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## EXTRATERRITORIAL JURISDICTION AND RIGHT TO TAKE PART IN CULTURAL LIFE AT THE ECtHR: A CRITICAL EXAMINATION OF DIFFERENT APPROACHES TO RECURRING ISSUES

CONTENT: 1. Introduction. – 2. The Long Journey of the Victorious Youth from Fano to Strasbourg. – 3. The ECtHR's Judgment in the Case *J. Paul Getty Trust and Others v. Italy*. – 4. Are There New Trends in the Jurisprudence of the ECtHR? 4.1. On Extraterritorial Jurisdiction. – 4.2. On the Protection of Cultural Heritage. – 5. Conclusion.

### 1. Introduction

The decades-long dispute concerning the “Victorious Youth”<sup>1</sup> has reached the European Court of Human Rights (“ECtHR” or “Court”). In the latest step of a lengthy fray, the Strasbourg Court rejected the complaint filed by the J. Paul Getty Trust (“Trust”)<sup>2</sup> against the confiscation measure adopted by Italian authorities to obtain the restitution of this bronze statue.<sup>3</sup> In a nutshell, the Court dismissed the Trust’s appeal on the grounds that the confiscation order did not infringe upon the Trust’s right to property, thereby enabling the Italian government to continue pursuing its restitution claim.

Much ink has been spilled on the judicial stages of this case and the arguments that would compel (or not) the restitution of the Victorious Youth.<sup>4</sup> Although it departs from

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<sup>1</sup> The Victorious Youth (known also as “Atleta vittorioso”) is a life-size bronze statue of a naked youth in the act of placing an olive wreath on his head. It is believed that it was created between the 4th and 2nd century BC by the Greek sculptor Lisippo from Sicione or one of his students. See <http://www.getty.edu/art/collection/object/103QXS> (last visited 4 May 2025).

<sup>2</sup> The Trust is a private foundation that was created in 1953 by businessman and art collector J. Paul Getty (1892-1976) to ensure the management of the J. Paul Getty Museum (“Museum”), which was established in 1954 in Los Angeles (<http://www.getty.edu/about/history/>; last visited 4 May 2025).

<sup>3</sup> *J. Paul Getty Trust and Others v. Italy*, No. 35271/19, Judgment 2 May 2024 (“Judgment”).

<sup>4</sup> See G. GIARDINI, *Il caso studio dell’Atleta Vittorioso di Fano. Tra argomenti di nazionalismo culturale e “terza via”*, in J. CLEMENTI et al. (ed.), *Un Atleta venuto dal mare. Criticità e prospettive di un ritorno*, Roma, 2023, pp. 129-152; T. SCOVAZZI, *Un atleta non ancora giunto a destinazione*, in *Rivista di diritto internazionale*, 2019, pp. 511-518; D. FINCHAM, *Transnational Forfeiture of the Getty Bronze*, in *Cardozo Arts & Entertainment Law Journal*, 2013-2014, pp.

the ruling of the Strasbourg Court, the purpose of the present article is to critically examine the Court's findings on two pivotal and interrelated issues: the extraterritorial jurisdiction of ECHR Contracting States – and correspondingly of the ECtHR – and the general interest in protecting the national cultural heritage. While it discusses the introduction of a new exception to the principle that a State's jurisdictional competence under Article 1 ECHR is primarily territorial, the present study also highlights the restrictive stance of the ECtHR with respect to the protection of cultural heritage. Specifically, the Court appears reluctant to include the right to take part in cultural life within the scope of the general interest in cultural heritage protection that Contracting States may legitimately pursue. Ultimately, this article reveals that the Court's jurisprudence can enhance the extraterritorial reach of protective national cultural heritage laws through the global circulation of domestic confiscation orders on the restitution of stolen or illegally exported cultural objects.

This article proceeds as follows. Section 2 rehearses a few key elements of the dispute, whereas section 3 summarizes the ECtHR's judgment. Next, the article engages with the pronouncements of the Court on extraterritoriality (section 4.1) and the general interest in protecting cultural heritage (section 4.2). Section 5 concludes.

## 2. *The Long Journey of the Victorious Youth from Fano to Strasbourg*

To understand the significance of the ECtHR's judgment in the case *J. Paul Getty Trust and Others v. Italy*, it is appropriate to recall the salient elements of the dispute.

Firstly, the Victorious Youth was fortuitously discovered by Italian fishermen in 1964 in the waters off Italy's East coast on the Adriatic Sea. Upon their return to the port of Fano, the fishermen sold the bronze statue to a local art dealer. Subsequently, the statue was exported from Italy and then purchased by the Trust in 1977.<sup>5</sup>

Secondly, the fishermen, the dealer and their accomplices were charged with receiving and handling stolen goods in 1965.<sup>6</sup> The prosecution reached the Court of Appeals of Rome, which acquitted everyone due to insufficient evidence of where the Victorious Youth was found (in Italy's territorial waters or international waters) and its archaeological value (at the time Italian authorities had been unable to view the statue or acquire an image of it).<sup>7</sup> As one of the finest original Greek bronzes to have survived from the classical era, the statue became the signature piece of the Museum.

Thirdly, the Trust's representatives were considered negligent – if not in bad faith – when buying the bronze. Indeed, although they were aware that the criminal proceedings that concerned the statue ended in acquittal only due to lack of evidence, they proceeded

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471-500; P. VIGNI, *Il caso del "bronzo di Lisippo" e la gestione del patrimonio culturale subacqueo nel diritto internazionale pubblico*, in *Studi senesi*, 2012, pp. 314-328; A. LANCIOTTI, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze"*, in S. BORELLI and F. LENZERINI (eds.), *Cultural Heritage, Cultural Rights, Cultural Diversity. New Developments in International Law*, Leiden, 2012, pp. 301-326.

<sup>5</sup> Judgment, §§ 6-9, 23-37.

<sup>6</sup> A. VISCONTI, *La Corte EDU si pronuncia sulla confisca obbligatoria di beni culturali illecitamente esportati nella vicenda dell'Atleta Vittorioso*, in *Sistema penale*, 2024, pp. 1-30, p. 4.

<sup>7</sup> Judgment, §§10-14.

without the diligence required by the nature of the transaction. For instance, they neither requested nor obtained a valid export permit from the seller.<sup>8</sup>

Fourthly, Italian authorities never stopped pursuing the statue following the 1977 sale. While judicial authorities sought the cooperation of foreign investigative authorities,<sup>9</sup> the Italian Ministries of Cultural Heritage and Foreign Affairs repeatedly requested the restitution of the Victorious Youth.<sup>10</sup> Yet, these initiatives yielded no result.

Fifthly, it must be recalled that a new set of criminal proceedings started in 2007, when the Preliminary investigation judge (GIP) at the Tribunal of Pesaro obtained new information on the conduct of the Trust's representatives at the time of the purchase of the bronze. In 2010, at the conclusion of these proceedings, the GIP issued an order providing for the confiscation of the statue wherever located and its restitution.<sup>11</sup> Notably, the confiscation was ordered pursuant to Article 174(3) of Legislative Decree No. 42 of 22 January 2004.<sup>12</sup> In keeping with this provision, the GIP confirmed that confiscation: (i) was aimed at recovering a cultural object belonging to the inalienable patrimony of the State<sup>13</sup> that had been illegally exported outside the Italian territory;<sup>14</sup> (ii) could be ordered also in case of acquittal (if the materiality of the fact was not excluded) and of extinction of the crime due to prescription;<sup>15</sup> (iii) could be imposed at any time on any possessor of stolen property who was extraneous to the illicit taking, provided that it could be ascertained and attributed to the possessor a lack of vigilance at the time of the purchase of the property.<sup>16</sup> The Trust

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<sup>8</sup> Judgment, §§ 23-37, 390. The Trust disregarded Mr. J. Paul Getty's instructions (that he left before his death in his will) to acquire the bronze only if written authorization was obtained from Italian authorities. Judgment, §§ 97, 386.

<sup>9</sup> Judgment, §§15-22, 48-49, 40-44, 50-51.

<sup>10</sup> Judgment, §§ 60-64. In 2007, Italy and the Trust reached an agreement on the restitution to Italy of forty archaeological objects for which Italian authorities had overwhelming evidence that they had been clandestinely excavated in Italy and illegally exported therefrom. The deal was signed after both sides agreed to set aside the question of the return of the Victorious Youth. See J. Paul Getty Trust, *Getty and Italian Ministry of Culture Sign Agreement in Rome for the Return of Objects*, 1 August 2007 (<https://www.getty.edu/news/getty-museum-and-italian-ministry-of-culture-sign-agreement-in-rome-return-objects/>, last visited 3 May 2025).

<sup>11</sup> These proceedings concerned five persons involved in the discovery and concealment of the statue. Order, Preliminary investigation judge at the Tribunal of Pesaro, 10 February 2010; Judgment, § 76.

<sup>12</sup> This decree (which carried the Code of Cultural Heritage and Landscape) was revised by Law No. 22 of 9 March 2022, and the provision on confiscation was transposed into Article 518-duodevices of the Criminal Code. The confiscation of illegally exported cultural objects was required also by the law in force at the time of the illicit export of the Victorious Youth: Article 66 of Law No. 1089 of 1 June 1939.

<sup>13</sup> Judgment, §§ 76. Declaring that the Victorious Youth belonged to Italy was necessary to justify the confiscation. The GIP made it clear that the Italian State acquired ownership of the Victorious Youth either because the fishermen found it in territorial waters or, alternatively, by virtue of the principle according to which the Italian laws about cultural property apply to discoveries of cultural objects on the high seas by ships flying the Italian flag (Judgment, §§ 78). On the latter hypothesis see T. SCOVAZZI, *Dal Melqart di Sciacca all'Atleta di Lisippo*, in *Rivista di diritto internazionale privato e processuale*, 2011, pp. 5-18.

<sup>14</sup> Italian cultural heritage laws provided for a blanket ban on all exports of cultural goods (whether publicly or privately owned), unless authorized by national authorities. Therefore, the mere passage of the statue on Italian territory qualified the Victorious Youth as an illegally exported cultural object.

<sup>15</sup> Article 174(3) of Legislative Decree 42/2004 (fn 12 and related text) allowed confiscation without a conviction if there was evidence of unlawful export of the item at stake. The reason is that this measure was no punitive; its purpose was to enable Italian authorities to regain control over an illegally exported cultural object. Standard confiscation under Article 240 of the Italian Criminal Code, instead, has a punitive nature.

<sup>16</sup> Judgment, § 77.

appealed the confiscation order of 2010, but this was confirmed in 2012,<sup>17</sup> 2018<sup>18</sup> and 2019.<sup>19</sup>

Finally, in July 2019, the Pesaro Public Prosecutor's office sent to the authorities of the United States (US) a request for recognition and enforcement of the confiscation order pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters of 1982.<sup>20</sup> Although the request has not been followed by any action to date,<sup>21</sup> the Trust and its individual trustees brought an action before the Strasbourg Court on 28 June 2019 alleging that the confiscation measure constituted a violation of their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR" or "Convention"). Specifically, the applicants argued that the confiscation order: (i) was unlawful on account of the lack of foreseeability of the legal basis; (ii) pursued an illegitimate aim as the Victorious Youth was not part of Italy's cultural heritage; and (iii) placed an excessive burden on them due both to the absence of a time limit within which the contested measure could be imposed and to the lack of any compensation for the confiscation of the bronze.<sup>22</sup>

It is to the judgment delivered by the ECtHR in this case that we turn now.

### 3. *The ECtHR's Judgment in the Case J. Paul Getty Trust and Others v. Italy*

Beginning with the admissibility of the complaint, the ECtHR declared it admissible after addressing the preliminary objections raised by the Italian government.

The Court upheld the government's first preliminary objection that the action brought by the individual members of the Trust (the "trustees") was inadmissible *ratione personae*. In essence, the Court held that the trustees could not be regarded as "victims" within the meaning of Article 34 ECHR because the confiscation measure did not affect their interests.<sup>23</sup>

By contrast, the ECtHR rejected the government's second preliminary objection according to which the Trust could not claim to be a victim of the alleged violation of Article 1 Protocol No. 1. On the one hand, the Court determined that the Trust could claim victim status, as it provided reasonable and convincing evidence that it had been adversely affected by the confiscation order from the moment it was adopted.<sup>24</sup> On the other hand, the ECtHR affirmed that Italy could be held responsible under the Convention for the adoption of the contested measure, even though the enforcement of the order would be carried out by US authorities through the physical removal of the Victorious Youth from the Museum.

<sup>17</sup> Order, Preliminary investigation judge at the Tribunal of Pesaro, 3 May 2012 (Judgment, § 81).

<sup>18</sup> Order, Preliminary investigation judge at the Tribunal of Pesaro, 8 June 2018 (Judgment, §§ 82-92).

<sup>19</sup> Court of Cassation, No. 22 of 2 January 2019 (Judgment, §§ 93-103).

<sup>20</sup> Judgment, § 104.

<sup>21</sup> Under the applicable provisions, the US Attorney General's Office must certify the request for mutual legal assistance and submit it to the domestic court competent to decide on the recognition and enforcement request. Judgment, § 105.

<sup>22</sup> Judgment, § 190, 361, 364.

<sup>23</sup> Judgment, § 191-209.

<sup>24</sup> For instance, the Trust proved that it had to cancel a loan of the statue for a temporary exhibition in Florence out of fears that it could be seized by Italian authorities. Judgment, § 222, 225-231.

The third preliminary objection – that the Trust had not proprietary interests protected by Article 1 Protocol No. 1 because the Victorious Youth was part of the inalienable patrimony of the Italian State – was also rejected by the Court. While not conceding that the Trust lawfully acquired ownership title, the ECtHR affirmed that the Trust's continuous possession since 1977 was sufficient to give it a "proprietary interest" protected under Article 1 Protocol No. 1.<sup>25</sup>

Turning to the merits of the complaint, the Court applied its standard approach in cases involving alleged infringements of the right to the peaceful enjoyment of possessions as guaranteed by Article 1 Protocol No. 1.<sup>26</sup>

At the outset, the ECtHR reiterated that Article 1 Protocol No. 1 comprises three distinct rules.<sup>27</sup> The first (the first sentence of the first paragraph) sets out the principle of peaceful enjoyment of property. The second (the second sentence of the first paragraph) covers deprivation of possessions and makes it subject to certain conditions. The third (the second paragraph) recognizes that ECHR Contracting States are entitled to control the use of property in accordance with the general interest.<sup>28</sup> According to the Court's jurisprudence, whether there has been a violation of Article 1 Protocol No. 1 involves two levels of examination. At the first level, two questions should be considered: whether a recognized property right exists; and whether there has been interference within the meaning of the provision. At a second level, the focus shifts to whether the interference constitutes a violation. It is thus necessary to verify whether the interference is lawful; whether it can be said to have been in the public or general interest; and whether it meets the test of proportionality.<sup>29</sup>

In light of its assessment of the facts, the Court affirmed that the adoption of the confiscation measure amounted to an interference with the Trust's proprietary interests for the reason that it restricted the applicant's right to use its possession.<sup>30</sup> Next, the Court moved to verify whether the interference was compatible with Article 1 Protocol No. 1, that is, whether it was lawful, in the general interest and proportionate.<sup>31</sup>

First, the Court upheld the lawfulness of the order.<sup>32</sup> The condition of lawfulness is fulfilled when a legislative provision is accessible and worded with sufficient precision, so that citizens can regulate their conduct accordingly.<sup>33</sup> In the present case, the ECtHR found that the relevant legislation was lawful in that it clearly indicated what the standard of diligence required of purchasers of cultural objects was. Likewise, the Court affirmed that the conditions for imposing the mandatory confiscation of illegally exported cultural objects were also clear and foreseeable. In summary, according to the Court, when the Trust pur-

<sup>25</sup> Judgment, §§259-267.

<sup>26</sup> «Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties».

<sup>27</sup> Judgment, § 272.

<sup>28</sup> See *Markus v. Latvia*, No. 17483/10, Judgment 11 June 2020, § 64.

<sup>29</sup> ECtHR, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of Property*, 29 February 2024, pp. 20-21.

<sup>30</sup> See fn 24.

<sup>31</sup> Judgment, §§190, 273-281, 361, 364.

<sup>32</sup> Judgment, §325. On the notion of lawfulness, see Judgment, §§ 293-298.

<sup>33</sup> A. W. SCHABAS, *The European Convention on Human Rights. A Commentary*, Oxford, 2015, p. 96.



chased the Victorious Youth, the notion of «person not involved in the criminal offence», as set out in the relevant legislation, allowed the imposition of confiscation on a person (the possessor of a smuggled cultural object) who was extraneous to the offence but who could not prove to have exercised the required vigilance at the time of the purchase of the object.<sup>34</sup>

The issue of lawfulness also included the question of whether the impugned measure could be imposed on the possessor when the criminal offence had become statute-barred in respect of the culprit.<sup>35</sup> The Court concluded that the legal basis did not lack clarity and foreseeability on this issue. In particular, it distinguished between prosecution and confiscation actions, explaining that the latter are unaffected by the outcome of the former. The reason was that the confiscation at issue had no punitive purpose. Rather, it fulfilled either the function of reobtaining control over objects owned by the State that have been illegally exported, or to prevent privately owned objects of cultural interest being removed from the State's territory without being subject to its control.<sup>36</sup> Furthermore, the Court ruled that the Italian government did not breach its domestic laws by imposing the confiscation of cultural objects located outside the State's territory. On this issue, the Court noted that, in case of illicit export of cultural objects, the adoption of a confiscation order was necessary to obtain its recovery through international judicial cooperation mechanisms.<sup>37</sup> Finally, the lack of a time limit for imposing confiscation under Article 174(3) of Legislative Decree 42/2004 was not deemed unlawful. This was justified by the wide margin of appreciation that States have with respect to the protection of the national cultural heritage and the recovery of illegally exported cultural objects.<sup>38</sup>

Second, the ECtHR found that the measure at issue was legitimate under the ECHR as it was adopted «in the public or general interest» of protecting Italy's cultural and artistic heritage.<sup>39</sup> The uncertainty over whether the Victorious Youth was found in Italian territorial waters or on the high seas did not prevent the Court from reaching this conclusion. Not only did the Court affirm that Italian authorities «reasonably showed that the Statue formed part of Italy's cultural heritage»,<sup>40</sup> but also that they «reasonably argued that the measure ... pursued the aim of reobtaining control over an object of cultural interest...».<sup>41</sup> It therefore appears that the Court deferred the question concerning the classification of the Victorious Youth as part of the Italian patrimony to the Italian judiciary.

Third, the ECtHR found that the confiscation measure met the test of proportionality, as it struck a reasonable balance between the restrictions on the Trust's property rights and the general interest pursued by the Italian State.<sup>42</sup> The Court reached this conclusion after having considered the negligent conduct of the Trust's representatives at the time of

<sup>34</sup> Judgment, §§ 301-306.

<sup>35</sup> E. MOTTESE, *La confisca di beni culturali illecitamente esportati*, in *Rivista di diritto internazionale*, 2019, pp. 1089-1108.

<sup>36</sup> See fn12 and 15.

<sup>37</sup> Judgment, §§ 79, 318-320.

<sup>38</sup> Judgment, §§ 321-324.

<sup>39</sup> Judgment, §§ 335-360.

<sup>40</sup> The legal fiction advanced by Italian courts that the fishing nets of the ship flying the Italian flag where the bronze was found represented a portion of Italian soil outside territorial waters (see fn 13) was found by the ECtHR not «manifestly arbitrary or unreasonable» in the light of customary international law and the relevant international treaties. Judgment, § 351.

<sup>41</sup> Judgment, § 359.

<sup>42</sup> Judgment, § 408.

the purchase of the bronze, the justifications for the misconducts committed by Italian domestic authorities in their attempts to recover the statue, and the lack of any form of compensation in favour of the Trust.<sup>43</sup>

Regarding Italian authorities' misconducts, the ECtHR found that their efforts to retrieve the Victorious Youth were adequate in the light of the complexity of the legal and factual issues of the case. The Court did not question the effectiveness of such initiatives and whether more efficient alternatives were neglected. Additionally, it did not criticize Italian authorities for having failed to bring the case before US courts or for the delay with which the impugned confiscation order was adopted. On the contrary, it justified Italian authorities for the reason 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».<sup>44</sup> In other words, the absence of an international framework explained the «occasional mistakes» committed by the Italian State.<sup>45</sup>

In conclusion, although the Trust's right under Article 1 Protocol No. 1 was triggered, the ECtHR held – unanimously – that the confiscation order issued by Italian authorities did not infringe the Trust's property rights. That measure was considered lawful and proportionate to fulfil the legitimate public interest of protecting cultural heritage as well as to ensure the restitution of an illegally exported cultural object.

#### 4. *Are There New Trends in The Jurisprudence of the ECtHR?*

The ECtHR's judgment in *J. Paul Getty Trust and Others v. Italy* is certainly a significant development in favour of the Italian government – albeit it cannot represent the end of the decades-long legal and diplomatic battle over the Victorious Youth.<sup>46</sup>

Irrespective of the conclusions reached by the ECtHR, it is worth taking a closer look at this judgment to discuss the Court's findings on two pivotal issues. First, the ECtHR introduced a new exception to the principle that a State's jurisdictional competence under Article 1 ECHR is primarily territorial (section 4.1). Second, the Court reaffirmed its readiness to recognize the general interest in the protection of cultural heritage (section 4.2). It is the opinion of the present writer that the fact that the Judgment was adopted by the First Section of the ECtHR instead of by the Grand Chamber does not diminish its value in relation to the above issues.

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<sup>43</sup> Judgment, §§ 374-407.

<sup>44</sup> Judgment, §400.

<sup>45</sup> Judgment, §§ 377, 407, where the Court distinguished the present case from the judgment in *Beyeler v. Italy*, No. 33202/96, Judgment 5 January 2000 (“*Beyeler*”). In *Beyeler* – where the Italian State was accused of violating Article 1 of Protocol 1 in relation to the sale of a cultural object – Italian authorities had delayed action in a manner that proved advantageous, amounting to a form of unjust enrichment. To the contrary, in the present case no benefit accrued to the Italian State as a result of its failure to act in due time.

<sup>46</sup> To date, the request for recognition and enforcement of the confiscation order has not been followed by any action (see fn 20 and 21 and related text).

#### 4.1. On Extraterritorial Jurisdiction

Article 1 ECHR provides that «The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention». The Court is of the view that, in keeping with public international law, Article 1 reflects a territorial notion of jurisdiction.<sup>47</sup> In other words, jurisdiction is presumed to be exercised normally throughout a State's territory. This means that Article 1 limits its scope to the persons that are within the physical space where a State can exercise its political and legal authority to prescribe, enforce and adjudicate domestic law.<sup>48</sup> The exercise of jurisdiction is the “necessary condition” for a Contracting State to be held responsible by the ECtHR for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the ECHR. Accordingly, a person claiming to be the victim of a violation of the Convention must first demonstrate that she/he was within the jurisdiction of the respondent State at the time of the alleged violation. In other words, the question of State responsibility or attribution would arise only after the ECtHR is satisfied that the matters complained of are within the jurisdiction of the respondent State.<sup>49</sup>

The ECtHR has also addressed the question of the extraterritorial application of the ECHR, that is, whether it has jurisdiction over the actions and omissions of ECHR Contracting States performed or producing effects outside their territory. While confirming that the Convention's notion of jurisdiction is essentially territorial and that the exercise of extraterritorial jurisdiction by a Contracting State is exceptional, the Court has recognised a number of exceptions to the principle of territoriality.<sup>50</sup> Generally speaking, the ECtHR's case-law indicates that accountability in these exceptional situations stems from the principle that Article 1 cannot be interpreted to allow a Contracting State to perpetrate violations of the Convention on the territory of another State that it could not perpetrate on its own territory.<sup>51</sup>

Another word of caution is appropriate. Whereas the Court has affirmed the importance of an evolutive or teleological approach to interpretation of the Convention, it has proved reticent to adopt such an approach in relation to Article 1. Yet, as ECHR Con-

<sup>47</sup> *Güzelyurtlu and Others v. Cyprus and Turkey*, No. 36925/07, Judgment 29 January 2019 (“*Güzelyurtlu*”) § 178. See also Article 29 of the *Vienna Convention on the Law of Treaties* of 1969: «a treaty is binding upon each party in respect of its entire territory». Similar provisions appear in other human rights treaties, such as the *International Covenant on Civil and Political Rights* of 1966 (Article 2(1)) and the *American Convention on Human Rights* of 1969 (Article 1(1)).

<sup>48</sup> *M.N. and Others v. Belgium*, No. 3599/18, Decision 5 May 2020, § 96.

<sup>49</sup> *Güzelyurtlu*, cit., § 178. Establishing whether a case falls within the jurisdiction of the respondent State is a preliminary issue to be determined at the admissibility stage, whereas the question whether the respondent State is responsible for the acts which form the basis of the applicant's complaints must be determined at the merits stage (*Güzelyurtlu*, cit., § 197).

<sup>50</sup> On the evolution of the ECtHR's approach to extraterritoriality see C. MALLORY, *A Second Coming of Extraterritorial Jurisdiction at the European Court of Human Rights?*, in *Questions of International Law*, Zoom-in 82, 2021, pp. 31-51; S. BESSON, *Extraterritoriality in International Human Rights Law: Back to the Jurisdictional Drawing Board*, in A. PARRISH and C. RYNGAERT (eds.), *Research Handbook on Extraterritoriality in International Law*, Cheltenham, 2023, pp. 269-291, pp. 279-280; and K. IŞIL and B. HASAN, *Extraterritorial Application of the European Convention on Human Rights: Evolution of the Court's Jurisprudence on the Notions of Extraterritorial Jurisdiction and State Responsibility*, in A. van AAKEN and I. MOTOC (eds.), *The European Convention on Human Rights and General International Law*, Oxford, 2018, pp. 112-134.

<sup>51</sup> *Ukraine and the Netherlands v. Russia*, Nos. 8019/16, 43800/14, 28525/20, Decision 30 November 2022, § 570.



tracting States take actions that reverberate in complex ways beyond their national borders, a restrictive understanding of the notion of jurisdiction will be increasingly challenged.<sup>52</sup>

The first exception to the principle that jurisdiction under Article 1 ECHR is limited to a Contracting State's own territory concerns the acts and omissions of diplomatic and consular agents of a Contracting State. Such acts and omissions may amount to an exercise of jurisdiction provided that these agents, in their official capacity, exercise authority, control or physical power over the nationals or their property located in a foreign territory in accordance with international law.<sup>53</sup>

Secondly, a Contracting State has Article 1 jurisdiction where a person brings a civil action before the courts of that State with respect to events occurred outside its territory, to the extent that the right to a fair trial secured under Article 6 ECHR is at stake.<sup>54</sup> Similarly, if the investigative or judicial authorities of a Contracting State institute criminal investigation or proceedings by virtue of its domestic law concerning a crime which occurred outside the jurisdiction of that State, the institution of that investigation or those proceedings is sufficient to trigger Article 1 ECHR.<sup>55</sup>

Thirdly, States' jurisdiction extends to situations where a Contracting State exercises "effective control" of an area outside its national territory as a consequence of lawful or unlawful military action (military occupation).<sup>56</sup> Such domination over a foreign territory takes place even if the Contracting State in question does not exercise detailed control over the policies and actions of existing government authorities. A Contracting State can exercise effective control directly through its own armed forces or through a subordinate local administration. In these cases, the Contracting State is deemed obliged to secure the rights and freedoms set out in the ECHR for the inhabitants of the area outside its national territory and yet placed under its jurisdiction.<sup>57</sup>

Fourthly, the Court's case-law demonstrates that the use of force by agents of a Contracting State operating outside their territory may bring the individual that is under their authority and physical control within the jurisdiction of that Contracting State pursuant to Article 1 ECHR. The jurisdiction of the Contracting State does not arise from the control exercised over the places in which the individual is held (buildings, aircrafts or ships), but from the exercise of physical power and control over the person in question. In these cases, the State is under an obligation under Article 1 ECHR to secure to that individual the rights and freedoms set out in the ECHR that are relevant to the situation of that individual.<sup>58</sup>

Fifthly, the Court recognised that a Contracting State exercises extraterritorial jurisdiction over the territory of a non-Contracting State when it carries out all or some of the public powers normally to be exercised by the government of that territory. Executive or judicial functions are exercised by a Contracting State in accordance with "custom, treaty or other agreement", that is, with the "consent, invitation or acquiescence of the Government of that territory". In these situations, the breaches of the ECHR deriving from the acts car-

<sup>52</sup> P. ALSTON, *International Human Rights. Texts and Materials*, New York, 2024, p. 768.

<sup>53</sup> *Al-Skeini and Others v. the United Kingdom*, No. 55721/07, Judgment 7 July 2011 ("*Al-Skeini*"), § 134.

<sup>54</sup> *Marković and Others v. Italy*, No. 1398/03, Judgment 14 December 2006, §§ 53-54.

<sup>55</sup> *Güzelyurtlu*, cit., §§ 188-192.

<sup>56</sup> *Loizidou v. Turkey*, No. 15318/89, Judgment 23 March 1995, p. 20.

<sup>57</sup> The question whether a Contracting State exercises effective control over an area outside its territory is a question of fact that can be answered by the ECtHR based on various indicators, such as the strength of that State's military presence in the area. *Al-Skeini*, cit., §§ 138, 139, 142.

<sup>58</sup> *Al-Skeini*, cit., §§ 136-137.

ried out by the Contracting State exercising extraterritorial jurisdiction are attributable to it rather than to the territorial State.<sup>59</sup>

In the judgment *J. Paul Getty Trust and Others v. Italy*, the ECtHR assessed whether the confiscation order adopted by Italian authorities would fall under the latter hypothesis.<sup>60</sup> At first, the Court noted that the confiscation order produced effects outside the Italian territory. As discussed, it found that the Trust had been adversely affected by the order from the moment it was adopted – as evidenced by the fact that the Museum was prevented from sending the statue to Italy for a temporary exhibition due to the risk of it being seized.<sup>61</sup> The interference with the Trust's proprietary interests, however, was regarded as compatible with Article 1 Protocol No. 1 since it was lawful, in the general interest and proportionate. The ECtHR also stated that it was not persuaded by the Italian government's argument that enforcement was unlikely to happen. In its view, it was clear that Italy was not willing to desist from the enforcement of the confiscation, notably since the Italian judiciary had already taken steps to this effect.<sup>62</sup>

As discussed, Italian authorities requested US authorities to recognise and enforce the order in the US pursuant to the Treaty of 1982.<sup>63</sup> In the event the order is recognized, the physical removal of the Victorious Youth from the Museum would be carried out by US authorities. Consequently, Italy could be in the position to exercise “executive or judicial functions” in the US territory in accordance with a “treaty or other agreement”, and hence with the “consent” of the US government, in keeping with one of the exception to territorial jurisdiction examined above. And in fact, the ECtHR concluded that the Italian State could be held responsible under the Convention because the confiscation order constituted an infringement of the Trust's right to the enjoyment of its property.<sup>64</sup>

The Court reached this conclusion by relying on its case-law on «measures taken in the context of international judicial cooperation requests».<sup>65</sup> These cases concerned measures adopted by States to curb transnational criminal activities – such as the freezing of assets and extradition. In these cases, the Court established the principle that the act initiated by an ECHR Contracting State on the basis of its own domestic law and followed up by a non-Contracting State in response to its treaty obligations can be attributed to the former, even if the act is executed by the latter. One reason is that ECHR Contracting States are under an obligation to ensure that their acts are compatible with the ECHR.<sup>66</sup> Another reason is that the Convention does not govern the actions of States not parties to it, nor does it require the Contracting States to impose Convention standards on other States.<sup>67</sup>

Extradition can be used to exemplify the principle established by the ECtHR. This is the legal process whereby a State can obtain the transfer of a person suspected or convicted of committing a crime from another State, either for the purpose of criminal prosecution or for carrying out of a custodial sentence or detention order. Most States comply with ex-

<sup>59</sup> *Al-Skeini*, cit., §135. See also ECtHR, *Guide on Article 1 of the European Convention on Human Rights. Obligation to Respect Human Rights. Concepts of “Jurisdiction” and Imputability*, 31 August 2023, §§ 73-74.

<sup>60</sup> Judgment, §§ 232-234.

<sup>61</sup> Judgment, §§ 222, 229. See also fn 24.

<sup>62</sup> Judgment, §§ 230-231.

<sup>63</sup> See fn 20 and related text.

<sup>64</sup> Judgment, §§ 236, 240.

<sup>65</sup> Judgment, §§ 237-238.

<sup>66</sup> Judgment, § 239.

<sup>67</sup> *Soering v. the United Kingdom*, No. 14038/88, Judgment 7 July 1989 (“*Soering*”), § 86.

tradition requests pursuant to extradition agreements. For the purposes of the present article, let's consider the case where an ECHR Contracting State requests the surrender of a person through an international arrest warrant. In the event the targeted person is found and arrested by a non-Contracting State in response to its treaty obligations, the detention and extradition of the targeted individual must be attributed to the requesting State. The latter may therefore be held responsible for guaranteeing that detention pending the extradition procedure is compatible both with its national law and with the ECHR, even if the detention of the targeted person is executed by the non-Contracting State.<sup>68</sup> The reason is that the deprivation of liberty has its origin in the measure taken by the Contracting State.<sup>69</sup>

Against this background, it becomes clear that with the judgment *J. Paul Getty Trust and Others v. Italy* the ECtHR developed its case-law on Article 1 ECHR by extending the scope of the last exception to the principle of territoriality described above to a new category of State measures. The notion of extraterritorial jurisdiction – and hence responsibility – of ECHR Contracting States was extended to cover interferences with the right to property protected by Article 1 Protocol No. 1 resulting from the adoption of non-conviction-based confiscation, that is, measures that (i) do not involve a convicted person or someone suspected of a crime, and (ii) apply to illegally exported cultural objects that are neither the instrument nor the result of a crime. Indeed, the confiscation order adopted by Italian authorities pursuant to Article 174(3) of Legislative Decree 42/2004 in the case of the Victorious Youth had no punitive purpose. Rather, it enabled Italian authorities to regain control over an illegally exported cultural object.<sup>70</sup> As explained, nobody has been convicted for the exportation of the Victorious Youth. The fact that the Trust was considered not “extraneous to the offence” under Article 174(3) meant that it was deemed guilty for not having exercised the required vigilance and for not having refused to purchase the statue, rather than suggesting that one or more members of the Trust participated in the illicit taking.

In conclusion, the 2024 judgment in the Victorious Youth case demonstrates that the outer limits of the extraterritorial jurisdiction of ECHR Contracting States can be expanded as a result of the emergence of novel circumstances and in response to challenges that were not foreseen at the time of drafting the ECHR.<sup>71</sup> The worldwide illicit trade in cultural objects, one of the most lucrative forms of transnational organized crime, is one of such unforeseen challenges.

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<sup>68</sup> The Court's case-law also covers the situation where a State is responsible under the ECHR for deporting a person that is within its jurisdiction toward a non-Contracting State where there are substantial grounds for believing that that person would face an infringement of his or her rights. See *Soering*, cit.

<sup>69</sup> Judgment, § 238.

<sup>70</sup> See fn 12 and 15. A. VISCONTI, *Fighting Cultural Property Trafficking: The Italian Criminal Law Framework and Its Forthcoming Reform*, in *Art Antiquity and Law*, 2021, pp. 317-354, p. 345.

<sup>71</sup> P. ALSTON, *International Human Rights*, cit., p. 768. For instance, the ECtHR expanded the notion of extraterritorial jurisdiction as defined in *Al-Skeini*, cit., with the judgment in the *Jaloud* case. This case concerned the investigation by Dutch authorities into the death of an Iraqi civilian (the applicant's son) who died of gunshot wounds in Iraq in April 2004 at a military checkpoint of Netherlands Royal Army personnel. The facts did not fit within the *Al-Skeini* precedent, which recognised custody and control, not shootings, as creating a jurisdictional link where force was used. Moreover, Dutch forces were not an occupying power in Iraq. Accordingly, the Court created a new basis for jurisdiction based on the exercise of a sphere of influence over a precise area, stating that Dutch forces exercised jurisdiction by «asserting authority and control over persons passing through the checkpoint» (*Jaloud v. the Netherlands*, No. 47708/08, Judgment 20 November 2014, § 152).

#### 4.2. *On the Protection of Cultural Heritage*

The second aspect of the judgment that deserves closer attention relates to the ECtHR's finding that the confiscation measure at stake was compatible with Article 1 Protocol No. 1 because it pursued the legitimate «public or general interest» of protecting Italy's cultural heritage. The Court noted that the case of the Victorious Youth concerned «a very particular issue», namely the fight against the unlawful exportation of cultural objects from the country of origin and the recovery of illegally exported cultural objects.<sup>72</sup> Indeed, the ECtHR recognized that the «purpose of the contested measure was ... to recover a cultural object that ... had in any event been unlawfully exported».<sup>73</sup>

In determining whether Italian authorities pursued a legitimate general interest for the purposes of Article 1 Protocol No. 1, the Court found refuge in the doctrine of the margin of appreciation. According to this doctrine, States enjoy a broad discretion in determining what aligns with the public interest when cultural heritage issues are concerned, and in striking a fair balance between this interest and the individual right to property. The Court usually shows deference to Contracting States' arguments that interferences are in the public interest, unless it is «manifestly without reasonable foundation».<sup>74</sup> It is for this reasons that the ECtHR accepted that the Victorious Youth belonged to the Italian cultural heritage even if was attributed to a Greek artist.<sup>75</sup> In the Court's opinion, Italy's declaration that the Victorious Youth was part of the national heritage was not «manifestly without reasonable foundation».<sup>76</sup> The Court also emphasized that, in its assessment of a State measure giving rise to an interference, it must interpret the ECHR taking into account existing norms of national and international law.<sup>77</sup> In this sense, it stated that the legitimacy of the public interest pursued by the Italian State was corroborated by existing international legal instruments.<sup>78</sup>

For the purposes of the present study, it is important to recall how the Court described the public interest purported by Italian authorities. The ECtHR stressed «the unique and irreplaceable nature of cultural objects»,<sup>79</sup> that the fight against the illicit trafficking and the restitution of illegally exported cultural objects aim to facilitate the «wide public access to works of art»,<sup>80</sup> and that the «conservation of cultural heritage and ... 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».<sup>81</sup>

<sup>72</sup> Judgment, §§278, 342, 348.

<sup>73</sup> Judgment, §§ 346, 357.

<sup>74</sup> P.VALENTIN, *The Victorious Youth: A Statue's Odyssey and the Battle for Cultural Heritage*, 11 June 2024 (<https://www.fieldfisher.com/en/insights/the-victorious-youth-a-statue-s-odyssey-and-the-battle-for-cultural-heritage>, last visited 3 May 2025).

<sup>75</sup> Similarly, in *Beyeler*, cit., the Court recognized that a painting realized in France by a Dutch artist, Vincent Van Gogh, belonged to Italy.

<sup>76</sup> Judgment, § 347.

<sup>77</sup> The Court referred to Article 31(3)(c) of the *Vienna Convention on the Law of Treaties* of 1969.

<sup>78</sup> Judgment, §§ 149-186, 279, 341-342, 351-355.

<sup>79</sup> Judgment, § 280.

<sup>80</sup> Judgment, §342.

<sup>81</sup> Judgment, §340. It is noticeable, however, that the Court used the same language in *Kozacıoğlu v. Turkey*, No. 2334/03, Judgment 19 February 2009, § 54.

This wording begs an important question: is the ECtHR referring here to the right of Italy's inhabitants to take part in cultural life? Or, in other words, was the ECtHR suggesting that the general interest pursued by the Italian State encompasses the protection and fulfilment of the right of all those residing in or visiting Italy to take part in cultural life?

The following sections highlight the main features of the right to take part in cultural life (A), discusses the relevant case-law (B), and provides some tentative answers to the above questions (C).

#### A. *The Right to Take Part in Cultural Life*

The right to take part (or participate) in cultural life is set out in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.<sup>82</sup> This article provides that «The States Parties to the present Covenant recognize the right of everyone ... to take part in cultural life». The normative content of this vague provision was fleshed out in 2009 by the Committee on Economic, Social and Cultural Rights (CESCR) with General Comment No. 21.<sup>83</sup> An in-depth analysis of this document goes beyond the scope of this article. However, it seems useful to rehearse in brief some of the arguments of the CESCR.

At the outset, the CESCR characterized the right to take part in cultural life as encompassing the rights to participate, access and contribute to culture.<sup>84</sup> The latter notion was defined as «a broad, inclusive concept encompassing all manifestations of human existence», including tangible cultural objects.<sup>85</sup> The CESCR affirmed that the right to culture is not limited to a mere individual entitlement to participate in the «national culture», i.e. the culture of the dominant group, but encompasses the right to «participate in one's own culture», as well as the right «to know and understand his or her own culture and that of others ...».<sup>86</sup>

Furthermore, the CESCR affirmed that the right to participate in cultural life may be exercised by a person as an individual or in association with others, within a community. As such, both individuals and communities are regarded as right-holders, regardless of whether they belong to the dominant group or to a minority, or whether they are citizens or non-citizens.<sup>87</sup>

The CESCR focused also on State obligations, also by recognising the inextricable connection between protection and conservation of, and access to, tangible cultural heritage, on the one hand, and the protection and fulfilment of human rights, on the other. De-

<sup>82</sup> This right also appears in the *Framework Convention of the Council of Europe on the Value of Cultural Heritage for Society* of 2005; the *Additional Protocol to the American Convention on Human Rights* of 1988; the *African Charter on Human and People's Rights* of 1981; the *International Covenant on Civil and Political Rights* of 1966; the *Universal Declaration of Human Rights* of 1948.

<sup>83</sup> General Comment No. 21, *Right of Everyone to Take Part in Cultural Life* (art. 15, para. 1(a), of the *International Covenant on Economic, Social and Cultural Rights*), 21 December 2009, E/C.12/GC/21. See also *Report of the Special Rapporteur in the field of Cultural Rights*, A/HRC/31/59 (3 February 2016), §§ 7-20; and *Report of the Independent Expert in the field of Cultural Rights, Farida Shabbeed*, A/HRC/17/38 (21 March 2011), §§ 34-43.

<sup>84</sup> General Comment No. 21, cit., § 15.

<sup>85</sup> The *travaux* of the ICESCR demonstrates that the drafters of Article 15(1)(a) had in mind a narrow conception of culture limited to tangible cultural objects: «the inheritance of books, publications, works of art and other monuments and objects of historic, scientific and cultural interest». B. SAUL (ed.), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials*, Oxford, 2014, p. 1180.

<sup>86</sup> General Comment No. 21, cit., § 15(b).

<sup>87</sup> *Ibidem*, §§ 9, 32, 42.



pending on the situation, ICESCR States Parties are under a negative obligation to refrain from interfering with the exercise of the right under consideration, or under a positive obligation to take measures to guarantee the fulfilment of such right.<sup>88</sup> In particular, it provided that «States Parties are obliged to respect the right of all persons to have access to ... cultural goods and services...»,<sup>89</sup> as well as to «... respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters».<sup>90</sup>

It follows from the above that the right to take part in cultural life may include, *inter alia*, the right of individuals and communities to the physical protection of cultural heritage against destruction and/or damage, the right to access and enjoy cultural heritage, and the right to participate – in an active and informed way, and without discrimination – in the identification, conservation, interpretation and development of cultural heritage.<sup>91</sup> Accordingly, States have the obligation to take measures to protect movable cultural objects existing within their territory from theft, illicit exportation and destruction, as well as to ensure the return of stolen or illegally exported cultural property.

In sum, the right under consideration includes all prerogatives that are necessary to give realization and transmit cultural manifestations to future generations.<sup>92</sup> Additionally, the full realization of the individual and collective right to take part in cultural life can enhance the protection of tangible cultural heritage. This should not be surprising because, as stated by Francesco Francioni, if cultural heritage «represents the symbolic continuity of a society beyond its contingent existence ..., the obligation to respect cultural heritage is closely linked with the obligation to respect human rights».<sup>93</sup> The same author pointed out that, «in so far as cultural heritage represents the sum of practices, knowledge and representations that a community or group recognize as part of their history and identity, it is axiomatic that members of the group, individually and collectively, must be entitled to access, perform and enjoy such cultural heritage as a matter of right».<sup>94</sup>

### B. *The Relevant Jurisprudence of the ECtHR*

The ECHR does not contain an explicit provision on the right to take part in cultural life, let alone on cultural heritage and its protection.<sup>95</sup> Yet, this fact cannot be used to rebut the argument that such a right should be factored in by the ECtHR in its decision-making process in Article 1 Protocol No. 1 cases. One reason is that the Court has not hesitated, «through a dynamic interpretation of the different Articles of the Convention», to recognise «substantive rights which may fall under the notion of “cultural rights”».<sup>96</sup> More importantly,

<sup>88</sup> *Ibidem*, §§ 6, 44-59.

<sup>89</sup> *Ibidem*, § 49(b).

<sup>90</sup> *Ibidem*, § 50(a).

<sup>91</sup> *Report of the Independent Expert in the field of Cultural Rights, Farida Shabbeed*, cit., § 79.

<sup>92</sup> Y. DONDEERS, *Do Cultural Diversity and Human Rights Make a Good Match?*, in *International Social Science Journal* (2010), p. 15 ff., p. 19.

<sup>93</sup> F. FRANCONI, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, in *Michigan Journal of International Law*, 2004, pp. 1209-1229, p. 1221.

<sup>94</sup> F. FRANCONI, *Culture, Heritage and Human Rights: An Introduction*, in F. FRANCONI and M. SCHEININ (eds.), *Cultural Human Rights*, Leiden/Boston, 2008, pp. 1-15, p. 6.

<sup>95</sup> CoE / ECtHR, Research Division, *Cultural Rights in the Case-Law of the European Court of Human Rights 2011, updated in 2017*, 4, ([www.concernedhistorians.org/content\\_files/file/to/385.pdf](http://www.concernedhistorians.org/content_files/file/to/385.pdf), last visited 3 May 2025).

<sup>96</sup> According to CoE / ECtHR, Research Division (*ibidem*), the provisions mostly invoked in relation to cultural rights are the right to respect for private and family life (Article 8 ECHR), the freedom of thought, conscience and religion (Article 9 ECHR), the freedom of expression (Article 10 ECHR), the freedom of associa-

the available case-law proves that the ECtHR accepts the protection of cultural heritage – in its tangible dimension – as a legitimate general interest that a Contracting State can pursue – albeit not unconditionally – when interfering with individual rights, especially with the right to property.

In the cases *Beyeler v. Italy*,<sup>97</sup> *Ruspoli Morenes v. Spain*,<sup>98</sup> and *Buonomo Gärber and Others v. Italy*,<sup>99</sup> the respondent States had interfered with the right of individuals to alienate their cultural property through the exercise of the right of pre-emption. The ECtHR ruled that the impugned measures pursued a legitimate aim, namely, to ensure the protection of, and public access to, an item forming part of the national cultural heritage. For instance, in *Beyeler*, the Court justified the interference at stake by affirming that the «control by the State of the market in works of art is a legitimate aim for the purposes of protecting a country's cultural and artistic heritage».<sup>100</sup> It also acknowledged that it was a legitimate aim for the State to facilitate public access to a cultural object that, though unrelated to the national culture, was lawfully located in the national territory and belonged to «the cultural heritage of all nations».<sup>101</sup> In *Ruspoli*, the ECtHR went as far as to declare that the wide margin of appreciation that States enjoy in the choice of measures necessary to control the use of property «est encore plus large lorsqu'ils'agit d'un bien déclaré d'intérêt culturel ou classé patrimoine historique».<sup>102</sup> More importantly, the Court emphasized that the general interest asserted by the responded State was not simply associated with the conservation of cultural heritage in and of itself, but rather with the necessity to secure the public's access: «[les] limitation [au droit de propriété] s'expliquent par le souci de l'Administration de centraliser ... la conservation et promotion des œuvres d'art ... et d'enfaciliter l'accès à l'ensemble de la population. Le tableau est à présent exposé dans la plus importante pinacothèque espagnole, à savoir le Musée du Prado à Madrid. ... Nul doute à cet égard que l'acquisition par l'État des œuvres d'art de façon préférentielle facilite en grande mesure l'exposition publique et permet d'en faire bénéficier un plus large public. L'intérêt général de la collectivité se voit ainsi privilégié».<sup>103</sup>

In the cases *Debelianovi v. Bulgaria*<sup>104</sup> and *Kozacıoğlu v. Turkey*,<sup>105</sup> which concerned the expropriation of immovable cultural heritage with compensation, the Court found that the respondent States had breached the right to property of the applicants, but it did not challenge the impugned measures. Whereas the expropriations were praised for pursuing a legitimate public interest (the protection of the national cultural heritage), the Court condemned the States for the manner in which such measures were applied. For instance, in *Kozacıoğlu* the Grand Chamber held that Turkey had violated Article 1 Protocol No. 1 because «neither the rarity of the expropriated building nor its architectural or historical fea-

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tion (Article 11 ECHR), the non-discrimination clause (Article 14 ECHR), and the right to education (Article 2 of Protocol No. 1 ECHR). On the other hand, Article 1 of Protocol 1 is the most invoked provision in claims involving cultural property.

<sup>97</sup> See fn 45.

<sup>98</sup> *Ruspoli Morenes v. Spain*, No. 28979/07, Judgment 28 June 2011 (“*Ruspoli*”).

<sup>99</sup> *Buonomo Gärber and Others v. Italy*, No. 63783/00, Decision 20 May 2003.

<sup>100</sup> *Beyeler*, cit., § 112.

<sup>101</sup> *Ibidem*, § 113.

<sup>102</sup> *Ruspoli*, cit., § 40.

<sup>103</sup> *Ibidem*, §§ 41-42.

<sup>104</sup> No. 61951/00, Judgment 29 March 2007.

<sup>105</sup> No. 2334/03, Judgment 19 February 2009.

tures were taken into consideration in calculating the amount of expropriation compensation». <sup>106</sup>

The expropriation of cultural property with compensation was at stake also in the case *Albert Fürst von Thurn und Taxis v. Germany*. However, this case differs from those mentioned above because the Court ruled out a violation of Article 1 Protocol No. 1. The Court reached this conclusion relying on the State's wide margin of appreciation regarding what is «in accordance with the general interest» in matters concerning cultural heritage. Also different are the cases *Catholic Archdiocese of Alba Iulia v. Romania* <sup>107</sup> and *Waldemar Nowakowski v. Poland*, <sup>108</sup> which concerned cultural property expropriated without compensation. In both cases, the Court found a violation of Article 1 Protocol No. 1 because the expropriation did not serve a legitimate aim. Specifically, the Court affirmed that domestic courts had failed to consider the distinctive intangible value of the cultural assets at stake in determining the public interest that would justify the expropriation.

Other cases concerned building prohibitions affecting privately-owned land located within or in the vicinity of historic buildings <sup>109</sup> and archaeological sites. <sup>110</sup> All in all, the Court settled these cases by holding that the interferences at stake were lawful and that the respondent States' objectives of protecting cultural heritage constituted a legitimate aim. As usual, the ECtHR affirmed that where cultural heritage issues are concerned, States have a wide margin of discretion.

This was not the case in *Potomska and Potomski v. Poland*, <sup>111</sup> which also involved the question of the legitimacy of State-imposed development restrictions. In this case, the respondent State was found responsible for a violation of Article 1 Protocol No. 1 because the protective measures at stake had not been in place prior to the applicant's acquisition. In the Court's view, the development restrictions were contrary to the ECHR because they imposed an excessive burden on the applicant. <sup>112</sup> The Court applied the fair balance test also in *Kristiana Ltd. v. Lithuania*, which concerned a property inscribed on the list set out under the UNESCO World Heritage Convention, the Curonian Spit National Park. In this case, however, the ECtHR came to the conclusion that a fair balance had been struck, and no violation had occurred, because it was likely that the applicant knew – or should have reasonably known – about the restrictions on the property, or possible future restrictions, given the special status of that property at the time of purchase.

The preceding analysis supports the conclusion that the ECtHR is eager to recognize the essential value of cultural heritage to society in cases involving the alleged violation of Article 1 of Protocol 1. Additionally, a number of writers have drawn a further conclusion from the available case-law. It has been argued that the Court has justified as legitimate the limitations on property rights imposed by Contracting States in cases involving cultural objects for the reason that these States acted as representatives or defenders of the collective

<sup>106</sup> *Ibidem*, § 67.

<sup>107</sup> No. 33003/03, Judgment 25 September 2012.

<sup>108</sup> No. 55167/11, Judgment, 22 July 2014.

<sup>109</sup> *SCEA Ferme de Fresnoy v. France*, No. 61093/00, Decision 1 December 2005.

<sup>110</sup> *Torno v. Italy*, No. 61781/08, Decision 23 September 2014; *Longobardi v. Italy*, No. 7670/03, Decision 26 June 2007; *Perinelli v. Italy*, No. 7718/03, Decision 26 June 2007; *Silahyurekli v. Turkey*, No. 16150/06, Judgment 26 November 2013; *Sinan Yıldız v. Turkey*, No. 37959/04, Decision 12 January 2010.

<sup>111</sup> No. 33949/05, Judgment 29 March 2011.

<sup>112</sup> The Court applied the same reasoning in *Matas v. Croatia*, No. 40581/12, Judgment 4 October 2016.

rights of nations or of communities within nations to preserve the integrity of their cultural heritage, to enjoy it and to have access to it.<sup>113</sup>

This opinion is not entirely convincing. On the one hand, it has been affirmed that the Court has interpreted the right to property under Article 1 Protocol No. 1 in such a way to carefully balance the economic interests of the individual owner of cultural property and the collective interest of the State to regulate the status and use of such property for the public good. In a few cases, the balance has tilted in favour of the former. In other – more numerous – cases the Court recognized that the public interest in the protection of cultural heritage is a legitimate aim that any State may pursue, even if it interferes with the individual right to property. However, the ECtHR has not gone beyond a strict application of Article 1 Protocol No. 1, thereby failing to engage with the nature of «the public interest in the conservation of a collective cultural patrimony», which therefore has remained «in the shadow of the law».<sup>114</sup> On the other hand, it has been noted that the ECtHR appears reluctant to recognize the – individual and collective – rights related to cultural heritage as justiciable when claims are brought against ECHR Contracting States by non-State entities – individual or groups – in cases where those States have adopted cultural-insensitive measures – such as the destruction of cultural sites. In these cases, the Court has struck out applications as incompatible *ratione personae*, as if, in the absence of an identifiable individual victim, the destruction of heritage that is cherished by a community does not constitute a human rights violation. The Court has also ruled out that public measures incompatible with heritage protection constituted a violation of ECHR rights, even if those measures were clearly at odds with the right to take part in cultural life and with broader societal demands. Ostensibly, this asymmetric protection of cultural heritage is not only due to the absence of explicit provisions analogous to Article 15(1)(a) ICESCR in the Convention. Rather, it stems from the perceived lack of consensus among Council of Europe member States on the existence of every people's and everyone's right to the protection of, and access to, cultural heritage. Although this position clashes with the recognition of the collective dimension of the right under consideration by UN bodies and experts,<sup>115</sup> the ECtHR tends to take a dismissive stance, which results in a favour for deferring to the margin of appreciation granted to respondent States.<sup>116</sup> Two cases illustrate this restrictive approach by the Court.

The first case was brought before the ECtHR by Syllogos Ton Athinaion, a Greek association which pursued the return of the Parthenon Marbles to Greece.<sup>117</sup> As well known, the Marbles were removed from the Parthenon in Athens by Lord Elgin at the beginning of the nineteenth century, and then ceded to the British Museum, where they are presently

<sup>113</sup> M. BIECZYNSKI, *The "Right to Cultural Heritage" in the European Union: A Tale of Two Courts*, in A. JAKUBOWSKI et al (eds), *Cultural Heritage in the European Union. A Critical Inquiry into Law and Policy*, 2019, pp. 113-140, pp. 118-119; and A. JAKUBOWSKI, *Cultural Heritage and the Collective Dimension of Cultural Rights in the Jurisprudence of the European Court of Human Rights*, in A. JAKUBOWSKI (ed.), *Cultural Rights as Collective Rights: An International Law Perspective*, Leiden, 2016, pp. 157-179, p. 164.

<sup>114</sup> F. FRANCONI, *The Human Dimension of International Cultural Heritage Law: An Introduction*, in *European Journal of International Law*, 2011, pp. 9-16, p. 12.

<sup>115</sup> See fn 81 and related text.

<sup>116</sup> R. PAVONI, *Underwater Cultural Heritage and Human Rights*, in G. A. OANTA (ed.), *Los derechos humanos en el mar ante los desafíos de la transición ecológica y digital*, Barcelona, 2023, pp. 307-337, pp. 318-336.

<sup>117</sup> *Syllogos Ton Athinaion v. United Kingdom*, No. 48259/15, Decision 31 May 2016. This association was founded in 1895 with the aim, *inter alia*, of ensuring the protection and maintenance of the monuments and works of art connected with the history of Athens.

on show. Since its declaration of independence in 1832, Greece has repeatedly requested the return of these artistic and historical artefacts but has never succeeded. The Greeks claim that the Marbles should be returned because they embody the Greek spirit and connect modern Greeks to their ancestors. As is equally well-known, the United Kingdom refuses to return the Marbles to Greece. In 2015, the United Kingdom refused to take part in mediation with Greece under the auspices of UNESCO. Sylogos Ton Athinaion then lodged an application before the ECtHR arguing that the refusal of the UK government amounted to a violation of Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 13 (right to an effective remedy) of the Convention and of Article 1 Protocol No. 1. Specifically, the applicant alleged that the UK's retention of the Marbles and refusal of mediation entailed the violation of its human rights and, indirectly, of the human rights of its members.<sup>118</sup> The ECtHR declared inadmissible the application as incompatible *ratione materiae* with the ECHR. The Court explained its decision by stating that none of the ECHR rights relied on gave rise «to any right for an association in the position of the applicant to have the Marbles returned to Greece or to have the respondent State engage in international mediation for their return».<sup>119</sup> It further ruled that Article 8 cannot give rise «to a general right to protection of cultural heritage of the nature contended for in the present case».<sup>120</sup>

The second case is about the 12,000 years old town of Hasankeyf.<sup>121</sup> In this case the ECtHR dismissed as incompatible *ratione materiae* with the ECHR the application instituted by five Turkish citizens against the construction of a dam on the river Tigris in southeastern Turkey. The applicants contested the project because of its impact on cultural heritage.<sup>122</sup> They complained of the alleged violation of Articles 1 (jurisdiction), 2 (right to life), 5 (personal liberty), 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 14 (prohibition of discrimination) of the Convention, as well as of Article 2 of Protocol 1 (right to education). Essentially, they argued that the destruction of the archaeological site would not only violate their – individual – rights to the protection of, and to access to, and knowledge of, the unique cultural heritage of the area, but also the – collective – rights of humanity and of future generations. The applicants contend that such rights could be deduced from the ECHR if this was interpreted in keeping with the treaties elaborated by UNESCO and the Council of Europe in the field of cultural heritage. On the other hand, the Turkish government defended the project on grounds of imperative gen-

<sup>118</sup> Specifically, the applicant argued that the UK «breached its right to respect for private life [under Article 8]. The violation stemmed from the failure to respect the applicant's ability to protect the monuments of Athens .... Under Article 9, the applicant argued that the statement made to UNESCO and the retention of the Marbles constituted a breach of its right to respect for its conscience. Under Article 10, the applicant relied on its right of access to cultural information that could be obtained from the Marbles in relation to their history and the history of Athens. Under Article 13, the applicant argued that the refusal of the United Kingdom to participate in mediation ... constituted the denial of a remedy. Finally, under Article 1 of Protocol No. 1 to the Convention, the applicant contended that the retention of the ... Marbles constituted an interference with its proprietary right to access to the whole monument ». *Ibidem*, p. 3.

<sup>119</sup> *Ibidem*.

<sup>120</sup> *Ibidem*.

<sup>121</sup> *Abunbay and Others v. Turkey*, No. 6080/06, Decision 29 January 2019 ("Abunbay"). See L. ACCONCIAMESSA, *Public-Interest Litigation Before the ECtHR: Towards a Human Rights Approach to the "Universal" Protection of Cultural Heritage?*, in *Ordine internazionale e diritti umani*, 2022, pp. 189-207.

<sup>122</sup> Following its implementation in 2019, the dam brought about the formation of a 300 square kilometre reservoir that flooded (therefore destroying and deteriorating) numerous villages (including Hasankeyf) and archaeological sites.



eral interests, also by contending that a fair balance was struck between the protection of cultural heritage and the protection of the economic and social interests related to the construction of the dam. The Court declared the application inadmissible for the reason that it lacked jurisdiction to determine whether the construction of the dam would have jeopardized the cultural heritage at stake. The ECtHR reached this conclusion by asserting that, under current international law, rights relating to cultural heritage were recognized only to minorities (to freely enjoy their culture) and indigenous peoples (to control and protect their cultural objects). Consequently, it ruled out the existence of a right to the protection of cultural heritage for individuals who do not belong to these groups. Importantly, the ECtHR held that it was unable to accommodate community interest<sup>123</sup> because it could not observe a «European consensus» or even a trend among the member States of the Council of Europe authorizing the inference from the provisions of the ECHR of «un droit individuel universel à la protection de tel ou de tel heritage culturel», as claimed by the applicants.<sup>124</sup>

C. *The ECtHR Failed to Incorporate the Right to Take Part in Cultural Life into Its Judgment J. Paul Getty Trust and Others v. Italy*

Against this background, it is safe to say that the judgment in *J. Paul Getty Trust and Others v. Italy* is significant in that the ECtHR recognised that Contracting States can legitimately pursue the general interest in protecting the national cultural heritage. This includes seeking the return of publicly owned cultural objects held by private entities in non-Contracting States, where these have been taken due to illegal export. This conclusion should not be viewed merely as one of the effects of the wide margin of appreciation granted to States by the Court. Rather, that should be taken as a confirmation that, consistent with the principle of sovereignty, only States have the authority to define the national cultural heritage and its composition, as well as to regulate the (legal and illegal) export of cultural objects.

Conversely, it is fair to say that the judgment under consideration cannot be regarded as a turning point in matters of right to take part in cultural life. Indeed, it does little to enrich the jurisprudence on this issue. For one thing, when defining the interests that Italy could legitimately claim under the margin of appreciation doctrine, the Court did not mention the right to take part in cultural life. Put differently, the ECtHR failed to recognize that Italy is under an obligation to recover illicitly exported cultural objects to guarantee the fulfilment of the right of all persons to enjoy and have access to them. Another reason is that the ECtHR did not overcome *Abunbay* as to the «European consensus» on a right to the protection of cultural heritage. By stating that Italian authorities had not exceeded their margin of appreciation considering «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»,<sup>125</sup> the Court did not go beyond the traditional confines of the interests that could be identified by States and, clearly, did not refer to human rights. Furthermore, in establishing the legitimacy of the confiscation measure adopted by the Italian authorities, the Court referred to the legal instruments addressing the problem

<sup>123</sup> L. LIXINSKI, *Right to Cultural Life: Panacea or Problem?*, in A. STRECKER and J. POWDERLY (eds.), *Heritage Destruction, Human Rights and International Law*, Leiden/Boston, 2023, pp. 259-282, p. 278.

<sup>124</sup> *Abunbay*, cit., §§ 23-25.

<sup>125</sup> Judgment, § 408.

of the illicit exportation and restitution of cultural objects, such as the treaties adopted by UNESCO,<sup>126</sup> UNIDROIT<sup>127</sup> and the Council of Europe,<sup>128</sup> as well as the instruments adopted by the European Union.<sup>129</sup> However, it failed to acknowledge that some of these legal instruments contain language that addresses cultural – individual and collective – human rights.<sup>130</sup> Indeed, the ongoing process of cross-fertilization between international human rights law and international cultural heritage law has refined the protection of cultural objects beyond a purely statist approach, to the extent that States are no longer the only right-holders concerning movable cultural objects. More importantly, when discussing international legal instruments, the Court failed to mention the Framework Convention of the Council of Europe on the Value of Cultural Heritage for Society of 2005 (“Faro Convention”). Grounded on the «need to put people and human values at the centre of an enlarged and cross-disciplinary concept of cultural heritage»,<sup>131</sup> this treaty is based on the idea that individuals and groups are vested with a right to take part in cultural life, which is «the ability to be involved with the heritage, helping to enrich it or add to it, and also to benefit from activities linked to it».<sup>132</sup>

In sum, the ECtHR approached the case of the Victorious Youth from a traditionally nationalistic perspective, in line with the international system for protecting cultural objects and the wide margin of appreciation conventionally recognised by the Court to ECHR Contracting States with respect to the protection of the national cultural heritage and the recovery of illegally exported cultural objects.

Therefore, the question remains whether a deeper understanding of existing cultural heritage treaties might have led the ECtHR to address these issues differently. For instance, one may wonder whether the Court could have recognized the existence of a “European consensus” on the right to take part in cultural life had it taken the Faro Convention of 2005 (and its level of ratification) into consideration.<sup>133</sup> There also remains the doubt as to whether the Court is reluctant to open the door to individual or collective claims regarding alleged violations of the right to take part in cultural life in order to prevent a predictable flood of litigation involving that right from overburdening its docket.<sup>134</sup>

<sup>126</sup> *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970, and *Convention on the Protection of the Underwater Cultural Heritage* of 2001.

<sup>127</sup> *Convention on Stolen or Illegally Exported Cultural Objects* of 1995.

<sup>128</sup> *Convention on the Protection of the Archaeological Heritage* of 1992, and *Convention on Offences relating to Cultural Property* of 2017.

<sup>129</sup> Directive (EU) 2014/60 of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State, Regulation (EC) 116/2009 of 18 December 2008 on the export of cultural goods, and Regulation (EU) 2019/880 of 17 April 2019 on the introduction and the import of cultural goods.

<sup>130</sup> A. CHECHI and M.-A. RENOLD, *International Human Rights Law and Cultural Heritage*, in J. CUNO and T.G. WEISS (eds.) *Cultural Heritage and Mass Atrocities*, Los Angeles, 2022, pp. 396-410, p. 404. Moreover, Francioni noted that «the original conception and the later development of human rights law were not extraneous to the notion of cultural rights and cultural heritage» (F. FRANCONI, *Culture, Heritage and Human Rights*, cit., p. 8).

<sup>131</sup> Second preambular paragraph.

<sup>132</sup> O. VÍCHA, *The Concept of the Right to Cultural Heritage within the Faro Convention*, in *International and Comparative Law Review*, 2014, pp. 25-40, p. 29.

<sup>133</sup> As of 11 November 2024, there are 25 States Parties.

<sup>134</sup> R. PAVONI, *Underwater Cultural Heritage*, cit., 334.

## 5. Conclusion

This article focused on the ECtHR's judgment in *J. Paul Getty Trust and Others v. Italy* and concerned the Victorious Youth, a bronze statue presently housed at the Getty Museum of Los Angeles. With this judgment, the Court was called upon to rule whether the confiscation order that Italian authorities had issued to recover the Victorious Youth following its unlawful exportation from Italy infringed the Trust's right to the enjoyment of its property as guaranteed by Article 1 Protocol No. 1 ECHR. Yet, this article did not aim to discuss the conclusions reached by the Court or the question whether this verdict marks the end of the lengthy dispute between Italy and the Trust. Rather, it sought to highlight and discuss the Court's findings in matters of extraterritorial jurisdiction and cultural heritage protection.

Regarding extraterritorial jurisdiction, the ECtHR introduced a new exception to the principle that a State's jurisdiction under Article 1 ECHR is primarily territorial – or extended the scope of one of the existing exceptions to a new category of State measures. The jurisdiction and responsibility of Contracting States – and therefore the ECtHR's jurisdiction over the actions and omissions of Contracting States – now extends to interferences with the right to property resulting from the adoption of confiscation orders against holders of illegally exported cultural objects located in the territory of a non-Contracting State. The fact that holders did not participate in the illicit taking and export of cultural objects, and that the enforcement of confiscation orders will be carried out by the authorities of a non-Contracting State, are immaterial. Moreover, on the application of the ECHR in non-Contracting States, this article highlighted that the ECtHR's jurisprudence is far from settled.

Regarding cultural heritage protection, the Court first recognized that the Italian confiscation order constituted an interference with the Trust's proprietary interests. It then decided that this interference did not violate Article 1 Protocol No. 1 because it was lawful, proportionate and in the public interest. In relation to the latter issue, the ECtHR not only asserted that protecting the national cultural heritage against the illicit trade and recovering illegally exported cultural objects are legitimate general interests that Contracting States may pursue. It also held that these interests can be invoked by Contracting States to justify the domestic measures (including confiscation orders) adversely affecting the right to property of the individuals who retain illegally exported cultural objects in non-Contracting States.

It is the opinion of the present writer that these interconnected developments may encourage Contracting States to use national and international laws and procedures to seek the recovery of publicly owned cultural objects acquired following their illegal export and held in non-Contracting States. In other words, Contracting States may cease to pursue the recovery of stolen or illegally exported cultural objects solely relying on legal actions in the courts of the country of residence or domicile of the possessor of such objects (*in rem* jurisdiction). As the case of the Victorious Youth demonstrates, national authorities can pursue the return of cultural objects through domestic judicial proceedings and provisions analogous to Article 174(3) of Legislative Decree 42/2004 and the US-Italy bilateral treaty on the recognition and enforcement of confiscation orders. In sum, the ECtHR's judgment in *J. Paul Getty Trust and Others v. Italy* provided another arrow in the quiver of art-rich Contracting States pursuing the return of illegally exported cultural objects.