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Claiming restitution of underwater cultural heritage: The Getty Bronze case

1. Introduction

An interesting example of the intrinsic divide that characterises the debate over restitution of cultural heritage to the country of origin[1] is given by the contention over the "Bronze Statue of a Victorious Youth", one of the few life-size Greek bronzes to have survived; it is presently on exhibition at the J.P. Getty Museum of Malibu (California). Better known as the "Getty Bronze", the unique archaeological piece attributed to Greek sculptor Lysippus (4th century BC) is the protagonist of a long lasting legal dispute between the Getty Museum and the government of Italy; the latter claims ownership of the statue as part of its own cultural heritage. This claim has been contested by the Museum, which has returned other archaeological property to Italy but refuses to repatriate the Bronze because of its convoluted history.[2]

The statue was accidentally found by some fishermen off the coast of the Mid--Adriatic Sea between Italy and Yugoslavia in 1964. It was brought ashore in the Italian port of Fano, then hidden for some time and subsequently smuggled abroad, in violation of Italian legislation on the protection of cultural heritage and in violation of custom regulations.[3] After various concealments in different states and subsequent

[1] For a general view on the debate see, among many authors: J.H. Merryman, "Two Ways of Thinking about Cultural Property", *American Journal of International Law* 1986, vol. 80, no. 4, p. 847; E. Jayme, "Globalization in Art Law: Clash of Interests and International Tendencies", *Vanderbilt Journal of Transnational Law* 2005, vol. 38, p. 927.

[2] A. Lanciotti, "The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the 'Getty Bronze'" [in:] *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, eds. S.H. Borelli, F. Lenzerini, Leiden 2012, p. 301; D. Fincham, "Transnational Forfeiture of the Getty Bronze", *Cardozo Arts & Entertainment Law Journal* 2014, vol. 32, p. 101; T. Scovazzi, "Un Atleta non ancora giunto a destinazione", *Rivista di Diritto internazionale* 2019, vol. 102, fasc. 2, p. 511.

[3] Namely, a violation of art. 510 of the Code of Navigation (which provides that the finder communicates to the maritime authority, within three days from the ship's landing, information concerning any objects he/she found at sea), and a violation of the customs law in force at the time (law of 25 September 1940, no. 1424), which for the crime of smuggling in the maritime movement of goods (art. 99) imposes the forfeiture of smuggled objects (art. 116). As for the Law on the protection of cultural heritage, see below.

changes of hands, in 1977 this precious piece was finally purchased by the curators of the Getty Museum for $3.98 million. The museum's curators have faced long criminal proceedings before Italian criminal courts because, according to Italian judges, they should have been more diligent in trying to ascertain the provenance of the bronze before purchasing it.

A first trial for the illicit export of the Getty Bronze began in 1966, when charges were brought against the alleged perpetrators of the smuggling and illicit transfer of the statue. Another case opened in 1973 before the criminal judge of Gubbio, the village where the object had been hidden before being exported. Both trials ended with a decision of acquittal for lack of evidence of all the accused: fishermen, middlemen, dealers, and others.[4] A new criminal investigation into the discovery and export of the bronze from Italy opened in 2007, under the initiative of a local citizens' group (Associazione le Cento Città*)* based in Fano, the hometown of the fishermen who had rescued the statue. During this proceeding, the Pre-Trial Judge of the Tribunal of Pesaro issued the first confiscation order relating to the statue.[5] This decision was appealed and another followed, until on 30 November 2018 the Italian Court of Cassation definitively ruled on the fate of this rare piece of antiquity – at least as far as Italian judges are concerned – issuing a final confiscation order (*confisca in executivis*) of the statue "wherever it is located".[6] With this ruling the Supreme Court upheld the confiscation order previously made by the Tribunal of Pesaro with an order of 8 June 2018, which confirmed a series of reiterated orders of forfeiture issued in 2012[7] and 2010.[8]

The Getty Museum appealed against all these judgments. At some point the case even involved the Italian Constitutional Court [9]. All these judicial decisions – issued more than thirty years after the bronze statue had left Italian soil and despite the fact

[4] Tribunal of Perugia on 18 May 1966; the Appeals Court of Perugia on 27 January 1967; this sentence was reversed by the Cassation Court with decision n. 1291/1968; then the Court of Appeals on 8 November 1970 acquitted all accused (these judgments are not reported but can be found in records). As regards the second case, Pretura di Gubbio, proc. n. 993/1973, this was closed on 12 March 1976 (proc. n. 1367/77) with the acquittal of all accused. For a summary in English of those trials see: D. Fincham, "Transnational Forfeiture…", p. 103.

[5] Tribunale ordinario di Pesaro, Ufficio del Giudice per le indagini preliminari in funzione di Giudice dell'esecuzione, Ordinanza del 10 febbraio 2010, proc. n. 2042/07 R.G.N.R; n. 3357/07 R.G.I.P, pp. 16–17, published in *Rivista di diritto internazionale privato e processuale* 2010, p. 149. On this ruling see: A. Lanciotti, "The Dilemma of the Right…"

[6] Corte di Cassazione (III Sezione penale) 30 November 2018 n. 2779, published on 2 January 2019 n. 22 (hereinafter: Cass. n. 2779).

[7] Tribunale di Pesaro, Ordinanza of 3 May 2012**,** issued when the case was reassigned to the investigating judge of Pesaro by the Supreme Court, following a previous appeal to the Cassation Court lodged by the Getty Museum (Corte di Cassazione, Udienza in Camera di Consiglio*,* judgment n. 169/2011 of 18 January 2011, deposited on 22 February 2011).

[8] *Ibidem.*

[9] Constitutional Court, decision of 15 April 2015 n. 109 https://www.giurcost.org/decisioni/2015/0109s-15.html (accessed: 20.04.2021). In this respect, see: M. Montagna, "Il Getty Bronze: prima un giallo archeologico, poi un rebus giuridico. Profili processualistici", *Archivio penale* 2019, no. 1, p. 193; E. Mottese, "La confisca di beni culturali illecitamente esportati", *Rivista di diritto internazionale* 2019, vol. 102, no. 4, p. 1089.

that the charges against the alleged perpetrators of the smuggling had already been dismissed – demonstrate the seriousness of Italy's commitment to retaining by any possible means what it considers to be part of its national heritage. But will the attempt be successful?

2. Confiscation as a penalty for the crime of illicit export of cultural heritage

It is well known that Italy, as one of the major art-exporting nations, has enacted all-encompassing legislation on public ownership of cultural property. This provides that all discovered and undiscovered archaeological objects within Italian territory are considered to be part of the State's national cultural heritage and are *hors de commerce*. This regime was introduced by Law no. 1089 of 1939; at present the Code of Cultural Property and the Landscape of 2004 maintains absolute export and sale prohibitions on all archaeological troves.[10] In addition, the requirement of inalienability of State-owned property is also stated in articles 822-828 of the Civil Code of 1942.[11]

Confiscation for the benefit of the State is a sanction established by Italian law for the crime of smuggling cultural property. Article 174 para. 3 of the Code of Cultural Property penalizes the specific crime of "illegal exit or export of things of historical, artistic or archaeological interest", providing for a special possibility of confiscation of the pieces of property "unless they belong to a person not related to the crime".[12]

The case against the Getty Museum opened because the judges were not convinced that the museum's curators had acted in good faith in the acquisition of the statue. So they treated them as persons involved in the illicit trafficking for having knowingly acquired an illicitly exported archaeological property belonging to the State. The curators did not commit the crime of smuggling and illicit export of cultural property but, according to the Court, they are not unrelated to it because they relied on the assurances given by the seller's lawyer that the sale was lawful under Italian law without making further enquiries.

The Court of Cassation confirmed the confiscation specifying that such measure has no penalizing purpose but pursues a "primarily recovery purpose", being aimed at "materially restoring the situation of dominion of which, by law, the State boasts

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[10] Under art. 23 of the Code of Cultural Property and the Landscape (Codice dei beni culturali e del paesaggio enacted by *Legislative Decree* n. 42 of 22 January 2004), State-owned cultural property is inalienable without a prior authorization by the Ministry of Culture, whilst art. 61 deems to be null and void all unauthorized sales and transactions of cultural property belonging to the State (see art. 65, art. 54 para. 2 letter a), art. 55, art. 10 para. 3 letter d), Code of Cultural Property).

[11] On this point, see: A. Lanciotti, "The Dilemma of the Right…", p. 306.

[12] Article 173 para. 3 of the Code of Cultural Property. Confiscation is a security measure according to which ownership is acquired by the State. An analogous measure was envisaged for the same crime by art. 66 of Law n. 1089 of 1939, the law in force at the time when the statue was found at sea.

on the illicitly expatriated property".[13] Given the peculiarity of the confiscation measure disposed independently of a contextual conviction for the crime of illegal export, the appellant denounced an erroneous application and interpretation of, *inter alia*, the rules of criminal law on forfeiture. However, the legal complexities of Italian criminal and criminal procedure law will not be tackled here, as they would warrant an article in themselves[14]. This comment will focus on the international law implications of the Cassation's decision, in particular on the arguments used in the judges' rationale to justify the application of substantive Italian law and, consequently, on the possibility for the Italian State to claim the return of such a valuable piece, which Italy contends is part of its "own" national cultural heritage.

3. Reflections on the determination of the law applicable to the ownership regime of illicitly exported cultural property

Among the many grounds for appeal to the Supreme Court, the claimant argued that "given the permanence of the work of art in the rooms of the Getty Museum for several decades, Californian law was the applicable law, as the law governing the material relationship between the statue and the Getty Museum" (Cass. n. 2779, para. 16.1). On the contrary, the Supreme Court decided that Italian substantive law is applicable despite the fact that "the statue was most likely found in non-territorial waters"[15] because the object was found by an Italian fishing boat and disembarked in an Italian port. Interestingly, both the Tribunal of first instance and the Cassation Court based their reasoning on a concept of national territory that includes not only the ship flying the flag of the State, but also the "extension" of the vessel consisting of the fishing net immersed on the seabed beyond the limit of territorial waters.[16] According to the judges, Italian statutory law vesting property rights in the State and declaring archaeological finds as *res extra commercium* is applicable to this case because of the mere circumstance that the boat that cast and collected the fishing net was an Italian one.[17] Conversely, it can

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[13] Cass. n. 2779, p. 34, para. 13.3.3, pp. 35, 36.

[14] See: M. Montagna, "Il Getty Bronze..."; E. Mottese, "La confisca di beni culturali..."; A. Gaito, M. Antinucci, "Prescrizione, terzo estraneo e confisca *in executivis* di beni archeologici (a margine della vicenda dell'Atleta Vittorioso di Lisippo" [in:] *La giustizia patrimoniale penale*, eds. A. Bargi, A. Cisterna, vol. 2, Turin 2011, p. 1185; G. Buonomo, "La richiesta di pubblicità dell'udienza sull'appartenenza dell'Atleta di Fano", *Diritto penale e processo* 2015, no. 9, p. 1173.

[15] Tribunal of Pesaro, *Ordinanza* of 12 June 2009 on jurisdiction (No. 2042/07 R.G.N.R.; No. 3357/07 R.G.I.P.) at p. 10 "In the present case, the investigations did not make it possible to identify with certainty the place where the discovery of the sculpture took place and on the basis of the investigations carried out, it can only be stated, also taking into account what was established by the Supreme Court in sentence n. 1291/1968, that the statue was most likely found in non-territorial waters". At the time of the discovery, the outer limit of the territorial sea was six nautical miles.

[16] Under art. 4 of the Code of Navigation, Italian ships on the high seas are considered part of Italian territory.

[17] The same interpretation was adopted before by the *Tribunal of Sciacca,* decision of 9 January 1963

be argued that, following the same line of reasoning, if it had been a vessel flying the flag of another country the discovery and the property regime of an object rescued from under water on the high seas could have been subjected to a different discipline, inspired by a different policy.[18]

4. The determination of the law governing the "relationship" between the statue and The Getty Museum

The Court assumed that the notion of "territory" can be expanded to include also a fishing net in the high seas, so as to rule on the issue of jurisdiction in favour of Italy. This argument, however, leaves open the question of which law governs the "material relationship between the statue and the Getty Museum", as the Cassation Court puts it (Cass. n. 2779, pp. 17–18, at paras. 6.2-6.4).

This issue needs to be broached from a conflict of law perspective. The conflict of laws in relation to property, including cultural property, is widely governed by the *lex rei sitae* principle. The Italian conflict-of-law provision follows this almost universally recognized rule. Article 51 of Law no. 218/95 on the Reform of the Private International Law System insists: "Possession, ownership and other rights *in rem* over movable and immovable property are governed by the law of the State *in which the property is situated*".[19] This provision has usually been interpreted in the sense that the *lex rei sitae* is the law in force in the State where the item was located at the time of the transfer.[20] As is typical of art cases, the Getty Bronze had passed through a number of jurisdic-

(published in *Il Foro Italiano* 1963, vol I, p. 1317) when it ruled on the acquisition to the national heritage of a Phoenician statue depicting the warrior god Melqart, casually rescued from the sea off the coast of Southern Sicily in 1955.

18 E.g. the Admiralty Law, The law of salvage. On this point see: T. Scovazzi, "Dal Melqart di Sciacca all'Atleta di Lisippo", *Rivista di diritto internazionale privato e processuale* 2011, vol. 47(1), p. 5, 12; A. Chechi, R. Contel, M. Reinold, "Case Victorious Youth – Italy v. J. Paul Getty Museum", *Platform ArThemis, Art-Law Centre, University of Geneva*, May 2019, p. 7, https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum (accessed: 20.04.2021). Provocatively, L. Li, A. Sargent, "The Getty Bronze and the Limits of Restitution", *Chapman Law Review* 2016, vol. 25, pp. 25, 45, wonder what would be the fate of a pre-Columbian art object rescued by an Italian ship in the Pacific Ocean.

19 Article 51, Law n. 218/95 on the Reform of the Italian System of Private International Law of 31 May 1995 (emphasis added). This law was enacted in 1995, but at the time of the discovery of the statue in 1964 the same *lex rei sitae* rule was applicable under art. 22 of the Preliminary Dispositions to the Civil Code (Disposizioni Preliminari al codice civile).

20 R. Clerici, "La protection des biens culturels vis-à-vis des règles italiennes de conflit", *Rivista di diritto internazionale privato e processuale* 1989, vol. 25, p. 799 ; M. Frigo, "Circulation des biens culturels, détermination del la loi applicable et méthodes de réglement des litiges", *Hague Collected Courses* 2015, vol. 375, p. 89. This approach is valid lacking any treaty-law uniform rule. For precedent case law: Tribunale di Torino, *Republic of Ecuador v. Danusso*, decision of 25 March 1982, *Rivista di diritto internazionale privato e processuale* 1982, 625; Court of Cassation, sez. I, *Ricorsi riuniti Stato francese- Ministero dei beni culturali v. De Contessini ed altri,* decision of 24 November 1995 n. 12166, *Rivista di diritto internazionale privato e processuale* 1997, p. 427.

tions before arriving in California. As acknowledged in the judgement, in the years following its discovery at sea, the statue had been the object of several transactions and border crossings (Cass. n. 2779, pp. 6–7).[21] Apparently, it was smuggled into Germany, then exported from Germany to England, perhaps passing through Brazil, then back to Germany until it ended up in the United States. From a strictly conflict-of-law perspective, all those movements across borders had an effect on the determination of the *lex rei sitae*, inevitably affecting the movable's ownership regime.[22] Therefore, if the transaction was concluded abroad, once the statue had been transferred (although illegally) into the territory of a foreign country, the "relationship between the statue and the museum" is ruled by that law. Italian substantive law on property, including the retentionist legislation governing cultural heritage, could be applied only if and to the extent to which the new *lex rei sitae,* which generally is the law of the forum, makes a specific reference to it.

5. Inapplicability of treaty law obligations on restitution of cultural property

The Italian retentionist legislation on cultural heritage would have been applied if the archaeological object in question was encompassed by specific uniform rules favouring the application of the *lex originis* (i.e. the law of the (cultural) origin of the disputed item). Rules of the kind are set forth by the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects[23] and the European Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a EU Member State.[24] Unfortunately, the US is neither a party to the Convention, nor an EU Member State. Consequently, the case in question is not encompassed by those rules on restitution, although the "failure to apply the conventional private international law

[21] For a detailed description of all the movements of the Getty Bronze see: D. Fincham, "Transnational Forfeiture…", p. 106; L. Li, A. Sargent, "The Getty Bronze…", p. 30.

[22] On the functioning of the *lex situs rule* in cases of restitution of cultural property, see: L. Prott, "Problems of Private International Law for the Protection of the Cultural Heritage", *Hague Collected Courses* 1989, vol. 217, pp. 223, 262; K. Siehr, "International Art Trade and the Law", *Hague Collected Courses* 1993, vol. 243, p. 9; W. Kowalski, "Restitution of Works of Art Pursuant to Private and Public International Law", *Collected Courses of the Hague Academy of International Law* 2001, vol. 288, p. 17; Ch. Armbrüster, "La revendication de biens culturels du point de vue du droit international privé", *Revue critique de droit international privé* 2004, vol. 93, no. 4, p. 740; S. Symeonides, "A Choice-of-Law Rule for Conflicts involving Stolen Cultural Property", *Vanderbilt Journal of Transnational Law* 2005, vol. 38, p. 1177; E. Jayme, "Globalization in Art Law…", p. 927.

[23] The Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995, has been in force since 1 July 1998 and has been ratified by 31 states (www.unidroit.org.) including Italy, which implemented it by the Law of 7 June 1999 n. 213, but not the USA.

[24] 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 (Recast). It repealed Council Directive 93/7/EEC of 15 March 1993 on the same topic.

rules" was also raised by the defendant among the grounds for appeal (Cass. n. 2779, p. 39, para. 17.1). The case at issue does not fall within the scope of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Notwithstanding the fact that both Italy and the USA have ratified it, the disputed bronze was imported into the United States sometime between 1974 and 1978, that is before the entry into force of that Convention in both states concerned.[25] Moreover, the USA has made a reservation according to which it is committed to prohibit the importation onto American soil of cultural property coming from another contracting state only when such property has been both "documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution" and stolen from that institution "after entry into force of this Convention", in compliance with art. 7 letter b (i) of the Convention.[26] The case under examination also falls beyond the scope of the bilateral agreements concluded between the Italian government and American museums on the return of removed archaeological objects.[27]

In conclusion, given the inapplicability of treaty law rules on restitution of cultural property to the case at issue, the dispute over the return of the precious sculpture to the state that claims to be its country of origin is to be decided under the new *lex rei sitae,* i.e. the law in force in the state where the movable is presently located.

The forfeiture order issued by the Italian Court could be enforced in the United States through application of the bilateral Treaty on Mutual Assistance in Criminal Matters of 2006 (MLAT).[28] But even if so, the obligation to execute a request for "seizure, freezing and *confiscation of the proceeds or profit of crime*" set forth in art. 18 of MLAT

[25] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, done in Paris, 14 November 1970. Italy deposited its instrument of ratification in 1978; the United States acceded in 1983, http://portal.unesco.org/en/ev (accessed: 20.04.2021).

[26] Convention on Cultural Property Implementation Act of 1983 (CPIA) Publ. L. No. 97–466, 96 Stat. 2329 (1983), current version at 19 U.S.C. §§ 2601–2613. For the text of the US reservation to the 1972 UNESCO Convention http:// portal.unesco.org/en/ev.phpRL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES (accessed: 15.03.2021).

[27] The Statue of the Victorious Youth was not included in the agreement concluded in 2007 between the Italian Ministry of Culture and the J.P. Getty Trust (the text is not public) whereby the Getty Museum agreed to return significant antiquities from its collection, see: *J. Paul Getty Museum return 26 Objects to Italy*, 21 November 21, www.getty.edu/news/press/center/statement06_getty_italy_meeting111706.html (accessed: 20.03.2021). Neither was it encompassed by the Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, done at Washington on 19 January 2001 (*I.L.M.* 2001, p. 1031). T. Scovazzi, "The Agreements between the Italian Ministry of Culture and American Museums on the Return of Removed Cultural Properties" [in:] *Cultural Heritage. Scenarios 2015–2017*, eds. S. Pinton, L. Zagato, Venice 2017.

[28] Article 1 letter g) contains the obligation to give mutual assistance "in the seizure and forfeiture of goods". See: Treaty on Mutual Assistance on Criminal Matters (MLAT) signed at Rome on 9 November 1982, S. Treaty Doc. No 25, 98th Congr. 2nd Sess. (1984), https://www.state.gov/85-1113/ (accessed: 14.03.2021).

will be accepted by the requested party, i.e. the USA, only "*to the extent permitted*" by "*its domestic law and administrative procedures*".[29] This means that, although the MLAT is considered self-executing, compliance with a request for confiscation ultimately relies on the domestic law of the requested State.

6. The territorial scope of the regime on public ownership of objects belonging to a national cultural heritage

The Getty strongly believes that it acquired the statue legally and insists that the bronze was imported legally into American territory after its acquisition had been highly publicized by the media, and that more than forty years have passed since this archaeological piece was placed on view at the Museum.[30] In response, the Supreme Court argues that the dispute "does not concern the legitimacy of the title that the Getty Museum can claim over the confiscated property, given that whatever the title it is obviously destined to give way in the face of the legitimate adoption of an authoritative act vesting ownership in the State (*provvedimento ablatorio*) issued by the Italian judicial authority" (Cass. n. 2779, p. 38, para. 16.2).

One may agree with the Cassation Court that the regime on public ownership of objects belonging to the cultural heritage contains overriding mandatory provisions (*lois de police* or *norme di applicazione necessaria*), respect for which is regarded as crucial by the country for safeguarding its public interests; one may also agree that these special domestic provisions are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the case following the conflict-of-law rule on property as described above.[31] But even assuming that the Italian statutory law vesting property rights in the State and declaring archaeological finds as *res extra commercium* is applicable to this case as *loi de police* and that, accordingly, an immediate right of ownership by the State arose, this law cannot *per se* have extraterritorial effect.[32] Alas, as it has been observed, "the interaction of *res extra commercium* and *lex situs* yields a regime under which the (in same cases fortuitous) physical location of the cultural property in question determines the validity of the title and under which

[29] Article 18 MLAT, *Seizure, Immobilization and Forfeiture of Assets:* "1. The Contracting Parties shall assist each other to the extent permitted by their respective laws in the seizure, immobilization and forfeiture of the fruits and instrumentalities of offenses. 2. Proceeds or property forfeited to a Contracting Party pursuant to this Article *shall be disposed of* by that Party *according to its domestic law and administrative procedures*. Either State may transfer all or part of such proceeds or property, or the proceeds of its sale, to the other State*, to the extent permitted by their respective laws, upon such terms as they may agree*" (emphases added).

[30] *Talking about the Getty Bronze. Conversation on the Court of Cassation's Recent Decision surrounding Victorious Youth*, 11 December 2018, https://blogs.getty.edu/iris/talking-about-the-getty-bronze/

[31] See: art. 17 of Law no. 218/95 on the Reform of the System of Private International Law.

[32] C. Staker, "Public International law and the Lex Situs Rule in Property Conflicts and Foreign Expropriations", *British Yearbook of International Law* 1987, vol. 58, issue 1, pp. 151, 185; K. Siehr, "International Art Trade…", pp. 85–86.

legal protection for cultural property can be defeated by smuggling".[33] Without having the opportunity to further explore this aspect, it should be noted that in US courts the nature of *res extra commercium* of imported cultural property imposed by foreign law is generally not recognized as such.[34]

7. Considerations on a possible enforcement of the confiscation order abroad

In the absence of a treaty-based rule applicable to the case in question, imposing the return of the removed archaeological treasure, the only way for the Italian government to recuperate it is via the enforcement of the confiscation order in the USA. Indeed, this has been done via application of the MLAT.[35] However, success for such an action seems rather difficult.[36] An argument against enforcement is that the disputed statue was never in the actual possession of the Italian State and that there is no evidence that it was found within Italian "internationally recognized borders". Moreover, no one has been convicted for the crime of theft or illegal export.[37]

As a matter of fact, if we examine the few precedents in which US courts have enforced confiscation measures to comply with requests for repatriation made by foreign governments, we find that confiscation was ordered only when the requesting foreign state was able to prove that the present owner was aware of the fact that the requested antiquities had been stolen from its territory and imported into the USA

33 O. Metzger, "Making the Doctrine of *Res Extra Commercium* Visible in United States Law", *Texas Law Review* 1995–1996, vol. 74, pp. 615, 625, 626.

34 Generally, US courts do not embrace a solution that favours the application of the law of the state where the chattel was initially located. See, for instance, *Autocephalous Greek Orthodox Church of Cyprus v. Goldberg*, 717 F. Supp.1374 (S.D. Ind. 1989) afff 'd, 917F.2nd 278 (7th Cir. 1990), where the court applied Indiana substantive law and not the law of the country of provenance to determine the ownership of Byzantine mosaics removed from a church in Cyprus. O. Metzger, "Making the Doctrine of *Res Extra Commercium*…", p. 625; D. Fincham, "How Adopting the *Lex Originis Rule* Can Impede the Flow of Illicit Cultural Property", *Columbia Journal of Law and the Arts* 2008, vol. 32, p. 111; A. Weinder, *Kulturgüter als* res extra commercium *im internationalen Sachenrecht*, Berlin – New York 2010, p. 93; J. Gordley, "The Enforcement of Foreign Law: Reclaiming One Nation's Cultural Heritage in Another Nation's Courts" [in:] *Enforcing Cultural Heritage Law*, eds. F. Francioni, J. Gordley, Oxford University Press, Oxford 2013, p. 110; P. Gerstenblith, "Enforcement by Domestic Courts, Criminal Law and Forfeiture in Recovery of Cultural Objects" [in:] *Enforcing Cultural Heritage Law*…; C. Roodt, "Restitution of Art and Cultural Objects and its Limits", *Comparative and International Law Journal of Southern Africa* 2013, vol. XLVI, p. 288.

35 See: A. Lanciotti, "The Dilemma of the Right to Ownership...", p. 322.

36 J.H. Merryman, "The Retention of Cultural Property", *U.C Davis Law Review* 1988, vol. 21, no. 3, pp. 477, 484; J. Fishman, "Locating the International Interest in International Cultural Property Disputes", *The Yale Law Journal of International Law* 2010, vol. 35, pp. 347, 355; N. Feldman, "The Getty Bronze shouldn't go back to Italy", *Bloomberg Opinion*, 5 December 2018.

37 P. Gerstenblith, "The Public Interest in the Restitution of Cultural Objects", *The Connecticut Journal of International Law* 2001, vol. 16, pp. 197, 216; D. Fincham, "Transnational Forfeiture…", p. 121. See: *Peru v. Johnson* 720 F. Supp. 810 (C.D. Calif. 1989), aff'd, 933 F.2d 1013 (9th Cir. 1991).

in breach of criminal law,[38] namely the National Stolen Property Act, 1988 (NSPA).[39] Confiscation was also awarded when the US court assessed a violation of custom regulations, in particular, when the holder of the requested object had made false statements about the origin of the imported property.[40] Naturally, restitution has been granted when the specific request fell within the scope of the domestic implementing legislation of the 1970 UNESCO Convention, as it was proved that the archaeological property had been stolen from a public institution of the requesting state after the entry into force of the Convention in the USA.[41]

Ultimately, in successful cases of restitution of removed cultural property, confiscation was granted via application of American domestic laws and not of the foreign law of the requesting state.[42] It can be further noted that US courts generally consider the requesting State's cultural heritage law as a mere "fact" of the case that proves that the possessor of the antiquity was aware of the factual circumstance that the object

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[38] In *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), confiscation was awarded because it was proved that the accused knew that the imported goods were owned by the State of Mexico; the court recognized "the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures" (*McClain* I, 545 F.2d at 992). B. Rosecrance, "Harmonious Meeting: The McCain Decision and the Cultural Property Implementation Act", *Cornell International Law Journal* 1986, vol. 19, p. 311.

[39] Section 545 of NSPA (18 U.S.C. paras. 2311–2321 (1988) criminalizes the possession of property valued at $5,000 or more that crossed a federal or state border after the property was stolen, if the possessor knows that the property was obtained by theft. See: J. Anglim Kreder, "The Choice Between Civil and Criminal Remedies in Stolen Art Litigation", *Vanderbilt Journal of Transnational Law* 2005, vol. 38, pp. 1199, 1206; G. Nowell, "American Tools to Control the Illegal Movement of Foreign Origin Archaeological Materials: Criminal and Civil Approaches", *Syracuse Journal of International Law and Commerce* 1978, vol. 6, no. 1, pp. 77, 89, 90.

[40] In *United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997) and 184 F.3d 131 (2nd Cir. 1999), the confiscation was ordered on the basis of a violation of US customs legislation, due to false declarations written in customs forms about the actual origin of an archaeological find and its actual value (Switzerland was indicated instead of Sicily and a value of only $250 was given). In *United States v. Hollinshead*, 495, F.2d 1154 (9th Circ. 1974), the accused was found guilty of "fraudulent custom declaration and of conspiracy to import stolen goods" for not declaring to customs that he imported a Mayan stele with bas-reliefs from Guatemala, while being aware that its removal was against the law of that country.

[41] As already noted, treaty-law obligations of cooperation in the fight against illicit trafficking in cultural property have a limited scope in the USA. In *United States v. A Roman Marble Torso of Artemis*, No. 96-CV-2929 (S.D.N.Y. 5 July 1996), the Federal District Court in the Southern District of New York applied the *Convention on Cultural Property Implementation Act*, 1983. It implemented articles 7 and 9 of the 1970 UNESCO Convention and ordered the forfeiture of a marble torso despite the fact that the defendant had purchased it in good faith. The torso from the 1st century CE, depicting Artemis, was stolen from a convent near Naples in Italy in 1988, that is, after the entry into force of the UNESCO Convention in the two countries involved.

[42] S.K. Urice, "Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act", *New Mexico Law Review* 2010, vol. 40, pp. 123, 127: "the possession of an *illegally* exported artwork that has been *legally* imported into the United States cannot be subject to legal action merely because the work had been transported in violation of the export rules of the foreign State"; see also: L. Kaye, "Art Wars: The Repatriation Battle", *New York University Journal of International Law and Politics* 1998, vol. 31, no. 1, pp. 79–80.

he/she imported into the USA had been "stolen" abroad, according to the definition of the term "stolen" given by the US National Stolen Property Act.[43] Conversely, American courts remain rather reluctant to apply the so called "blanket cultural patrimony statutes", i.e. foreign nations' export laws and vesting statutes that, like the Italian one, attribute to the State the exclusive ownership of archaeological troves,[44] In sum, foreign export prohibitions are enforced only when confirmed by domestic import barriers.

8. Conclusions

The Getty Bronze case clearly demonstrates the inadequacy of the *lex rei sitae* rule to regulate disputes relating to the return of antiquities claimed to belong to a national cultural heritage. Solutions favourable to the recognition of the constraints imposed on cultural heritage by the *lex originis* have been authoritatively suggested for many years.[45] However, even if so, in the specific case examined here, doubts may arise as to the identification of Italy as the real country of origin of the sculpture, considering that it was found accidentally by fishermen in an unknown location, presumptively on the high seas, where it is believed that a Roman ship carrying the statue from Greece was shipwrecked in the 1st century BC.

In this respect, the appellant lamented the "violation of the obligation to motivate the decision with regard to the demonstration of the existence of solid links between the national cultural environment and the artefact in question which, demonstrating it belongs to the Italian artistic heritage, justify the particular protection afforded" (Cass. n. 2779, p. 39, para. 18.1). The appellant argued that it seems simplistic to indicate Italy as the only country of origin of the disputed Greek archaeological trove. After all, the connections with Italian territory are not so "solid", consisting only of a fortuitous fishing up and a brief and clandestine stay on Italian soil during the twentieth century but probably never before.[46] In rejecting this specific ground for complaint, the Supreme Court has embarked on a broad digression aimed at reconstructing the existence of a historical *continuum* between ancient Greek civilization and the Italian peninsula, in

43 K. Vitale, "The War on Antiquities: United States Law and Foreign Cultural Property", *Notre Dame Law Review* 2009, vol. 84, pp. 1835, 1854; M. Murali, "Black Beauty-How Schultz and the Trial of Marion True Changed Museums Acquisitions", *American University Criminal Law Brief* 2012, vol. 7, p. 55; J. Anglim, "Crossroads in the Great Race: Moving Beyond the International Race to Judgement in Disputes over Artwork and Other Chattels", *Harvard International Law Journal* 2004, vol. 45, p. 239.

44 J. Hugues, "The Trend Toward Liberal Enforcement of Repatriation Claims, in Cultural Property Disputes", *George Washington International Law Review* 2000–2001, vol. 33, pp. 131, 152.

45 Institut de droit international, Session de Bâle 1991, "International Sale of Work of Art from the Angle of the Protection of Cultural Heritage", *Annuaire de l'Institut de droit international* 1992, vol. II, p. 403; T. Pecoraro, "Choice of Law in Litigation to Recover National Cultural Property: Efforts at Harmonization in Private International Law", *Virginia Journal of International Law* 1990, vol. 31, issue 1, pp. 1, 11 ff.; K. Siehr, "International Art Trade…", p. 106; D. Fincham, "How Adopting the *Lex Originis Rule*…", p. 111.

46 A. Chechi, R. Contel, M. Reinold, "Case Victorious Youth…", p. 7; L. Li, A. Sargent, "The Getty Bronze…", p. 44.

an attempt to legitimize the inclusion of the disputed masterpiece within Italy's national heritage from a historical point of view (Cass. n. 2779, pp. 39–40, para. 18.1 f.). In any case, one question remains open: who owns the past?

It is undeniable that the continuation of this long-lasting litigation is very costly for all the actors involved and risks jeopardizing cooperation in cultural matters between the United States and Italy with reference to other disputed works of art. As has been achieved before,[47] an agreement in the direction of settling through negotiations the litigation in order to reach an equitable solution would be the best option. In this regard, the appellant asked the judge to examine the possibility of applying a measure less burdensome than confiscation, which would have been more respectful of the relationship of proportionality between the legal measure adopted by the Court and the purposes it pursued (Cass. n. 2779, p. 31). The Court did not consider such an option.

Now, given the improbability of a successful enforcement of the confiscation order in the USA, an alternative solution should be envisaged. A possible settlement to overcome the *impasse* can be a long-term loan of the sculpture to the American museum[48]. This proposal can offer a mutual advantage: the Getty Museum could continue to exhibit the bronze in its collection in the Malibu Museum where the statue represents one of the main attractions, while the Italian government could receive a fee for the loan which it could invest in other cultural activities.[49] Nonetheless, such a compromise solution can only be based on the acknowledgment by all the parties to the dispute that the "Victorious Youth" definitively belongs to Italy.

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[47] Agreement concluded in 2007 between the Italian Ministry of Culture and the J.P. Getty Trust.

[48] A. Lanciotti, "Il Getty Bronze: prima un giallo archeologico, poi un rebus giuridico. Profili internazionalistici", *Archivio penale* 2019, no. 1, pp. 175, 192.

[49] J. Cuno, *Who Owns Antiquity?: Museums and the Battle over Our Ancient Heritage*, Princeton University Press, Princeton 2008, p. 39; S. Spagnoli, *Over Cultural Property: The Case of Italy v. J. Paul Getty Museum, Thesis Submitted to the Faculty of the Department of Arts Administration*, Savannah College of Art and Design, Georgia 2011, p. 86 see both authors endorse such a solution.

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Summary

Alessandra Lanciotti

Claiming restitution of underwater cultural heritage: The Getty Bronze case

This article focuses on the legal questions raised by the convoluted story of the statue known as the Getty Bronze, an ancient sculpture dating back to the 4th century BC found in the Adriatic Sea off the coast of Italy over fifty years ago and currently on exhibit at the Getty Museum in California. The dispute between the Museum and the Italian State has been going on for many years. With a recent decision, the Italian Supreme Court confirmed the confiscation order with respect to the statue "wherever it is located". But can such an order be enforced abroad and the antiquity returned to the claimant state? Taking its cue from this decision, the article discusses the law applicable to the regime of illegally exported archaeological properties demonstrating the inadequacy of the *lex rei sitae* rule to regulate disputes relating to the return of antiquities that are part of a state's cultural heritage. It also analyses the issue of enforcement of the confiscation order abroad, suggesting a possible alternative solution to solve this long drawn out judicial affair.

Keywords: underwater cultural heritage, restitution of cultural property, confiscation, *lex rei sitae* rule, return of antiquities

Streszczenie

Alessandra Lanciotti

Roszczenia restytucyjne z zakresu podwodnego dziedzictwa kultury – sprawa Brązu Getty'ego

W artykule przytoczone skomplikowane dzieje antycznej rzeźby znanej jako Brąz Getty'ego (Atleta z Fano, Zwycięski Młodzieniec), datowanej na IV wiek p.n.e. i wydobytej przeszło 50 lat temu z dna Adriatyku u wybrzeży Włoch, a obecnie znajdującej się w Muzeum Getty'ego w Kalifornii. Spór Muzeum z Republiką Włoską trwa od lat; niedawny wyrok włoskiego Sądu Najwyższego utrzymał w mocy nakaz wydania rzeźby „gdziekolwiek się ona znajduje". Czy nakaz taki może być wykonany za granicą i czy zabytek powróci do Włoch? W artykule poddano analizie prawo właściwe dla nielegalnie wywiezionych dóbr kultury i wskazano przy tym na nieadekwatność zasady *lex rei sitae* do rozwiązywania sporów windykacyjnych, których przedmiotem są rzeczy będące częścią dziedzictwa kultury całego kraju. Poruszono także zagadnienia wykonania za granicą krajowych nakazów wydania rzeczy i zaproponowano alternatywne rozwiązanie zadawnionego sporu.

Słowa kluczowe: podwodne dziedzictwo kultury, restytucja dóbr kultury, nakaz wydania, zasada *lex rei sitae*, zwrot dzieł sztuki antycznej