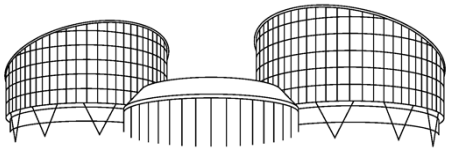

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF THE J. PAUL GETTY TRUST AND OTHERS v. ITALY

(Application no. 35271/19)

JUDGMENT

STRASBOURG

2 May 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of The J. Paul Getty Trust and Others v. Italy,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak*, President*,
Alena Poláčková,
Krzysztof Wojtyczek,
Lətif Hüseynov,
Ivana Jelić,
Gilberto Felici,
Raffaele Sabato*, judges*,
and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 35271/19) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the J. Paul Getty Trust and fourteen American nationals ("the applicants"), whose names are indicated in the appendix, on 28 June 2019;

the decision to give notice to the Italian Government ("the Government") of the complaint concerning Article 1 of Protocol No. 1 to the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 19 March 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns a confiscation order adopted in respect of the "Victorious Youth", also referred to as the "Athlete of Fano" or the "Lysippus of Fano", a bronze statue dating back to the classical Greek period ("the Bronze" or "the Statue") in the possession of the J. Paul Getty Trust ("the Trust" or "the first applicant"). The domestic judicial authorities found that the Statue, which was protected by Italian cultural heritage and customs law, had been unlawfully exported from Italy and then negligently purchased by the Trust despite the absence of an export licence and repeated attempts by the Italian authorities to recover it as part of Italy's cultural heritage and on account of the non-payment of customs export duties.

2. The Trust and the members of its board of trustees ("the trustees") alleged that the adoption of the confiscation order constituted a violation of their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1. They further complained of the risk of being deprived of that right if the Italian authorities succeeded in obtaining recognition and enforcement of the confiscation in the United States of America (US), where the Statue is still being kept and exhibited, at the Getty Villa in Malibu, California, one of two campuses of the Getty Museum.

THE FACTS

3. The first applicant is a non-profit legal entity, which was founded by Mr J. Paul Getty Senior ("Mr Getty Senior") and registered in the United States in 1953. The fourteen individual applicants are all American nationals and members of the first applicant's board of trustees. They were represented by Mr T. Otty, a lawyer practising in London.

4. The Government were represented by their Agent, Mr L. D'Ascia, *Avvocato dello Stato*.

5. The facts of the case may be summarised as follows.

I. BACKGROUND TO THE CASE

A. Discovery of the Statue

6. In 1964 an ancient Greek bronze statue of a young man, known as the "Victorious Youth", was discovered in the waters off Pedaso on the Adriatic coast by Italian fishermen, who took it to the port of Fano.

7. The Statue was then taken to Carrara, a suburb in the municipality of Fano.

8. It was then bought by Mr P.B., Mr F.B. and Mr G.B., who placed it in the home of Mr G.N. in Gubbio.

9. In 1965 the Bronze was sold to unknown parties and its whereabouts became unknown.

B. Criminal proceedings for the offence of receiving and handling a stolen archaeological object belonging to the State

10. Mr P.B., Mr F.B., Mr G.B. and Mr G.N. were charged with receiving and handling stolen goods in connection with the theft of a protected archaeological object belonging to the State, pursuant to section 67 of Law no. 1089 of 1 June 1939 ("Law no. 1089/1939"; see paragraph 114 below).

11. On 18 May 1966 the Perugia District Court acquitted them. It observed (i) that there was insufficient evidence to conclude that the Statue had been discovered in Italian territorial waters and therefore belonged to the State, and (ii) that, even if it had been found in Italian territorial waters, there was insufficient evidence to prove that the defendants knew of its unlawful origin, as the vendor had reassured them that it had been found in Yugoslav waters. Consequently, it could not be proved that they "knew or ought to have known" that they were receiving and handling "stolen goods".

12. On 27 January 1967 the Perugia Court of Appeal reversed the first-instance judgment. Mr P.B., Mr F.B. and Mr G.B. were convicted of

receiving and handling stolen goods, while Mr G.N. was convicted of aiding and abetting the concealment of the product or profit of a criminal offence.

13. On 22 May 1968 the judgment was quashed by the Court of Cassation, which observed that the offence of receiving stolen goods presupposed the theft of an archaeological object belonging to the State. The court further concluded that the judgment was insufficiently reasoned with regard to the discovery of the Bronze on Italian territory and referred the case back to the Perugia Court of Appeal.

14. On 18 November 1970 the Perugia Court of Appeal acquitted the defendants. It held that there was no direct and convincing evidence of the origin and location of the discovery of the Statue in Italian territorial waters and, accordingly, of the crimes with which the defendants had been charged.

C. Export of the Statue to Germany and first investigation into unlawful exportation

15. The Bronze reappeared in Munich, Germany, on the premises of a German art dealer, Mr H.H., who was holding it on behalf of a company registered and based in Liechtenstein (see paragraph 23 below).

16. On 27 July 1973 an official of the Italian Ministry of the Interior wrote to the Munich criminal police informing them of the circumstances in which the Statue had been exported and that it was in the possession of Mr H.H. They were requested to urgently intervene to prevent any resale and to allow Italian experts to examine and photograph the Statue.

17. The actions taken by the German police are referred to in a letter dated 17 August 1973 from Mr H.H. to his Italian lawyer:

> "On [30 July] 1973, the Munich criminal police, accompanied by two Italian officials, entered our gallery, presenting an order to arrest [the word here is intended to mean 'to seize'] our Greek bronze statue, and – if necessary – to search for it in our premises, as well as in my private home. The argument being that of suspicion of having received stolen goods, and the suspicion of having smuggled the said statue from Italy, illegally.
>
> ...
>
> On [31 July] various talks took place, between our lawyer and the investigating judge, as well as with the two head-officials of the Munich criminal police, in charge of the matter ... our lawyer was able to stress that the suspicion of having received stolen goods was completely unfounded, same as the suspicion of having smuggled the object from any country. He also made a point in warning that no photograph should be taken, and that no unnecessary information should be given to anybody, nor any authority.
>
> ...
>
> The Munich criminal police waived all their original intentions to view the statue, to have copies of our import documents, or to receive any other details and evidence. The two abovementioned orders ... have simply been withdrawn, and given back to the police – it was us who insisted of [*sic*] having a complete documentation of these acts, especially a copy of the withdrawn order, and the Public Prosecutor's order to discontinue the case."

18. On 1 August 1973 the German police interviewed Mr H.H., who expressed doubts as to whether the statue being investigated at the request of the Italian authorities corresponded to the statue in his possession. In any event, he stated that he had received it from the company Artemis, that he had no reason to doubt the validity of the latter's title to it and that, if the Italian authorities had any plausible claim to it, they should have instituted civil proceedings.

19. On 3 August 1973 the German authorities brought charges against Mr H.H. However, on 22 August 1973 the Munich public prosecutor's office discontinued the case as "the criminal act of handling stolen goods [could] not be proved ... with the certainty necessary for an indictment".

20. The following year the Gubbio magistrate (*pretore*) opened an investigation into the unlawful exportation of a cultural object under section 66 of Law no. 1089/1939 (see paragraph 113 below). On 9 February 1974 the magistrate sent a letter of request to the German authorities, requesting them to: (i) seize the Statue, if necessary, after searching the places where it could be found; (ii) hear Mr H.H. as a suspect of having committed such a crime and ask him about the circumstances in which he had come into possession of the Statue and for any other information concerning its provenance and ownership; (iii) provide photographs of it; (iv) inform them of compliance with the requests; and (v) hold onto the Statue before sending it to Italy.

21. On 2 April 1974 the Munich public prosecutor's office dismissed the Italian authorities' request and discontinued the investigation against Mr H.H.

22. In 1976 the Italian authorities discontinued the investigation on the grounds that the perpetrators of the alleged crime remained unknown.

II. PURCHASE OF THE STATUE BY THE FIRST APPLICANT

23. While the Statue was in Germany, the Trust entered into negotiations for its purchase with Mr H.H., the vendor's representative, acting on behalf of the owner, a company registered and based in Liechtenstein (see paragraph 15 above).

24. On 30 August 1972 Mr N.B., Mr Getty's adviser, informed the vendor's representative that Mr Getty had stated that, subject to and assuming that clear title could be obtained to the satisfaction of Mr S.P. (Mr Getty's attorney) he would recommend that the trustees purchase the Statue. The letter noted the existence of "some possible legal complications" as "it [was] not known when the [object had] left Greece or Italy, or when it [had been] discovered". The Trust's representatives asked the vendor to provide information to allow a proper assessment of the legality of the purchase.

25. In a letter dated 31 August 1972 Mr Getty Senior informed the vendor's representative that he had recommended that the trustees buy the

Statue for 3,500,000 United States dollars (USD). He requested a copy of the Italian courts' decisions in the criminal proceedings concerning the circumstances surrounding the discovery of the Bronze in the Adriatic Sea (see paragraphs 10-14 above).

26. On 4 October 1972 Mr G.M., the vendor's Italian lawyer, assured Mr Getty's attorney that, under Italian law, Italy could not claim any rights to the Statue. He argued, in particular, that it could not be proved that the statue under negotiation was the same as that which had been the subject of the above-mentioned criminal proceedings. In any event, he further observed that the criminal proceedings had concluded that it could not be proved that the statue had been found in Italian territorial waters (see paragraph 14 above), that the Italian government had failed to claim ownership of the statue in those criminal proceedings and that it was therefore an ordinary object belonging to his clients in a private capacity.

27. The letter was accompanied by a translation of the Italian judgments issued in the criminal proceedings (see paragraphs 10-14 above) prepared by Mr V.G., a lawyer from the Italian law firm representing the vendor.

28. On 30 June 1973 Mr Getty's adviser sent a letter to Mr Getty Senior with regard to the possibility of the Getty Trust and the Metropolitan Museum of New York jointly purchasing the Statue.

29. On 25 August 1973 the vendor's representative assured Mr J.F. (then curator of antiquities at the Getty Museum) of the vendor's willingness to share all the available information. With regard to the origin of the Statue, the letter read as follows:

> "In the meantime one of Mr Getty's main worries have been proved absolutely to his satisfaction: even the Italians admit that we do have a clear title to this Bronze: [Mr. Getty's advisor] will be properly informed about this, by our Italian lawyers ..."

30. On 25 September 1973 Mr V.G., another of the vendor's Italian lawyers, sent a letter to Mr Getty's adviser including information concerning the investigation opened by the Munich public prosecutor's office. The relevant part of the letter reads as follows:

> "According to the Munich District Attorney, the allegation originally raised against our client is not substantiated. This should settle once and for all a case destitute of any legal foundation ... On the other hand, the Italian authorities appear to be perfectly aware that no charge can be brought in this country against our clients after the judgment rendered by the [Perugia] Court of Appeal on [18 November] 1970 which, as you know, is a final one. Moreover, the applicable statute of limitation precludes any charge of unlawful exportation even though this may be a superfluous notation since no such charge could ever be preferred against our clients who purchased the statue abroad."

31. In a letter dated 1 October 1973, the vendor's Italian lawyers further informed Mr Getty's adviser of the circumstances concerning the purchase of the Statue, its ownership and the Italian State's claims:

"You will find enclosed herewith copy of the order issued by the Munich District Attorney. As you know the order in question is the most recent development in the legal entanglements which followed the excited speculation raised in March 1973 by *Il Messaggero*, a Rome paper with some local importance. In this connection I think you should be aware of certain facts which, even though of general knowledge, may be regarded as relevant by a proposed purchaser of the Bronze.

Our firm originally advised the present owners of the Statue (Etablissement D.C. of Vadu[z]), in respect of the undisputable good title of their acquisition which took place in June 1971. Our opinion followed a thorough factual and legal investigation concerning the whereabouts of the bronze as well as historical and judicial precedents involving discoveries of work of art in international waters.

We subsequently continued to act for the D.C. group, by disclosing legal considerations on which our opinion had been based,[1] to the Getty Museum in Malibu, as one of the proposed purchasers of the Bronze. ...

The statements made by *Il Messaggero*, although dramatically misleading, were more prejudicial to the Italian Government authorities in charge of the surveillance of works of art than to the reputation of our clients. Which accounted for the informal request of explanation which we received from Mr [L.G.], a high official of the Ministry of Education, through the good offices of a mutual friend. During a meeting with Mr [L.G.] which took place in March 1973 in our office, we disclosed to him our findings and told him the very simple truth that, to the best of our clients' knowledge, the bronze had only one true country of origin: Greece, some 2,400 years ago. Mr [L.G.] was quite openly relieved to be able to confirm to his Minister that, after the judgment of the [Perugia] Court of Appeal in 1970, no charge of negligence could be advanced against the Government and stated that as far as the Ministry of Education was concerned the matter could be set aside.

In fact we have been able to ascertain through confidential channels that the investigation conducted in Germany by the Italian Police was but the personal and somehow arbitrary initiative of a well-known figure in the Police who, in an internal feud with officials of another department, acquired a certain notoriety by suggesting that a number of works are Nazi war-lot or contraband from Italy...

May I add, knowing that the contents of this letter will be treated with the utmost confidence, that I personally learned by one of the policemen [*sic*] who has been dealing with the subject matter, that the Italian police regards the same as finally closed."

32. In a letter dated 3 November 1973 the vendor's representative informed the curator of antiquities at the Getty Museum that the vendor would not sell the Bronze for less than USD 4,000,000.

33. On 6 June 1976, while negotiations were still ongoing, Mr Getty Senior died.

34. On 8 June 1977 the trustees discussed the purchase. It was agreed that the legal opinion obtained from the Italian lawyer in October 1972 (see paragraph 26 above) should be updated.

35. In a letter dated 8 July 1977 the vendor's representative wrote to the curator of the Getty Museum that he had instructed the vendors' London office to send him by post the complete documentation on the legal aspects

[1] The comma is in the original version of the letter.

concerning the Statue. The letter stated that the file contained "every possible document", namely: (i) "the complete documentation of the case in the Italian courts"; (ii) "all documents relating to the first attempt by the Italians to appropriate the Statue"; and (iii) "all documents relating to the second attempt by the Italians to appropriate the Statue".

36. The letter included a legal opinion obtained by the vendor on 7 January 1974 from Mr P.R., a German lawyer, which stated that ownership of the Statue had been validly acquired by the fishermen who had found it and therefore validly transferred to the vendors.

37. The Trust purchased the Bronze on 27 July 1977 for USD 3,950,000 through a contract concluded in the United Kingdom. The purchase was officially announced by means of a press release. Clause 2(a) of the purchase agreement between the vendor and the Getty Museum stipulated as follows:

> "It has good title to the Statue, free of all rights and claims of others, and ... has the power and authority to enter into and perform its obligations hereunder in accordance with the terms and provisions of this Agreement."

38. The Statue entered the United States through the port of Boston on 15 August 1977 and arrived at the Getty Villa in Malibu in March 1978, where it has been displayed ever since.

III. THE ITALIAN AUTHORITIES' RECOVERY ATTEMPTS

39. Following the Statue's arrival in the United States, the Italian authorities took steps to investigate the circumstances surrounding its purchase and entry into US territory.

A. International request for an investigation

40. In December 1977 the Italian customs authorities, through Interpol in Rome, sent a request for an investigation, which was forwarded to the US Customs Service in Washington D.C. It was requested to verify whether the Statue had entered the United States properly, to obtain copies of all entry documents and to interview Getty Museum staff to determine what action they had taken to satisfy themselves that the purchase had been legitimate. The request was forwarded on 27 December 1977 to the office of the Special Agent in charge in Los Angeles.

41. The Special Agent conducted an investigation between 3 and 11 January 1978. The results of the investigation were included in a report dated 17 January 1978, which concluded that the Statue's entry into US territory did not appear to have violated US customs laws.

42. On 23 May 1978 the Central Office of the Italian Ministry for Cultural and Environmental Heritage clarified that the Export Office had ascertained that no export licence had been issued with regard to the Statue.

43. On 30 May 1979 the Cultural Heritage Protection Department of the *carabinieri* received a note from the US authorities via Interpol in Rome, requesting clarification as to whether the Italian authorities considered that the Statue was protected under Italian cultural heritage law, and whether it had been unlawfully exported from Italy.

44. Following the discontinuance of the domestic investigations (see paragraph 54-55 below), the Italian authorities did not follow up the matter. The documents available to the Court show that the investigation was closed by Interpol and the US authorities in 1984.

B. Second investigation into unlawful exportation

45. On an unspecified date the Gubbio magistrate opened an investigation into the unlawful exportation of a cultural object.

1. Taking of statements

46. The Imola *carabinieri* were informed that Mr R.M., a local dealer, had seen the Statue covered in marine encrustations in 1964 while it was still with the fishermen who had found it. When questioned on 24 November 1977, he gave the *carabinieri* a photograph of the Statue taken on that occasion.

47. In December 1977 the *carabinieri* again questioned the captains of the fishing boats and the fishermen who had found the Statue. They said that they had found the object by chance while they had been fishing a few miles off the Italian coast, not far from the coast of Pedaso.

2. Letter of request to the British authorities

48. On 14 January 1978 the Gubbio magistrate sent a letter of request to the British authorities asking them to cooperate in the investigation into the circumstances surrounding the purchase of the Statue and its transit through British territory.

49. On 2 May 1978 the British authorities provided information concerning the transit of the Statue. However, they dismissed the other requests, observing, *inter alia*, that the United Kingdom was not a party to the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (see paragraph 150 below) which had been relied on by the Italian authorities.

3. Letter of request to the US authorities

50. On 17 February 1978 the Italian embassy in the US received a letter of request from the Perugia public prosecutor's office, following a request from the Gubbio magistrate, asking the US authorities for judicial assistance in the investigation into the circumstances surrounding the entry of the Statue into US territory and its seizure.

51. On 27 February 1978 the US Department of State dismissed the request on the grounds that, under the US Secretary of State's circular letter of 3 February 1976, the seizure of property on US territory could not be effected by means of a request for judicial assistance accompanied by a letter of request. The dismissal clarified that the Italian authorities could have instituted proceedings before the US judicial authorities in accordance with US law.

4. Further investigations

52. On 9 March 1978 the Gubbio magistrate ordered the Cultural Heritage Protection Department of the *carabinieri* to search the marine area where the discovery had taken place to determine its exact location.

53. On 13 September 1978 the Cultural Heritage Protection Department of the *carabinieri* replied that the requested search was impossible for technical reasons and because of the risk of undertaking actions in Yugoslav waters.

5. Discontinuance of the investigations

54. On 25 November 1978 the Gubbio magistrate discontinued the investigations into the unlawful exportation of a cultural object as the perpetrators of the crime remained unknown and the offences had become statute-barred.

55. Following the information request submitted by the US authorities through Interpol (see paragraph 43 above), on 25 August 1980 the Gubbio magistrate sent a letter to the Perugia public prosecutor's office confirming that the investigation had been discontinued and that the "criminal proceedings in question appear[ed] ... not to be amenable to any further examination by the ordinary courts, which [were], in particular, prevented from ordering further measures aimed at recovering the Statue". It considered that, according to him, any competence in that regard lay with the Ministry of Foreign Affairs and the Ministry for Cultural and Environmental Heritage, which could have tried to recover the Statue by resorting to the means referred to in the note of the US Department of State (see paragraph 51 above).

6. Further proceedings

56. The documents available to the Court show that on 3 November 1989 the Pesaro public prosecutor's office ordered the seizure and examination of certain marine encrustations removed from the Statue after its discovery.

57. According to the results of the scientific examination, dated 9 July 1992, no clear information could be drawn from the assessment.

58. The authorities also collected statements from several individuals who had been involved in hiding the Statue after its discovery.

59. It is not clear from the material submitted by the parties when these investigations were discontinued.

C. The Italian authorities' administrative and diplomatic attempts to recover the Bronze

60. On 28 September 1982 a meeting took place between representatives of the Trust and those of the Italian Ministry for Cultural and Environmental Heritage. The content of the discussion is unknown.

61. On 19 April 1984 the Italian Ministry for Cultural and Environmental Heritage acknowledged that it had received a note from Interpol Washington stating that until concrete evidence concerning ownership of the Statue could be provided, it could not be recovered.

62. In 1989 the General Director for Archaeological Objects of the Italian Ministry for Cultural and Environmental Heritage wrote to the Director of the Getty Museum, asking for the Bronze to be returned to Italy. The letter highlighted the "ethical and legal inconsistency of the reasons that [seemed to have been] given [by the Trust] for retaining the Bronze", reiterated that "the [object had been] found by an Italian boat and immediately transported onto Italian soil, where it [had] stayed for a long time before being exported without a proper licence", and referred to the 1970 UNESCO Convention, which had in the meantime been ratified by both Italy and the United States. On 15 May 1989 the Trust replied that there was no relationship between the Statue and Italy, and it refused to return the Bronze.

63. In 1995 the Italian Ministry of Foreign Affairs, through the Italian Embassy in Washington, instructed the Italian consul in Los Angeles to negotiate the return of the Bronze with the then curator of antiquities of the Getty Museum. The latter reiterated that the Trust had purchased the Statue in good faith, seven years after the acquittal decision issued in the Italian criminal proceedings, and six years before the United States had acceded to the 1970 UNESCO Convention. She observed that it was unrealistic to expect that the Bronze would be returned unconditionally.

64. The curator of antiquities of the Getty Museum therefore dismissed the restitution request on the grounds that the alleged offences had become time-barred and that the Trust had acted in good faith when purchasing the Statue. The Trust's representatives proposed an agreement whereby the Getty Museum would finance the restoration of works of art in Italy and lend the Statue for long periods of exhibition in Italy, in exchange for an end to the dispute over its ownership.

65. Between 2006 and 2007 the Italian Ministry for Cultural Heritage and Activities and the Trust negotiated the return to Italy of around forty archaeological objects. The parties jointly decided to postpone the negotiations concerning the Statue. According to the Government, the agreement had contained an express confidentiality clause preventing the

parties from producing it in a court of law. They therefore chose not to provide the agreement to the Court.

IV. DOMESTIC PROCEEDINGS AND THE CONFISCATION ORDER

66. On 11 May 2006 the Los Angeles Times published an article containing certain statements made by Mr T.H., then Director of the Metropolitan Museum of New York, with regard to the Statue.

67. On 5 April 2007 local campaigners lodged a petition with the Pesaro public prosecutor's office requesting that action be taken to seek the return of the Bronze to Italy.

68. On 12 April 2007 the Pesaro public prosecutor's office brought charges against the captains of the two fishing boats, as well as Mr P.B., Mr F.B., Mr G.B. (see paragraph 8 above) and some unknown individuals. They were charged with exporting the Bronze without the required licence, failing to report the Statue to the competent authorities after its discovery and violating border controls in importing it to Italy.

69. On 24 April 2007 the Italian *carabinieri* took a statement from Mr T.H. (see paragraph 66 above), who stated that he had seen the Statue for the first time in Munich in 1972, at the gallery of Mr H.H., and that during the discussions between the Getty Trust and the Metropolitan Museum of New York about the joint purchase of the Statue, Mr Getty Senior had reported concerns about the circumstances in which the Statue had been discovered and exported. Mr T.H. further stated that "Mr Getty [had] made the acquisition of written authorisations by the Italian authorities a condition for the purchase of the Bronze".

A. Discontinuance of the criminal proceedings and dismissal of the confiscation request

70. On 12 July 2007 the Pesaro public prosecutor's office requested the preliminary investigations judge (*giudice per le indagini preliminari* – "the GIP") of the Pesaro District Court to discontinue the proceedings "as they [had] become statute-barred and some of the people under investigation [were] deceased". The public prosecutor requested the confiscation (*confisca*)[2] of the Bronze on the grounds that it had been unlawfully exported.

71. By an order dated 19 November 2007, the GIP of the Pesaro District Court ordered that the proceedings be discontinued.

[2] The translation prepared by the Registry uses the expression "confiscation" in accordance with the Italian word "*confisca*" used in the text of Article 174 § 3 of Decree no. 42/2004 (see paragraph 121 below), due to the criminal nature of that provision. However, where the original version of the texts quoted in the present judgment used the different term "seizure", the original text has not been amended.

72. The GIP dismissed the confiscation request. He observed that the domestic provisions concerning the confiscation of unlawfully exported cultural objects (see paragraphs 113 and 121 below), as amended in the light of the Constitutional Court's case-law (see paragraph 125 below), did not allow the imposition of such a measure on a "person not involved in the criminal offence" (*nei confronti di persona estranea al reato*). It therefore considered that the confiscation could not be ordered because the Trust had not been involved in the offences in question, and as their representatives' good faith could not be ruled out with certainty. In particular, the Statue had been purchased after a final decision adopted by the Italian judicial authorities had ruled out the offence of receiving and handling stolen goods.

B. Enforcement proceedings and the first confiscation order

73. On 29 November 2007 the Pesaro public prosecutor's office lodged an objection to enforcement (*incidente di esecuzione*).

74. On 10 December 2008 the GIP of the Pesaro District Court informed the Trust, in its capacity as current possessor of the item (*attual[e] detentor[e] del bene*), of its right to attend the hearing and to submit observations. The Trust participated in the proceedings through its representative.

75. By an interlocutory order of 12 June 2009, the GIP dismissed an objection by the Trust to the admissibility of the enforcement proceedings.

76. On 10 February 2010 the GIP ordered the confiscation of the Statue, "wherever located". The GIP considered that the measure was mandatory under the applicable domestic legislation, as it was aimed at recovering possession of a cultural object belonging to the State.

77. The GIP further observed that a confiscation order, given its "recovery" purpose, could be imposed in the enforcement proceedings even if the relevant criminal offences had become statute-barred, if the individual who owned or was in possession of the object was not a "person not involved in the criminal offence": under the relevant case-law, the measure could be imposed on individuals who had not committed the crime if a "lack of vigilance" could be ascertained and attributed to them (see paragraph 124 below). In this connection, the GIP observed that the Trust's representatives had not conducted a proper inquiry into the lawful origin of the Statue and, therefore, had been at least negligent.

78. The GIP found that the investigation had not succeeded in identifying the location of discovery of the Statue and concluded that it had probably been found in international waters. However, the GIP considered that the Italian State had acquired ownership of it. He observed, in particular, that the Bronze had been discovered by an Italian-flagged vessel. Taking into account the customary international law principle of the freedom of high seas and the corresponding principle of the exclusive jurisdiction of the "flag State",

Article 4 of the Italian Navigation Code (see paragraph 116 below) was applicable. Under those provisions, vessels flying the Italian flag are part of the State's territory. As a consequence, the Bronze had been found on Italian territory, Italian heritage law was applicable and Italy had therefore acquired ownership of the Statue.

79. The GIP further observed that, in principle, confiscation could not be ordered with regard to cultural objects, which, by definition, belonged to the State. However, when the relevant cultural object was outside the State's territory, it could be recovered exclusively through international judicial cooperation mechanisms, which needed as a basis a formal confiscation or similar order. The decision observed that there were no examples of case-law, only academic opinions, stating that the measure in question could not be imposed in cases in which the cultural objects were located outside Italian territory.

80. On 13 February 2010 the applicants lodged an appeal on points of law with the Court of Cassation. By judgment no. 6558 of 22 February 2011, the court reclassified the appeal as an objection to confiscation within the meaning of Article 667 § 4 of the Code of Criminal Procedure and ordered the case to be transferred to the GIP of the Pesaro District Court.

81. On 3 May 2012 the latter dismissed the applicants' objection.

C. Annulment of the confiscation order for lack of a public hearing

82. The first applicant lodged an appeal against that decision with the Court of Cassation, complaining, *inter alia*, that the proceedings had been unfair as the hearings before the GIP had not been held in public.

83. By order no. 24356 of 4 June 2014, the Court of Cassation raised a constitutionality issue with the Constitutional Court as regards Article 666 § 3, Article 667 § 5 and Article 676 of the Code of Criminal Procedure in so far as those provisions did not allow, upon the request of the parties, proceedings concerning an objection to a confiscation order to be conducted in the form of a public hearing.

84. By judgment no. 97 of 15 June 2015, the Constitutional Court declared the above-mentioned provisions unconstitutional in so far as they did not allow enforcement proceedings to be held in public.

85. By a judgment of 27 October 2015, the Court of Cassation upheld the appeal concerning the lack of a public hearing. It consequently quashed the judgment of 3 May 2012 (see paragraph 81 above), remitting the case to the GIP of the Pesaro District Court for a new decision on the applicants' complaints.

D. Reopening of the enforcement proceedings and the second confiscation order

1. Order of 8 June 2018 of the GIP of the Pesaro District Court

86. By an order of 8 June 2018, the GIP of the Pesaro District Court upheld the confiscation order. The GIP observed that the purpose of the measure was to recover the Statue as it was part of the State's property and, in any event, had been unlawfully exported from Italy without the necessary licence and payment of the relevant customs duties.

87. As to the establishment of the facts, the GIP considered that the discovery of the Bronze had occurred in Italian territorial waters on the basis of the statements made in December 1977 by the captains of the two boats, who had recalled that when the discovery had been made they had been fishing a few miles off the coast (see paragraph 47 above).

88. The GIP further stated that, pursuant to Article 510 of the Navigation Code, the discovery of the Statue should have been reported to the competent authorities and that, in accordance with Article 511 of the same Code, ownership of any cultural objects found at sea passed to the State.

89. However, the GIP observed that the first applicant had overestimated the relevance of the exact location of the discovery. He considered that, irrespective of that issue, the Italian State had acquired ownership of the Bronze as it had been discovered by an Italian-flagged vessel and therefore within Italian territory, in accordance with Article 4 of the Italian Navigation Code (see paragraph 116 below). Moreover, although antiquities experts had put forward several hypotheses (that the Bronze was an original, a Roman copy, a travelling exhibit or part of an imperial collection), the Bronze was most probably the work of the Greek artist Lysippus and its connection with Italy had to be considered "certainly not marginal", as at the time the Statue had been created the artist had most probably visited Rome and Taranto. At the relevant time, Greece and Rome had enjoyed good relations and, thereafter, Roman civilisation developed as a continuation of Hellenic civilisation. This was sufficient, according to the GIP, to establish a significant connection between the cultural object and Italy.

90. Moreover, according to the GIP, the Trust's ownership was null and void as its legal predecessor (*dante causa*) and, before him, those who had discovered the Bronze and exported it, had breached Italian law on the protection of objects of artistic and historical interest.

91. The decision stated that even if the Trust had not committed any criminal offence, it was not a "person not involved in the criminal offence", notably someone that at the time of the purchase had ignored, without fault, the objects' illicit origin and had not profited from it in any way (see paragraphs 124-128 below). In particular, the GIP found that the Trust had been negligent in purchasing the Statue without a proper and independent inquiry into the legitimacy under Italian law of the previous transfers and,

instead, merely relying on the assurances and legal assessments of the vendors' lawyers.

92. Lastly, the GIP considered that the final criminal judgment issued in 1970 (see paragraph 14 above) was not binding for the purposes of the confiscation as it had been delivered in proceedings initiated in respect of different crimes. As to the other decisions issued in the proceedings concerning the offence of unlawful exportation which had taken place in the 1970s, it had been decided in those cases not to proceed to trial solely on account of the failure of other countries' authorities to respond to the Italian authorities' letters of request (see paragraphs 49, 51 and 54 above). According to the GIP, if the Italian State had failed to recover the Statue for more than thirty years, the blame fell on those who had failed to carry out the necessary import and export formalities and pay the relevant customs duties, as compliance with those obligations would have allowed the State to be informed of the situation and to take proper action in this regard.

2. The Court of Cassation's judgment of 2 January 2019

93. The first applicant's representative lodged two separate appeals on points of law with the Court of Cassation.

94. The confiscation order was upheld by a final decision of the Court of Cassation of 2 January 2019 (judgment no. 22/19).

95. The Court of Cassation held that the confiscation ordered under Article 174 § 3 of Legislative Decree no. 42/2004 (see paragraph 121 below) is not a penalty. In addition to being linked with the commission of an offense (*oltre ad essere connessa ... all'avvenuta commissione di un reato*), for which however there was no need for a criminal conviction (see paragraph 98 below), it had "primarily a recovery purpose" (*funzione prioritariamente recuperatoria*) apt to be pursued also with respect to persons not involved in the commission of the offence (see paragraph 96 below), since it was aimed at ensuring respect of the public interest violated by an unlawful export by way of restoring the "original public control" (*situazione originaria di dominio pubblico*; see paragraph 99 below) over the object. The Court of Cassation found that, after its discovery, the Statue had not been reported to the competent domestic authorities pursuant to the applicable maritime legislation (see paragraphs 88 above and 116 below). Moreover, it had been subsequently exported without payment of the relevant customs duties and without the necessary licence.

96. As regards whether the Trust had been negligent or had acted in bad faith when it had purchased the Statue, the Court of Cassation reiterated that the notion of "person not involved in the criminal offence" within the meaning of the relevant domestic case-law (see paragraphs 124-128 below) demanded that it be ascertained whether the "addressee" of the measure had cooperated in the commission of the offence of unlawful exportation or whether, negligently or in bad faith, it had "consciously benefited" from its

commission and, consequently, had purchased or acquired the object despite knowledge of the offence.

97. The Court of Cassation observed that the GIP's assessment of the Trust's bad faith or negligence had been reasonable, observing that: (i) during the negotiations, Mr Getty Senior had expressed serious doubts as regards the provenance of the Statue; (ii) the Trust's representatives had asked for information exclusively from the vendor's representative who, although a professional in the field, had a clear interest in presenting the provenance as legitimate; (iii) the Trust's representatives had failed to ask the competent Italian authorities whether the export formalities and other provisions of Italian heritage law had been complied with. As a result, the Trust's representatives had purchased the Statue without assessing, with the diligence required by the particular nature and seriousness of the transaction and the previous events of which they had full knowledge, its legitimate provenance.

98. As regards the possibility of imposing the measure in the absence of a criminal conviction, the Court of Cassation observed that the relevant domestic legislation provided for the mandatory confiscation of cultural objects that had been unlawfully exported without payment of the relevant customs duties (see paragraph 110 below) and without the relevant licence (see paragraph 121 below). It further clarified that, according to its previous case-law, the measure could also be imposed when the proceedings did not lead to a criminal conviction because the relevant offence had become statute-barred.

99. In the Court of Cassation's view, the measure was indeed aimed at re-establishing "public control" over cultural heritage objects, in respect of which, in the absence of any specific exception in the applicable domestic legislation, there was a "presumption of public ownership". In this connection, no other less restrictive measures could have pursued the same aim.

100. As regards whether the Statue could be considered part of Italy's cultural heritage, the Court of Cassation considered that the exact place of discovery was irrelevant, for two reasons. First, the Statue had been found by an Italian-flagged vessel and had therefore entered the State's territory (see also paragraph 78 above). Secondly, the Court of Cassation considered that, at the time the Statue had sunk, it was possible to infer the following:

> "a continuum between Greek civilisation, which had expanded onto Italian territory, and the subsequent Roman cultural experience; a continuum confirmed by the presence off the coast of Pedaso, in what is now the Marche Region, of the Statue of the 'Victorious Youth'"[3]

[3] The Court of Cassation held as follows: "there is no doubt that the Statue of the 'Victorious Youth' … is part of the State's artistic heritage. This conclusion is based … on its belonging to that cultural continuum that has, since its inception, linked Italic and Roman civilisation to Greek culture, of which the Roman culture can well be regarded as carrying the torch. As Mr [S.C.]'s defence expertly reminds [us] … substantial military incursions into Greece

101. The Court of Cassation also held as follows:

> " ... it may be reasonably inferred that, whether the Statue was carried by a ship that in turn had sailed from Italian territory – the presence of Lysippus of Sicyon in what used to be Taranto has been indeed documented – or whether it was transported by a ship that had set sail from the Ionian coast of the Greek peninsula, the final destination was one of the Adriatic ports of the Italian peninsula, in further support of the artefact's place within our country cultural orbit from as far back as that time."

102. The Court of Cassation also dismissed the complaint concerning the lack of foreseeability of the legal basis, observing that Article 174 of Decree no. 42/2004 incorporated the provision previously included in section 66 of Law no. 1089/1939 and in Article 123 § 3 of Legislative Decree no. 490 of 29 October 1999 ("Decree no. 490/1999"), and that the notion of "person not involved in the criminal offence" was clearly established in the previous available case-law.

103. As to the binding effect of the Perugia Court of Appeal's judgment of 18 November 1970, the Court of Cassation noted that the charges brought against the defendants in that case had concerned the possible commission of the offence of handling stolen goods, whereas in the most recent case before the Pesaro District Court the disputed facts concerned the illegal export of the Statue, which constituted a cultural object, outside the territory of the State, and its import into the State without payment of customs duties and without it being duly reported to the authority responsible for the protection of historical and artistic heritage.

---

on the part of the Romans only began in 146 B.C. with the fall of Corinth and the defeat of the Achaean League (although the conquest of Macedonia occurred before then, which is not a coincidence when one considers that the sculptor Lysippus owes part of his fame to his bronze statue depicting, with astounding realism, the features of Alexander the Great, who favoured him as the master of the craft; see the Anthology of Planudes, epigram no. 119), so much so that only in the proto-imperial era Horace, in his Epistle to Augustus, mentioned, in the famous couplet, *Graecia capta, ferum victorem cepit/et artes intulit agresti Latio* ("Greece, the captive, made her savage victor captive, and brought the arts into rustic Latium", from Horace's Epistles, 1, 2, v. 156 *et seq.*), the Greek influence on Italian territory goes back much further; many of the most important Greek historical figures were born in what were then the Greek colonies on Italic territory (Gorgias was born in Leontinoi, Archimedes in Syracuse, to name but a few of the major figures), other lived there to the point of claiming a sense of belonging (notably, Herodotus, born in Halicarnassus in Asia Minor, was called 'Herodotus of Thurium', due to his lengthy stay in the Greek colony of Thurium, today's Apulia); the first literary and artistic expressions referring to Latin culture can easily be attributed to figures educated in a Greek environment (one for all, Livius Andronicus, who arrived in Rome – following Livius Salinator, whose family name he took – from his native Taranto, the city where Lysippus of Sicyon had stayed and worked."

E. The Italian authorities' attempt to obtain recognition and enforcement of the confiscation order in the United States

104. On 4 July 2019 the Pesaro public prosecutor's office sent the US authorities an international letter of request through the Italian Ministry of Justice (letter no. 720/2021). It included a request for recognition and enforcement of the confiscation measure pursuant to the Treaty of Mutual Assistance in Criminal Matters between Italy and the United States of America, signed on 9 November 1982 (see paragraphs 131-132 below), which was supplemented by the United States of America – European Union Treaty signed on 3 May 2006 (see paragraph 133 below), as well as the United Nations Convention against Transnational Organized Crime, adopted by the General Assembly on 15 November 2000 (see paragraph 135 below).

105. On the basis of the information available to the Court, the procedure is still pending in its first phase. Under the applicable provisions, the US Attorney General's Office has to certify the request for mutual legal assistance and submit it to the domestic court competent to decide on the recognition and enforcement request.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LEGAL FRAMEWORK

A. Constitution

106. Article 9 of the Italian Constitution, as in force at the material time, read as follows:

> "The Republic promotes the development of culture and of scientific and technological research. It safeguards the natural landscape and the historical and artistic heritage of the Nation."

B. Law no. 1089 of 1 June 1939 on the protection of objects of artistic or historical interest

107. When the Bronze was found, the protection of cultural objects was regulated by Law no. 1089/1939, which was later consolidated with other provisions by Legislative Decree no. 490 of 20 October 1999 (see paragraph 120 below) and subsequently replaced by Legislative Decree no. 42 of 22 January 2004 (see paragraph 121 below).

108. Sections 1 and 2 provided a definition of objects of artistic, historical, archaeological or ethnographic interest.

109. Section 23 provided that the objects referred to in sections 1 and 2 were inalienable and imprescriptible when owned by the State, provinces and municipalities.

110. Sections 30 et seq. regulated the circulation of cultural objects owned by private individuals. Section 36, in particular, made the export of archaeological objects subject to the issuing of a certificate of free circulation, known as an "export licence".

111. The acquisition of ownership of cultural objects found was regulated by section 44, the relevant parts of which read as follows:

> "1. Found objects shall belong to the State.
>
> 2. The owner of the property shall be paid by the Minister, in money or by the handing over of part of the objects found, a reward, which in any event may not exceed a quarter of the value of the objects themselves.
>
> ..."

112. The first paragraph of section 64 provided that if the object could no longer be traced or had been exported from the State's territory, the individual responsible for exporting it was liable to pay a fine equal to its value.

113. Section 66 regulated the confiscation of unlawfully exported cultural objects. The relevant parts of the provision, as in force when the Statue was exported from Italy, provided as follows:

> "1. A fine ranging from 2,000 lire to 150,000 lire shall be imposed for the export, even if only attempted, of the objects specified by this Law:
>
> (a) when the object is not presented to customs;
>
> ...
>
> 2. The object shall be confiscated. The confiscation shall be carried out in accordance with the provisions of the customs law on smuggled goods.
>
> ...
>
> 4. If it is not possible to recover the object, the provisions of section 64 shall apply."

114. Section 67 provided that whoever took possession of objects of artistic or historical value would be punished for theft under Article 624 of the Criminal Code.

C. Civil Code

115. Article 826 of the Civil Code, which regulates the inalienable patrimony of the State, provinces and municipalities, reads as follows:

> "Assets of the State, provinces and municipalities, which are not of the type referred to in the preceding Articles, shall constitute the patrimony of the State or of the provinces and municipalities respectively.
>
> The inalienable patrimony of the State includes ... objects of historical, archaeological, paleontological and artistic interest, found underground by whomsoever and howsoever ..."

D. Navigation Code

116. The relevant provisions of the Italian Navigation Code read as follows:

Article 4: Italian vessels and aircraft in airspace not subject to the sovereignty of a State

"Italian vessels on the high seas and Italian aircraft in airspace not subject to the sovereignty of a State shall be considered to be part of Italian territory."

Article 510: Rights and duties of the finder

"1. Whoever finds wreckage at sea ... shall, within three days of the find, or of the landing of the vessel if the find took place during navigation, report it to the nearest maritime authority and, where possible, return it to the legitimate owner or, if the latter is unknown or the value is higher than 0.30 EUR, to the above-mentioned authority.

..."

Article 511: Custody and sale of found objects

"The provisions of Article 508 shall apply to the custody of the objects found, their sale and the allocation of the sums obtained. However, objects of artistic, historical, archaeological or ethnographic interest ... when the owner does not arrange to collect them, or does not present himself within the time-limit indicated in the third paragraph of the above-mentioned Article, shall pass to the State, without prejudice in any event to the finder's right to the indemnity and compensation established in the preceding Article."

E. Presidential Decree no. 43 of 23 January 1973 (*Testo unico delle disposizioni legislative in materia doganale*, Consolidated Act of legislative provisions on custom matters)

117. This Decree includes provisions on customs and smuggling, which read as follows:

Article 292: Other cases of smuggling

"Whoever, except in the cases provided for in the preceding Articles, withholds goods from the payment of the customs duties due, shall be punished by a fine of no less than two and no more than ten times the [amount of the] relevant duties."

Article 301: Property security measure. Confiscation

"1. In cases of smuggling, confiscation shall always be ordered of objects which were used or were intended to commit the offence and of objects which are the object or the product or profit thereof.

..."

F. Law no. 127 of 15 May 1997 (Urgent measures to streamline administrative activities and decision-making and control procedures)

118. Section 12(3) of Law no. 127/1997 provided that "the provisions set forth in section 24 et seq. of Law no. 1089 of 1 June 1939" were applicable to the alienation of property of historical and artistic interest belonging to the State, municipalities or provinces.

G. Law no. 88 of 30 March 1998 (Provisions on the circulation of cultural objects)

119. Section 23 of Law no. 88/1998 amended section 66 of Law no. 1089/1939 (see paragraph 113 above) in the light of the Constitutional Court's judgment no. 2 of 19 January 1987 (see paragraph 125 below). Section 66(3) of the amended provision stated that the measure of confiscation of unlawfully exported cultural objects could not be imposed on a "person not involved in the criminal offence" within the meaning of the relevant domestic case-law (see paragraphs 122-128 below).

H. Legislative Decree no. 490 of 29 October 1999 (Consolidated Act of legislative provisions concerning cultural and environmental goods)

120. This Decree consolidated the provisions of Law no. 1089/1939 and the other provisions concerning cultural objects. The relevant provision read as follows:

Article 123: Unlawful exportation

"...

3. The [unlawfully exported] objects shall be confiscated, unless they belong to a person not involved in the criminal offence. The confiscation shall be carried out in accordance with the provisions of the customs law on smuggled goods.

..."

I. Legislative Decree no. 42 of 22 January 2004 (*Codice dei beni culturali e del paesaggio*, Code of Cultural and Landscape Heritage)

121. This Decree was aimed at coordinating and harmonising the provisions concerning the protection of cultural heritage included in the above-mentioned legislation. The relevant provisions read as follows:

Article 2: Cultural heritage

"1. Cultural heritage (*patrimonio culturale*) consists of cultural objects (*beni culturali*) and landscape assets (*beni paesaggistici*).

2. Cultural objects (*beni culturali*) are immovable and movable property which, pursuant to Articles 10 and 11, are of artistic, historical, archaeological, ethnoanthropological, archival and bibliographical interest, and any other property identified by law or in accordance with the law as bearing witness to the values of civilisation.

..."

Article 10: Cultural objects

"1. Cultural objects are immovable and movable property belonging to the State ... which are of artistic, historical, archaeological or ethnoanthropological interest.

..."

Article 54: Non-alienable objects

"...

2. The following cultural objects are likewise inalienable:

(a) immovable and movable property belonging to [the State] which is the work of non-living artists and whose creation dates back more than fifty years, until such time as, where necessary, release from State ownership has occurred following the verification procedure set out in Article 12;

..."

Article 65: Permanent exportation

"1. The permanent exportation from the territory of the Republic of the movable cultural objects referred to in Article 10 §§ 1 to 3 is prohibited.

...

3. Except for the cases provided for in paragraphs 1 and 2, the permanent exportation from the territory of the Republic of the following objects is subject to authorisation, in accordance with the procedure set out in this Section and in Section II of this Chapter:

(a) objects, whoever they belong to, which are of cultural interest, the work of an author no longer living and whose creation date back more than seventy years, the value of which ... is higher than EUR 13,000;

..."

Article 91: Ownership and classification of found objects

"1. The objects referred to Article 10, found underground or on the seabed by whomsoever and howsoever, shall belong to the State and, depending on whether they are immovable or movable, shall form part of its public domain or its inalienable patrimony, pursuant to Articles 822 and 826 of the Civil Code ..."

Article 174: Unlawful exportation

"1. Whoever transfers abroad objects of artistic, historical, archaeological, ethno-anthropological, bibliographic, documentary or archival interest, as well as those referred to in Article 11 § 1 (f), (g) and (h), without a certificate of free circulation or export licence, shall be sentenced to one to four years' imprisonment or a fine between EUR 258 and EUR 5,165.

2. The penalty provided for in paragraph 1 shall also apply to anyone who, on expiry of the time-limit, fails to return to the national territory cultural objects for which temporary export or removal has been authorised.

3. The judge shall order confiscation (*confisca*)[4] of the objects unless they belong to a person not involved in the criminal offence. Confiscation shall be carried out in accordance with the provisions of customs law relating to smuggled goods.

..."

II. DOMESTIC CASE-LAW

A. Notion of "person not involved in the criminal offence"

122. Section 66 of Law no. 1089/1939 (see paragraph 113 above) allowed the imposition of the measure of confiscation of unlawfully exported cultural objects on third parties who owned or were in possession of such an object, irrespective of whether they were responsible for or involved in its unlawful exportation. In judgment no. 260 of 21 January 1974, the Court of Cassation specified that this had the purpose of "discouraging easy collusion between the third party and the smuggler with a view to evading the law".

123. In subsequent case-law, it was considered that the measure could not be imposed on third parties "not involved in the criminal offence" and the meaning of this notion was clarified.

1. Constitutional Court

124. In judgment no. 229 of 17 July 1974, the Constitutional Court ruled that the confiscation of smuggled objects (see paragraph 117 above) could be imposed on individuals who had not committed the crime only if a "lack of vigilance" could be ascertained. In order to avoid the imposition of "strict liability" (*responsabilità oggettiva*) on third parties who owned or were in possession of such an object, it was necessary to establish that, even if they were unaware of the commission of the offence of smuggling, their negligent conduct had allowed or facilitated its commission.

125. In judgment no. 2 of 19 January 1987, the Constitutional Court applied the same reasoning to the confiscation of unlawfully exported cultural objects (see paragraph 113 above), confirming that the imposition of the measure on third parties demanded an assessment of "non-attributability of a lack of vigilance": a person not involved in the criminal offence was someone "who [was] not the perpetrator of the crime and ha[d] not profited from it in any way".

126. In judgment no. 3 of 9 January 1997, the Constitutional Court declared Article 301 § 1 of Decree no. 43/1973 (see paragraph 117 above) unconstitutional in so far as it did not allow the owner of smuggled objects to

[4] See footnote no. 3.

avoid confiscation by proving that he or she had acted in good faith, that is to say that the purchase was concluded by ignoring, without fault, the illicit origin of the objects.

2. Court of Cassation

127. With regard to the confiscation of smuggled objects, in judgments nos. 9803 of 7 February 1975 and 1344 of 2 July 1976, the Court of Cassation confirmed that the notion of "person not involved in the criminal offence" required an assessment of whether the person concerned could be reproached, at the very least, for a "lack of vigilance". In other words, in order to demonstrate that they were "not involved in the criminal offence", third parties were required to show that no negligence could be attributed to them. More recently, in judgment no. 11269 of 10 December 2019, in a case concerning the confiscation of unlawfully exported cultural objects, the Court of Cassation ruled that third parties had the "burden of proving [their] own innocent expectation created by a situation of appearance on the lawfulness of the origin of the object which ma[de] ignorance or lack of diligence excusable".

128. The Court of Cassation has applied the same principle with regard to other types of confiscation, confirming that, in general, third parties are allowed to prove their good faith and the absence of any negligence in the use or purchase of the relevant object (see, for example, judgments nos. 4008 of 2 December 1997 and 47312 of 20 December 2011on confiscation of the product or profit of crimes; judgment no. 26529 of 2 July 2008 on confiscation in environmental crime cases; Joint Chambers, judgment no. 14484 of 19 January 2012 on confiscation imposed in drink driving cases; and judgment no. 7979 of 23 February 2015 on "extended confiscation").

B. Nature and purpose of confiscation of unlawfully exported cultural objects

129. The domestic case-law made it clear that, unlike the confiscation of proceeds of crime following conviction, the confiscation of smuggled goods and unlawfully exported cultural objects was mandatory in nature (*natura obbligatoria*). The Court of Cassation ruled that the measure had to be ordered "not only when the smuggling had been judicially ascertained, but also when the accused [had been] acquitted or declared not punishable or not criminally prosecutable for subjective reasons that d[id] not interrupt the relationship of the object with the illegal introduction into the territory of the foreign State" (see judgment no. 4215 of 8 January 1980). If the fact was ascertained (namely smuggling or exportation) the measure had to be imposed irrespective of whether there was a criminal conviction (see judgments nos. 611 of 18 February 1983, 49438 of 4 November 2009

and 11269 of 10 December 2019 and, more recently, no. 9101 of 2 March 2023).

130. The Court of Cassation (see judgments nos. 42458 of 10 June 2015 and 11269 of 10 December 2019) ruled that, although imposed in criminal proceedings, the measure had no primary punitive function. It was defined as an "administrative measure" which fulfilled a "recovery purpose" (*funzione recuperatoria*). In the Court of Cassation's view, the measure had either the function of reobtaining control over objects that, being *extra commercium*, were owned by the State and could not be appropriated by private individuals, or of preventing privately owned objects of cultural interest from being removed from the State's territory without being subject to State control. Accordingly, once the fact (unlawful exportation) had been ascertained, the measure had to be imposed irrespective of whether the individual who owned or was in possession the objects had committed the crime, subject to the assessment of whether he or she could be qualified as a "person not involved in the criminal offence", and irrespective of whether there had been a formal conviction for such a crime.

III. INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK

A. International instruments regulating judicial cooperation between the United States of America and Italy

1. Treaty between the United States of America and the Italian Republic on Mutual Assistance in Criminal Matters

131. This Treaty was signed in Rome on 9 November 1982. Italy ratified it on the basis of Law no. 224 of 26 May 1984, while the United States ratified it on 16 August 1984. It entered into force on 13 November 1985.

132. The Treaty includes an obligation to grant mutual assistance in criminal matters. The relevant provisions read as follows.

Article 1: Obligation to grant assistance

"1. The Contracting Parties, upon request and in accordance with the provisions of this Treaty, undertake to render mutual assistance to each other in criminal investigations and proceedings.

2. Such assistance shall include:

...;

(g) seizure and confiscation of property.

..."

Article 2: Execution of a request

"1. The request shall be executed in accordance with the provisions of this Treaty and the laws of the requested State. The procedures indicated in the request shall be followed unless prohibited by the laws of the requested State."

2. Agreement on mutual legal assistance between the European Union and the United States of America

133. This Agreement, concluded on 19 July 2003, is a framework treaty which complements bilateral cooperation treaties concluded by the United States and EU Member States.

134. Article 18 states that the Contracting Parties will assist each other in the "seizure, immobilisation and confiscation of the fruits and proceeds of crime".

3. United Nations Convention against Transnational Organized Crime

135. The United Nations Convention against Transnational Crime was adopted by General Assembly Resolution 55/25 of 15 November 2000 and entered into force on 29 September 2003. It was ratified by the United States and Italy on 3 November 2005 and 2 August 2006 respectively.

136. Article 13 establishes obligations concerning the international cooperation between Member States for the purposes of confiscation of proceeds of crime derived from offences covered by the Convention.

B. International law concerning the responsibility of States for internationally wrongful acts

1. International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts

137. The Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA"), adopted by the International Law Commission (ILC) in 2001, formulate general conditions under international law for the State to be considered responsible for wrongful actions and omissions, and the legal consequences which flow therefrom.

138. In paragraph 13 of the Commentary to Article 14 ("Extension in time of the breach of an international obligation",) the ILC drew a distinction between internationally wrongfully acts or offences and preparatory actions which could precede and which were not to be confused with the act or offence itself. In particular, the ILC observed as follows:

"... the [International] Court [of Justice] distinguished between the actual commission of a wrongful act and conduct of a preparatory character. Preparatory conduct does not itself amount to a breach if it does not 'predetermine the final decision to be taken'. Whether that is so in any given case will depend on the facts and on the content of the primary obligation. There will be questions of judgement and degree, which it is not possible to determine in advance by the use of any particular formula."

139. Article 47 § 1 of the ARSIWA reads as follows:

Article 47: Plurality of responsible States

"1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act."

2. Case-law of the International Court of Justice

140. In its judgment in *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (25 September 1997, § 79) the International Court of Justice (ICJ) held as follows:

"79. ... A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which 'does not qualify as a wrongful act.'"

C. International law of the sea

1. Customary international law

141. It is widely recognised that the principle of the freedom of the high seas is clearly established under customary international law. In its judgment in the *"Lotus"* case of 7 September 1927, the Permanent Court of International Justice (PCIJ) recognised that a key aspect of such principle is that freedom of navigation is exercised under the exclusive jurisdiction of the flag State. In particular, the PCIJ held as follows:

"It is certainly true that – apart from certain special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them... A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory ..."

2. Geneva Convention on the High Seas

142. The Convention on the High Seas was concluded in Geneva on 29 April 1958 and entered into force on 30 September 1962. Italy deposited its instrument of accession on 17 December 1964.

143. Article 1, which provided a definition of "high seas", reads as follows:

"The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State."

144. Article 2, which codified the customary principle of the freedom of the high seas, reads as follows:

> "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
>
> (1) Freedom of navigation;
>
> ...
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

3. Geneva Convention on the Territorial Sea and the Contiguous Zone

145. The Convention on the Territorial Sea and the Contiguous Zone was also concluded in Geneva on 29 April 1958 and entered into force on 10 September 1964. Italy deposited its instrument of accession on 17 December 1964.

146. Article 1 reads as follows:

> "1. The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.
>
> 2. This sovereignty is exercised subject to the provisions of these articles and to other rules of international law."

4. United Nations Convention on the Law of the Sea

147. The Convention on the High Seas (see paragraph 142 above) and the Convention on the Territorial Sea and the Contiguous Zone (see paragraph 145 above) were replaced, for the States that had ratified it, by the United Nations Convention on the Law of the Sea ("UNCLOS"). It was concluded in Montego Bay on 10 December 1982 and entered into force on 16 November 1994. Italy ratified it on 13 January 1995 on the basis of Law no. 689 of 2 December 1992.

148. The relevant provisions read as follows:

Article 1: Use of terms and scope

> "1. For the purposes of this Convention:
>
> (1) 'Area' means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction;
>
> ..."

Article 149: Archaeological and historical objects

> "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being

paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."

Article 303: Archaeological and historical objects found at sea

"1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."

D. Cultural heritage law

1. International law

149. Several treaties regulate issues concerning the international protection of cultural heritage. The following paragraphs include a non-exhaustive description of those treaties. In respect of each treaty, there is an indication of the date of the entry into force, and of whether it is binding on Italy and/or the United States.

(a) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

150. The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("the 1970 UNESCO Convention") was signed in Paris on 14 November 1970 and entered into force on 24 April 1972.

151. Italy ratified it on 2 October 1978 on the basis of Law no. 873 of 30 October 1975.

152. The United States ratified it on 2 September 1983.

153. Article 21 stated that the Convention would enter into force in respect of each State three months after its instrument of ratification or acceptance had been deposited. When depositing its ratification, the United States made a declaration excluding the retroactive application of the Convention and clarifying that the return proceedings provided for by Article 13 would be applied only in respect of cultural property "removed from the country of origin after the entry into force of this Convention for the States concerned".

154. The relevant provisions of the 1970 UNESCO Convention read as follows:

Article 1

"1. The States Parties to this Convention recognise that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting there from.

..."

Article 3

"The import, export or transfer of ownership of cultural property effected contrary to the provisions adopted under this Convention by the States Parties thereto, shall be illicit."

Article 4

"The 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;

..."

Article 13

"The States Parties to this Convention also undertake, consistent with the laws of each State:

...

d. To recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported."

155. UNESCO's Operational Guidelines for the Implementation of the 1970 Convention clarified the notion of "link between heritage and the State" under Article 4. The relevant passages read as follows:

"18. Article 4 (a) to (e) sets out categories of cultural property that can form part of the cultural heritage of a State, either owned by the State itself or a private individual. States Parties to the Convention are required to recognize a link between those categories and the relevant State where the object concerned has been created by an individual or by the 'collective genius' of nationals, foreign nationals or stateless persons resident within its territory; found within its national territory ..."

156. The 2014 Report on the Evaluation of UNESCO's Standard-setting Work of the Culture Sector clarified, *inter alia*, Member States' practice with

regard to the establishment of ownership of undiscovered cultural heritage. The relevant passages read as follows (footnotes omitted):

> "74. [Under] Art. 13 (d) of the Convention ... State Parties are encouraged to establish State ownership for whatever is deemed appropriate by the national authorities, and for cultural property not yet excavated, or illicitly excavated from the national territory. This provision may help in requesting return of these objects domestically or even abroad. For objects legally excavated, national legislation may either maintain the State's ownership or permit private ownership.
>
> 75. The results of the evaluation survey showed that around 83% of State Parties responding to the survey had established state ownership of undiscovered cultural heritage. In Turkey, for example, the law provides 'that movable cultural property that is known to exist or will be discovered on an immovable property owned by a real and legal person subject to civil law' shall be state property. Owners or occupants of the ground or waterway where the cultural property is discovered must notify a local museum or authority, which must then protect and secure the property and inform the Ministry of Culture and Tourism. In Egypt accidental finds of movable antiquity or fragments of immovable antiquity must be reported and become state property with compensation paid to the finder, and in China movable cultural relics remaining underground, in inland waters or territorial seas within the boundary of China are owned by the state. The state also owns cultural relics unearthed in China.
>
> 76. In a number of countries, on the other hand, undiscovered cultural property can also be private property. This is the case in Peru, for instance, where such private property is however subject to certain limitations contained in the relevant legislation. In Mali movable and immovable objects discovered during archaeological excavations on public or private state land are state property. If the movable archaeological material is discovered on another (privately held) land, ownership will be shared with the private owner, while the State has the right of pre-emption over cultural property.
>
> ..."

(b) Convention on Stolen or Illegally Exported Cultural Objects

157. On the outcome of preparatory works started in 1986[5], the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was concluded in Rome on 24 June 1995 ("the 1995 UNIDROIT Convention"), and entered into force on 1 July 1998. It was drafted with the purpose of achieving further effectiveness in the international fight against the illicit trafficking of cultural objects, and supplements the 1970 UNESCO Convention in terms of private law issues not directly dealt with by the latter.

158. It was ratified by Italy on 11 October 1999 on the basis of Law no. 213 of 7 June 1999. Article 12 stated that it would enter into force in respect of Italy after six months, while Article 10 states it has no retrospective effect and therefore does not apply to objects stolen or exported before its entry into force.

159. It is not applicable to the relationship between Italy and the United States as the latter did not sign nor ratify it.

---

[5] See https://www.unidroit.org/instruments/cultural-property/1995-convention/preparatory-work/.

160. Its relevant provisions read as follows:

Article 1

"This Convention applies to claims of an international character for:

...

(b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage (hereinafter 'illegally exported cultural objects')"

Article 2

"For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention."

Article 5

"(1) A Contracting State may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State.

...

(3) The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if ... [it] establishes that the object is of significant cultural importance for the requesting State.

...

(5) Any request for return shall be brought within a period of three years from the time when the requesting State knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the date of the export or from the date on which the object should have been returned under a permit referred to in paragraph 2 of this article."

Article 6

"1. The possessor of a cultural object who acquired the object after it was illegally exported shall be entitled, at the time of its return, to payment by the requesting State of fair and reasonable compensation, provided that the possessor neither knew nor ought reasonably to have known at the time of acquisition that the object had been illegally exported.

2. In determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State.

..."

Article 9

"1. Nothing in this Convention shall prevent a Contracting State from applying any rules more favourable to the restitution or the return of stolen or illegally exported cultural objects than provided for by this Convention.

...”

161. The Explanatory Report states that the absence of statutes of limitation or time-limits for recovering and confiscating unlawfully exported pieces of art is a distinctive feature of countries with a high risk of suffering thefts or unlawful exportation:

> “The countries most at risk from theft or the illegal export of their cultural heritage have defended themselves by taking drastic legal steps such as decreeing total export bans, granting ‘public property’ status to certain cultural objects (implying, for example, no limitation period, expropriation in the event of illegal export, etc.) ...”

(c) Convention on the Protection of Underwater Cultural Heritage

162. The UNESCO Convention on the Protection of Underwater Cultural Heritage (“the 2001 UNESCO Convention”) was adopted in Paris on 2 November 2001 and entered into force on 2 January 2009.

163. It was ratified by Italy on 8 January 2010 on the basis of Law no. 157 of 10 November 2009.

164. It has not been signed nor ratified by the United States.

165. The relevant provisions are as follows:

Article 1: Definitions

> “For the purposes of this Convention:
>
> 1. (a) ’Underwater cultural heritage’ means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:
>
> (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
>
> (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
>
> ...
>
> 5. ’Area’ means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
>
> ...
>
> 7. ’Activities incidentally affecting underwater cultural heritage’ means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.
>
> ...”

Article 2: Objectives and general principles

> “1. ...
>
> 6. Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.
>
> 7. Underwater cultural heritage shall not be commercially exploited.

...

8. Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying ... any State's rights with respect to its State vessels and aircraft.

...

11. No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction."

Article 3: Relationship between this Convention and the United Nations Convention on the Law of the Sea

"Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea."

166. The 2001 UNESCO Convention did not regulate the acquisition of ownership over cultural objects located underwater. However, it excluded the applicability of the law of salvage and law of finds:

Article 4: Relationship to law of salvage and law of finds

"Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

is authorized by the competent authorities, and

is in full conformity with this Convention, and

ensures that any recovery of the underwater cultural heritage achieves its maximum protection."

167. The Convention regulated the protection of underwater cultural heritage in the different sea areas, in accordance with the degree of sovereign rights enjoyed under international law by States in those areas. In particular, under Article 7, coastal States have an exclusive sovereign right to regulate and authorise activities directed at underwater cultural heritage in their territorial sea, while under Articles 9 to 11 they have a responsibility to protect underwater cultural heritage in the exclusive economic zone, on the continental shelf and in the "Area" (namely the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction; see Article 1 of UNCLOS, cited in paragraph 148 above), and must require their national and vessel flying their flag that discover underwater cultural heritage to report such discoveries.

168. Articles 14 to 17 of the 2001 UNESCO Convention further established several obligations aimed at preventing nationals and vessels of States Parties from engaging in activities incompatible with the protection of underwater cultural heritage. Article 18, in particular, reads as follows:

Article 18: Seizure and disposition of underwater cultural heritage

"1. Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.

...

4. A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for reassembly of a dispersed collection; the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned."

169. Rule 2 of the Annex ("Rules concerning activities directed at underwater cultural heritage") reads as follows:

"The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods."

2. Council of Europe instruments

(a) Convention on the Protection of the Archaeological Heritage

170. The European Convention on the Protection of the Archaeological Heritage was concluded in London on 6 May 1969 and entered into force on 20 November 1970. As clarified in its Explanatory Report, it has no retrospective application.

171. It was ratified by Italy on 16 September 1974 on the basis of Law no. 202 of 12 April 1973 and entered into force in respect of Italy on 17 December 1974.

172. Article 1 defines "archaeological heritage" as all remains, objects and traces of human existence, epochs and civilisations for which "excavations or discoveries are the main source". The Explanatory Report further clarifies the territorial scope of application of the Convention:

"... the Convention applies to the entire territory of each of the Contracting States, as delimited by general international law ... Further, the definition given does not in any way prejudge the effects of the Convention in the matter of the territorial competence of one or other of the Contracting States which may in its case be recognised at some future time in accordance with the rules of international law concerning the seabed."

173. Under Article 8, the measures provided for in the Convention could not restrict lawful trade in or ownership of cultural objects or affect the legal rules governing the transfer of such objects.

(b) Convention on the Protection of the Archaeological Heritage (Revised)

174. The revised version of the European Convention on the Protection of the Archaeological Heritage was adopted in La Valletta on 16 January 1992 and entered into force on 25 May 1995.

175. It was ratified by Italy on 30 June 2015 on the basis on Law no. 57 of 29 April 2015 and entered into force in respect of Italy on 31 December 2015.

176. The Explanatory Report provides that the term archaeological heritage defined in Article 1 includes objects that are located underwater within the jurisdiction of the State. The relevant part reads as follows:

> "The list of elements set out in paragraph 3 states that these are part of the archaeological heritage, whether they are situated on land or under water. This must be qualified by the third of the criteria appearing in paragraph 2 that the element from past human existence must be located within the area of jurisdiction of a State. In itself this is merely stating what is inherent in any international convention. Here, it emphasises that the actual area of State jurisdiction depends on the individual States and, in this respect, there are many possibilities. Territorially, the area can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural protection zone. Among the members of the Council of Europe some States restrict their jurisdiction over shipwrecks, for example, to the territorial sea, while others extend it to their continental shelf. The revised convention recognises these differences without indicating a preference for one or the other."

(c) Convention on Offences relating to Cultural Property

177. The Council of Europe Convention on Offences relating to Cultural Property was adopted in Nicosia on 3 May 2017 and entered into force on 1 April 2022.

178. It was ratified by Italy on 1 April 2022 on the basis of Law no. 6 of 21 January 2022 and entered into force in its respect on 1 July 2022.

179. Article 12 lays down principles concerning Member States' jurisdiction over offences relating to cultural property:

> "1. Each Party shall take the necessary measures to establish jurisdiction over the criminal offences referred to in this Convention, when the offence is committed:
>
> (a) in its territory;
>
> (b) on board a ship flying the flag of that Party;
>
> (c) on board an aircraft registered under the laws of that Party; or
>
> (d) by one of its nationals.
>
> 2. Each Party shall take the necessary measures to establish jurisdiction over any criminal offence referred to in this Convention, when the alleged offender is present in its territory and cannot be extradited to another State, solely on the basis of his or her nationality.
>
> ..."

180. The relevant parts of the Explanatory Report to the Convention read as follows:

> "73. This article lays down various requirements whereby Parties must establish jurisdiction over the offences referred to in this Convention.
>
> ...
>
> 75. Paragraph 1 a) is based on the territoriality principle. Each Party is required to punish the offences referred to in the Convention when they are committed on its territory.
>
> 76. Paragraph 1 b) and c) are based on a variant of the territoriality principle. These subparagraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently under the jurisdiction of the State in which they are registered. This type of jurisdiction is useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1, letter a. would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory and on the high seas of the flag or registry Party, it might be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft, which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the Registry State to also have jurisdiction."

181. Article 14 § 3 of the Convention provides as follows:

> "3. Each Party shall take the necessary legislative and other measures, in accordance with domestic law, to permit seizure and confiscation of the:
>
> (a) instrumentalities used to commit criminal offences referred to in this Convention;
>
> (b) proceeds derived from such offences, or property whose value corresponds to such proceeds."

3. European Union instruments

(a) Directive on the return of cultural objects unlawfully removed from the territory of a Member State

182. Directive (EU) 2014/60 of the European Parliament and 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) ("Directive 2014/60/EU") applies, in accordance with its Article 1, to the return of cultural objects classified or defined by a Member State as being among national treasures which have been unlawfully removed from the territory of that Member State.

183. The relevant provisions read as follows:

Article 1

"This Directive applies to the return of cultural objects classified or defined by a Member State as being among national treasures, as referred to in point (1) of Article 2, which have been unlawfully removed from the territory of that Member State.

Article 2

For the purposes of this Directive, the following definitions apply:

(1) 'cultural object' means an object which is classified or defined by a Member State, before or after its unlawful removal from the territory of that Member State, as being among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 TFEU;

(2) 'unlawfully removed from the territory of a Member State' means:

(a) removed from the territory of a Member State in breach of its rules on the protection of national treasures or in breach of Regulation (EC) No 116/2009;

...

Article 3

Cultural objects which have been unlawfully removed from the territory of a Member State shall be returned in accordance with the procedure and in the circumstances provided for in this Directive.

...

Article 8

1. Member States shall provide in their legislation that return proceedings under this Directive may not be brought more than three years after the competent central authority of the requesting Member State became aware of the location of the cultural object and of the identity of its possessor or holder.

2. Such proceedings may, in any event, not be brought more than 30 years after the object was unlawfully removed from the territory of the requesting Member State.

3. However, in the case of objects forming part of public collections, defined in point (8) of Article 2, and objects belonging to inventories of ecclesiastical or other religious institutions in the Member States where they are subject to special protection arrangements under national law, return proceedings shall be subject to a time-limit of 75 years, except in Member States where proceedings are not subject to a time-limit or in the case of bilateral agreements between Member States providing for a period exceeding 75 years.

...

Article 9

Save as otherwise provided in Articles 8 and 14, the competent court shall order the return of the cultural object in question where it is found to be a cultural object within the meaning of point (1) of Article 2 and to have been removed unlawfully from national territory.

Article 10

Where return of the object is ordered, the competent court in the requested Member State shall award the possessor fair compensation according to the circumstances of the case, provided that the possessor demonstrates that he exercised due care and attention in acquiring the object.

In determining whether the possessor exercised due care and attention, consideration shall be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other step which a reasonable person would have taken in the circumstances.

...

The requesting Member State shall pay that compensation upon return of the object.

Article 12

Payment of the fair compensation and of the expenses referred to in Articles 10 and 11 respectively shall be without prejudice to the requesting Member State's right to take action with a view to recovering those amounts from the persons responsible for the unlawful removal of the cultural object from its territory.

Article 13

Ownership of the cultural object after return shall be governed by the law of the requesting Member State.

Article 14

This Directive shall apply only to cultural objects unlawfully removed from the territory of a Member State on or after 1 January 1993."

(b) Regulation on the export of cultural goods

184. The relevant provisions of Council Regulation (EC) no. 116/2009 of 18 December 2008 on the export of cultural goods ("Regulation 116/2009/EC") read as follows:

Article 2: Export licence

"1. The export of cultural goods outside the customs territory of the Community shall be subject to the presentation of an export licence.

...

Article 4: Presentation of licence

The export licence shall be presented, in support of the export declaration, when the customs export formalities are carried out, at the customs office which is competent to accept that declaration.

Article 9: Penalties

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.

(c) Regulation on the introduction and the import of cultural goods

185. The relevant provision of Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019 on the introduction and the import of cultural goods ("Regulation 2019/880/EU") read as follows:

Article 13: Introduction and import of cultural goods

"1 The introduction of cultural goods referred to in Part A of the Annex which were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country shall be prohibited.

..."

186. Part A of the Annex to Regulation 2019/880/EU mentions, in letter (c), "products of archaeological excavations (including regular and clandestine) or of archaeological discoveries on land or underwater", and, in letter (g)(ii), "original works of statuary art and sculpture in any material".

THE LAW

I. PRELIMINARY ISSUE: THE NEW TRUSTEES' REQUEST

187. On 22 September 2022 the applicants' representative informed the Court that four of the trustees who had originally lodged the present application (the sixth, seventh, ninth and thirteenth applicants) were no longer on the first applicant's board of trustees. The letter further indicated that four newly appointed members of the board (Ms K. Singh, Ms M. Schmidt Campbell, Ms A.M. Sweeney and Ms J. Miller Studenmund) were willing to take over from those applicants in the present case.

188. The Government did not wish to comment. They did however raise an objection that the trustees lacked victim status.

189. The Court considers that the issue of whether the newly appointed trustees can take over from the original applicants is dependent on whether the latter can claim to be victims, within the meaning of Article 34 of the Convention, of the violation complained of. It will therefore deal with this issue after addressing the Government's preliminary objection (see paragraphs 203-208 below).

II. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL NO. 1

190. The applicants complained under Article 1 of Protocol No. 1 to the Convention of an allegedly unjustified interference with their right to the peaceful enjoyment of their possessions. They argued that the confiscation measure had been unlawful, within the meaning of this provision, on account of the lack of foreseeability of the legal basis; that it had not pursued any legitimate aim as, in their view, the Statue was not part of Italy's cultural heritage; and that it had placed an excessive burden on them. Article 1 of Protocol No. 1 reads as follows:

> "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."

A. Admissibility

1. The Government's objections concerning the admissibility of the application with specific regard to the position of the trustees

(a) The Government's submissions

191. The Government objected that the trustees could not claim to be victims of the alleged violation complained of as, on the one hand, they were not "owners" of the Statue and were asserting a right attributable to the Trust, and, on the other hand, they did not even "enjoy" the property involved, as they merely administered the Trust's property for the benefit of the museum's users.

192. As regards the first argument, they observed that (i) the purchase contract had been concluded in the name and on behalf of the Trust, (ii) the Trust had been the "addressee" of the contested measure and (iii) the Trust, through its legal representative, had participated in the domestic proceedings.

193. As regards the second argument, the Government pointed out that the trustees provided a service to the Trust, in so far as they administered its assets for the ultimate benefit of the museum's users. Some of the trustees, according to the trust instrument, received a fee, which was not a form of enjoyment of the assets in question, but a remuneration for that service.

194. In the Government's view, to accord victim status to both the Trust and the trustees would be duplicative since the right of ownership which they claimed had been infringed was that of the Trust. They submitted that the applicants did recognise this fact, stating in their application that the latter "[had] been brought in the name of the Trust and individual trustees out of an abundance of caution".

195. The Government further relied on the Court's case-law, according to which the bringing of an action by a legal entity (through its representative) rendered the actions of its administrators or shareholders inadmissible if they concerned the same right. They also submitted that individuals could not complain of a violation of their rights in proceedings to which they had not been parties, even if they had been shareholders or administrators of a company that had been party to the proceedings. In this connection, the Government observed that the party in the domestic proceedings had been the Trust. Accordingly, as regards the trustees, the application was inadmissible for non-exhaustion of domestic remedies.

(b) The applicants' submissions

196. The applicants submitted five arguments on the basis of which, in their view, their victim status should be recognised by the Court.

197. First, they argued that the trustees' rights had been "directly affected" by the confiscation order because, under the trust instrument, they were the sole holders of the Trust's assets, which they held in accordance with the charitable purposes of the Trust.

198. Secondly, the applicants submitted that there was a "legal relationship" whereby the Trust's property was placed under the legal ownership and control of the trustees as, under Californian law, trustees "[could], in the name of the institution, sue and defend in relation to the trust property".

199. Thirdly, they argued, in the alternative, that the trustees could be recognised as indirect victims of the alleged violation as the legal relationship created by the Trust rendered it and the trustees so closely identified to each other that it would serve no purpose to distinguish between the two.

200. Fourthly, the trustees considered that they had, at least in substance, been parties to the domestic proceedings, in accordance with Californian law and in compliance with the order of the Los Angeles Superior Court, which had authorised the trustees "to use the name of the 'J. Paul Getty Trust' to refer to the [Trust] as the overall operating entity in connection with those Trust activities which [were] operated separately from the J. Paul Getty Museum". The applicants submitted that Mr S.C., who had represented the Trust in the domestic proceedings, had kept the trustees fully apprised of those proceedings. Accordingly, if the Court were to consider that the trustees could claim to be victims of the alleged violations, they argued that they had correctly exhausted domestic remedies as they had *de facto* participated in the domestic proceedings through the Trust's legal representative, and any other proceedings instituted by them would have clearly been ineffective as they would have raised the same arguments as those raised by the Trust.

201. As regards the applicants' fifth argument, they observed that both Italian and Californian law recognised the *locus standi* of a trustee to enforce an infringement of rights in respect of trust property.

202. Lastly, the applicants asked the Court to recognise that the present case presented some "exceptional circumstances" justifying the conclusion that the trustees were victims of the alleged violations and emphasised that, given that the application had been lodged in the name of both the Trust and the trustees, the Court's finding on the present issue should not be determinative as to the admissibility of the application as a whole.

(c) The Court's assessment

203. The Court reiterates that in order to be able to lodge an application in accordance with Article 34, an individual must be able to show that he was "directly affected" by the measure complained of (see, among other authorities, *Roman Zakharov v. Russia* [GC], no. 47143/06, § 164, ECHR 2015, and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 96, ECHR 2014, with further references). This means that there must be a sufficiently direct link between the applicants and the harm which they consider they have sustained on account of the alleged violation (see *Brudnicka and Others v. Poland*, no. 54723/00, § 26, ECHR 2005-II, and *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35, ECHR 2004-III).

204. In the present case, the question to be assessed is whether the trustees had a separate legal interest, different from that of the Trust, which was allegedly affected by the contested measure (see, *mutatis mutandis*, *Albert and Others v. Hungary* [GC], no. 5294/14, §§ 120-45, 7 July 2020, and contrast *Edwards v. Malta*, no. 17647/04, § 54, 24 October 2006).

205. The Court notes that the parties did not dispute and that all the material in its possession indicates that it is the Trust, as a separate legal entity, which bought and is in possession of the Statue (see paragraphs 37-38 above), and which was the addressee of the contested domestic measure (see paragraphs 74-75 above). Furthermore, all the decisions of the Italian courts during the domestic proceedings concerned only the Trust.

206. Moreover, the trustees acknowledged that: (i) they administered the Trust's property in the interests of the museum's users (see paragraph 197 above); (ii) under the applicable domestic law, they were allowed to sue and defend in judicial proceedings "in the name of the institution [the Trust]" and therefore not in their own name (see paragraph 198 above); (iii) they identified so closely to the Trust that it would be useless to distinguish their legal positions (see paragraph 199 above); and (iv) they had participated, *in concreto*, in the domestic proceedings, through the Trust's representatives, given that their interests were *de facto* identical (see paragraph 200 above). The Court therefore considers that the trustees' observations demonstrate that they could have lodged the present application in the Trust's interests, but not in their name and interests. Since the Trust lodged the application independently, however, those arguments are devoid of any relevance, as also recognised by the applicants (see paragraph 202 above).

207. The Court thus infers that the confiscation order only affected the interests of the first applicant, namely the Trust. Accordingly, it cannot regard the trustees as "victims" within the meaning of Article 34 of the Convention.

208. Having regard to the foregoing, the Court upholds the Government's preliminary objection and concludes that the application, in so far as it has been lodged by the trustees, is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4. Accordingly, in its further assessment, the Court will refer to the first applicant (the Trust) as "the applicant".

209. In the light of the above, the Court finds that there is no need to rule on whether the newly appointed members of the Trust's board of trustees should be granted the possibility of taking over from the relevant applicants (see paragraphs 187-189 above).

2. The Government's objection to the applicant's victim status

(a) The Government's submissions

210. The Government submitted that the applicant could not claim to be a victim of the alleged violation of Article 1 of Protocol No. 1.

211. In their view, the Court's case-law only recognised the status of potential victims in exceptional circumstances. They recognised that the present case bore similarities to a case in which, although the contested measure had not yet been enforced, the Court had allowed an application on the grounds that implementation of the measure would cause irreparable damage to the applicant. However, the present case had at least two different characteristics. Firstly, implementation of the measure was the responsibility of a State other than the one which issued the measure, and which was not party to the Convention; secondly, such implementation was not automatic but presupposed an autonomous and evaluative decision on the part of the authorities of a third State, which was not obliged to enforce the Italian authorities' request.

212. According to the Government, those observations were in line with the basic principles on State responsibility for internationally wrongful acts, in the light of which the contested measure was not attributable to the Italian authorities, nor did it fall within Italy's jurisdiction.

213. As regards attribution, the Government relied on the distinction drawn from the ARSIWA's *travaux préparatoires* (see paragraph 137 above) and the ICJ's judgment in the *Gabčikovo-Nagymaros Project* case (see paragraph 140 above) between preparatory actions which might precede a wrongful act or offence and an internationally wrongful act itself. According to Government, the confiscation order did not amount *per se* to a breach of the Convention as it had not been enforced and, even assuming that it would be enforced, it would be attributable to the US authorities. The Government

further submitted that substantial violations of the Convention, unlike procedural ones, would be attributable exclusively to the State which could materially interfere with the relevant rights. In their view, the Court's case-law led to the conclusion that the fact that decisions affecting human rights were taken within the territorial scope of applicability of the Convention did not justify the applicability of the latter when the effects of such decisions were produced outside that scope.

214. They further observed that the Statue was on American territory and that the Italian authorities had no jurisdiction over its physical removal.

215. The Government further submitted that ownership of an asset did not automatically determine the existence of the victim status. What was required was the likelihood of a violation of the Convention. However, according to the Government, it was unlikely that the US authorities would enforce the Italian confiscation order. The Government argued that the burden of proof with regard to the likelihood of enforcement of the measure rested with the applicant, but that it had failed to discharge it.

216. The Government pointed out that the domestic judicial authorities had not recognised the applicant's victim status.

217. With regard to the damage allegedly already suffered by the applicant, the Government observed that, in the absence of a confiscation measure or any other violation of the Convention, the existence of negative repercussions on the applicant's finances were irrelevant.

(b) The applicants' submissions

218. The applicant submitted that it had been significantly affected by the measure even before its enforcement, that its victim status had been recognised by the domestic judicial authorities and that the enforcement proceedings were still pending.

219. As regards the effects of the measure, the applicants argued that, according to the Court's case-law, a confiscation order or similar measures constituted interference with an individual's right to the peaceful enjoyment of his or her possessions even before their enforcement. Moreover, the applicant submitted that the Court of Cassation had acknowledged that its ownership of the Statue had been overridden by the mere "adoption" rather than "enforcement" of the confiscation order.

220. In any event, the applicant argued that it could also be considered a potential victim on the basis of reasonable and convincing evidence of the likelihood that a violation would occur. In this regard, the Trust pointed out that the Italian authorities had (i) made repeated attempts to seize the Statue, (ii) informed the applicant that the confiscation order had been upheld by the highest domestic court and that "the Ministry [had] therefore ha[d] no choice but to execute that decision and claim the [Bronze] as its property" and (iii) admitted that they had already taken steps towards enforcement of the order in the United States.

221. The applicant also relied on the principle that recognition of legal standing in the domestic proceedings is a factor to be taken into account by the Court in assessing an applicant's victim status.

222. The applicant further submitted that the measure had already had serious consequences on its sphere. On the one hand, it had affected its reputation; on the other hand, due to the risk that the Statue could be seized, it was currently prevented from lending it to foreign museums or other institutions to make it available for display and study in accordance with the Trust's mission and its previous practice. In particular, in 2015 the Bronze had featured in the "Power and Pathos" exhibition hosted initially at the Getty Museum and then at the National Gallery of Art in Washington D.C. However, the Bronze could not be transported to Florence in Italy for the last leg of the exhibition because of the risk that it would be seized. Thirdly, the applicant argued that the Italian authorities' decision to "review all partnerships" with the Getty Museum had interrupted its long-standing relationship, including in areas in which the Trust and Italy had been collaborating for a long time.

223. Lastly, the applicant observed that the Government's speculation as to the possible refusal of the United States to enforce the confiscation order was irrelevant as the Italian authorities were currently attempting to enforce the measure. Moreover, according to the applicant, making the recognition of victim status dependent on the cooperation of a State which was not party to the Convention would deprive it of any form of redress under it. This would enable a respondent Government not to be held responsible for measures adopted in violation of the Convention, the enforcement of which required the cooperation of a third State.

(c) The Court's assessment

224. The Court notes that the Government's objections include arguments which concern different issues, namely (i) whether the applicant can claim to be a direct or potential victim of the alleged violation, and (ii) whether Italy is able to be held responsible under the Convention for the enforcement of the measure.

(i) Whether the applicant has been sufficiently affected by the contested measure

225. The Court reiterates at the outset that it interprets the concept of "victim" autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act, even though it should have regard to the fact that an applicant was a party to the domestic proceedings (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 52, ECHR 2012). The word "victim", in the context of Article 34 of the Convention, denotes the person directly or indirectly affected by the alleged violation (see *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 47, ECHR 2013

(extracts), and *Gorraiz Lizarraga and Others*, cited above, § 35) or who runs the risk of being directly affected by it (see *Monnat v. Switzerland*, no. 73604/01, § 31, ECHR 2006-X). However, for an applicant to be able to claim to be a victim in such a situation, he or she must produce reasonable and convincing evidence of the likelihood that a violation affecting him or her personally will occur; mere suspicion or conjecture is insufficient (see *Centre for Legal Resources on behalf of Valentin Câmpeanu*, cited above, § 101).

226. In the light of the above, the Court has clarified that is not possible to claim to be the "victim" of an act which is deprived, temporarily or permanently, of any legal effect (see *Monnat*, cited above, § 31, and the case-law cited therein, and *Sisojeva and Others v. Latvia* (striking out) [GC], no. 60654/00, § 92, ECHR 2007-I).

227. In this connection, the Court found that a measure transferring ownership of a property to the State, even though it had not yet been enforced in the sense of depriving the individual of possession of the asset, had nonetheless resulted in an interference with the right to property on account of the possibility of an eviction or other form of enforcement order, in the absence of any guarantee that the measure would not be enforced in the future (see *The Holy Monasteries v. Greece*, 9 December 1994, § 65, Series A no. 301-A). Similarly, the Court considered that a confiscation order, even though it had been appealed against and was not therefore definitive and was not yet enforceable, had amounted to a measure of control of the use of property (see *Raimondo v. Italy*, 22 February 1994, §§ 28-29, Series A no. 281-A), and that a measure leading to the future confiscation of unlawfully acquired assets had already amounted to a control of the use of property (see *Bokova v. Russia*, no. 27879/13, §§ 50-51, 16 April 2019).

228. In the light of the above, and in order to rule on the applicant's victim status, the Court deems it necessary to assess whether the Trust was sufficiently affected by the contested measure, even though it had not yet been enforced. This requires an assessment of whether, in the light of the specific circumstances of the case, the confiscation order at issue in the present case is not deprived of any legal effect.

229. As to the effects of the measure even before its enforcement, the Court notes that the applicant was able to demonstrate that the measure had impeded it from displaying the Statue during an exhibition in Italy due to the risk of it being seized (see paragraph 222 above).

230. As regards the potential consequences of enforcement of the measure in the United States, the Court observes that, in conformity with international agreements in force between that country and Italy, the Italian authorities lodged a letter of request aimed at obtaining recognition and enforcement of the confiscation order (see paragraphs 104-105 above). It is not persuaded by the Government's argument that enforcement is unlikely to happen as cooperation in the enforcement of similar measures is provided for by precise

international obligations which are binding on the US authorities. It was therefore for the Government to provide the Court with documentation, such as examples of case-law and practice, to show that, for whatever reason, their request would be dismissed and that enforcement was therefore unlikely to take place.

231. In the light of the above, the Court finds that the applicant was able to demonstrate that it had been affected by the contested measure even before its enforcement. Moreover, the Italian authorities are neither legally obliged nor willing to desist from enforcement of the measure and, by contrast, have taken steps to this effect. Therefore, the Court finds that the applicant can claim to be a victim, within the meaning of Article 34 of the Convention, of the alleged violation of Article 1 of Protocol No. 1.

(ii) Whether Italy is able to be held responsible under the Convention for the enforcement of the measure

232. As regards the second limb of the Government's objection, the Court reiterates that the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions attributable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention (see *Ukraine v. Russia (*re *Crimea)* (dec.) [GC], nos. 20958/14 and 38334/18, § 264, 16 December 2020, and *Ukraine and the Netherlands v. Russia* (dec.) [GC], nos. 8019/16, 43800/14 and 28525/20, § 564, 30 November 2022). The concept of "jurisdiction" for the purposes of Article 1 of the Convention must be considered to reflect the term's meaning in public international law (see *Ukraine v. Russia (re Crimea)*, cited above, § 344). From the standpoint of public international law, a State's jurisdictional competence is primarily territorial. It is presumed to be exercised normally throughout the territory of the State concerned. However, the Court has recognised that, as an exception to the principle of territoriality, acts of the States Parties performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention (see *H.F. and Others v. France* [GC], nos. 24384/19 and 44234/20, § 185, 14 September 2022, and *M.K. and Others v. Poland*, nos. 40503/17 and 2 others, § 128, 23 July 2020).

233. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts (see *Carter v. Russia*, no. 20914/07, § 124, 21 September 2021). In particular, the Court has held that where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the

territorial State (see *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 135, ECHR 2011, and *H.F. and Others v. France*, cited above, § 186).

234. The Court must therefore assess whether Italy is able to be held responsible under the Convention for the enforcement of the confiscation order at stake.

235. Turning to the circumstances of the present case, the Court notes that the confiscation order was adopted in Italy and that the Italian authorities lodged a request with the US authorities aimed at obtaining its recognition and enforcement in the US (see paragraph 104 above) pursuant to several international agreements binding Italy and the United States (see paragraphs 131-135 above). Therefore, in the event of enforcement of the measure, physical removal of the Statue would be carried out by the US authorities.

236. However, the Court is not persuaded by the Government's argument that the act in question would not be attributable to Italy and therefore would not be capable of engaging its responsibility under the Convention. In their view, the adoption by the Italian authorities of the confiscation order was a "preparatory" act, within the meaning of ARSIWA, while the wrongful act itself, namely enforcement of the order, would be exclusively attributable to the US and fall within its jurisdiction (see paragraph 212 above).

237. In general, under Article 1 of Protocol No. 1, the Court has held that member States may be held responsible under the Convention for measures taken in the context of international judicial cooperation requests (see *Shorazova v. Malta*, no. 51853/19, § 111, 3 March 2022).

238. Moreover, the Court has examined similar issues in extradition cases and observed that although an individual that has been deprived of his or her liberty in the context of an extradition procedure finds him or herself under the authority and control of the requested State, it cannot be overlooked that the deprivation of liberty has its sole origin in the measure taken by the requesting State pursuant to the relevant international agreements agreed on both by the requesting State and the requested State (see *Stephens v. Malta (no. 1)*, no. 11956/07, §§ 50-54, 21 April 2009; *Toniolo v. San Marino and Italy*, no. 44853/10, § 56, 26 June 2012; *Vasiliciuc v. the Republic of Moldova*, no. 15944/11, §§ 21-25, 2 May 2017; and *Gilanov v. the Republic of Moldova*, no. 44719/10, §§ 41-44, 13 September 2022). The Court has found that the requesting State is responsible for guaranteeing that the request to detain an individual pending an extradition procedure is compatible both with its national, substantive and procedural law (see *Stephens*, cited above, § 52) and with the Convention (see *Vasiliciuc*, § 24, and *Gilanov*, § 43, both cited above).

239. The principle that can be drawn from this case-law, as already clarified by the Court, is that an act initiated by a requesting country on the basis of its own domestic law and followed up by the requested country in

response to its treaty obligations can be attributed to the requesting country even if the act was executed by the requested country (see *Toniolo*, cited above, § 56).

240. In the light of the principles stated above, the Court considers that, by setting in motion a request for enforcement of the confiscation order, Italy was under an obligation to ensure that the order was compatible with the Convention (see paragraph 222 above). Therefore, the Court considers that the measure the applicant complained of under Article 1 of Protocol No. 1 is capable of engaging the responsibility of Italy for the purposes of Article 1 of the Convention.

(iii) Conclusions

241. In the light of the above findings (see paragraphs 231 and 240 above), the Government's objections to the applicant's victim status must be rejected.

3. The Government's objection concerning the existence of a proprietary interest protected by Article 1 of Protocol No. 1

(a) The Government's submissions

242. The Government objected that the applicant had not had any proprietary interest protected by Article 1 of Protocol No. 1, which they therefore submitted was not applicable to the circumstances of the present case.

243. They submitted that, under Article 826 of the Civil Code, the Statue was part of the inalienable patrimony of the State and had therefore never been owned by the applicant as it had been acquired *a non domino* (from a non-owner).

244. The Government also disputed the existence of any legitimate expectation on the part of the applicant: the domestic authorities' conduct had never amounted to tolerance or inaction in response to the *contra legem* situation created by the purchase of the Statue, and they had never treated the applicant as its *de facto* owner.

245. According to the Government, both Italian and Californian law, irrespective of which was applicable under the relevant rules of private international law, did not allow the acquisition of property from a non-legitimate owner if the purchaser was not acting in good faith.

246. They further disputed the applicant's submission that the Court of Cassation had recognised its ownership of the Statue. In their view, in stating that the Statue was not subject to the rule of adverse possession, the Court of Cassation had asserted that it was part of Italy's cultural heritage. Moreover, in the Government's view, the Court of Cassation had based its decision of the assumption that the Statue had been found in Italian territorial waters and was owned by the State.

247. The Government also disputed the applicant's submission that the measure could only be imposed with regard to privately owned assets, as the confiscation in question had had a recovery nature and pursued the aim of taking back a State's asset as it formed part of the cultural heritage.

248. By contrast, the applicants' assertion that the Bronze was a "Greek statue" that had been created in Greece and had only briefly transited through Italy was not supported by any evidence.

249. In addition, the Government disputed the applicant's reference to "multiple acknowledgments" by other States of the Trust's ownership of the Bronze. They argued that these acknowledgments did not give rise to any legitimate expectation as, on the one hand, they could not be binding on the Italian authorities and, on the other hand, the entities that had made these "acknowledgments" might have been unaware of the real ownership of the Bronze.

(b) The applicant's submissions

250. According to the applicant, the Bronze clearly constituted a "possession" within the meaning of Article 1 of Protocol No. 1.

251. The Trust submitted that it was undisputed that it had negotiated and acquired the Bronze in July 1977 for USD 3,950,000.

252. The applicant stressed that the purchase agreement had never been declared null and void and that no action had been taken by the Italian authorities in this regard, despite them knowing for almost fifty years that the Bronze had been purchased by the Trust and taken to the United States.

253. In its view, moreover, under Californian law, it would have acquired ownership of the Statue after three years of possession.

254. In addition, the applicant observed that its proprietary interest had been recognised by the domestic courts in the domestic proceedings. In particular, the Court of Cassation had not challenged the validity of its ownership, which had been a logical prerequisite for ordering confiscation.

255. The applicant further pointed out that the Government's assertion that the Statue had always belonged to "the inalienable patrimony of the State" lacked any evidentiary basis. That assertion was dependent on the false premise that the Bronze had been found on Italian territory, a fact that the applicant had always disputed. In its view, the Bronze was a Greek statute, created in Greece, which had only transited through Italy for a brief period and had never been in the possession of the Italian authorities.

256. The applicant also based the existence of its proprietary interest on the fact that its ownership of the Statue had arguably been recognised on multiple occasions by public or publicly funded institutions (museums and research institutes) of other member States of the Council of Europe.

257. The applicants further submitted that, irrespective of the existence of legal title, long-term possession of the Statue (more than forty years) was

sufficient to establish a property right or at least a "legitimate expectation" of being able to continue to enjoy that possession.

258. Lastly, the applicants argued that the Italian law regarding what constituted the "inalienable patrimony of the State" did not expressly preclude private individuals from having property rights over cultural objects.

(c) The Court's assessment

259. The Court notes that the parties disagreed as to whether the applicant had a proprietary interest eligible for protection under Article 1 of Protocol No. 1. Accordingly, the Court must determine whether the applicant's legal position as a result of purchasing the Statue was such as to attract the application of that provision and, therefore, whether the circumstances of the case, considered as a whole, conferred on the Trust title to a substantive interest protected by Article 1 of Protocol No. 1 (see *Beyeler*, *v. Italy* [GC], no. 33202/96, §§ 99-100, ECHR 2000-I).

260. The concept of "possessions" in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision (see *Iatridis v. Greece* [GC], no. 31107/96, § 54, ECHR 1999-II, and *Molla Sali v. Greece* [GC], no. 20452/14, § 124, 19 December 2018). Therefore, the fact that the domestic laws of a State do not recognise a particular interest as a "right" or even a "property right" does not necessarily prevent the interest in question, in some circumstances, from being regarded as a "possession" (see *Depalle v. France* [GC], no. 34044/02, § 68, ECHR 2010, and *Molla Sali*, cited above, § 126).

261. Turning to the circumstances of the present case, the Court notes that the parties did not dispute that the Trust purchased the Bronze in July 1977 for USD 3,950,000 (see paragraph 37 above). The Court must however consider that the Government contested the validity, under both Italian and US law, of that title, on account of a violation of Italian heritage law, given that cultural objects belonging to the State are inalienable and imprescriptible (see paragraphs 109, 115 and 121 above).

262. In this connection, the Court reiterates that, generally speaking, the inalienability and imprescriptibility of public land have not prevented it from concluding that "possessions" within the meaning of Article 1 of Protocol No. 1 were at stake, particularly in cases in which the applicants' property titles were not contestable under domestic law because they could legitimately consider themselves to be "legally certain" of the validity of those titles before they had been annulled in favour of the State (see, *mutatis mutandis*, *Bellizzi v. Malta*, no. 46575/09, § 70, 21 June 2011, with further references). In addition, the Court considers that the principle of legal certainty and the protection of legitimate expectations would have required

the Government to challenge the validity of such a title before the competent domestic courts (see, *mutatis mutandis*, *Bölükbaş and Others v. Turkey*, no. 29799/02, §§ 31-32, 9 February 2010; *Valle Pierimpiè Società Agricola S.P.A. v. Italy*, no. 46154/11, § 48, 23 September 2014; and *Elif Kızıl v. Turkey*, no. 4601/06, §67, 24 March 2020), whichever they would have been in accordance with the applicable rules of private international law.

263. In particular, the Court considers that in the present case several national laws might be applicable in the abstract to the determination of the applicant's ownership over the Statue. In particular, the applicant, a US legal entity (see paragraph 3 above), negotiated the purchase of the Statue in Germany with a company based in Liechtenstein (see paragraph 23 above), and purchased it through a contract concluded in the United Kingdom (see paragraph 37 above).

264. Moreover, the Court notes that the existence of some proprietary interest of the applicant over the Statue was established under Italian law, as demonstrated by the fact that the Italian authorities invited the applicant, in its capacity as current possessor of the item (*attual[e] detentor[e] del bene*), to participate in the domestic proceedings in which the confiscation order was adopted (see paragraph 74 above).

265. The Court further notes that the applicant has been in possession of the Statue without any interruption, except for those resulting from lawful loan agreements, since 1977. It therefore considers that, irrespective of the above observations concerning whether lawful ownership existed, the length of time that passed had in any event the effect of conferring on the applicant a proprietary interest in peaceful enjoyment of the Statue that was sufficiently established and weighty to amount to a "possession" (see, *mutatis mutandis*, *Beyeler*, § 104; *Edwards*, § 55; *Depalle*, § 68, all cited above; see also *Hamer v. Belgium*, no. 21861/03, § 76, ECHR 2007-V (extracts), and *Mkhchyan v. Russia*, no. 54700/12, § 63, 7 February 2017).

266. In the light of the above, the Court will base its analysis on the assumption that in the circumstances of the present case, considered as a whole, the applicant had a proprietary interest in peaceful enjoyment of the Statue that was sufficiently established and weighty to amount to a "possession" within the meaning of the rule expressed in the first sentence of Article 1 of Protocol No. 1, which is therefore applicable *ratione materiae* to the complaint under consideration.

267. Accordingly, the Court rejects the Government's objection as to the applicability of Article 1 of Protocol No. 1 to the Convention.

4. Overall conclusions on admissibility

268. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *Existence of an interference and the applicable rule of Article 1 of Protocol No. 1*

(a) The applicant's submissions

269. The applicant argued that if the Bronze was a "possession" within the meaning of Article 1 of Protocol No. 1, there could be no doubt that the confiscation order had constituted an interference with its peaceful enjoyment.

(b) The Government's submissions

270. The Government denied that there had been an interference, within the meaning of Article 1 of Protocol No. 1, with the applicant's proprietary interests protected by that provision. They relied on the same arguments as those used to challenge the existence of a proprietary interest protected by above-mentioned Convention provision and the applicant's victim status.

271. The Government further submitted that if the Court were to recognise that an interference had taken place in the present case, only the first rule enshrined in Article 1 of Protocol No. 1 should apply. According to them, the applicant clearly had not had formal ownership. As the Statue, on the basis of the relevant domestic law, belonged to the inalienable patrimony of the State, no deprivation of property had taken place. In the alternative, they submitted that the interference in question fell within the second paragraph, as a form of "control of the use of property".

(c) The Court's assessment

272. The Court reiterates that Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest (see *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61, Series A no. 52, and *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 44, ECHR 1999-V). The three rules are not, however, "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, among many authorities, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*

[GC], no. 44302/02, § 52, ECHR 2007-III, and *Broniowski v. Poland* [GC], no. 31443/96, § 134, ECHR 2004-V).

273. The Court has already recognised that the applicant was able to demonstrate that the adoption of the confiscation order limited its capacity to fully dispose of the Statue (see paragraph 229 above) and the possibility that the Italian authorities will succeed in obtaining its recognition and enforcement in the proceedings they have initiated in the United States in conformity with international agreements in force between the two countries (see paragraph 230 above). In the light of these findings, the Court accepts that the issuance of the confiscation order amounted to an interference with the applicant's proprietary interests protected by Article 1 of Protocol No. 1 took place.

274. As to the nature of the interference, the complexity of the legal situation prevents it from being classified in a precise category. The Government submitted that, under Italian law, the Trust had never become owner of the Statue as it pertained to Italy's cultural heritage on account of the circumstances in which it had been found and its cultural link with the country, had not been reported to the competent domestic authorities after the discovery, and had subsequently been exported without the requisite customs formalities being complied with. However, the applicant purchased the Statue abroad from a third party and has been in possession of it for a long time. To ascertain whether the applicant became its owner would require an assessment of the chains of transfer following the Statue's export and the law applicable to that contract, which are issues highly disputed between the parties.

275. In the light of those considerations the Court finds that, on the one hand, in the absence of valid ownership, only the general rule of Article 1 of Protocol No. 1 is applicable, because in any event the impugned measure restricted the applicant's right to use its "possession" (see, *mutatis mutandis*, *Sporrong and Lönnroth*, cited above, § 60, and *Pialopoulos and Others v. Greece*, no. 37095/97, § 56, 15 February 2001).

276. On the other hand, assuming the existence of valid ownership, the third rule is applicable. The Court has indeed held that where a confiscation measure has been imposed independently of the existence of a criminal conviction but rather as a result of separate "civil" (within the meaning of Article 6 § 1 of the Convention) judicial proceedings aimed at the recovery of assets deemed to have been acquired unlawfully, such a measure, even if it involves the irrevocable forfeiture of possessions, constitutes control of the use of property (see *Gogitidze and Others v. Georgia*, no. 36862/05, § 94, 12 May 2015, and the case-law cited therein; *Bokova*, cited above, § 51; and *Aktiva DOO v. Serbia*, no. 23079/11, § 78, 19 January 2021). The Court has also considered that the seizure and confiscation of assets, the importation of which was forbidden by law, amounts to a measure of control of the use of property (see *AGOSI v. the United Kingdom*, 24 October 1986, § 51, Series A

no. 108). The same is true for the confiscation of goods which have been imported without the necessary customs declarations being complied with (see *Yaşaroğlu v. Türkiye*, no. 78661/11, § 53, 12 September 2023).

277. In any event, the Court does not consider it necessary to rule on whether the second sentence of the first paragraph of Article 1 of Protocol No. 1 applies in this case (see, for a similar approach, *Aktiva DOO*, cited above, § 78, and *Denisova and Moiseyeva v. Russia*, no. 16903/03, § 55, 1 April 2010). It has long taken the view that the situation referred to in the second sentence of the first paragraph of this provision is only a particular instance of interference with the right to the peaceful enjoyment of property, as guaranteed by the general rule set forth in the first sentence. The Court therefore considers that it should examine the situation complained of in the light of that general rule (see, *mutatis mutandis*, *Gladysheva v. Russia*, no. 7097/10, § 71, 6 December 2011, and the case-law cited therein, and *Alentseva v. Russia*, no. 31788/06, § 59, 17 November 2016), albeit taking into account the specific circumstances of the case.

278. In this connection, the Court notes that, irrespective of the applicable rule of Article 1 of Protocol No. 1, the present case concerns a very particular issue, namely the protection of cultural heritage and the recovery of an unlawfully exported cultural object through a measure that, although adopted within criminal proceedings, has civil effects (see paragraphs 129-130 above).

279. The specificity of the subject matter of the present case is further demonstrated by the fact that similar measures aimed at recovering unlawfully exported cultural objects have been progressively regulated under international law (see Article 13 § 1 (d) of the 1970 UNESCO Convention, cited at paragraph 154 above, Article 5 of the 1995 UNIDROIT Convention, cited at paragraph 160 above, and Article 14 § 3 of the Council of Europe Convention on Offences relating to Cultural Property, cited at paragraph 181 above) and European Union law (see Directive 2014/60/EU, cited at paragraphs 182-184 above). Moreover, Article 18 of the 2001 UNESCO Convention expressly provides that underwater cultural heritage recovered in a manner incompatible with that Convention must be seized (see paragraph 165 above).

280. In the light of the above, the Court considers that, irrespective of the applicable rule under Article 1 of Protocol No. 1, the justification for the interference at issue in the present case must be assessed by taking into account that, due to the unique and irreplaceable nature of cultural objects, States enjoy a wide margin of appreciation where cultural heritage issues are concerned (see *Petar Matas v. Croatia*, no. 40581/12, § 40, 4 October 2016; *SCEA Ferme de Fresnoy v. France* (dec.), no. 61093/00, ECHR 2005-XIII (extracts); *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 54, 19 February 2009; and *Sinan Yildiz and Others v. Turkey* (dec.), no. 37959/04, 12 January 2010).

281. The Court reiterates that in order for an interference to be compatible with Article 1 of Protocol No. 1 it must be lawful, be in the general interest and be proportionate, that is, it must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, for example, *Pařízek v. the Czech Republic*, no. 76286/14, § 42, with further references, 12 January 2023). The Court will examine these three steps in turn.

2. Compliance with Article 1 of Protocol No. 1

(a) Whether the measure complied with the principle of lawfulness

(i) The applicant's submissions

282. The applicant admitted that Italian law required anyone wishing to export an object potentially of cultural interest to declare it to an export office and obtain approval. If the export office denied approval and declared the object to be of cultural interest, it could not be exported without a special licence or certificate.

283. However, the applicant complained that Article 174 § 3 of Decree no. 42/2004 had not been in force when the Bronze had been discovered and then purchased by it, and that the law then in force had been amended several times between 1965 and the date on which the confiscation order had been adopted. According to the applicant, the prevailing case-law before 2015 had considered the measure at issue criminal in nature and, as a consequence, its imposition could not be foreseen for two reasons. Firstly, the applicant had not been involved in the commission of the crime of unlawful exportation and secondly, the purchase of the Statue had been concluded outside of Italy's jurisdiction.

284. Moreover, according to the applicant, the provision in force when it had acquired the Statue had been declared unconstitutional in so far as it allowed the confiscation measure to be imposed on third parties "not involved in the criminal offence" (see paragraph 125 above). The provision currently in force had been introduced by section 23 of Law no. 88/1998 (see paragraph 119 above). Therefore, when it had purchased the Statue, it could not have reasonably foreseen the standard of diligence required of it, particularly because the interpretation by the domestic courts of the notion of "person not involved in the criminal offence" had, in its view, been inconsistent.

285. The applicant further submitted that when the Statue had been exported from Italy, the prevailing view had been that the contested measure could not be applied when the object in question was outside Italy and that, before a legislative reform in 2022 (which introduced Articles 518-*undecies* and 518-*duodevicies* into the Criminal Code), domestic law did not clarify whether the measure could be imposed even when the offence had become time-barred.

286. Lastly, the applicant argued that Article 174 § 3 of Decree no. 42/2004 lacked clarity as it did not impose any time-limit within which the State could impose the measure and that, as a consequence, the Italian authorities had been able to confiscate the Statue more than thirty years after they had become aware of its location. The applicant relied on Articles 77 and 78 of Decree no. 42/2004, as recently amended, which set a time-limit of three years from the date on which the requesting State became aware of the location of the object for claims concerning restitution of cultural goods lodged against Italy. Moreover, the 1995 UNIDROIT Convention clearly provided for a three-year time-limit for instituting actions for the recovery of unlawfully exported cultural objects.

(ii) The Government's submissions

287. The Government argued that Article 174 § 3 of Decree no. 42/2004 had not been retrospectively applied to the applicant's detriment as it had merely transposed into a single provision the already existing rule of section 66 of Law no. 1089/1939 (see paragraph 113 above), which had been incorporated into Article 301 of Presidential Decree no. 43 of 23 January 1973 on customs matters (see paragraph 117 above).

288. They further submitted that the subsequent legislative amendments referred to by the Trust had actually been favourable to the applicant as they had introduced the inability to impose the measure on those who could demonstrate that they were "persons not involved in the criminal offence" within the meaning of the established domestic case-law, as well as the right to a public hearing during the judicial proceedings aimed at imposing the contested measure.

289. The Government attached judgments of the Constitutional Court and the Court of Cassation clarifying the notion of "person not involved in the criminal offence" and submitted that, in the light of those judgments, the standard of diligence required of the applicant had been clear and foreseeable.

290. The Government further submitted that it was untrue that the measure could not be applied when the cultural object was outside Italian territory and that, in fact, the domestic courts had already observed that the applicant had merely cited academic opinions in that regard.

291. As regards the alleged lack of clarity of the legal basis, on account of the absence of a time-limit, the Government argued that the present case differed from cases in which the Court had found that it raised an issue under the Convention as it concerned a measure not criminal in nature and aimed at merely recovering an asset already owned by the State.

292. Lastly, the Government observed that, even in the absence of a time-limit, certain procedural limitations applied to the present case. In particular, after a first decision by the execution judge on the issue of confiscation, any new application relating to the same facts would be declared

inadmissible if it was not accompanied by new elements (such as a change in the law or the delivery of a relevant ruling by a higher or supranational court).

(iii) The Court's assessment

(α) General principles

293. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The rule of law, one of the fundamental principles of a democratic society, is inherent in all Articles of the Convention (see *Former King of Greece and Others*, § 79, and *Beyeler*, § 108, both cited above). When speaking of "law", Article 1 of Protocol No. 1 alludes to the very same concept as that to which the Convention refers elsewhere when using that term – a concept that comprises statutory law as well as case-law (see *Bežanić and Baškarad v. Croatia*, nos. 16140/15 and 13322/16, § 62, 19 May 2022, and *Tokel v. Turkey*, no. 23662/08, § 74, 9 February 2021).

294. The existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. The requirement of lawfulness also demands compliance with the relevant provisions of domestic law (see *East West Alliance Limited v. Ukraine*, no. 19336/04, § 167, 23 January 2014, and *Zlínsat, spol. S r.o. v. Bulgaria*, no. 57785/00, §§ 97-98, 15 June 2006). In addition, the legal basis must have a certain quality, that is, it must be sufficiently accessible, precise and foreseeable in its application and consequences (see *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 187, ECHR 2012), compatible with the rule of law and provide sufficient procedural guarantees against arbitrariness (see *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 96, 25 October 2012).

295. As regards the notion of "foreseeability" in civil matters, its scope depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed (see, among other authorities, *Vistiņš and Perepjolkins v. Latvia*, cited above, § 97, 25 October 2012). The applicable law must also provide minimum procedural safeguards commensurate with the importance of the principle at stake (see *Centro Europa 7 S.r.l. and Di Stefano*, cited above, § 97, and the case-law cited therein).

296. The Court has held that a law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true with regard to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see *Lekić v. Slovenia* [GC], no. 36480/07, § 97,

11 December 2018, and the case-law cited therein). The same may be said to apply to persons engaging in commercial activities (see, among other authorities, *Forminster Enterprises Limited v. the Czech Republic*, no. 38238/04, § 65, 9 October 2008; *Lekić*, cited above, § 97, with further references; and *NIT S.R.L. v. the Republic of Moldova* [GC], no. 28470/12, § 161, 5 April 2022).

297. The Court has acknowledged in its case-law that however clearly drafted a legal provision may be, in any system of law there is an inevitable element of judicial interpretation. There will always be a need for the elucidation of doubtful points and for adaptation to changing circumstances. Again, while certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 568, 20 September 2011). The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain (see *Bežanić and Baškarad v. Croatia*, nos. 16140/15 and 13322/16, § 63, 19 May 2022). This means that the requirement of foreseeability which the term "law" implies cannot be read as outlawing the gradual clarification of the rules through judicial interpretation from case to case, provided that the resultant development remains consistent with the essence of the provision and could reasonably be foreseen (see *Kopytok v. Russia*, no. 48812/09, § 34, 15 January 2019). By contrast, an inconsistent case-law interpretation of the relevant domestic provisions is a factor which could result in unforeseeable or arbitrary outcomes and deprive individuals of effective protection of their rights and which, as a consequence, is inconsistent with the requirement of lawfulness (see *Carbonara and Ventura v. Italy*, no. 24638/94, § 65, ECHR 2000-VI).

298. As regards the procedural safeguards available to the individual, the Court has held that they will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation (see *Connors v. the United Kingdom*, no. 66746/01, § 83, 27 May 2004). What is required by way of safeguard will depend, to some extent at least, on the nature and extent of the interference in question (see *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 170, ECHR 2013).

(β) Application of the above principles to the present case

299. The Court notes that the parties did not dispute that the contested measure had a basis in domestic law, namely Article 174 § 3 of Legislative Decree no. 42/2004 (see paragraph 121 above), in force at the time the confiscation order was adopted, and observes that this provision reproduced, with minor amendments, the rule enshrined in section 66 of

Law no. 1089/1939 (see paragraph 113 above), which was in force when the Statue was found and when it was purchased by the applicant, and which was subsequently transposed in Article 123 § 3 of Decree no. 490/1999 (see paragraph 120 above).

300. However, the parties disagreed regarding the quality of that legal basis, within the meaning of Article 1 of Protocol No. 1, in particular with regard to the clarity and foreseeability of: (i) the standard of diligence required of the purchaser of a cultural object for the imposition of the contested measure; (ii) the possibility of imposing the measure even if the criminal offence had become statute-barred; (iii) the possibility of imposing the measure when the object was outside Italian territory; and (iv) the absence of a time-limit for imposing the measure.

– *Standard of diligence required of the purchaser of a cultural object for the imposition of the contested measure*

301. As regards the foreseeability of the standard of diligence required of a purchaser of cultural objects, the Court notes that it was progressively clarified in domestic law and case-law.

302. Section 66(3) of Law no. 1089/1939 (see paragraph 113 above), imposed the mandatory confiscation of objects of cultural interest which had been unlawfully exported or in the event of attempted unlawful export, and provided that it would be carried out in accordance with the provisions on the confiscation of smuggled goods, namely Article 301 § 1 of Decree no. 43/1973 (see paragraph 117 above).

303. The conditions for imposing that measure were clarified in domestic case-law. In particular, in judgment no. 229 of 1974, the Constitutional Court declared Article 301 § 1 of Decree no. 43/1973 unconstitutional in so far as it allowed the imposition of the measure on a "person not involved in the criminal offence", that is to say someone who was not aware or did not in any event facilitate, due to a "lack of vigilance", the commission of the offence of smuggling (see paragraph 124 above). This approach was subsequently followed by the Court of Cassation (see paragraph 127 above).

304. With specific regard to the provision concerning the confiscation of unlawfully exported cultural objects, namely section 66(3) of Law no. 1089/1939, in judgment no. 2 of 19 January 1987 the Constitutional Court expressly clarified that a "person not involved in the criminal offence" was someone "who [was] not the perpetrator of the crime and ha[d] not profited from it in any way" on account of a lack of vigilance (see paragraph 125 above), while in judgment no. 3 of 9 January 1997 it observed that an individual who considered him or herself not involved in the criminal offence had to demonstrate that the purchase had taken place by ignoring, without fault, the illicit origin of the object (paragraph 126 above).

305. Following the above-mentioned judgments, the notion of "person not involved in the criminal offence" was expressly incorporated into the wording

of section 66(3) of Law no. 1089/1939 through section 23 of Law no. 88/1998 (see paragraph 119 above) and then transposed into Article 123 § 3 of Decree 490/1999 (see paragraph 120 above) and, subsequently, into Article 174 § 3 of Legislative Decree no. 42/2004 (see paragraph 121 above), the provision applied in the applicant's case.

306. The Court therefore finds that, at the moment of the issuance of the confiscation order, that is, the moment when the interference at stake in the present case took place (see paragraph 273 above), the notion of a "person not involved in the criminal offence" was clearly established under the Italian case-law. The Court notes that the Court of Cassation dismissed the applicant's complaint about the lack of foreseeability of the legal basis for the confiscation on that ground (see paragraph 102 above). It sees no reason to disagree with this assessment.

307. As regards the question whether the representatives of the applicant acted with the required diligence when they acquired the Statue (see paragraphs 283-284), it will be examined by the Court as part of the proportionality assessment (see paragraphs 380-390 below).

– *Imposition of the measure even if the criminal offence has become statute-barred*

308. As regards whether it was foreseeable that the contested measure could be imposed when the relevant offence, notably the unlawful exportation of a cultural object, had not been committed by the owner and had become statute-barred in respect of the accused, the Court reiterates that each confiscation must be seen in its context (see *Balsamo v. San Marino*, nos. 20319/17 and 21414/17, § 64, 8 October 2019).

309. In this connection, the Court must examine whether the measure was exclusively punitive in nature, so as to be needing to be based exclusively on a conviction, in proceedings in which the owner was the accused.

310. Firstly, the Court considers that even in the case of punitive confiscations, where the domestic courts find that all the elements of the offence are made out, while discontinuing the proceedings as statute-barred, a confiscation is possible if the rights of the defence have been respected (see *G.I.E.M. S.R.L. and Others v. Italy,* nos. 1828/06 and 2 others, § 261, 28 June 2018, with reference to a situation in which, however, the measure was not proportionate).

311. Secondly, the Court reiterates that it is a common feature of several jurisdictions for criminal courts to take decisions of a non-punitive nature (see *Balsamo*, cited above, § 63). The Court has previously held that confiscation is not a measure confined to the sphere of criminal law, but that it is encountered widely in the sphere of administrative law where objects liable to confiscation include, for example, unlawfully imported goods (see *AGOSI*, cited above, § 64).

312. The Court has further held that these types of confiscation, whether or not meted out by courts of criminal jurisdiction, being restorative in nature, fall outside the scope of Article 7 of the Convention (see, *Ulemek v. Serbia* (dec.), no. 41680/13, §§ 55-58, 2 February 2021, and the case-law cited therein; contrast with, for example, *Welch v. the United Kingdom*, no. 17440/90, §§ 28-35, 9 February 1995; *Varvara v. Italy*, no. 17475/09, § 72, 29 October 2013; and *G.I.E.M. S.R.L. and Others*, cited above, § 233).

313. It has consequently found that these types of confiscations, being aimed at the recovery of an object in the public interest, can be applied to third parties owning the relevant objects in the absence of their participation in the criminal proceedings, of a criminal conviction or of a finding of guilt, provided that the fact of the unlawfully acquired possession has been objectively ascertained (see, among other authorities, *Yildirim v. Italy* (dec.), no 38602/02, 10 April 2003; *Telbis and Viziteu v. Romania*, no. 47911/15, § 49, 26 June 2018; *Balsamo*, cited above, §§ 60-65; and *Voiculescu and Others v. Romania* (dec.), no. 502/15, §§ 12-14, 22 February 2022), and that the persons concerned have had the right to present their arguments before the competent authorities (see *Yildirim* (dec.), and *Balsamo*, § 63, both cited above); in this context, a reasonable possibility of putting the case before the authorities, after the criminal proceedings have come to an end, suffices for the purposes of Article 1 of Protocol No. 1 (see *Zaghini v. San Marino*, no. 3405/21, § 67, 11 May 2023).

314. In the specific circumstances of the present case, the Court notes that the confiscation at issue, applicable both to the accused of unlawful exportation of cultural objects and third parties, extraneous to the crime, in possession of the same objects, had no primary punitive purpose. Regardless of whether it could also be a penalty in respect of those charged with a crime, according to the Court of Cassation, such a measure, of an administrative nature, fulfilled a "primarily recovery purpose" (*funzione prioritariamente recuperatoria*). It had either the function of reobtaining control over objects that, being *extra commercium*, were owned by the State and could not be appropriated by private individuals (including third parties), or to prevent privately owned objects of cultural interest being removed from the State's territory without being subject to its control, based on the sole ascertainment of the fact (unlawful exportation) and irrespective of whether the individual who owned or was in possession the objects had committed a crime (subject to the assessment of whether he or she could be qualified as a "person not involved in the criminal offence"), or whether there had been a formal conviction for such a crime (see paragraph 130 above). The measure was therefore aimed at recovering a specific object, in order to ensure respect of the public interest violated by an unlawful export by way of restoring the "original public control" (*situazione originaria di dominio pubblico* (see paragraph 99 above).

315. The Court further notes that at the time the Trust purchased the Statue in 1977, the domestic case-law already provided that confiscation could be imposed on third parties which owned or were in possession of the smuggled object, if it could be demonstrated that they had been at least negligent (see paragraph 124 above). The possibility of imposing the measure was not therefore related to the commission of or participation in the crime.

316. It is true that it was only in 1980 that the Court of Cassation expressly clarified that the measure had to be imposed even in cases in which the defendant charged with unlawful exportation had been acquitted or declared otherwise non-punishable for reasons which did not exclude the material fact of the offence, notably the unlawful exportation (see paragraph 129 above). However, in the light of the primarily recovery purpose of the measure (see paragraph 314 above), and given that it was already clear that it could be imposed on third parties that had not committed the crime but were at least negligent (see paragraph 315 above), the Court considers that this was a mere clarification which was consistent with the essence of the provision and could therefore have been reasonably foreseen (see paragraph 297 above).

317. Accordingly, the Court considers that the legal basis did not lack clarity and foreseeability as regards whether the measure could be applied when the criminal offence had become statute-barred.

– *Possibility of imposing the measure when the object is outside the State's territory*

318. As regards the applicant's argument that the measure was imposed in breach of domestic law as the latter did not allow the confiscation of objects located outside the State's territory, the Court observes that the domestic courts already dealt with this issue, observing that the applicant's argument had only been advanced in academic opinions and that there were no examples of case-law justifying such a conclusion. By contrast, the adoption of the confiscation order was a necessary condition for lodging international judicial cooperation requests aimed at recovering a cultural object located outside the State's territory (see paragraph 79 above).

319. As observed by the Government, the Court notes that the applicant did not provide any other relevant arguments, either before the domestic courts or the Court.

320. The Court, reiterating that its power to review compliance with domestic law is limited to instances of manifestly erroneous application of the impugned legal provisions or arbitrary conclusions being reached (see *Beyeler*, cited above, § 108, *BENet Praha, spol. s r.o. v. the Czech Republic*, no. 33908/04, § 97, 24 February 2011, and *BTS Holding, a.s. v. Slovakia*, no. 55617/17, § 65, 30 June 2022), considers that in the present case the applicant did not provide any documentation capable of substantiating its argument and of demonstrating that the domestic judicial authorities applied domestic law in an arbitrary or unreasonable manner.

– *Absence of a time-limit for imposing the measure*

321. As regards the applicant's complaint concerning the absence of a time-limit for adopting the measure, the Court has previously held that a domestic statute may lack foreseeability when it leaves open the time-limit for the exercise of certain powers or actions by the domestic authorities (see *Beyeler*, § 109, and *Dimitrovi*, § 46, both cited above).

322. However, the Court reiterates that the existence of sufficient procedural safeguards must be assessed by having regard to, at least among other factors, the nature and extent of the interference in question (see *Ivashchenko v. Russia*, no. 61064/10, § 170, 13 February 2018). The Court must therefore take into account the fact that in the field of cultural heritage, States enjoy a wide margin of appreciation, not least because the measure at issue pursues the aim of recovering a unique and irreplaceable object (see paragraph 280 above).

323. In this connection, the Court observes that the absence of a statute of limitation or a time-limit for actions aimed at recovering stolen or unlawfully exported cultural objects appears to be a distinctive feature of several countries, including within the Council of Europe (see the Explanatory Report to the 1995 UNIDROIT Convention, cited in paragraph 161 above).

324. In the light of the above, the Court considers that the absence of a time-limit is not a factor that, on its own, can automatically lead to the conclusion that the interference in question was unforeseeable or arbitrary and therefore incompatible with the principle of lawfulness within the meaning of Article 1 of Protocol No. 1. In any event, as the Court has already held, this element of uncertainty in the statute and the considerable latitude it afforded the authorities from this point of view are material considerations to be taken into account in determining whether the measure complained of struck a fair balance between the competing interests (see *Beyeler*, cited above, § 110; *Alentseva*, cited above, § 66; and, *mutatis mutandis*, *Zelenchuk and Tsytsyura v. Ukraine*, nos. 846/16 and 1075/16, § 106, 22 May 2018; and *Béla Németh v. Hungary*, no. 73303/14, § 40, 17 December 2020; (see paragraphs 391-400 below)).

(γ) Conclusions as to whether the measure was in accordance with the principle of lawfulness

325. In the light of the above, the Court concludes that the legal basis for the contested measure was sufficiently clear, foreseeable and compatible with the rule of law, and that it was therefore compliant with the principle of lawfulness within the meaning of Article 1 of Protocol No. 1.

(b) Whether the measure was adopted in the public or general interest

(i) The applicant's submissions

326. Although the applicant admitted that the protection of cultural heritage was a legitimate aim under the Convention, it argued that, contrary to what had been stated by the domestic judicial authorities and reiterated by the Government, the Statue was not part of Italy's cultural heritage. The contested measure had not therefore been justified by any public or general interest.

327. The Trust pointed out that the 1970 UNESCO Convention had no retrospective effect and that it therefore was not applicable to the present case. In any case, the Statue did not fall within any of the categories provided for in Article 4 for identification of a State's cultural heritage. In the applicant's view, the Statue was not the creation of Italian "individual or collective genius" as it was most probably the work of the Greek sculptor Lysippus, and there was no proof that it had been created on Italian territory. The Trust further submitted that there was no evidence proving that the Bronze had been found in Italian territorial waters and that the Government could not rely on the historical notion of a "continuum" between Greek and Roman cultures, as that connection was very tenuous and, in any event, had no relevance under the 1970 UNESCO Convention or general international law.

328. The applicant further admitted that, according to the Court's case-law, it was legitimate for a State to take measures designed to acquire control over cultural objects in order to facilitate in the most effective way wide public access to works of art lawfully present on its territory. However, according to the Trust, this principle actually justified the retention of the Statue at the Getty Museum, where it had been made available to the general public and carefully preserved. By contrast, the Government had failed to clarify how it intended to more effectively facilitate access to the Statue for the general public.

329. Lastly, the applicant argued that, if the Court were to consider that the contested measure had pursued a legitimate aim, that aim should be given little weight in the balancing exercise between competing interests.

(ii) The Government's submissions

330. The Government submitted that the Statue undoubtedly formed part of Italy's cultural heritage and that the recovery measure had therefore pursued the legitimate aim of ensuring the substantive respect of cultural national heritage and its protection for the general interest in its custody, preservation and possible general fruition. They considered this statement to be consistent with the domestic and international legal framework concerning the identification of a State's cultural heritage.

331. As regards the national legal framework, the Government argued that the Statue was an object of "artistic, historic ... interest ... bearing witness to

the values of civilisation", as stated in Article 2 § 1 of Legislative Decree no. 42/2004, which belonged to the State, as stated in Article 10 § 1. According to them, under Article 54 § 1 of that Decree, those objects were inalienable, thereby preventing any valid transfer of ownership or *a non domino* acquisition.

332. As regards the international legal framework, the Government argued that, under Article 4 § 1 (b) of the 1970 UNESCO Convention, cultural objects found within the national territory were part of a State's cultural heritage. According to the Government, in the domestic proceedings it had been established that the Statue had been discovered in Italian territorial waters, and the applicants had failed to raise that issue in their appeal on points of law lodged with the Court of Cassation and in their application to the Court.

333. The Government also submitted that, according to international practice, cultural objects found at sea during the twentieth century were commonly accepted as belonging to the coastal State where the object had been found, even if they were of Hellenic origin. In the Government's view, this argument had also been recognised by the Getty Museum, which had returned several works of art of Hellenic origin found on Italian territory.

334. In addition, the Government argued that it could not be ruled out that the Statue formed part of Italy's cultural heritage on the basis of Article 4 § 1 (a) of the 1970 UNESCO Convention, which referred to "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". The Government submitted that it could not be established with certainty that the Statue was the work of Lysippus and that, even assuming that he had created it, he had also lived in southern Italy. According to the Government, the applicants' theory about the Greek origin of the Statue was unsubstantiated and failed to take into account the continuum between Greek civilisation and the subsequent Roman cultural experience, to which the Court of Cassation had referred in the domestic proceedings.

(iii) The Court's assessment

335. Irrespective of the applicable rule of Article 1 of Protocol No. 1, any interference by a public authority with the peaceful enjoyment of possessions can only be justified if it serves a legitimate general interest (see *Beyeler*, § 111, and *Lekić*, § 106, both cited above). The principle of a "fair balance" inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community (see *Đokić v. Bosnia and Herzegovina*, no. 6518/04, § 57, 27 May 2010).

336. The Court considers that the substance of the general interest referred to by the Government and strongly disputed by the applicant calls for an in-

depth examination (see, *mutatis mutandis*, *S.A.S. v. France* [GC], no. 43835/11, § 114, ECHR 2014 (extracts), and *Y.Y. v. Turkey*, no. 14793/08, § 77, ECHR 2015 (extracts)), as the present case leaves some doubts as to the fulfilment of the aim relied upon to justify the contested measure.

337. The Court will therefore assess whether the general interest referred to by the Government may be deemed legitimate for the purpose of the Convention and whether, in the specific circumstances of the present case, the measure was aimed at fulfilling that interest.

338. In so doing, the Court will take into account that the Convention cannot be interpreted in a vacuum but instead in harmony with the general principles of international law. Account should be taken, as indicated in Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties of 1969, of "any relevant rules of international law applicable in the relations between the parties" (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, § 67, ECHR 2008; *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, § 131, ECHR 2010; *Naït-Liman v. Switzerland* [GC], no. 51357/07, § 174, 15 March 2018; and *X and Others v. Bulgaria* [GC], no. 22457/16, § 179, 2 February 2021). Moreover, the Court reiterates that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (see *Demir and Baykara*, cited above, § 68).

339. In particular, in determining whether States had a legitimate general interest for the purposes of Article 1 of Protocol No. 1, the Court has often taken into account whether the contested measures constituted a duty under other international treaties (see, for example, *Karapetyan*, cited above, § 34; *Gyrlyan v. Russia*, no. 35943/15, § 23, 9 October 2018; and *Denisova and Moiseyeva*, cited above, § 58).

(α) The protection of cultural heritage as a legitimate interest in general

340. The Court stresses that the protection of a country's cultural and artistic heritage is a legitimate aim for the purposes of the Convention, also taking into account the margin of appreciation enjoyed by the national authorities in determining what is in the general interest of the community (see *Beyeler*, cited above, § 112; *SCEA Ferme de Fresnoy*, cited above; *Debelianovi v. Bulgaria*, no. 61951/00, § 54, 29 March 2007; *Valette and Doherier v. France* (dec.), no. 6054/10, § 20, 29 November 2011; *Fürst von Thurn und Taxis*, cited above, § 21; and *Petar Matas*, cited above, § 40). The conservation of cultural heritage and, where appropriate, its sustainable use, have as their aim, in addition to the maintenance of a certain quality of life, the preservation of the historical, cultural and artistic roots of a region and its inhabitants. As such, they are an essential value, the protection and promotion of which are incumbent on the public authorities (see *Debelianovi v. Bulgaria*, no. 61951/00, § 54, 29 March 2007; *Kozacıoğlu*, cited above,

§ 54; *Potomska and Potomski v. Poland*, no. 33949/05, § 64, 29 March 2011; *Bogdel v. Lithuania*, no. 41248/06, § 60, 26 November 2013; *Petar Matas*, cited above, § 35; *Kristiana Ltd. v. Lithuania*, no. 36184/13, § 104, 6 February 2018; and *Malliakou and Others v. Greece*, no. 78005/11, § 57, 8 November 2018; see also, *mutatis mutandis*, *Ahunbay and others v. Turkey* (dec.), no. 6080/06, § 22, 29 January 2019).

341. The legitimacy of the purpose of protecting cultural heritage is further demonstrated by the subsequent developments in the international and European legal framework (see paragraph 338 above). In this connection, the Court notes that several international instruments stress the importance of protecting cultural goods from unlawful exportation, such as the 1970 UNESCO Convention (see paragraphs 150-156 above), and the 1995 UNIDROIT Convention (see paragraphs 157-160 above). Similarly, the same purpose is stressed in European Union law, notably in Directive 2014/60/EU (see paragraphs 182-183 above) and Regulation 116/2009/EC (see paragraph 184 above). Moreover, other instruments provide for protection in general terms of cultural heritage, such as the European Convention on the Protection of the Archaeological Heritage (see paragraphs 170-173 above), and its revised version (see paragraphs 174-176 above), the 2007 UNESCO Convention on the Protection of Underwater Cultural Heritage (see paragraphs 162-169 above), and the Council of Europe Convention on Offences relating to Cultural Property (see paragraphs 177-181 above).

342. In the light of the above, the Court considers that the legitimacy under the Convention of State measures aimed at protecting cultural heritage against unlawful exportation from the country of origin, or at ensuring its recovery and return therein in case that the unlawful act has nonetheless taken place, in both cases with a view to facilitate in the most effective way wide public access to works of art, cannot be called into question.

(β) Whether the measure was aimed at protecting cultural heritage in the specific circumstances of the present case

343. However, the parties disagreed as to whether the contested measure pursued the purpose of protecting cultural heritage in the specific circumstances of the present case. The parties' disagreement concerned the location of the discovery of the Statue and its relevance to determining whether the measure had been adopted in the general interest of protecting cultural heritage. The Court will therefore assess whether the confiscation measure was aimed at pursuing the legitimate aim relied on by the Government and was suitable in order to advance such an aim (see, *mutatis mutandis*, *Bayev and Others v. Russia*, nos. 67667/09 and 2 others, § 83, 20 June 2017, and *Macatė v. Lithuania* [GC], no. 61435/19, § 188, 23 January 2023).

344. The Court reiterates that it is sensitive to the subsidiary nature of its role, and that it must be cautious in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts, and as a general rule it is for those courts to assess the evidence before them. Although the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 150, 20 March 2018).

345. In the present case, the disputed issues were discussed at length in the domestic proceedings, during which the applicant's arguments were duly taken into account (see paragraphs 77-78, 87-89, 98 and 100 above). The Court will therefore take as the starting point for its assessment the conclusions as to the establishment of the facts and the interpretation of domestic law reached by the domestic courts.

346. In this connection, the Court notes that the domestic proceedings did not lead to a definitive conclusion as to whether the Statue had been found in Italian territorial waters or on the high seas. However, this fact was not considered decisive. The Court of Cassation made it clear that the Statue was part of Italy's cultural heritage and therefore belonged to the State as it had been found by an Italian-flagged vessel (see paragraph 100 above) and had subsequently been brought into Italy without the relevant reporting obligations being complied with (see paragraphs 95 and 116 above). In the Court of Cassation's view, the contested measure was therefore aimed at restoring the State's ownership of the property (see paragraph 95 above). Moreover, irrespective of the issue of ownership, the Statue was an object of cultural interest and its export would therefore have required an export licence to be obtained from the competent domestic authority and payment of the relevant customs duties (see paragraph 98 above). Under the applicable domestic provision, a breach of these obligations resulted in the mandatory confiscation of the unlawfully exported cultural object (see paragraphs 113 and 121 above). The purpose of the contested measure was therefore to recover a cultural object that either belonged to the State as part of its cultural heritage or, although privately owned, had in any event been unlawfully exported.

347. As regards whether the above findings suffice to consider that the measure was adopted in the general interest of protecting cultural heritage, the Court reiterates that the notion of "public interest" is necessarily extensive (see, among other authorities, *Jahn and Others v. Germany* [GC], nos. 46720/99 and 2 others, § 91, ECHR 2005-VI) and that the national authorities are in principle better placed than the international judge to appreciate what is in the public interest (see *Savickis and Others v. Latvia* [GC], no. 49270/11, § 184, 9 June 2022). As noted above, the State has a wide

margin of discretion as to what is "in accordance with the general interest", particularly where cultural heritage issues are concerned (see *Beyeler*, § 112; *Kozacıoğlu*, § 53; and *Sinan Yildiz and Others* (dec.), all cited above). The Court will respect the domestic authorities' judgment unless it is "manifestly without reasonable foundation" (see, *mutatis mutandis*, *Garib v. the Netherlands* [GC], no. 43494/09, § 137, 6 November 2017, and the case-law cited therein, and *Béláné Nagy v. Hungary* [GC], no. 53080/13, § 113 ECHR 2016, and the case-law cited therein).

348. The Court considers that the domestic authorities fulfilled their duty to reasonably demonstrate that the contested measure pursued the aim of protecting cultural heritage, as there is nothing in the instant case to suggest that the Italian authorities applied the legal provisions in question in a manifestly erroneous manner or in order to reach arbitrary conclusions (see, *mutatis mutandis*, *Alentseva*, cited above, § 64).

349. The Court notes that similar arrangements are contemplated in the relevant principles and rules of international law.

350. As regards the State's ownership, the Court of Cassation stated that the Statue was part of Italy's cultural heritage. It took into account that it had been found by an Italian-flagged vessel (see paragraph 100 above). As clarified in the order of 8 June 2018 of the GIP of the Pesaro District Court (see paragraph 89 above; see also paragraph 78 above), under Article 4 of the Italian Navigation Code, Italian vessels on the high seas and Italian aircraft in airspace not subject to the sovereignty of any State are considered to be part of Italian territory (see paragraph 116 above). The Statue was subsequently brought into Italian territory where, in accordance with Article 50 of the Navigation Code, the find should have been reported to the competent maritime authority (see paragraph 116 above). Furthermore, according to the Court of Cassation, there was a continuum between classical Greek culture and Roman culture (see paragraph 100 above).

351. As regards the location of the discovery, the Court notes that the domestic courts' reference to Article 4 of the Italian Navigation Code was not, in the light of customary international law and, in particular, the principles of freedom of the high seas and the exclusive jurisdiction of the flag State on the high seas (see paragraphs 141-144 above), manifestly arbitrary or unreasonable.

352. The jurisdiction of the flag State with respect to cultural objects found at sea was not contradicted by the subsequent developments in international law. In particular, the European Convention on the Protection of the Archaeological Heritage clarified that it had been adopted without prejudice to the rules concerning State jurisdiction over objects found on the seabed (see paragraph 172 above), while its revised version was adopted without prejudice to the rules of international law concerning whether State jurisdiction over the seabed is limited to the territorial sea or also extends, for

example, to the exclusive economic zone or the continental shelf (see paragraph 176 above).

353. For its part, Article 303 § 3 of UNCLOS clarified that the duty to protect cultural objects found at sea did not affect the application of domestic laws concerning the identification of lawful owners (see paragraph 148 above), thereby allowing the application of domestic maritime and cultural heritage law.

354. Lastly, the Court notes that Article 13 § 1 (d) of the 1970 UNESCO Convention recognised the "indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore *ipso facto* not be exported" (see paragraph 154 above). The 2014 Report on the Evaluation of UNESCO's Standard-setting Work of the Culture Sector clarified that, under that provision, "State Parties [were] encouraged to establish State ownership ... for cultural property not yet excavated, or illicitly excavated from the national territory", given that that provision could "help in requesting return of these objects domestically or even abroad" (see paragraph 156 above). The report further stated that around 83% of the State parties that had responded to the survey had established State ownership over undiscovered cultural heritage.

355. As regards the obligation to report the discovery of underwater cultural heritage established in the Italian Navigation Code (see paragraph 116), the Court notes that it was in accordance with the reporting obligations subsequently laid down in the 2001 UNESCO Convention (see paragraph 167 above).

356. In the light of the above, it cannot be said that the domestic authorities' conclusion that the Statue was part of Italy's cultural heritage and was owned by the State was arbitrary or manifestly unreasonable.

357. In any event, the issue of the State's ownership as determined by the location of the discovery was not decisive, as the Court of Cassation clarified that this measure was also applicable to privately owned objects that, being of cultural interest, were exported without the relevant customs formalities being complied with (see paragraph 98 above).

358. In this connection, the Court notes that the principles applied by the Court of Cassation in respect to the imposition of confiscation in case of unlawful exportation are confirmed by the developments in the international legal framework. In particular, Article 1 of the 1995 UNIDROIT Convention provides that it applies to the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects (see paragraph 160 above), thereby referring to domestic law as regards the formalities that must be complied with in order to export cultural objects and a breach of which justifies restitution claims. As regards European Union Law, Article 2 of Regulation 116/2009/EC provides that "[t]he export of cultural goods outside the customs territory of the

Community shall be subject to the presentation of an export licence" (see paragraph 184 above).

359. In the light of the above, the Court considers that the domestic authorities reasonably showed that the Statue formed part of Italy's cultural heritage. Moreover, they reasonably argued that the measure in any event pursued the aim of reobtaining control over an object of cultural interest which had been taken to the mainland without the relevant reporting obligations being complied with, and which had been subsequently exported without the necessary licence and payment of the relevant customs duties, irrespective of whether it was owned by the State.

(iv) Conclusions as to whether the measure was adopted in the general interest

360. Accordingly, the Court finds that the measure at issue was adopted "in the public or general interest", within the meaning of Article 1 of Protocol No. 1, of protecting Italy's cultural heritage.

(c) Whether the measure was proportionate to the aim pursued

(i) The applicant's submissions

361. The applicant submitted that it had suffered an excessive burden on account of the absence of a time-limit within which the contested measure could be imposed (see paragraph 286 above).

362. The applicant further argued that the domestic authorities had failed to act "in good time" as the proceedings which had led to the contested measure had been instituted more than thirty years after they had become aware of the identity of the owner of the Statue and its location. That delay had extended far beyond the three-year limit provided for in Article 5 § 5 of the 1995 UNIDROIT Convention (see paragraph 160 above) and the four-year delay that the Court had found excessive in the case of *Beyeler* (cited above). The applicant submitted that, contrary to the Government's submissions, it could not be blamed for having contributed to the delay as its representatives had cooperated with the US law enforcement agents' investigation and they had had no obligation to verify with the Italian authorities before purchasing the Statue whether an export licence had been issued before its export from Italy.

363. According to the applicant, the authorities' conduct had not been "appropriate and consistent" either, as the proceedings which had led to the contested measure had been instituted despite the acquittal of the individuals who had discovered the Statue and the dismissal of several international judicial cooperation requests. Moreover, the Trust pointed out that the investigations for the crime of unlawful exportation had been discontinued in November 1978 by the Gubbio magistrate and that, in the letter sent on 25 August 1980 by that magistrate to the Perugia public prosecutor's office, it had been explained that "the criminal proceedings in question [did] not

appear to be capable of any further examination by the ordinary judicial authority, which [was] prevented from issuing measures aimed at recovering the Statue".

364. The applicant also submitted that it had suffered an excessive burden on account of the absence of any compensation for the confiscation of the Bronze.

365. Lastly, the applicant pointed out that when purchasing the Statue, its representatives had acted in an "open and honest" way and that no fault or bad faith could be attributed to them as they had relied on the assurances provided by the Italian lawyers who had represented the vendor, as well as on the dismissal of the Italian authorities' requests for international judicial cooperation.

(ii) The Government's submissions

366. The Government argued that both the authorities' conduct and the applicable domestic law had been compatible with the principle of legal certainty and that the measure had been proportionate to the aim pursued.

367. They maintained that the present case differed from cases where the Court had found that delays on the part of the national authorities in responding to the unlawful appropriation of property by the applicants had amounted to a breach of the principle of legal certainty because it did not concern the recovery of property owned by *bona fide* private individuals, but of property owned by the State and negligently acquired by the Trust.

368. The Government further argued that no issue under the principle of legal certainty had arisen in the present case as domestic law clearly stated at all times the inalienability of the State's cultural heritage and the imprescriptible nature of actions for restitution in favour of the State.

369. As regards the duty to act in good time, the Government submitted that such an assessment had to take into account the conduct of the domestic authorities and the other particular circumstances of the case. They pointed out that, despite several objective difficulties (such as the Italian authorities being prevented from seeing and photographing the Statue when it had been in Germany), the police had instituted an investigation and the Gubbio magistrate had lodged several international judicial cooperation requests, which had been rejected on procedural grounds or had not contained sufficient elements for proceeding. According to the Government, the difficulties faced by the authorities had also been caused by a lack of cooperation and transparency on the part of the Trust's representatives. Lastly, they observed that full disclosure of the documents held by the Getty Museum had not been achieved until 21 December 2009, during the proceedings before the Pesaro District Court. Only from then onwards had the State been in a position to assess whether the applicants had acted in bad faith.

370. The Government maintained that the authorities had constantly and diligently tried to recover the Statue, which demonstrated that they had not acquiesced in its acquisition by the Trust. In particular, they had undertaken several diplomatic and judicial attempts at recovery starting from the time the Trust had purchased the Statue, but they had undertaken more serious action in 2006 because of the new available evidence that had come to light that year.

371. The Government further submitted that the applicants' negligence, given the degree of professionalism required in similar transactions, had been definitively established in the domestic proceedings. In any event, they reiterated that the applicant's representatives could have discharged their due diligence obligations by requesting the vendors to hand over their ownership documents, asking the Italian authorities whether an export licence had been issued when the Statue had left Italy and checking whether the relevant provisions on customs declarations and duties had been violated. Instead, they had relied on the vendors' assurances and on documents which any honest and diligent businessperson would have considered insufficient.

372. The Government also maintained that the measure had been proportionate as it had not had a punitive purpose and had not been aimed at preventing a situation of potential danger for the object. It had rather been aimed at recovering public property in the interests of preserving cultural heritage. Given this aim, it would have made no sense to consider an alternative measure.

373. Lastly, the Government submitted that the absence of compensation for the confiscation was compatible with the principles established in the Court's case-law, as compensation was only one factor in the fair balance assessment, which varied in relation to the type of interference. They further observed that Article 7 § 1 (b) (ii) of the 1970 UNESCO Convention provided for the payment of compensation only to *bona fide* owners of an object.

(iii) The Court's assessment

(α) General principles

374. The Court reiterates that the concern to achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights is reflected in the structure of Article 1 of Protocol No. 1 as a whole, regardless of which paragraphs are concerned in each case, and entails the need for a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, among other authorities, *East West Alliance Limited*, cited above, § 168). The requisite balance will be upset if the person concerned has had to bear "an individual and excessive burden" (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 50, Series A no. 98).

375. In the context of the general rule established in the first sentence of the first paragraph of Article 1, ascertaining whether such a balance existed requires an overall examination of the various interests in issue (see *Belova v. Russia*, no. 33955/08, § 37, 15 September 2020), which may call for an analysis not only of the compensation terms – if the situation is akin to the taking of property – but also, as in the instant case, of the conduct of the parties to the dispute, including the means employed by the State and their implementation (see *Beyeler*, cited above, § 114, and *Vod Baur Impex S.R.L. v. Romania*, no. 17060/15, § 69, 24 April 2022).

376. As regards the conduct of the applicant, the behaviour of the owner of property, including the degree of fault or care which the owner has displayed, is one element of the entirety of circumstances which should be taken into account (see *AGOSI*, cited above, § 54, and *Yaşar v. Romania*, no. 64863/13, § 60, 26 November 2019). The Court must therefore determine whether the domestic authorities had regard to the applicant's degree of fault or care or, at least, the relationship between the applicant's conduct and the offences which had been committed (see *Silickienė v. Lithuania*, no. 20496/02, § 66, 10 April 2012, and *S.C. Service Benz Com S.R.L. v. Romania*, no. 58045/11, § 29, 4 July 2017). In particular, the Court has held that an acquirer of property should carefully investigate its origin in order to avoid possible confiscation claims (see *Belova*, cited above, § 41).

377. As regards the conduct of the domestic authorities, the Court stresses the particular importance of the principle of "good governance", which requires that, where an issue in the general interest is at stake, particularly when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and, above all, consistent manner (see *Petar Matas*, § 43; *Belova*, § 37; and *Beyeler*, § 120, all cited above). However, the "good governance" principle should not, as a general rule, prevent the authorities from correcting occasional mistakes, even those resulting from their own negligence (see *Moskal v. Poland*, no. 10373/05, § 73, 15 September 2009, and *Romeva v. North Macedonia*, no. 32141/10, § 70, 12 December 2019). In similar situations, it is necessary to assess whether the mistake has been caused by the authorities themselves, without any fault on the part of a third party, or whether fault or negligence can be attributed to the private individual (see, *mutatis mutandis*, *Moskal*, § 73, and *Romeva*, § 71, both cited above).

378. Compensation terms under the relevant domestic legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicant (see *Maurice v. France* [GC], no. 11810/03, § 87, ECHR 2005-IX, and *Former King of Greece and Others v. Greece* [GC], no. 25701/94, § 89, ECHR 2000-XII). In the context of the general rule enshrined in Article 1 of Protocol No. 1 and of measures concerning control of the use of property, a lack of compensation is a factor to be taken into

consideration in determining whether a fair balance has been achieved, but is not in itself sufficient to constitute a violation of Article 1 of Protocol No. 1 (see *Depalle*, cited above, § 91; *Berger-Krall and Others v. Slovenia*, no. 14717/04, § 199, 12 June 2014; and *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, no. 44460/16, § 124, 7 June 2018).

(β) Application of the above principles to the present case

379. The Court must therefore examine whether: (i) the applicant acted with the necessary diligence, (ii) the domestic authorities acted in in good time and in an appropriate and consistent manner, and (iii) the applicants had to bear an excessive burden, on account of the lack of compensation.

– *Conduct of the applicant*

380. The Court has already found that the standard of diligence laid down by Italian law was sufficiently clear and foreseeable (see paragraph 306 above).

381. The Court further considers that the nature of the transaction justified a high standard of diligence in the present case (see paragraph 306 above).

382. It notes that similar standards are nowadays enshrined in Article 4 of the 1995 UNIDROIT Convention, which requires an assessment of whether a purchaser of a cultural object took into account the price paid, consulted any reasonably accessible register of stolen cultural objects and any other relevant information and documentation which it could reasonably have obtained, and consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances (see paragraph 160 above).

383. For its part, Directive 2014/60/EU, which in its recital 16 recalled that the Council of the European Union had recommended Member States to consider the ratification of the 1995 UNIDROIT Convention, incorporated a similar rule in its Article 10 § 2. In particular, the latter provides that in determining whether the possessor has exercised due care and attention, consideration must be given to all the circumstances of the acquisition, in particular the documentation on the object's provenance, the authorisations for removal required under the law of the requesting Member State, the character of the parties, the price paid, whether the possessor consulted any accessible register of stolen cultural objects and any relevant information which he could reasonably have obtained, or took any other steps which a reasonable person would have taken in the circumstances (see paragraph 183 above).

384. As reiterated above, the Court cannot in principle challenge the assessment of evidence undertaken by the domestic authorities, unless there are reasons to believe that it is arbitrary or unreasonable (see paragraph 344 above). As regards the assessment of the *bona fide* status of a purchaser of

property, the Court has questioned the domestic authorities' conclusions in cases in which the applicants' good faith was denied without any proper justification and, in particular, where the domestic authorities did not base their conclusion on any action on the part of the applicants which could have demonstrated their bad faith (see *Beinarovič and Others v. Lithuania*, nos. 70520/10 and 2 others, § 144, 12 June 2018, and *Seregin and Others v. Russia*, nos. 31686/16 and 4 others, §§ 108-09, 16 March 2021). The Court will therefore look closely at the adequacy of the domestic authorities' reasoning to that effect (see *Osipkovs and Others v. Latvia*, no. 39210/07, § 83, 4 May 2017).

385. The Court considers that the domestic authorities examined the available evidence in order to demonstrate that the applicant's representatives were at least negligent, and took into account the applicant's arguments, which it was able to defend at several levels of jurisdiction. With the exception of the order of 12 July 2007 of the GIP of the Pesaro District Court (see paragraph 72 above), all the domestic decisions were to the effect that the applicant was not a *bona fide* purchaser (see *Belova*, cited above, § 41), observing that, although it was aware of the existence of at least some doubts as to the legitimate provenance of the Statue, its representatives had not conducted a proper and independent inquiry and had merely relied on the assurances provided by the vendors' lawyers (see paragraphs 77, 91 and 97 above).

386. Given the domestic courts' findings, the Court considers that the Trust's representatives had, at the very least, very weighty reasons to doubt the Statue's legitimate provenance (see, *mutatis mutandis*, *Vukušić v. Croatia*, no. 69735/11, § 66, 31 May 2016). In particular, as observed by the GIP and the Court of Cassation the criminal proceedings that took place between 1966 and 1970 concerning the offence of receiving and handling a stolen archaeological object belonging to the State, which were concluded by the judgment of 18 November 1970 of the Perugia Court of Appeal, did not rule out that the Statue was part of Italy's cultural heritage, but merely acquitted the defendants on the grounds of insufficient evidence concerning the exact place where the Statue had been found (see paragraphs 14, 92 and 103 above). That judgment could not be relied on to conclude that the Statue had been lawfully exported from Italy as it concerned the circumstances of its discovery and not of its export. Moreover, the Court of Cassation stressed that during the negotiations the Trust's representatives were aware of the Italian authorities' attempts to recover the Statue, and the latter's claims over the object were mentioned several times by the vendors' lawyers (see paragraphs 26-27, 30-31, 36 and 97 above). All those circumstances are even more significant when one considers that Mr Getty Senior clearly made the purchase of the Statue conditional on obtaining proof of its legitimate provenance, and that he was clearly informed of the existence of "some possible legal complications", as "it [was] not known when the

[object had] left Greece or Italy, or when it [had been] discovered" (see paragraph 24 above).

387. In these circumstances, the Court considers that, due to the nature of the transaction, the Trust's representatives had a clear duty to take all the steps that could reasonably be expected of them to investigate the Statue's legitimate provenance before purchasing it (see *Belova*, cited above, § 41).

388. However, as observed by the GIP and the Court of Cassation, they did not carry out a careful and objective assessment of the Statue's provenance (see paragraphs 92 and 97 above). They relied on the assurances of the vendors' lawyers, some of which were very general and capable of raising serious doubts as to their good faith (see paragraph 91 above). For example, in their letter of 1 October 1973 the vendor's lawyers guaranteed the legitimacy of the transaction by relying on information received by a senior official of the Italian Ministry of Education "through the good offices of a mutual friend", on other information ascertained "through confidential channels" or "personally learned by one of the policeman [*sic*] who [had] been dealing with the subject matter" (see paragraph 31 above).

389. The Court further notes that following Mr Getty Senior's death on 6 June 1976 (see paragraph 33 above), the trustees decided on 8 June 1977 to merely request a new and updated legal opinion from the same lawyers who had represented the vendors (see paragraph 34 above). The lawyers reiterated the very same opinions as previously and reassured the Trust of the valid ownership. However, the Court has not been provided with any proof in that regard (see paragraphs 35-36 above). Moreover, the Court notes that Trust's representatives did not request, nor did the vendors provide, any proof of the lawful export of the Statue from Italy, even though they had knowledge of the applicable domestic provisions requiring an export licence, irrespective of the issue of ownership (see paragraph 110 above). Therefore, the trustees authorised the transaction without complying with the instructions given by Mr Getty Senior (see paragraph 386 above).

390. All these elements, which were carefully examined and reiterated by the domestic judicial authorities, led them to consider that the Trust's representatives when purchasing the Statue were, at the very least, negligent, if not in bad faith. The Court considers that such an assessment is not arbitrary or manifestly unreasonable.

– *Conduct of the domestic authorities*

391. The Court considers that in assessing the adequacy of the State authorities' conduct it must take into account, on the one hand, the complexity of the legal and factual issues faced by them and, on the other hand, the state of uncertainty in which the applicants might have found themselves as a result of delays attributable to the authorities (see, *mutatis mutandis*, *Beinarovič and Others v. Lithuania*, nos. 70520/10 and 2 others, § 142, 12 June 2018).

392. However, it cannot be said that the domestic authorities' conduct raised doubts as to their intention to recover the Statue as part of Italy's cultural heritage and on account of the non-payment of customs export duties.

393. In this connection, it must be noted that it is undisputed that the domestic authorities became aware of the applicant's purchase of the Statue soon after its arrival in the US, which took place on 15 August 1977 (see paragraph 38 above above), given that as early as December 1977 they took measures aimed at investigating the circumstances of the transaction (see paragraph 39 above). It is therefore from that moment that the Court must assess whether the domestic authorities acted in good time, and in an appropriate and consistent way.

394. In the light of all the material in its possession, the Court finds that the Italian authorities responded promptly and diligently. In particular, on 13 December 1977 the Italian customs authorities sent a request for an investigation through Interpol Rome, which was forwarded to the US Customs Service (see paragraph 40 above). For its part, the Gubbio magistrate opened a new investigation into unlawful exportation (see paragraph 45 above), in the course of which: (i) on 24 November 1977, the domestic authorities heard evidence (see paragraphs 46-47 above); (ii) lodged letters of request on 14 January and 17 February 1978 with the British and US authorities respectively (see paragraphs 48-51 above); (ii) and undertook further investigations (see paragraphs 52-53 above).

395. In this context, the Court considers that the domestic judicial authorities cannot be criticised for discontinuing the investigation on 25 November 1978 on account of the lack of sufficient evidence, given that they did so because their judicial cooperation requests had been dismissed by the foreign authorities (see paragraph 54 above).

396. As regards the letter sent on 25 August 1980 by the Gubbio magistrate to the Perugia public prosecutor's office, which stated that the domestic judicial authorities were prevented from taking further measures aimed at recovering the Statue (see paragraph 55 above), the Court cannot agree with the applicant and consider that, on that basis, it had a legitimate expectation that it would not be the subject of confiscation proceedings. The applicant was not party to the proceedings to which the letter referred, and it did not have knowledge of the letter before the proceedings which led to the imposition of the contested measure were brought on 12 April 2007 (see paragraph 68 above).

397. By contrast, it appears from the available documents that, even though the criminal investigation was discontinued, the other domestic authorities acted in the manner suggested in that letter, in which the magistrate considered that further action aimed at recovering the Statue should be taken by the executive authorities. In this regard, the Court notes that (i) on 28 September 1982 the Ministry for Cultural and Environmental Heritage negotiated the restitution of the Statue with the Getty Museum (see

paragraph 60 above); (ii) in 1989 the Ministry formally lodged a restitution request, which was dismissed by the applicant's representative (see paragraph 62 above); (iii) in 1995 the Ministry formally instructed the Italian consul in Los Angeles to continue negotiations for the restitution of the Statue, but the applicant's representatives refused (see paragraph 63 above); and (iv) between 2006 and 2007 further negotiations took place, although the parties did not disclose their content to the Court (see paragraph 65 above).

398. The Court must, however, also take note of the fact that some negligence is also attributable to the Italian authorities. In particular, it appears from the documents made available to the Court that, after the first investigation into unlawful exportation was discontinued, the Italian authorities did not follow up the procedure instituted with the US authorities through Interpol (see paragraph 44 above), and did not consider whether to follow the procedure indicated in the US Secretary of State's circular letter of 3 February 1976, which suggested that the Italian authorities could have instituted proceedings before the US courts in conformity with US law (see paragraph 51 above).

399. The Court is also not convinced by the Government's argument that the proceedings which led to the confiscation measure could not have been instituted earlier, as the evidence of the applicant's bad faith only emerged in 2007. For the very same reason that that evidence emerged in those proceedings, the Court considers that the authorities would have obtained such evidence earlier had they instituted those proceedings earlier. However, the Court admits that the institution of those proceedings was the only available means of obtaining the cooperation of the applicant and the US authorities in gathering of the necessary evidence.

400. In particular, the fact that the Italian authorities did not succeed in their attempts to recover the Statue cannot be attributed to them. The Court must indeed take account of the fact that they operated in a legal vacuum, as there were no binding international legal instruments in force at the time in which the Statue was exported and purchased by the applicant which would have allowed it to recover it or, at the very least, to obtain the full cooperation of the foreign domestic authorities.

– *The absence of compensation*

401. As regards whether the applicant suffered an excessive burden on account of the lack of any form of compensation, the Court has already found that it acquired the Statue, at the very least, negligently (see paragraph 390 above) and considers that this can be regarded as a crucial consideration under Article 1 of Protocol No. 1 (see, *mutatis mutandis*, *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, § 75, 21 April 2016). In particular, when assessing whether a confiscation measure imposed on third-party owners of property struck a fair balance, the Court considers the behaviour of the owner of the

property a relevant circumstance (see *Yaşar v. Romania*, no. 64863/13, § 60, 26 November 2019, and *Silickienė*, cited above, § 67)

402. Even assuming that the Trust obtained valid ownership, which is, however, highly disputed, the Court observes that the applicant could not have been unaware, in the light of the domestic-case law on the confiscation of unlawfully exported cultural objects owned by third parties "not involved in the criminal offence" (see paragraphs 124-130 above), of the principle that no compensation was payable in the event of the imposition of this measure on owners who or which were considered to have been acting in bad faith or, at the very least, negligent (see, *mutatis mutandis*, *Depalle*, cited above, § 91, and *Brosset-Triboulet and Others v. France* [GC], no. 34078/02, § 94, 29 March 2010).

403. Moreover, the Court considers that the applicant, by negligently purchasing the Statue in the absence of any proof of its legitimate provenance and with full knowledge of the Italian authorities' claims over it, disregarded the requirements of the law (*Ivanova and Cherkezov*, cited above, § 75).

404. In the Court's view, therefore, the applicant accepted, at least implicitly, the risk that the Statue might be confiscated in the absence of any compensation (contrast *Dzirnis v. Latvia*, no. 25082/05, §§ 91-95, 26 January 2017, and *Gladysheva*, cited above, § 80). Accordingly, the lack of compensation cannot, in the Court's view, be regarded as making the measure disproportionate in respect of the general interest pursued, notably the recovery of an unlawfully exported cultural object.

(γ) Conclusions as to proportionality

405. In the light of the above, the Court therefore concludes that the Trust did not act with the requisite diligence when purchasing the Statue (see paragraphs 386-390 above) and that this situation undoubtedly carries some weight in the assessment (see *Beyeler*, cited above, § 116). Moreover, since the applicant was aware of the absence, under the relevant domestic law, of a time-limit for adopting the confiscation measure aimed at recovering unlawfully exported cultural objects, it cannot be said to have developed a legitimate expectation that it would retain the Statue, given that several State authorities were working continuously with the aim of recovering it (see paragraphs 394-397 above). At the same time, and again in the light of the applicable domestic provisions, no legitimate expectation can be said to have arisen on the part of the applicant as to the possibility of obtaining compensation (see paragraph 402 above).

406. On the other hand, although the domestic authorities took several steps aimed at recovering the Statue (see paragraphs 394-397 above), the Court has also observed that they did not always diligently follow the relevant procedures (see paragraph 398 above) and that the Government have failed to convince it of the reason why the proceedings which led to the imposition of the contested measure could not be instituted before 2007 (see

paragraph 399 above). The Court considers that these findings also carry weight in its assessment (see *Beyeler*, cited above, § 120).

407. However, unlike the *Beyeler* case, in which the relevant cultural object was legitimately owned by a private individual, the domestic authorities' negligence in the present case did not result in any unjust enrichment on their part, as they reasonably demonstrated that the Statue was part of Italy's cultural heritage (see paragraphs 346 and 348-52 above). Moreover, in the present case the occasional mistakes committed by the domestic authorities did not occur in a situation in which no fault or negligence could be attributed to an applicant acting in good faith, but rather were committed as part of a response to the applicant's conduct, which was considered by the domestic judicial authorities at least negligent, if not in bad faith (see paragraphs 377 and 390 above). Lastly, the domestic authorities in the present case operated in a legal vacuum, as none of the international instruments which could have helped them to recover an unlawfully exported cultural object were in force at the material time (see paragraph 279 above). By contrast, the Court stresses that nowadays, in a similar scenario, the domestic authorities would be under a duty to strictly comply with the time-limits and procedures laid down in the 1995 UNIDROIT Convention and with the domestic provisions which implemented Directive 2014/60/EU, in cases in which they are applicable (see paragraphs 160 and 183 above).

408. In the light of the above findings, and taking into account that the State has a wide margin of discretion as to what is "in accordance with the general interest", particularly where cultural heritage issues are concerned (see *Beyeler*, § 112; *Kozacıoğlu*, § 53; and *Sinan Yildiz and Others* (dec.), all cited above), the strong consensus in international and European law with regard to the need to protect cultural objects from unlawful exportation and to return them to their country of origin (see paragraphs 340-342 above, and the case-law cited therein), the applicant's negligent conduct, as well as the very exceptional legal vacuum in which the domestic authorities found themselves in the present case, the Court concludes that they did not overstep their margin of appreciation.

409. Accordingly, the Court finds that there has been no violation of Article 1 of Protocol No. 1.

FOR THESE REASONS, THE COURT

1. *Upholds*, unanimously, the Government's objection to the standing of the members of the first applicant's board of trustees and *declares* that they have no standing to lodge the present application;

2. *Holds*, unanimously, that there is no need to rule on whether the new members of the first applicant's board of trustees have standing to pursue the present application;

3. *Dismisses*, by a majority, the other preliminary objections raised by the Government and *declares*, by a majority, the complaint under Article 1 of Protocol No. 1 admissible;

4. *Holds*, unanimously, that there has been no violation of Article 1 of Protocol No. 1 to the Convention.

Done in English, and notified in writing on 2 May 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Marko Bošnjak President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

M.B.
I.F.

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the majority's view that the instant application is admissible. Moreover, I have reservations concerning some parts of the reasoning.

2. The case concerns an important issue, namely the illegal exportation of cultural objects and their subsequent trade. The instant judgment will therefore have an impact extending far beyond the scope of the individual case. I fully agree in this context with the finding that there exists "*[a] strong consensus in international and European law with regard to the need to protect cultural objects from unlawful exportation and to return them to their country of origin*" (see paragraph 408 of the judgment).

I note that the market in cultural goods has a number of specific features. Purchasers assume the risk that the specific cultural object they wish to buy from a private vendor may in fact still be in the ownership of a State or of a private third party. Therefore, they must act with special diligence and caution and take all necessary steps to verify whether they will be able to enter a valid contract.

3. In the instant case, the statue of Victorious Youth is the object of two conflicting ownership claims. On one hand, the applicant trust claims to be the owner of the statue under Italian law. On the other hand, the Italian authorities assert that the Italian State acquired ownership of the statue before it was exported and remains its owner.

I note in this context that the question of ownership was addressed by the preliminary investigations judge of the Pesaro District Court in his order of 8 June 2018. The preliminary investigations judge established that the Italian State was the owner of the statue. This order was later upheld by a final decision of the Court of Cassation of 2 January 2019.

I further observe that the Court has recently restated the following principles (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 149-150, 20 March 2018):

> "It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, even in those fields where the Convention "incorporates" the rules of that law, since the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (see *Zagrebačka banka d.d. v. Croatia*, no. 39544/05, § 263, 12 December 2013). This is particularly true when, as in this instance, the case turns upon difficult questions of interpretation of domestic law (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 83, ECHR 2007-I). Unless the interpretation is arbitrary or manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of that interpretation are compatible with the Convention (ibid., §§ 83 and 86). It is for that reason that the Court has held that, in principle, it cannot be said that an applicant has a sufficiently established claim amounting to an "asset" for the purposes of Article 1 of Protocol No. 1, where there is

> a dispute as to the correct interpretation and application of domestic law and where the question whether or not he or she complied with the statutory requirements is to be determined in judicial proceedings (see, for example, *Kopecký*, cited above, §§ 50 and 58, and *Milašinović v. Croatia* (dec.), no. 26659/08, 1 July 2010).
>
> ... the Court reiterates that it is sensitive to the subsidiary nature of its role, and that it must be cautious in taking on the role of a first-instance tribunal of fact where this is not rendered unavoidable by the circumstances of a particular case. It is not the Court's task to substitute its own assessment of the facts for that of the domestic courts, and as a general rule it is for those courts to assess the evidence before them. Although the Court is not bound by the findings of domestic courts, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by those courts (see, for example, *Gäfgen*, cited above, § 93, and *Trapeznikova v. Russia*, no. 21539/02, § 106, 11 December 2008)."

Against this backdrop, concerning the issue of ownership of the statue in the instant case, I do not see sufficiently strong reasons to depart from the factual findings and legal assessments made by the preliminary investigations judge of the Pesaro District Court in the legal order of 8 June 2018, nor to call into question the latter's finding that the Italian State acquired the ownership of the disputed statue before it was exported. Therefore, in my view, Article 1 of Protocol No. 1 is not applicable; in any event, the instant application appears manifestly ill-founded.

4. The majority make the following assessments concerning the legal status of the disputed statue:

> "- the parties did not dispute that the Trust purchased the Bronze in July 1977 for USD 3,950,000...; The Court must however consider that the Government contested the validity, under both Italian and US law, of that title, on account of a violation of Italian heritage law, given that cultural objects belonging to the State are inalienable and imprescriptible" (paragraph 261 of the instant judgment);
>
> - the existence of some proprietary interest of the applicant over the Statue was established under Italian law, as demonstrated by the fact that the Italian authorities invited the applicant, in its capacity as current possessor of the item (*attual[e] detentor[e] del bene*), to participate in the domestic proceedings in which the confiscation order was adopted (see paragraph 74 above)" (paragraph 264 of the instant judgment)
>
> "- the Court will base its analysis on the assumption that in the circumstances of the present case, considered as a whole, the applicant had a proprietary interest in peaceful enjoyment of the Statue that was sufficiently established and weighty to amount to a "possession" within the meaning of the rule expressed in the first sentence of Article 1 of Protocol No. 1, which is therefore applicable *ratione materiae* to the complaint under consideration" (paragraph 266 of the instant judgment).

I note in this connection that it would be more correct to say that the Italian Government disputes the fact that the Trust did indeed purchase the Bronze: in their view, the Trust signed a contract which was not valid and which could not have effectively transferred the ownership.

The majority relies on the fact that the Italian authorities correctly established that the applicant is the "*attual[e] detentor[e] del bene*" (current

possessor of the item, in other words, the Bronze - see paragraphs 74 and 264 of the judgment). It would be useful to add that the preliminary investigations judge also established that the applicant trust is not the owner of the Bronze. This finding implies that the applicant trust is a possessor without valid legal title. Its legal situation is nonetheless qualified by the Court as a "proprietary interest" established under Italian law and protected by Article 1 of Protocol No 1 (see paragraphs 265-266). I note that the Court often uses the term "proprietary interest". It may be used as a generic term in respect of specific subjective rights recognised in the domestic legal system and clearly identified in the reasoning (see, for instance, *Bruncrona v. Finland*, no. 41673/98, § 79, 16 November 2004, and *Sukhanov and Ilchenko v. Ukraine*, nos. 68385/10 and 71378/10, § 51, 26 June 2014). The term may also be used in respect of some unspecified legal situation, without the identification of its constitutive elements (see, for instance, *Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I). This second usage may be problematic.

In the instant case, the characterisation of the applicant's legal situation as "a proprietary interest" without any further specification triggers several objections. Firstly, it is not clear what exactly a "proprietary interest" means and what are the criteria for identifying it. The notion does not appear to exist in Italian law and the constitutive elements of the applicant's legal situation have not been identified. The reasoning remains obscure on this point. Secondly, it is not clear why mere possession without valid title under the domestic law should be protected under Article 1 of Protocol No. 1 against an owner (in this case, the Italian State) who tries to recover his or her property. Thirdly, the fact that the domestic legislation offers procedural protection to a possessor who asserts the claim to be the owner of an object does not transform his or her legal situation into a "proprietary interest" justifying, *per se,* substantive protection against the claims of the actual owner. It would depend upon the specific substantive entitlements recognised in the domestic law. Fourthly, it is worth recalling that the following view has been expressed by the Court in respect of the identification of possessions within the meaning of Article 1 of Protocol No. 1 (in *Kopecký v. Slovakia* [GC], no. 44912/98, § 52, ECHR 2004-IX):

> "... where the proprietary interest is in the nature of a claim it may be regarded as an 'asset' only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it."

The legal position of the applicant should instead be qualified as a claim (in other words: an assertion; not necessarily a "claim" in the meaning of the *Kopecký* judgment) that it is the owner of the disputed statue. Article 1 of Protocol No. 1 can be deemed applicable to such a claim (assertion) if we assume that (i) such a claim is arguable, and (ii) its validity has not yet been decided, or has been rejected by the domestic authorities - but in an arbitrary manner. In my view, this not the case here.

5. The majority further relies on the following argument (see paragraph 262 of the instant judgment):

> "In addition, the Court considers that the principle of legal certainty and the protection of legitimate expectations would have required the Government to challenge the validity of such a title before the competent domestic courts (see, *mutatis mutandis*, *Bölükbaş and Others v. Turkey*, no. 29799/02, §§ 31-32, 9 February 2010; *Valle Pierimpiè Società Agricola S.P.A. v. Italy*, no. 46154/11, § 48, 23 September 2014; and *Elif Kızıl v. Turkey*, no. 4601/06, §67, 24 March 2020), whichever they would have been in accordance with the applicable rules of private international law."

This argument triggers two remarks. Firstly, there are significant differences between ownership and possession of plots of land (subject to registration in a land register) on the one hand and ownership and possession of cultural objects on the other. The case-law referred to in the above quotation pertains to the former, not to the latter. Secondly, the categorical assessment of the applicant's situation seems to be contradicted later in the reasoning by the finding that there has been no violation of Article 1 of Protocol No. 1.

6. In conclusion, it is necessary to stress that - in my view - the adopted approach is very problematic. It leads to strong protection for possessors without recognised legal title, against owners who are trying to recover their goods. As a result, it considerably weakens the protection of cultural heritage and unduly strengthens the protection of persons who have acquired illegally exported cultural objects.

APPENDIX

List of applicants:

No.	Applicant's Name	Year of birth/registration	Nationality	Place of residence
1.	THE J. PAUL GETTY TRUST	1953	American	Los Angeles
2.	Megan Brody CHERNIN	1954	American	Los Angeles
3.	James Bash CUNO	1951	American	Los Angeles
4.	Bruce Wall DUNLEVIE	1956	American	Los Angeles
5.	Catharine Drew Dilpin FAUST	1947	American	Los Angeles
6.	Frances Daly FERGUSSON	1944	American	Los Angeles
7.	Maria Denise HUMMER-TUTTLE	1944	American	Los Angeles
8.	Pamela JOYNER	1958	American	Los Angeles
9.	Paul Omer LECLERC	1941	American	Los Angeles
10.	David Li LEE	1949	American	Los Angeles
11.	Robert Whitney LOVELACE	1962	American	Los Angeles
12.	Thelma Esther MELENDEZ DE SANTA ANA	1958	American	Los Angeles
13.	Neil Leon RUDENSTINE	1935	American	Los Angeles
14.	Ronald Paul SPOGLI	2019	American	Los Angeles

No.	Applicant's Name	Year of birth/registration	Nationality	Place of residence
15.	John Joseph STUDZINSKI	1956	American	Los Angeles