to persuade civil law nations to adopt discovery rules in art replevin actions).

<sup>163</sup> See Borodkin, *supra* note 10, at 411-16 (arguing that source countries must create state regulated auctions and allow some of their cultural treasures to be released onto the market).



performance. This change would all but eliminate the costly legal battles that surround the return of cultural property, with only a modest increase in transaction costs. The proposed LTCO does not reform the BFP specifically, but changes the onus from the buyer to the dealer, an adequate measure if enforced.

Finally, adopting a discovery rule rather than the current theft rule would restore an equitable balance to the rights of owners and the purchasers.<sup>164</sup> The current law is unduly protective of the rights of BFPs and encourages the continued theft of art.<sup>165</sup> By using a discovery rule, Switzerland would promote uniformity within its own rules without compromising the rights of the BFP. The tort laws in Switzerland currently toll at discovery rather than the tortious action.<sup>166</sup> In addition, breach of warranty statutes in Switzerland recognize the discovery rule.<sup>167</sup> Change of the statute of limitations law to include a discovery rule is necessary for the Swiss process to obtain a semblance of justice. The proposed LTCO adopts a discovery rule, and therefore comports with this suggestion.

In order for Switzerland to participate in the efforts to curb the traffic in illicit art through its borders and in the world as a whole, it needs to take affirmative steps to reform its own legal process and to take an active role in the international debate. The new proposal is certainly a step in that direction, however, the law needs to be adopted and vigorously enforced before true congratulations can be conferred. Switzerland can either take part and step up to the responsibilities of the global marketplace or it can continue to allow its institutions to be used as a conduit for the pillaging of the world's cultural treasures and the theft of art from innocent owners.

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<sup>164</sup> See David B. Goldstein, *A Tale Of Two Innocents: Creating An Equitable Balance Between The Rights Of Former Owners And Good Faith Purchasers Of Stolen Art*, 64 *FORDHAM L. REV.* 49 (1995) (arguing that a confidential international registry should be created so that purchasers could perform their due diligence efficiently and parties would not fear legal action).

<sup>165</sup> See Grover, *supra* note 91, at 1432. Grover states that in order for this change to be palatable to Switzerland, and other civil law nations, an outer limit on the statute of limitations would have to be set to protect a BFP from uncertainty. But this change at least injects some reason and compassion into a situation where the cards are heavily stacked against true owners. See *id.* at 1458-59.

<sup>166</sup> *Id.* at 1433.

<sup>167</sup> PROTTE & O'KEEFE, *supra* note 8, at 251.