

# THE LEGALITY OF CONFISCATION ORDERS OF STOLEN CULTURAL PROPERTY: THE FANO ATHLETE CASE BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

*Elena Scudeler\**

## *Abstract*

The present work aims to analyze the judgment delivered by the ECHR on May 2, 2024, in the case of *J. Paul Getty Trust v. Italy*. This judgement examines various aspects concerning the circulation of cultural property and sheds particular light on the Court's interpretations in relation to its own case law.

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### **1. The Fano Athlete case**

On May 2, 2024, the European Court of Human Rights issued a judgement regarding a confiscation order issued by the Italian authorities concerning the statue of the 'Young Victorious', also known as the 'Fano Athlete'<sup>1</sup>: a life-sized bronze statue by the Greek

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\* Apprentice notary public in Trieste

sculptor Lysippos, dated between the 4th and 2nd centuries BCE. This Greek bronze statue of the classical period was discovered in 1964 by an Italian fishing vessel in the Adriatic Sea near Fano (Italian municipality in the province of Pesaro and Urbino, Marche Region). Today, it is in the possession of the J. Paul Getty Trust (hereinafter 'the Trust'), a non-profit entity established by Mr. J. Paul Getty Sr. in Los Angeles, California, and registered in the United States in 1953, which purchased the statue in 1977 for \$3,950,000.

As we will see, the J. Paul Getty Trust argued before the ECHR that the adoption of a judicial confiscation order by the Italian Court of Cassation constituted a violation of the right to the peaceful enjoyment of possessions of the claimant, as guaranteed by Article 1 of Protocol No. 1 to the European Convention of Human Rights and Fundamental Freedoms of 1950<sup>2</sup>. According to the ECHR, the request is unfounded: Italy has the right to confiscate the statue from the J. Paul Getty Villa Museum, where it is now held. To understand the ECHR decision, we need first to summarize the facts of the case (section 2) and then to examine the different issues solved by the Court (section 3), highlighting how the court reasoned both for assessing the admissibility of the claim and the merits of the case. Conclusions (section 4) will ensue.

## 2. The facts of the case

After the discovery of the statue in 1964, the Fano Athlete was acquired by private buyers who kept it in Gubbio. The following year, however, the statue was sold to unknown parties, after which its whereabouts remained unknown<sup>3</sup>. The statue resurfaced in Munich at the beginning of the 1970s in the gallery of a private collector, who was holding it on behalf of a company

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<sup>1</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, 2 May 2024.

<sup>2</sup> Article 1 Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

<sup>3</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 1-3.

registered and based in Liechtenstein. In 1973, the Italian authorities contacted the German police, aiming to inform them of the circumstances surrounding the statue's export<sup>4</sup>. While the statue was still in Germany, negotiations began for its acquisition by the Trust. However, due to concerns raised by J. Paul Getty's legal counsel regarding the statue's lawful provenance and the validity of its title, the Trust requested the seller further information. On July 27, 1976, the Trust purchased the statue through a contract concluded in the United Kingdom. The statue was then transported to the United States in 1977 and, since 1978, it has been on display at the Getty Villa in Malibu, California<sup>5</sup>.

Numerous attempts were made by the Italian state to recover the statue, both through domestic civil and criminal proceedings (section 2.1) and through requests for international judicial cooperation (section 2.2).

### 2.1. Criminal and civil proceedings

After the purchase of the statue by private buyers in 1964, the Italian state brought criminal proceedings against them, accusing them of receiving a stolen cultural artifact, classified as an archaeological asset belonging to the Italian state. In 1970, the defendants were however acquitted, as the court found no direct evidence of the statue's discovery or location within Italian territorial waters<sup>6</sup>.

Following the transfer of the statue in Germany, a second investigation was launched by the Public Prosecutor's Office of Gubbio for the illicit export of a cultural asset. New inquiries were conducted, and testimonies were gathered anew from the captains of the fishing vessels and the fishermen who had discovered the statue, in addition to an inspection of the marine area where the discovery occurred, in an attempt to definitively establish the

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<sup>4</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §16.

<sup>5</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §37; for some other details of the case, see also L. Solaro, *Case Review: Getty v. Italy*, Center for Art Law, 2024, at <https://itsartlaw.org/2024/07/24/case-review-getty-v-italy-2024>.

<sup>6</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §10, 14; see also A. Visconti, *La Corte EDU si pronuncia sulla confisca obbligatoria di beni culturali illecitamente esportati nella vicenda dell'atleta vittorioso*, in *Dir. pen. cont.*, 45 (2024) at [www.sistemapenale.it/it/articolo/visconti-la-corte-edu-si-pronuncia-sulla-confisca-obbligatoria-di-beni-culturali-illecitamente-esportati-nella-vicenda-dellatleta-vittorioso](http://www.sistemapenale.it/it/articolo/visconti-la-corte-edu-si-pronuncia-sulla-confisca-obbligatoria-di-beni-culturali-illecitamente-esportati-nella-vicenda-dellatleta-vittorioso).

location of the find. However, these investigations proved inconclusive, with the authorities unable to determine the exact location of the discovery. As a result, an acquittal was again issued in 1978<sup>7</sup>.

In 2007, following a petition filed by some activists seeking the return of the bronze statue, the Prosecutor's Office of Pesaro opened a third investigation against the captains of the fishing vessels who had discovered the statue, the private Italian buyers, and other unknown individuals, charging them with the unauthorized export of a cultural asset, failure to report the find to the relevant authorities, and violations of border controls<sup>8</sup>. This investigation was closed in 2007, resulting in the opening of criminal proceedings. In 2010, the criminal court of Pesaro ordered the confiscation of the statue according to Article 174, paragraph 3 of Decree No. 42/2004 (also known as the Cultural Heritage and Landscape Code) "wherever it may be located", on the assumption that the statue was a cultural asset that belonged and that had been exported from Italy without the required license and without the payment of the associated duties<sup>9</sup>.

The confiscation order was later upheld by the Court of Cassation in 2019, with ruling no. 22 of January 2, 2019<sup>10</sup>. The Court considered the confiscation order under the Cultural Heritage and Landscape Code to be a non-criminal sanction of compensatory nature (although connected to a criminal offense) that could be enforced even in the absence of a criminal verdict and even against persons who were not involved in the offence. The Court of Cassation also noted that the Italian domestic legislation mandates the confiscation of cultural assets exported illegally without the necessary license and the payment of the related duties. Furthermore, the Court recognized that the Trust had been negligent in its purchase, agreeing with the assessment previously

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<sup>7</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 45-54.

<sup>8</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 67-68.

<sup>9</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 73-74. It should be noted that Article 174 of the Cultural Heritage and Landscape Code was abrogated in 2022 and replaced by Article 518-undecies of the Criminal Code (Legge 9 Marzo 2022 n. 22). On this reform, see also A. Visconti, *Problemi e prospettive della tutela penale del patrimonio culturale* (2023); L. Mazza, *Le Disposizioni in materia di reati contro il patrimonio culturale. Una prima lettura* (2023).

<sup>10</sup> Court of Cassation, 2 January 2019, n. 22, § 2.3; on the Italian decision, see T. Scovazzi, *Un atleta non ancora giunto a destinazione*, Riv. Dir. Int. 511-518 (2019).

made by the Pesaro criminal court<sup>11</sup>. In addition, the Court determined that the location was irrelevant in establishing the ownership of the statue, as the latter had been found by a vessel sailing under the Italian flag. Furthermore, it was affirmed that there is a connection between the statue and the Italian state, considering “the existence of a continuum between Greek civilization, imported into Italian territory, and the subsequent Roman cultural experience”<sup>12</sup>.

## 2.2. International Cooperation

At the same time, numerous attempts were made by the Italian state to recover the statue, primarily by requesting the cooperation of foreign authorities.

First, in 1973, an official from the Italian Ministry of the Interior wrote to the police in Munich informing them of the statue’s presence in the city and asking them to take action to prevent its resale<sup>13</sup>. The German authorities questioned the gallerist, who stated that he had no reason to doubt the validity of the purchase title held by the Luxemburg’s company, that had appointed him as their representative in the negotiations and custodian of the statue. Charges were later brought against the gallerist, but these charges were dismissed as it was not possible to prove the offense of receiving stolen property with the certainty required for a trial<sup>14</sup>. The following year, after the opening of new investigations into the illegal export of cultural assets, under Article 66 of Italian Law no. 1089/1939 on the protection of cultural property, a Magistrate of the city of Gubbio sent a rogatory request to the German authorities, asking for the statue’s seizure. This request was rejected by the Prosecutor’s Office in Munich, which again closed the investigation.

A second attempt to recover the statue through international cooperation occurred after the arrival of the statue in the United States. In 1977, Italian customs authorities contacted the U.S.

<sup>11</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 93-96.

<sup>12</sup> Court of Cassation, 2 January 2019, n. 22, § 18.2, 18.3; ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 99; see also M.S. de Clippele, *Who owns art over time? The judicial saga of the Statue of Victorious Youth in Getty Trust v. Italy*, Strasbourg Observers, 2024, <https://strasbourgobservers.com/2024/08/16/who-owns-art-over-time-the-judicial-saga-of-the-statue-of-victorious-youth-in-getty-trust-v-italy/>.

<sup>13</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 16.

<sup>14</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 18-19.

Customs Service in Washington D.C., requesting an investigation into the way the statue was introduced into the U.S. The request was forwarded to the Los Angeles authorities, who, after conducting some inquiries, concluded that the statue's entry into the state followed local laws. In 1978, U.S. authorities contacted the Italian Ministry of Cultural Heritage, sending a request to clarify whether, under Italian law, the statue was protected and whether it had been illegally exported from Italy; however, the Ministry did not follow up the request<sup>15</sup>.

In the same year, the Gubbio Magistrate (the same office that started the investigation about the export of the statute to Germany) sent a rogatory request to the British authorities, as the last sale contract for the statue was concluded in the United Kingdom. The British authorities were asked to assist in investigating the circumstances of the statue's purchase and its transit through British territory. The authorities provided information regarding the statue's transit through the UK but not regarding its purchase, noting that they were not part of the 1970 UNESCO Convention concerning the measures to prevent the illegal import, export, and transfer of ownership of cultural property<sup>16</sup>.

Still in 1978, Gubbio Magistrate sent a request for judicial assistance to United State's authorities concerning the statue's entry into the U.S. and its seizure. The request however was rejected, based on a 1976 circular from the U.S. Secretary of State which stated that a request for judicial assistance could not result in the confiscation of an asset in U.S. territory without a rogatory request. For this reason, Italian authorities were advised to initiate the proceedings before U.S. authorities in accordance with domestic law<sup>17</sup>. Instead of doing so, in the 1980s the Italian Ministry of Cultural Heritage made numerous attempts to recover the statue through diplomatic channels, but none of these attempts led to positive results. On these occasions, the Trust claimed that the refusal to return the statue was due to the lack of a connection between the statue and the Italian state<sup>18</sup>. Another diplomatic effort made in 1995 by the Italian consul in Los Angeles to negotiate the return of the bronze failed, after the curator of the Getty Museum stated that the alleged crimes were time-barred and that the Trust

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<sup>15</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 40-44.

<sup>16</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 49.

<sup>17</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 50-51.

<sup>18</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 60.

had purchased the statue in good faith. Between 2006 and 2007, the Trust negotiated with the Ministry of Cultural Heritage regarding the return of numerous archaeological artifacts to the Italian state, agreeing to postpone negotiations concerning the return of the statue<sup>19</sup>.

Finally, in July 2019, following the confiscation order issued by the Court of Cassation, the Italian Ministry of Justice sent another rogatory request to U.S. authorities seeking the recognition and enforcement of the order under the prevailing international treaties between the United States and Italy<sup>20</sup>. To date, the procedure is still in the preliminary phase, and the request awaits submission to the competent domestic court for review<sup>21</sup>.

### 3. The ECHR decision

As noted, the claimants in the present case argued that the confiscation order issued by the Italian state had violated their right to peaceful enjoyment of their own possession under Article 1 of Protocol No. 1 to the Convention. Before deciding the merit, the Court had to decide whether the Trust could be considered a ‘victim’ under the ECHR and whether it could assert the presence of a financial interest of its own. As we will see in sub-section 3.2, the Court answered these questions in the affirmative.

As to the merit, there were three major issues at stake. The first one concerned whether the confiscation order issued according to the Article 174, paragraph 3 of Decree No. 42/2004 was legal, considering that the purchase of the statute occurred many years before the adoption of the Cultural Heritage and Landscape Code. The second issue centered on the possibility of considering the statue as part of the Italian cultural heritage, and the related question of the applicability of the 1970 UNESCO Convention concerning measures to prohibit and prevent the illicit import, export, and transfer of ownership of cultural property. The third issue concerned the question of whether the measure in question

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<sup>19</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 63-65.

<sup>20</sup> Treaty of Mutual Assistance in Criminal Matters between Italy and United States of America, signed on 9 November 1982, supplemented by the United States of America – European Union Treaty signed on 3 May 2006 and United Nations Convention against Transnational Organized Crime. Adopted by the General Assembly on 15 November 2000.

<sup>21</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 103-104.

was proportionate to the aim of protecting a public or general interest.

### 3.1. The ECHR case law

Most of these issues were not new to the Court. On several previous occasions the Court had been asked to determine the conditions under which applicants could be considered 'victims' under the ECHR, particularly regarding a violation of their right to the peaceful enjoyment of their possessions. The Court had also already developed significant case law on the requirements that applicants must fulfil to claim the existence of their property rights. This concept is interpreted autonomously by the Court to cover not only the ownership of physical goods but also legitimate expectations based on domestic law to acquire a property right. The interpretation is very broad, inasmuch as it extends the concept of 'possessions' to any proprietary interest without regard to domestic legal concepts, which significantly facilitates the filing of claims before the Court<sup>22</sup>.

In cultural heritage law, the need to protect property rights is often linked to the circulation of works of art and is primarily discussed with regard to stolen cultural objects in disputes between their original owner and their current possessor. The 1995 UNIDROIT Convention on stolen or illegally exported cultural property provides for the restitution of stolen cultural objects, prioritizing the property rights of the original owner, even against a good-faith purchaser<sup>23</sup>. However, the issue is often whether an individual's ownership right can be limited in order to protect cultural heritage. Several international conventions aimed at protecting various forms of cultural heritage explicitly recognize that the protection of individual property rights must sometimes yield to the general interest of protecting cultural heritage, and, as such, property rights may be subject to certain limitations. This approach reflects, to some extent, the solution provided by Article 1 of Protocol No. 1 of the ECHR, which, in addition to guaranteeing

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<sup>22</sup> ECHR, *Beyeler v. Italy* (GC), no. 33202/96, 5 January 2000; ECHR, *Depalle v. France* (GC), no. 34044/02, 29 March 2010; ECHR, *Hamer v. Belgium*, no. 21861/03, 27 February 2008; ECHR, *Mkhitaryan v. Russia*, no. 54700/12, 7 February 2017.

<sup>23</sup> 1995 UNIDROIT Convention on stolen or illegally exported cultural objects, art. 6 at <https://www.unidroit.org/instruments/cultural-property/1995-convention/status/>



the right to property, acknowledges the possibility of limiting that right in the general interest. For instance, it is well established under Article 1 of Protocol No. 1 of the ECHR, that good-faith possessors who have exercised due diligence in acquiring a cultural heritage object may not acquire ownership of the object but content themselves with fair and reasonable compensation<sup>24</sup>. These issues will be further examined in section 3.2.

The Court had also previously ruled on the applicability of the ECHR to events occurring only after its ratification<sup>25</sup>. For this reason, in several cases, applicants have sought to devise strategies to bring their disputes under the *ratione temporis* jurisdiction of the CourtHR. They challenged decisions that fell within the jurisdiction of the Court, even if the source of the dispute dated back to a period before the ratification of the ECHR and Protocol No. 1<sup>26</sup>. The issue will be examined further in section 3.2.1, where we will have a look at the solution devised to the Court to this specific point.

Another issue extensively addressed by the Court concerns the respect for the principle of proportionality, essential for reconciling conflicting values and interests or resolving conflicts between two sets of norms. It is an analytical procedure used to assess whether a state's intervention, despite the exercise of a constitutionally guaranteed right, is justified when undertaken in defense of important public interests. This principle is widely applied to resolve disputes between an individual, or a state holding a right, and a state adopting measures to protect a public interest, despite those measures infringing the holder's right. The 'suitability' of the measure under review must be assessed, evaluating whether the choice of certain means of action is proportionate to the pursued objective, based on an aim deemed legitimate by domestic or international sources. It is essential that the state's intervention be the least burdensome possible for the subject affected ('necessity'). The final evaluation is that of 'proportionality in the narrow sense', which involves comparing the benefits of the act to the sacrifice imposed on the right holder

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<sup>24</sup> T. Szabados, *Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights*, Vol. 3 No. 2 Cent. Eur. j. comp. law 173 (2022).

<sup>25</sup> ECHR *Syllogos ton Athinaion v. United Kingdom*, no. 48259/15, 31 May 2016; EHCR *Potomska and Potomski v. Poland*, no. 33949/05, 29 March 2011.

<sup>26</sup> T. Szabados, *Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights*, cit. at 24, 172.

(‘proportionality in the narrow sense’)<sup>27</sup>. The issue will be further explored in section 3.2.3, in which we will see how the Court approached proportionality in the Fano Athlete case.

### 3.2. The admissibility of the case

As said, for the Court to examine the merit of the case, it was necessary to verify that the case fell under the jurisdiction of the Court. To determine whether the challenge was admissible, the Court therefore had to check whether the Trust could be deemed a “victim” under the Convention and whether it had a financial interest of its own to pursue the action.

On the one hand, the applicant claimed that the confiscation order constituted an interference with its right to the peaceful enjoyment of its possession. According to the Trust, the J. Paul Getty Trust had a relationship with the statue equal or anyway comparable to the one of an owner, as the same Italian Court of Cassation had recognized; therefore, the Trust claimed he could legitimately be considered a victim under the Convention due to the attempts to seize the statue and to obtain the recognition and execution of the confiscation order in the United States. Furthermore, according to the Trust’s opinion, the Trust had the standing to act as a victim even if the measure was already not carried out, inasmuch as the measure had already had significant repercussions on the Trust’s professional activities<sup>28</sup>.

On the other hand, the Italian government argued that the applicant could not be considered a victim under the Convention since the contested measure (the confiscation order) was not yet executed. Moreover, even if the order had been executed, it would have not been attributable to the Italian authorities, but rather to the US ones. Since violations of the Convention are only attributable to the state that interferes with the relevant rights, and since in this case the interfering state would have been the United States, which of course is not part to the ECHR, the Court’s jurisdiction would have been lacking<sup>29</sup>. Finally, the Italian government argued that the applicant, being a trust, did not have a financial interest in the

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<sup>27</sup> A. Stone Sweet and G. della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez*, 46 N.Y.U. J. Int’l L. & Pol. 911 (2014).

<sup>28</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 218-219.

<sup>29</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 209-212.

statue that met the requirements for protection under Article 1 of Protocol No. 1 to the Convention<sup>30</sup>.

The Court found that the applicant had provided evidence of being affected by the measure adopted by the Italian state even before its execution and therefore could be recognized as a victim under the Convention, for the violation of Article 1 of Protocol No. 1 to the Convention<sup>31</sup>. Moreover, the Court held that the Italian State could be held responsible for the interference with the trust's right to the peaceful enjoyment of its possession. In this regard, the Court reiterated that the exercise of jurisdiction is a necessary condition for responsibility to exist under the ECHR. According to the international understanding of the term, the jurisdiction of a state is primarily territorial, but the Court also reminded that, as an exception to the principle of territoriality, acts that are carried out or produce effects outside of the territorial jurisdiction can still be considered as an exercise of jurisdiction if they are attributable to the state that adopted the measure, rather than to the territorial state that is affected by the measure – a principle fully consistent with the Court's previous case law<sup>32</sup>. The fundamental principle applied is that an act, initiated by the requesting country based on national laws and executed by the requested country, in accordance with its obligations under international treaties, can be attributed to the requesting country. Therefore, since in this case the order was adopted by the Italian state, that also requested the United States to enforce it on the basis of judicial cooperation agreements, the Court concluded that the Italian state can be held responsible for the measure<sup>33</sup>.

Finally, the Court also concluded that the applicant's financial interest in the statue had been recognized by Italian law in the domestic proceedings in which the Trust had been invited to participate<sup>34</sup>. The Court noted that the applicant had uninterrupted

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<sup>30</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §258; on the point of eligible property interest for protection under Article 1 of Protocol No. 1 see ECHR, *Beyeler v. Italy (GC)*, no. 33202/96, cit. at 22, §§ 99-100.

<sup>31</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 230.

<sup>32</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 232. As to ECHR's previous case-law, see ECHR *H.F. and Others v. France*, no. 24384/19 and 44234/20, 14 September 2022, § 185; ECHR, *M.K. and Others v. Poland* no. 40503/17, 23 July 2020, § 128; ECHR, *Carter v. Russia*, no. 20914/07, 21 September 2021, §124.

<sup>33</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 237-238.

<sup>34</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 264.

possession of the statue since 1977, the year of purchase, which led to the conclusion that there existed a financial interest in the peaceful enjoyment of the statue, falling within the definition of 'property' under Article 1 of the Convention<sup>35</sup>. The Court therefore considered the applicability of Article 1 of Protocol No. 1 to the Convention to be sufficiently established in this case. Based on this analysis, the Court declared the application admissible<sup>36</sup>.

### 3.3. The merit of the case

As said above, once the Court decided it had jurisdiction on the case, it went on to assess the merit of the case, with particular regard with three main issues: the lawfulness of the confiscation order (section 3.3.1), the applicability of the 1970 UNESCO Convention (section 3.3.2) and the proportionality of the measure adopted (section 3.3.3).

#### 3.3.1. The legality and applicability *ex post facto* of confiscation orders

On the assessment of whether the confiscation order complies with the principle of legality, the Trust raised a significant objection concerning the applicability of Italian domestic norms. While the Trust acknowledged that Italian law required authorization for the export of cultural property, it argued that the provision invoked in this context – that is, Article 174, paragraph 3 of Decree No. 42/2004 (also known as the Cultural Heritage and Landscape Code) –, was not in force neither at the time in which the statue had been found, nor at the time in which the statue was purchased. Additionally, the Trust argued that, at the time of the statue's export, it was believed that the confiscation of cultural property could not be applied if the property was located outside of Italy. Moreover, even assuming the application of the Cultural Heritage and Landscape Code, the Trust pointed out that, according to Articles 77 and 78 of the same Code, there is a three-year time limit to request action, which begins from the moment the requesting state becomes aware of the location of the property. The

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<sup>35</sup> For the notion of "property" under Article 1 of the Convention, see *mutatis mutandis*, ECHR, *Beyeler v. Italy* (GC), no. 33202/96, cit. at 22, § 104; ECHR, *Depalle v. France* (GC), no. 34044/02, cit. at 22, § 68; ECHR, *Hamer v. Belgium*, no. 21861/03, 27 February 2008, § 76; ECHR, *Mkhitaryan v. Russia*, no. 54700/12, 7 February 2017, § 63.

<sup>36</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 268.

Trust also raised the issue of the time limit under the 1995 UNIDROIT Convention on stolen or illegally exported cultural objects<sup>37</sup>, which has been ratified by Italy (but not by the United States)<sup>38</sup>.

The Italian government maintained that there had been no retroactive application of the law in an unfavorable way, as the Legislative Decree No. 42/2004 did nothing but codify the existing law at the time of the events with the aim of coordinating national provisions on cultural heritage. The only legislative novelties brought by the Decree – the Italian government insisted – were favorable to the claimant, as they introduced in the legislation the possibility (affirmed since a 1974 ruling by the Italian Constitutional Court<sup>39</sup>) of proving that the owner of stolen cultural property was “unaware of the crime”. As for the objection related to the impossibility of applying the measure outside of Italy, the government pointed out that the interpretation defended by the Trust was supported solely by academic opinions, and had been repeatedly rejected by domestic courts<sup>40</sup>.

On this point, the Court started by reiterating the necessary respect for the principle of legality and then moved on to the assessment of the applicability of Article 174, paragraph 3 of Decree No. 42/2004. In this regard, the Court adopted the Italian government’s interpretation, considering the provision nothing more but a restatement of Article 66 of the Law no. 1089/1939 that was in force at the time of both the statue’s discovery and its purchase by the Trust. It was further recognized that the Cultural Heritage and Landscape Code was adopted to harmonize domestic provisions on cultural heritage<sup>41</sup>. The Court also held that the possibility for the Trust to prove that it was a “person unconnected to the crime”, established by the Cultural Heritage and Landscape Code, was a novelty that resulted in a more favorable position for the claimant<sup>42</sup>.

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<sup>37</sup> 1995 UNIDROIT Convention on stolen or illegally exported cultural objects, at <https://www.unidroit.org/instruments/cultural-property/1995-convention/status/>.

<sup>38</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, §§ 283, 284, 285, 286.

<sup>39</sup> Constitutional Court, 29 December 1974, 202 Giur. Cost. 2130 (1974).

<sup>40</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 287, 288, 290, 291; see also P. Cipolla, *Sulla obbligatorietà della confisca dei beni culturali appartenenti allo Stato illecitamente esportati*, Giur. mer. 2197 (2011).

<sup>41</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 297.

<sup>42</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 299, 304.

Since the confiscation order was adopted by the Italian state in accordance with the Article 174, paragraph 3 of the Italian Cultural Heritage Code, the Court also considered the issue of negligence in the Trust's purchase, as this would affect whether the Trust could be considered a "person unconnected to the crime"; this provision establishes that confiscation cannot be ordered against such persons. Regarding the level of diligence required for the purchase, Italian domestic case law had specified that the confiscation order cannot be applied to individuals who are unconnected to the crime, meaning individuals who were unaware of the crime and had not facilitated it (e.g., through smuggling) due to a lack of vigilance. According to the Court, the provision therefore allowed the Trust to demonstrate that it acquired the property in good faith, unaware of its illicit origin<sup>43</sup>.

The Court's assessment of the legality of the measure also considered other fundamental aspects raised by the claimant, such as the imposition of the measure despite the statute of limitations for the crime. The Court found that the confiscation measure could be ordered even if the illegal export of cultural property had been committed by someone other than the property owner, and even if the crime had expired under the criminal statute of limitations, given its broader function. According to the court, the confiscation order in cultural property cases is not a punitive measure, even when it is imposed by a criminal court; rather, the confiscation order bears greater resemblance to administrative measures typically aimed at recovering the property for the public interest. The Court therefore concluded that the confiscation order could be imposed even on third-party owners of the property who had not participated in the criminal proceedings, had not been convicted, and had not been accused of any crime, once the illicit acquisition of the property is objectively established<sup>44</sup>. The Court noted that, at

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<sup>43</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 300, 125; see also G. Pioletti, *Articolo 127*, in M. Cammelli (ed.), *La nuova disciplina dei beni culturali e ambientali* (2000).

<sup>44</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 310, 311, 312; for the nature of confiscation order, see also ECHR, *Ulemek v. Serbia*, no. 41680/13, 2 February 2021, § 55-58; contrast with ECHR, *Welch v. the United Kingdom*, no. 17440/90, 9 February 1995, §§ 28, 35 (that qualified the measure as a penalty). On the same issue, see Tribunal of Pesaro, Sezione Ufficio Indagini Preliminari, decision of 10 February 2011, confirmed by Court of Cassation, 2 January 2019 n. 22; see also P. Cipolla, *Sulla obbligatorietà della confisca dei beni culturali appartenenti allo Stato illecitamente esportati*, cit. at 40, 2197.

the time of the Trust's purchase, Italian domestic case law was clear about the possibility of imposing confiscation on third parties in possession of goods subject to smuggling, provided that their negligence was demonstrated. The Court concluded that the measure was not linked to the commission or participation in the crime. It therefore ruled that the confiscation could be applied even if the time-limit for pursuing the crime had expired<sup>45</sup>.

The Court also addressed whether the absence of a time limit within which the confiscation must be ordered under the Italian Cultural Heritage Code could impact the foreseeability of the measure. As has been stated by the ECHR on numerous occasions, there can be a lack of foreseeability when domestic laws do not specify a deadline within which national authorities must exercise certain powers or actions. However, the Court considered that sufficient procedural safeguards must be evaluated considering various factors, such as the nature and extent of the interference. In the context of cultural heritage protection, there is broad discretion granted to states, as the goal of cultural protection measures is to recover unique and irreplaceable assets. The Court observed that the absence of provisions regarding the statute of limitations in this field is a characteristic feature of the cultural protection legislation of several countries. For this reason, the Court concluded that the absence of a time limit for confiscation could not lead to the conclusion that the interference was incompatible with the principle of legality<sup>46</sup>.

Finally, the assessment of legality of the confiscation order also considered the possibility of imposing confiscation when the property is located outside the national state. The Court concluded that the confiscation order was not only possible in these cases, but also necessary to request international judicial assistance to recover the property located abroad<sup>47</sup>.

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<sup>45</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §306, 311, 315.

<sup>46</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §321, 322, 323, 324; in relation of foreseeability and the absence of a time limit see also ECHR, *Beyeler v. Italy* (GC), no. 33202/96, cit. at 22, § 109; ECHR, *Béla Németh v. Hungary*, no. 73303/14, 17 December 2020, §40.

<sup>47</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §318.

### 3.3.2. The application of 1970 UNESCO Convention

An additional criticism raised by the claimant concerned whether there was a public or general interest that could justify the adoption of the confiscation order. While the legitimacy of protecting cultural heritage is a reason acknowledged under Article 1 of Protocol 1 to the ECHR for limiting private property, the claimant contested the statue's inclusion in the cultural heritage of the Italian state. The key argument put forward by the Trust in support of this claim was related to the application of the UNESCO 1970 Convention concerning measures to prohibit and prevent the illicit import, export, and transfer of ownership of cultural property<sup>48</sup>. The Trust argued that the UNESCO Convention could not be applied retroactively and therefore was not applicable to the case at hand. Additionally, it argued that the statue did not belong to the cultural heritage of the Italian state under Article 4 of the UNESCO 1970 Convention<sup>49</sup>.

A clarification is necessary here: the United States, in accordance with the provisions of Article 21 of the UNESCO Convention, which states that the Convention enters into force three months after the deposit of the instrument of ratification or acceptance, had made a declaration at the time of depositing the ratification. The declaration stated that Article 13 of the Convention on requests for international assistance would not be applied retroactively, specifying that the provision would only apply to cultural property that left the country after the Convention entered into force for the contracting states concerned<sup>50</sup>.

The link to Italian cultural heritage was contested primarily on the grounds that the statue could not be considered a work of the 'individual or collective genius' of citizens from the Italian state,

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<sup>48</sup> UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, at <https://whc.unesco.org/en/conventiontext/.Specifica>.

<sup>49</sup> Under art. 4 (b) of the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, "[t]he States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; b) cultural property found within the national territory".

<sup>50</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 153.



as it was a work of the Greek sculptor Lysippus, and there was no evidence that it had been created in Italy. The lack of evidence regarding the discovery of the statue in Italian territorial waters was also highlighted, with the claimant arguing that the link drawn by the domestic courts, based on the “continuum” between Greek and Roman civilizations, was irrelevant under both the UNESCO 1970 Convention and under general international law<sup>51</sup>.

The Italian government, on the other hand, argued that the statue was part of Italy’s cultural heritage under the UNESCO 1970 Convention, specifically Article 4, letter b), which recognizes that cultural property found within a country’s territory forms part of that state’s cultural heritage. The government also pointed out that the domestic courts had already sufficiently established that the statue was found in Italian territorial waters and noted that the claimant had not raised this issue either in their appeal to the Italian Court of Cassation or in the claim before the ECHR. Regarding the possibility of excluding the statue from Italy’s cultural heritage based on Article 4, letter a) of the UNESCO 1970 Convention, the Italian government argued that it could not be definitively established that the statue was created by Lysippus, but, even if this were the case, it was likely that Lysippus had lived in southern Italy. It also reiterated that the theory regarding the statue’s Greek origin was unsupported by any evidence and that the claimant’s objections failed to consider the concept of “continuum” embraced by the Italian Court of Cassation<sup>52</sup>.

Regarding the applicability of the UNESCO 1970 Convention to the case, the Court started by reminding that the European Convention must be interpreted in harmony with general principles of international law, considering the 1969 Vienna Convention on the Law of Treaties and any relevant international law provisions applicable to the parties, in accordance with the Court’s interpretation<sup>53</sup>. In this light, the Court highlighted that Article 13 of the UNESCO 1970 Convention recognizes the inalienable right of each contracting state to classify or declare certain cultural property inalienable and to prohibit its export<sup>54</sup>.

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<sup>51</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 327.

<sup>52</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 330, 331, 332.

<sup>53</sup> For the relevant judgments, see G. Ulfstein, *Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties*, 24 *Int’l J. Hum. Rts.* 971 (2020).

<sup>54</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §3 52.

### 3.3.3. The proportion to the aim pursued

The last objection by the claimant concerned the allegation that the confiscation order was not proportionate to the aim pursued, especially considered that the Italian government failed to act in good time<sup>55</sup>. The Italian government argued that the measure was proportionate to the aim pursued and requested that the assessment about whether Italy acted in good time should be done by taking into account the conduct of the domestic authorities, including the repeated attempts by the Italian state to seize the property before and after it reached the United States<sup>56</sup>.

In assessing the proportionality of the measure taken, the Court considered several factors, including whether the Trust had acted with the necessary diligence, whether the domestic authorities had acted consistently and promptly, and whether the claimants were burdened with an excessive charge due to the absence of a compensatory remedy.

Regarding the first point, the Court held that the level of diligence required by the Trust was clear and predictable based on domestic law, and that the unique nature of the operation justified a very high level of diligence in this specific case, in accordance with various international law provisions on the circulation of cultural property<sup>57</sup>. Furthermore, Italian domestic authorities had already established that the Trust's purchase was at least negligent, as no adequate investigation had been conducted regarding the legitimate provenance of the statue. The Trust was found to have a duty to take all reasonably reliable measures to investigate the provenance of the statue before purchasing it. By contrast, the Trust bought the statue by relying on the seller's assurances only. The concerns expressed by Mr. J. Paul Getty Sr. before his death were also considered by the Court, as Mr. J. Paul Getty Sr. had raised doubts about the legitimate provenance of the statue. The Court

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<sup>55</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 361-362.

<sup>56</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 369.

<sup>57</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 379, 380, 381, 383. The Court cited the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (in particular art. 4) and the EU Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (in particular art. 10 § 2).

thus found that the assessment regarding the Trust's negligence was not arbitrary or manifestly unreasonable<sup>58</sup>.

Regarding the actions of the domestic authorities, the Court noted that there was no doubt about Italy's intent to recover the property. The evaluation focused mainly on whether the Italian authorities acted promptly, starting from the moment they learned of the statue's exportation. On this point, the Court considered that the Italian authorities had acted diligently and promptly and had made numerous attempts to recover the statue through international cooperation efforts. The fact that these attempts were not successful could not be attributed to the Italian authorities, as they were operating in a legal vacuum, with no binding international legal instruments in force at the time of the statue's exportation and purchase, which would have allowed them to recover it or, at least, to obtain full cooperation from the foreign authorities<sup>59</sup>.

Another issue the Court considered to determine whether the measure was proportionate was the absence of compensation. In the context of the general provision of Article 1 of Protocol 1 of the Convention, the lack of compensation was a factor to consider, although it could not by itself lead to a violation of the same provision<sup>60</sup>. Considering the finding of negligent purchase, the Court held that the Trust could not have been unaware, in light of domestic case law, that the confiscation of illicitly exported cultural property could be ordered even against third-party owners who were not involved in the offense, thereby excluding the possibility of receiving compensation due to the negligent behavior. The Court found that the claimant had purchased the statue with full awareness of Italy's claims, and that by making the purchase, the claimant had implicitly accepted the risk of the statue being confiscated. The Court concluded that the mere absence of

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<sup>58</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 384, 385, 388, 389, 390.

<sup>59</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 391, 392, 398.

<sup>60</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, § 378; on the way in which the lack of compensation may contribute to a finding of violation of Article 1 of Protocol I to the ECHR, see also ECHR, *Depalle v. France (GC)*, no. 34044/02, cit. at 22 §91; ECHR *Berger-Krall and Others v. Slovenia*, no. 14717/04, 12 June 2014 §199; ECHR, *McCarthy Mussel Development Ltd. v. Ireland*, no. 44460/16, 7 June 2018, §124.

compensation could not determine a lack of proportionality in the adoption of the measure<sup>61</sup>.

Overall, the adoption of the confiscation measure aimed at recovery appeared proportionate and did not conflict with Article 1 of Protocol 1 of the Convention.

#### 4. Some concluding remarks

Under many points of view, the Fano Athlete decision is fully in line with the Court's well-known position on issues such as extraterritorial application of the ECHR, on the relationships between the ECHR and general internal law, on the crucial role played by the principle of legality and by the proportionality test. The decision no. 35271/19 confirms the extraterritorial application of the Convention, whenever a state exercises its jurisdiction, directly or indirectly, in the territory of another states. The decision confirms the need of reading the ECHR in combination with other provisions of international law, including EU law. It confirms the Court's long-standing interpretation of the principles of legality, certainty of the law and prohibition of ex post facto laws, while also applying the proportionality test as the fundamental recipe for balancing rights.

The main novelty of the decision lies elsewhere, in its defence of the specialty of rules on protection of cultural property and in the distinction drawn between criminal measures for the restitution of stolen property and quasi-administrative measures for the recovery of stolen cultural heritage. This is particularly noteworthy since the 1950 ECHR does not explicitly acknowledge cultural heritage rights.

While the ECHR lacks an express provision on cultural heritage, the Court has repeatedly interpreted its norms in ways that implicitly protect it, highlighting the importance of preservation concerns in multiple instances. For instance, in the Fano case the ECHR referred to its earlier decision in *Beyeler v. Italy* (no. 33202/96) a case involving a Swiss national who sought to sell

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<sup>61</sup> ECHR, *J. Paul Getty Trust and others v. Italy*, no. 35271/19, cit. at 1, §§ 402, 403, 404; In relation to the fact that the lack of compensation cannot in itself constitute a violation of Article 1 of Protocol No. 1, see also ECHR *Brosset-Triboulet and Others v. France* (GC), no. 34078/02, 29 March 2010, §94; ECHR, *Dzirnis v. Latvia*, no. 25082/05, 26 January 2017 §91, 95.

a painting to the Peggy Guggenheim Collection in Venice<sup>62</sup>. Italy exercised its right of preemption at a price below market value, prompting the claimant to allege a violation of property rights. In *Beyeler*, the Court found that Italy's interference, though justified by cultural heritage legislation, ultimately failed the proportionality test. This decision highlights the ECHR's nuanced approach: while the protection of cultural heritage justifies certain restrictions on property rights, those restrictions must not impose disproportionate burdens<sup>63</sup>.

But the Fano Athlete decision does not only emphasise the value of cultural heritage norms; it also endorses the interpretations provided to national and international principles on the matter by other actors, be they national courts or international organizations. This is shown by the ECHR's confirmation of the validity of both the decision by the Italian Court of Cassation and the UNESCO's regime for protection of cultural property. In this regard, it is worth noting that, in the Fano Athlete decision, the ECHR makes reference to the Report on the Evaluation of UNESCO's Standard Settings of the Culture Sector (2014). The Report emphasizes that, under Article 13(d) of the 1970 UNESCO Convention, member states must recognize each State's inalienable right to classify certain cultural assets as non-exportable and facilitate their recovery when illicitly exported. The Report further acknowledges that, while undiscovered cultural property may, in some jurisdictions, remain private property, most states have established public ownership of such heritage.

The Fano Athlete decision by the ECHR should therefore be read as a confirmation of the growing sensitivity towards the protection of cultural heritage, a sensitivity which is also demonstrated by significant legislative activity at the national level and increased interaction among international regulatory regimes. Over time, cultural assets have gained recognition and protection as a distinct category of goods, contributing to the development of the modern concept of 'cultural heritage'. This development stems largely from a shift in the perspective from which cultural property is seen and protected. As the Fano Athlete decision stresses, cultural property should be looked at in the human rights perspective,

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<sup>62</sup> ECHR, *Beyeler v. Italy* (GC), no. 33202/96, cit. at 22.

<sup>63</sup> T. Szabados, *Right to Property and Cultural Heritage Protection in the Light of the Practice of the European Court of Human Rights*, cit. at 24, 162.

recognizing its social value as meaningful element of a cultural community and an expressions of its creative spirit and identity<sup>64</sup>.

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<sup>64</sup> See F. Francioni, *Public and Private in the International Protection of Global Cultural Goods*, 23(3) Eur. J. Int. Law 722 (2012).