

# THE BATTLE OF THE BRONZE: INTERNATIONAL LAW AND THE RESTITUTION OF CULTURAL PROPERTY

Jeanine M. Cryan\*

ABSTRACT .....	174
I. INTRODUCTION.....	174
II. RECOVERY OF THE STATUE OF A VICTORIOUS YOUTH.....	179
III. THE GETTY'S PURCHASE OF THE BRONZE .....	181
IV. THE LEGAL BATTLE – ITALY'S ATHLETE OF FANO V. THE GETTY'S BRONZE.....	182
V. THE INTERNATIONAL FRAMEWORK FOR ISSUES INVOLVING CULTURAL PROPERTY, RELEVANT DOMESTIC LAW IN ITALY AND THE U.S.....	185
<i>A. Italian Law Regarding Illegal Export and Illegal     Ownership of Italian Cultural Property.....</i>	185
<i>B. International Law and Treaties .....</i>	188
<i>C. 1970 UNESCO Convention on the Means of Prohibiting     and Preventing the Illicit Import, Export and Transfer of     Ownership of Cultural Property.....</i>	188
<i>D. 1995 UNIDROIT Convention on Stolen or Illegally     Exported Cultural Objects.....</i>	190
<i>E. U.S. – Italy Memorandum of Understanding in     2001 and 2016.....</i>	192
<i>F. Relevant U.S. Law.....</i>	193
VI. WHAT LAW SHOULD APPLY AND WHAT SHOULD HAPPEN TO THE STATUE OF A VICTORIOUS YOUTH?.....	195

---

\*J.D. Candidate, Syracuse University College of Law, 2020; B.A. Classics, Hobart and William Smith Colleges, 2015. The author would like to thank her family and friends for their support, with special thanks to her parents for encouraging her passionate interest in art and antiquities. The author would like to express gratitude to Note Advisor Professor Laura G. Lape and Faculty Advisor Professor Christian C. Day for their wisdom and guidance throughout this process.

A. <i>The Italian Courts' Incorrect Application of Italian Law and the Italian Government's Weak Claim under Italian Law</i> .....	195
B. <i>International Law is Insufficient to Resolve Art Repatriation Issues between Nations</i> .....	197
C. <i>Domestic Law in the U.S. and Italy Should Not Apply to Issues of Cultural Patrimony between the Nations</i> .....	199
VII. ETHICAL CONSIDERATIONS AND PUBLIC POLICY .....	200
VIII. CONCLUSION .....	201

### ABSTRACT

Since the promulgation of the 1970 United Nations Education, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention") and the 1995 International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects ("1995 UNIDROIT Convention"), the subject of art repatriation has continued to garner increasing international attention and cooperation among foreign nations. The shift in public attitude and decrease in litigation of issues of cultural patrimony are reflective of increased collaboration among countries of origin and museums resulting in deals that consider ethical and moral concerns and marketability issues as well as a collective desire to combat looting and illegal trafficking. Nonetheless, conflicts over particular artifacts have generated extensive legal disputes and questions regarding the applicable governing law, the artifact's discovery and provenance, and due diligence by museums before acquisition. For over three decades, Italy and the J. Paul Getty Museum have engaged in an extensive legal battle encompassing these issues over the "Statue of a Victorious Youth."

### I. INTRODUCTION

Notoriously difficult to define, art encompasses a seemingly infinite number of innovations of human creativity, both past and present. Art is typically thought of as a work in a tangible, physical form using traditional media to sculpt, paint, photograph, and so forth. However, art encompasses both visual and performing arts. Multidisciplinary study and the body of art law have evolved to address

the complex legal issues involving the visual arts.<sup>1</sup> Art law protects, facilitates, and regulates the use, sale, and marketing of art.<sup>2</sup>

Cultural heritage law has developed in order to preserve and protect cultural property. The term “cultural property” was first used in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“Hague Convention”).<sup>3</sup> Under the Hague Convention, cultural property was defined to include “movable or immovable property of great importance to the cultural heritage of every people,” such as objects religious or secular, that are of historic, artistic, or archaeological interest.<sup>4</sup>

In the years since the Hague Convention, cultural property has evolved under the broader concept of cultural heritage, focusing not only on the protection of the cultural objects themselves, but also on their value as significant to the culture and identity of a community.<sup>5</sup> Peacetime international law grew to protect cultural property from illicit trafficking, notably under the 1970 UNESCO Convention and 1995 UNIDROIT Convention.<sup>6</sup> Additionally, many countries have enacted export and import restrictions, not to cut off transfers of art, but in order to improve regulation of art across borders and discourage illicit black-market trading.<sup>7</sup>

Public opinion regarding the repatriation of art and antiquities has been especially influential as the publicity of repatriation claims has drawn attention to the conflicting public policies faced by host countries, countries of origin, and private institutions.<sup>8</sup> Many museums have changed their stance on repatriation of illicitly looted objects in their collections for both moral and economic reasons. Not only is it the

---

1. *Art Law Research Guide*, GEO. L. LIBR., available at <http://guides.ll.georgetown.edu/artlaw> (last visited Feb. 17, 2019).

2. *Id.*

3. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 (1954) [hereinafter Hague Convention].

4. *Id.* art. 1.

5. Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, in ENFORCING INTERNATIONAL HERITAGE LAW 9, 12-13 (Francesco Francioni & James Gordley eds., 2013).

6. *Id.* at 13-14.

7. LEONARD D. DUBOFF, SHERRI BURR, & MICHAEL D. MURRAY, ART LAW CASES AND MATERIALS 592 (2010).

8. Abby Seiff, *How countries are successfully using the law to get looted cultural treasures back*, ABA (July 1, 2014), available at [http://www.abajournal.com/magazine/article/how\\_countries\\_are\\_successfully\\_using\\_the\\_law\\_to\\_get\\_looted\\_cultural\\_treasur](http://www.abajournal.com/magazine/article/how_countries_are_successfully_using_the_law_to_get_looted_cultural_treasur) (last visited Feb. 17, 2019).

right thing to do, but failure to do so once the claim has been publicized is simply bad for business.<sup>9</sup> Institutions such as the Metropolitan Museum of Art in New York have received an overwhelmingly positive response to decisions in favor of repatriation, whereas institutions such as the British Museum in London have received harsh criticism for decisions to deny the return of cultural objects.<sup>10</sup> The most infamous collection of looted antiquities, known as the Elgin Marbles, was removed from the Acropolis in Athens, Greece, in the early 1800's by British nobleman Thomas Bruce, the Earl of Elgin.<sup>11</sup> The eponymous marbles have garnered decades of press attention as a result of the British Museum's staunch refusal to return the antiquities to Greece.<sup>12</sup>

However, there is a general misconception that all cultures whose property is in private institutions and public museums around the world want the objects returned to their country of origin.<sup>13</sup> Rather, in some circumstances, looted objects should not be sent back because of insecure conditions or communities' attitudes towards the particular object.<sup>14</sup>

The diverse perspectives on repatriation have contributed to competing public policies regarding the return of cultural objects. Beside moral or ethical obligations, there are a number of compelling arguments that either support or caution against the growing trend of repatriation. The rising view of art as a symbol of cultural identity, heritage and pride for the country of origin, best understood and appreciated in its original cultural and historical context opposes the contrasting view that art is part of a shared heritage and transcends cultural boundaries. Further, there are legitimate concerns that ease of repatriation would reduce the marketability of foreign art and that weak

---

9. *Id.*

10. *Id.*

11. The Elgin Marbles are also known as the "Parthenon Sculptures." For more information about the Parthenon Sculptures, see Juan Pablo Sanchez, *How the Parthenon Lost Its Marbles*, NAT'L GEOGRAPHIC (Mar. 28, 2017), available at <https://www.nationalgeographic.com/history/history-magazine/article/parthenon-sculptures-british-museum-controversy> (last visited Feb. 17, 2019). For the British Museum's statement on the Parthenon Sculptures, see *Parthenon Sculptures*, THE BRITISH MUSEUM, available at <https://www.britishmuseum.org/about-us/british-museum-story/objects-news/parthenon-sculptures> (last visited Feb. 17, 2019).

12. Seiff, *supra* note 8.

13. Nicholas Thomas, *Should Colonial Art be Returned Home?*, FIN. TIMES (Dec. 6, 2018), available at <https://www.ft.com/content/6c61c6e6-f7ed-11e8-af46-2022a0b02a6c> (last visited Feb. 17, 2019).

14. *Id.*

claims by modern nations that have a tenuous title and connection to the object may result in unjust return of objects. The public's view of museums as repositories for stolen art competes with the notion that museums present an opportunity to broaden cultural understanding and increase exposure to a variety of cultural objects. These competing policies lead to important questions regarding the role of museums, the availability of appropriate channels to navigate repatriation issues, and the impact of repatriation claims on the global art market.

Rather than engaging in extensive, costly litigation, museums are more frequently using a collaborative model to establish arrangements with willing countries of origin.<sup>15</sup> These deals harmonize the institution's needs with the home country's desire to repatriate the property through cross-cultural cooperation, loans and special exhibits.<sup>16</sup> Nevertheless, not all interactions between the alleged home country and current host country are quite so amicable. The extensive legal battle between Italy and the J. Paul Getty Museum over the Statue of a Victorious Youth highlights the many flaws of the international legal framework, competing public policies and greater questions resulting from the growing trend toward repatriation.

The Statue of a Victorious Youth is a bronze, nude athlete standing approximately five feet tall, resting his weight on his right leg, and raising his right arm as if he is admiring his olive wreath crown, or crowning himself with it.<sup>17</sup>

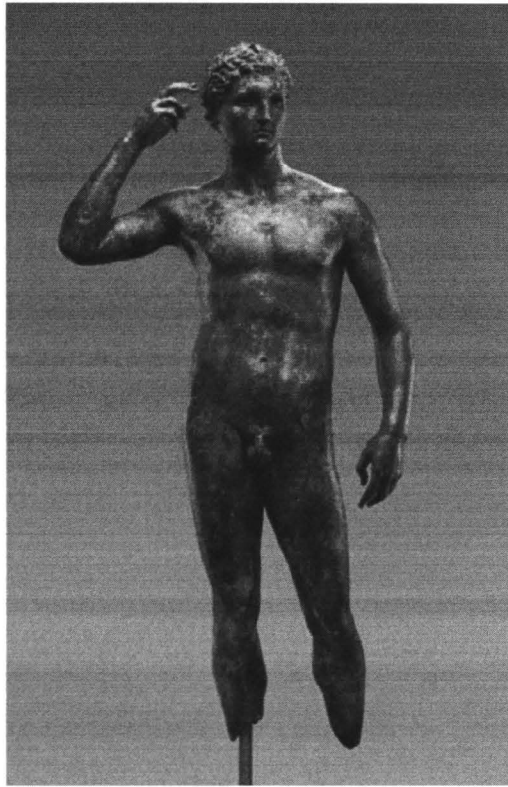
---

15. *Id.*

16. *Id.*

17. *Statue of a Victorious Youth*, J. PAUL GETTY MUSEUM, available at <http://www.getty.edu/art/collection/objects/7792/unknown-maker-statue-of-a-victorious-youth-greek-300-100-bc/?dz=#0e7116b1eef4fd3a30227068c44986a494b1b49f> (last visited Feb. 17, 2019) [hereinafter Getty Bronze Description].

**Figure 1:** The bronze Statue of a Victorious Youth.<sup>18</sup>



The so-called “Getty Bronze” was allegedly discovered in 1964 by Italian fishermen in international waters off the Adriatic Coast.<sup>19</sup> After its discovery, the statue changed hands numerous times, finally coming to rest in Los Angeles, California, after purchase by the Getty Museum in 1977.<sup>20</sup> Italy’s legal claim over the statue arises from a 1939 Italian law that declares that the Italian State owns any and all cultural property discovered on its territory, and that any artifact exported from Italy requires an export license.<sup>21</sup> The Getty argues that because the statue was found in international waters, Italy does not have a claim to the statue, and the Italian courts have flip-flopped on whether they agree.<sup>22</sup>

---

18. *Id.*

19. Sopan Deb, *Italian Court Says the Getty’s Prized Ancient Bronze Should Be Seized*, N.Y. TIMES (June 13, 2018), available at <https://www.nytimes.com/2018/06/13/arts/getty-bronze-victorious-youth-italy-court.html> (last visited Feb. 17, 2019).

20. *Id.*

21. *Id.*

22. *Id.*

Parts II and III of this note introduce the story of the Statue of a Victorious Youth, beginning with its discovery and subsequent purchase by the Getty Museum. Part IV details the legal history between Italy and the Getty Museum. Part V explains relevant international law as well as applicable law of Italy and the United States (U.S.). Though Italian criminal law and procedure are significant to the Italian courts' decisions, the focus of this note is on the justification for the application of Italian law, and Italy's claim for the forfeiture or voluntary return of the statue. In Part VI, this note considers how the judgments of the Italian courts might be enforced in the U.S. and whether the U.S. is under any international law or treaty obligation to return the Bronze. Additionally, in Part VII, the pertinent public policy arguments around cultural property will be analyzed. In sum, this note is a critique of the international framework for the repatriation of cultural property. This flawed system and conflict of applicable governing law have enabled a legal battle between Italy and the Getty to carry on for far too long. This note concludes that Italy's legal claim for the Statue of a Victorious Youth is tenuous at best, and that under the current international legal framework, the U.S. is not obligated to return the statue.

## II. RECOVERY OF THE STATUE OF A VICTORIOUS YOUTH

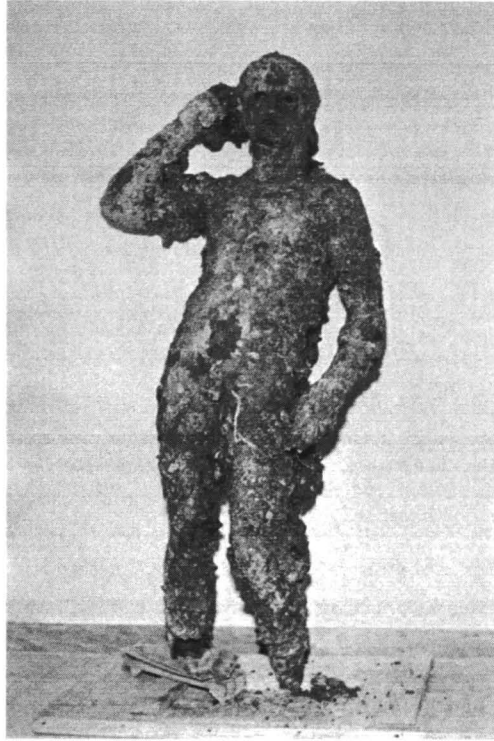
The saga begins in the summer of 1964,<sup>23</sup> when fishermen from Fano, a coastal town in northeast Italy, discovered a statue tangled in their nets thirty to forty miles off Italy's coast in the Adriatic Sea.<sup>24</sup>

---

23. Trib. Ordinario di Pesaro, Ufficio del Giudice per le Indagini Preliminari in funzione di Giudice dell'esecuzione, *Ordinanza del 10 Febbraio 2010*, No. 2042/07 R.G.N.R. No. 3357/07 R.G.I.P. (10 Feb. 2010) at 4, available at <http://www.europeanrights.eu/index.php?funzione=S&op=2&id=1387> (last visited Feb. 17, 2019) [hereinafter 2010 Ordinanza].

24. Jason Felch, *The Amazing Catch They Let Slip Away*, L.A. TIMES (May 11, 2006), available at <http://articles.latimes.com/2006/may/11/local/me-bronze11> (last visited Feb. 17, 2019).

**Figure 2:** The Bronze before restoration.<sup>25</sup>



The fishermen had drawn up the Statue of a Victorious Youth, also known in Italy as the “Athlete of Fano,” in their nets. Initially believed to be the work of the fourth century B.C. Greek sculptor Lysippos, the statue has been dated to the second or third century B.C. by contemporary studies.<sup>26</sup> The Statue of a Victorious Youth is considered to be one of the finest Greek bronzes to survive the classical era.<sup>27</sup> Likely looted by the Romans from its Grecian home and then lost at sea, the statue avoided the presumed fate (melt and recycle) of the many bronzes of Athens, Rhodes, Olympia and Delphi.<sup>28</sup>

---

25. Getty Bronze Description, *supra* note 17.

26. Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES (Jan. 15, 2010), available at [http://www.nytimes.com/2010/01/16/arts/design/16-bronze.html?\\_r=0](http://www.nytimes.com/2010/01/16/arts/design/16-bronze.html?_r=0) (last visited Feb. 3, 2019). For more information about the Greek sculptor, Lysippos (Lysippus), see also *Lysippus*, ENCYCLOPAEDIA BRITANNICA (Apr. 21, 2018), available at <https://www.britannica.com/biography/Lysippus> (last visited Feb. 28, 2019).

27. *Id.*

28. Memorandum from Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture 4 (Nov. 20, 2006), available at <http://www.getty.edu/news/press/center/>



The fishermen brought the statue ashore and the owners of the trawler allegedly hid the statue, burying it in a cabbage patch, before selling it to Giacomo Barbetti, a nearby antiquarian, and his brothers Pietro and Fabio Barbetti for 3.5 million lire in August of 1964.<sup>29</sup> The statue was later moved to the home of a priest, Father Giovanni Nagni, for safekeeping.<sup>30</sup> In June of 1965, the statue was sold by the Barbettis to an “unidentified person” from Milan.<sup>31</sup>

Shortly thereafter, the Barbettis and Father Nagni were charged with purchasing and concealing stolen property in violation of Article 67 of Italian Law No. 1089 of 1939. In May of 1966, all four men were acquitted after the Magistrate Court of Perugia found insufficient evidence that the statue had been found in Italian territorial waters and that the statue was of “historic and artistic value.”<sup>32</sup> On appeal, the Court of Appeals of Perugia reversed.<sup>33</sup> This ultimately led to the conviction of the Barbettis for receiving stolen property and Father Nagni for aiding and abetting the crime on January 1, 1967.<sup>34</sup>

The case was appealed to the Court of Cassation, Italy’s Supreme Court, where the Court overturned the sentence of the Court of Appeals of Perugia due to the lack of proof of the statue’s provenance and a lack of evidence as to the “artistic and archaeological value” of the property, sending the case to the Court of Appeals of Rome.<sup>35</sup> On November 8, 1970, the Court of Appeals of Rome affirmed the Court of Cassation’s ruling.<sup>36</sup>

### III. THE GETTY’S PURCHASE OF THE BRONZE

After the statue was allegedly sold to the unidentified Milanese man, the Bronze resurfaced in Germany years later and in 1973, The New York Times reported it was up for sale in Munich, Germany for

---

getty\_italy\_bronze\_112006.pdf [hereinafter 2006 Brief]; Peter Steward, *The lost art of Greek bronzes*, APOLLO (July 25, 2019), available at <https://www.apollo-magazine.com/the-lost-art-of-greek-bronzes/> (last visited Sept. 18, 2019).

29. 2010 Ordinanza, *supra* note 23, at 5; Povoledo, *supra* note 26.

30. 2010 Ordinanza, *supra* note 23, at 5.

31. *Id.* Translated by author, “*un personaggio non meglio identificato.*”

32. *Id.* Translated by author, “*sia sul valore storico ed artistico dell’oggetto.*”

33. *Id.*

34. *Id.*

35. 2010 Ordinanza, *supra* note 23, at 5-6. Translated by author, “*del valore artistico ed archeologico.*”

36. 2010 Ordinanza, *supra* note 23, at 6.

\$3.5 million.<sup>37</sup> Art dealer Heinz Herzer had purchased the statue on behalf of the European art consortium, Artemis S.A., for \$700,000 and was looking for a new buyer.<sup>38</sup> The New York Times reported the initial asking price for the statue was close to \$5 million and it was offered to both the Metropolitan Museum of Art in New York and Mr. J. Paul Getty, an avid art and antiquities collector for his eponymous museum.<sup>39</sup> Getty turned down the opening offer due to concern over its title and high price, and later reportedly considered a fruitless deal with the Metropolitan Museum to jointly acquire the statue for \$3.8 million.<sup>40</sup>

Getty allegedly expressed concern regarding the provenance of the statue and wished for a list of conditions to be met before proceeding with the purchase, including permission from the Italian Minister of Culture and proof of permission for exportation.<sup>41</sup> In August 1973, Heinz Herzer wrote to Jiri Ferel, the curator of antiquities for the Getty museum, in response to the Getty's concern over potential legal claims and asserted that "even the Italian government admits our incontestable property right to the Bronze."<sup>42</sup>

Getty died in 1976 before the conditions were fulfilled, but upon his death, the Getty Museum received a \$700 million endowment from his estate, \$3.95 million of which was used to purchase the statue from Artemis in 1977.<sup>43</sup> The Getty's acquisition of the statue was publicized internationally on November 26, 1977.<sup>44</sup> The Getty trustees consequently renamed the statue the "Getty Bronze" and displayed it in the museum in 1978, where it has remained ever since.<sup>45</sup>

#### IV. THE LEGAL BATTLE – ITALY'S ATHLETE OF FANO V. THE GETTY'S BRONZE

While negotiations over the Bronze were proceeding, Italy continued its pursuit. In 1973, the Italian government requested an

---

37. David L. Shirey, *Greek Bronze on Sale for \$3.5-Million*, N.Y. TIMES, (Mar. 10, 1973), available at <https://www.nytimes.com/1973/03/10/archives/greek-bronze-on-sale-for-35million-greek-bronze-on-sale-for.html> (last visited Feb. 3, 2019).

38. *Id.*

39. *Id.*

40. *Id.*

41. Felch, *supra* note 24.

42. 2010 Ordinanza, *supra* note 23, at 13. Translated by author, "*anche lo Stato Italiano ammette il nostro diritto incontestabile di proprietà sul bronzo.*"

43. *Id.* at 8.

44. 2006 Brief, *supra* note 28, at 9.

45. Felch, *supra* note 24.

investigation by German authorities into Herzer and his purchase of the statue on the grounds of violation of Italian export laws, but the investigation was discontinued for lack of evidence.<sup>46</sup> The following year, Italy asked for the German authorities' participation in the seizure of the Bronze and extradition of Herzer for his alleged role in the illegal export of the statue from Italy.<sup>47</sup> However, the German authorities refused to proceed against Herzer and the investigation ceased.<sup>48</sup>

In December of 1977, Interpol requested that U.S. Customs look into the legal status of the Bronze, seeking further verification of proper exportation and due diligence by the Getty.<sup>49</sup> As a result, U.S. Customs officials established that the Getty trustees had reviewed the Italian cases and concluded that the statue had indeed been found in international waters and therefore, was not subject to Italian law prior to acquisition.<sup>50</sup> Interpol in Washington D.C. then conveyed to the Carabinieri that absent proof or further information supporting Italian ownership of the statue, the investigation would be closed.<sup>51</sup>

In 1989, Italy's Director General of the Italian Ministry of Cultural Heritage and Activities wrote to John Walsh, the Getty's Director, asking the Getty to consider returning the statue to Italy. Walsh replied that the request "came as an unwelcome surprise" and that the statue had "a tenuous relationship to Italian patrimony."<sup>52</sup>

A few years later, the Italian Ministry of Culture and the new Director of the Getty, Michael Brand, renewed negotiations, this time over a number of other antiquities in the Getty's collection.<sup>53</sup> The Italian government submitted an initial petition for fifty-two objects, including the Bronze, with both parties reaching an agreement in October of 2006 for the return of twenty-six objects, minus the statue.<sup>54</sup> The congenial negotiations reached a halt shortly thereafter, when the Ministry disavowed the agreement and refused any further talks without the additional transfer of the Getty Bronze.<sup>55</sup> In April of 2007,

---

46. 2010 Ordinanza, *supra* note 23, at 7.

47. 2006 Brief, *supra* note 28, at 8.

48. *Id.* at 8; 2010 Ordinanza, *supra* note 23, at 6.

49. 2010 Ordinanza, *supra* note 23, at 7; 2006 Brief, *supra* note 28, at 10.

50. 2010 Ordinanza, *supra* note 23, at 8.

51. *Id.* at 9.

52. 2006 Brief, *supra* note 28, at 10.

53. Michael Brand, *Italy and the Getty Must Find Common Ground*, L.A. TIMES (Nov. 28, 2006), available at [http://www.getty.edu/news/press/center/latimes\\_brand\\_object\\_return\\_oped112806.html](http://www.getty.edu/news/press/center/latimes_brand_object_return_oped112806.html) (last visited Feb. 17, 2019).

54. *Id.*; Felch, *supra* note 24

55. Brand, *supra* note 53.

Francesco Rutelli, Italy's Minister of Culture, announced a "cultural embargo" against the Getty Museum.<sup>56</sup> In response, the Getty urged Minister Rutelli to reconsider his position and take the Bronze off the table in order to proceed with the agreement.<sup>57</sup> In August of 2007, Minister Rutelli and Getty Director Michael Brand reached a new agreement to transfer forty pieces, including the notorious Cult Statue of a Goddess, from the Getty's antiquities collection back to Italy.<sup>58</sup> Discussions regarding the Statue of a Victorious Youth were suspended for the sake of the agreement while an Italian court conducted yet another inquiry into the discovery and exportation of the Bronze.<sup>59</sup>

The 2007 inquiry arose following a petition from a local group in Fano, Italy to the public prosecutor's office in Pesaro.<sup>60</sup> The prosecutor's office filed criminal charges against the fishermen and sought a forfeiture order.<sup>61</sup> The judge dismissed the petition because many of the fishermen were no longer alive, the charges would be barred by statute of limitations, and the Getty Museum was a good faith purchaser.<sup>62</sup> The members of the local group had anticipated the rejection, but nonetheless, appealed.<sup>63</sup>

In 2009, Pre-Trial Judge Mussoni in Pesaro re-examined the case and found that "the Tribunal had jurisdiction over the case and that Italian law applied."<sup>64</sup> Judge Mussoni conceded that the statue was

56. *J. Paul Getty Museum Responds to Imposition of a Cultural Embargo by Italy's Ministry of Culture*, J. PAUL GETTY TRUST (Apr. 20, 2007), available at [http://www.getty.edu/news/press/center/cultural\\_embargo\\_response.html](http://www.getty.edu/news/press/center/cultural_embargo_response.html) (last visited Feb. 17, 2019).

57. *Id.*

58. *Id.*; *Italian Ministry of Culture and the J. Paul Getty Museum Sign Agreement in Rome*, J. PAUL GETTY TRUST (Sept. 25, 2007), available at [http://www.getty.edu/news/press/center/italy\\_getty\\_joint\\_statement\\_092507.html](http://www.getty.edu/news/press/center/italy_getty_joint_statement_092507.html) (last visited Feb. 17, 2019).

59. Elisabetta Povoledo, *Getty Agrees to Return 40 Antiquities to Italy*, N.Y. TIMES (Aug. 2, 2007), available at <https://www.nytimes.com/2007/08/02/arts/design/02gett.html> (last visited Feb. 17, 2019).

60. Jason Felch, *Italian Group's Bid for Getty Statue Rejected*, L.A. TIMES (Nov. 20, 2007), available at <http://articles.latimes.com/2007/nov/20/world/fg-getty20> (last visited Feb. 17, 2019).

61. *History of the Statue of the Victorious Youth (The Getty Bronze)*, News from the Getty, J. PAUL GETTY TRUST (Dec. 2018), available at [http://news.getty.edu/content/1208/files/History%20of%20the%20Statue%20of%20the%20Victorious%20Youth%20December%202018%20\(1\).pdf](http://news.getty.edu/content/1208/files/History%20of%20the%20Statue%20of%20the%20Victorious%20Youth%20December%202018%20(1).pdf) (last visited Mar. 6, 2019).

62. *Id.*

63. Felch, *Italian Group's Bid for Getty Statue Rejected*, *supra* note 60.

64. Alessandra Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze"*, in CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW 301, 304 n.15 (Silvia Borelli & Federico Lenzerini eds., 2012).

likely found in international waters, but upon reference to a decision by the Tribunal of Sciacca, found that, because the Italian fishermen pulled up the statue on a trawler under the Italian flag, the statue was property of the Italian state.<sup>65</sup> In a subsequent 2010 ruling, Judge Mussoni found that the J. Paul Getty Trust could not be considered a good faith buyer and the statue was illegitimately held by the museum after its illegal export in violation of Italian cultural and export law.<sup>66</sup> As a result, Judge Mussoni ordered the forfeiture of the statue “currently held by the J. Paul Getty Museum wherever it is found.”<sup>67</sup>

This decision was upheld in 2012 on appeal and in June of 2018 an Italian court ordered that the statue be seized.<sup>68</sup> The museum’s grounds on which to claim ownership of the statue and exercise of due diligence in its acquisition have again come into question following the latest decision in December of 2018 by Italy’s highest court, the Court of Cassation, reaffirming the demand for the statue’s return.<sup>69</sup>

## V. THE INTERNATIONAL FRAMEWORK FOR ISSUES INVOLVING CULTURAL PROPERTY, RELEVANT DOMESTIC LAW IN ITALY AND THE U.S.

### A. Italian Law Regarding Illegal Export and Illegal Ownership of Italian Cultural Property

As the Italian courts have held that Italian law applies here, this note will explore relevant Italian law and Italy’s claim to the Bronze under such laws before addressing the international framework and relevant law in the U.S.

Article 9 of the Italian Constitution states, “[t]he Republic... safeguards the natural beauties and the historical and artistic wealth of Italy.”<sup>70</sup> In accordance with Article 9, Italy has enacted strict export

65. Alessandro Chechi, Raphael Contel & Marc-André Renold, *Case Victorious Youth – Italy v. J. Paul Getty Museum*, ARTHEMIS, 4-5 (May 2012), available at <https://plone.unige.ch/art-adr/cases-affaires/victorious-youth-2013-italy-v-j-paul-getty-museum> (last visited Feb. 17, 2019).

66. 2010 Ordinanza, *supra* note 23, at 35.

67. *Id.* at 36. Translated by author, “*Ordina la confisca della statua denominata ‘L’Atleta Vittorioso’ attribuita allo scultore greco Lisippo attualmente detenuta dal J. PAUL GETTY MUSEUM ovunque essa si trovi.*”

68. Deb, *supra* note 19.

69. Gaia Pianigiani, *Italian Court Rules Getty Museum Must Return a Prized Bronze*, N.Y. TIMES (Dec. 4, 2018), available at <https://www.nytimes.com/2018/12/04/arts/design/getty-bronze-italy-ruling.html> (last visited Feb. 17, 2019).

70. Cost. art. 9 (Italy).

restrictions on a broad scope of cultural property in order to preserve and retain these objects as part of the State's cultural heritage.

The principal source for the Italian state's attitude towards cultural property and ownership claims is Law No. 1089 of 1939, titled *Tutela delle Cose di Interesse Storico e Artistico* ("Protection of Things of Artistic and Historic Interest").<sup>71</sup> As the fundamental Italian law for the protection of cultural heritage, Law No. 1089/39 was enacted for the protection of things, movable and immovable, of historic, artistic, archaeological or ethnographic interest.<sup>72</sup> Under Article 44 of Law No. 1089/39, an antiquity that falls under the scope of Article 1 belongs to the state unless a private party can establish ownership prior to 1902, which was when the first Italian law protecting antiquities was enacted.<sup>73</sup> Article 23 states that objects protected under Articles 1 to 2 are inalienable when they belong to the state, however, the Ministry of Culture may authorize the sale of art or antiquity in particular circumstances.<sup>74</sup> Nevertheless, under Article 61, an unauthorized alienation of cultural property belonging to the state is considered null and void.<sup>75</sup>

The export provisions of Law No. 1089/39 provide that objects falling under Article 1 may not be exported if export would constitute significant damage to the national patrimony.<sup>76</sup> In all cases, anyone who intends to export antiquities must obtain a license.<sup>77</sup> Further, under Article 66, an unlawfully exported item must be confiscated by Italian authorities, and the exporter fined.<sup>78</sup>

The Italian Civil Code of 1942 further articulates Italy's stance on antiquities and works of art as inalienable state property. Cultural property is either considered to be part of the public domain or of the inalienable State assets.<sup>79</sup> If within the public domain, the cultural

---

71. Legge 1 giugno 1939, n. 1089, G.U. Aug. 8, 1939, n. 184 (It.) [hereinafter Law No. 1089/39].

72. *Id.* art. 1. Translated by the author, "Sono soggette alla presente legge le cose, immobili e mobili, che presentano interesse artistico, storico, archeologico o etnografico."

73. *Id.* art. 44; Legge 12 giugno 1902, n. 185, G.U. June 27, 1902, n. 149 (It.) (Law No. 185 on the Protection and Conservation of Monuments and Objects of Valuable Art and Antiquities (June 12, 1902)).

74. Law No. 1089/39, *supra* note 71, art. 23-25.

75. *Id.* art. 61.

76. *Id.* art. 35.

77. *Id.* art. 36.

78. *Id.* art. 66.

79. Lanciotti, *supra* note 64, at 306. Article 822 of the Italian Civil Code of 1942 defines the extent of the public domain ("*demanio pubblico*"), which includes "state owned

property is absolutely prohibited from sale, whereas cultural property identified as an inalienable State asset may be transferred in specific circumstances with State authorization.<sup>80</sup> However, under either category, cultural property cannot be transferred privately or exported from Italy.<sup>81</sup>

Italian Law No. 42 of 2004 similarly pledges to protect Italy's cultural heritage, as well as "preserve the memory of the national community and promote cultural development."<sup>82</sup> Like Law No. 1089/39, Law No. 42/04 generally prohibits the export or sale of any cultural property.<sup>83</sup>

Beyond the extensive legal protection for antiquities that has existed in Italy for over 100 years, it is worthwhile to note that there are two police units that investigate matters in art theft and recover stolen or illegally exported art in Italy, the most well-known being the Carabinieri's Art Squad.

The Carabinieri Special Unit for the Protection of Artistic Patrimony (*Comando Carabinieri per la Tutela del Patrimonio Culturale*) has been in operation since 1969 in order to combat theft of cultural heritage property, including the illegal excavation of archaeological sites, as well as to prevent the trafficking of stolen art and cultural property.<sup>84</sup> The unit, known as the "Art Squad," inspects antique dealers and also traces stolen or illegally exported objects for their safe return to Italy. In order to do so, the Art Squad utilizes a comprehensive database of stolen art, known affectionately as "Leonardo."<sup>85</sup> The database contains the names and pictures of almost

---

real property of historic archaeological or artistic interest as well as collections of paintings, archives and libraries of the State museums." The inalienable assets of the Italian State ("*patrimonio indisponibile dello Stato*") mentioned in Article 826(2) include "things of artistic, historical, archaeological, palethnological, paleontological and interest found by whosoever and by whatever means underground."

80. *Id.*

81. *Id.* at 307.

82. Decreto Legislativo 22 gennaio 2004, n. 42, G.U. July 6, 2002, n. 137 (It.) (Legislative Decree No. 42 of 2004, Code of the Cultural and Landscape Heritage), art. 1, available at <https://en.unesco.org/cultnatlaws> (follow "Database" hyperlink; then search for "Italy" and year "2004") (last visited Feb. 17, 2019) [hereinafter Law No. 42/04].

83. *Id.*; Lanciotti, *supra* note 64, at 306.

84. *Carabinieri for the Protection of Cultural Heritage and Anti-Counterfeiting*, Ministero della Difesa, CARABINIERI (2010), available at <http://www.carabinieri.it/multilingua/en/english/carabinieri-for-the-protection-of-cultural-heritage-and-anti-counterfeiting> (last visited Mar. 8, 2019) [hereinafter Carabinieri 2010].

85. *Id.*; Sylvia Poggioli, *For Italy's Art Police, An Ongoing Fight Against Pillage Of Priceless Works*, NPR (Jan. 11, 2017), available at <https://www.npr.org/sections/parallels/>

6 million registered works of art, mostly from Italy, and of those, 1.2 million are considered stolen, missing, smuggled, or illegally excavated.<sup>86</sup> The Art Squad's rate of recovery is high; in 2014 it recovered 137,000 works with an estimated value of \$500 million.<sup>87</sup>

Armed with extensive legal protection for antiquities and a specialized police force that is internationally recognized as a leader in this field, Italy continues to actively pursue the return of stolen Italian art and antiquities.<sup>88</sup>

### *B. International Law and Treaties*

The cornerstone of international law governing the conduct of nations regarding art repatriation and illicit trafficking of cultural property is the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention").<sup>89</sup> Complementing the 1970 UNESCO Convention is the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects ("1995 UNIDROIT Convention"), which provides for the return and restitution of stolen, illegally excavated or illegally exported cultural property under international law.<sup>90</sup> Taken together, the Conventions are the foundation of the international framework for the protection of cultural property.

### *C. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*

During the late 1960s and early 1970s, there was a rise in the theft and illicit exportation of art, while private collectors and institutions were increasingly offered objects that had been illegally imported or were of undisclosed origin.<sup>91</sup> In this context, the 1970 UNESCO

---

2017/01/11/508031006/for-italys-art-police-an-ongoing-fight-against-pillage-of-priceless-works (last visited Mar. 8, 2019).

86. Poggioli, *supra* note 85.

87. *Id.*

88. Carabinieri 2010, *supra* note 84.

89. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

90. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention].

91. *Illicit Trafficking of Cultural Property: 1970 Convention*, UNESCO, available at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/> (last visited Feb. 17, 2019).



Convention was created with the aim of the Convention being to promote international cooperation in the return of illegally exported cultural property by addressing preventative measures and restitution.<sup>92</sup> Cultural property, under the 1970 UNESCO Convention, is defined as property “which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science” and also falls within a prescribed list of categories.<sup>93</sup>

The parties to the 1970 UNESCO Convention committed to a series of proactive measures to inhibit the illegal export and import of cultural property. In Article 5, the parties promised to establish “national services” where they do not already exist to protect the cultural heritage of each country.<sup>94</sup> These services include the creation of laws and regulations to prevent illicit import, export and transfer of ownership of cultural property, the establishment of a national inventory of protected cultural property, and the promotion of scientific and technical institutions to ensure the preservation of cultural property.<sup>95</sup> Additionally, the parties committed to supervise archaeological excavations, establish educational campaigns, and, under Article 6, introduce export certificates.<sup>96</sup> Per Article 6, cultural property must be subject to an export certificate, otherwise exportation of the property is illegal.<sup>97</sup>

The 1970 UNESCO Convention’s restitution provisions are outlined in Article 7, under which the parties committed:

- (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States . . .<sup>98</sup>

The parties also promised to prohibit the import of cultural property that was stolen from a museum or similar institution of another

---

92. See 1970 UNESCO Convention, *supra* note 89.

93. *Id.* art. 1.

94. *Id.* art. 5.

95. *Id.* art. 5(a)-(c).

96. *Id.* art. 5(d), (f); art. 6 (a)-(c).

97. 1970 UNESCO Convention, *supra* note 89, art. 6.

98. *Id.* art. 7(a).

party if the property was recorded in the inventory of that institution.<sup>99</sup> The party requesting restitution must provide documentation and other evidence to establish its claim, and the requesting party must compensate an innocent purchaser or a person who has valid title to the property that is being returned.<sup>100</sup>

Furthermore, the parties agreed to ensure the cooperation of internal services to facilitate the earliest possible return of property and to permit actions brought by rightful owners for recovery of lost or stolen cultural property.<sup>101</sup>

In the event of dispute over its implementation, the Convention offers a "good offices" mediation clause in order to reach a settlement.<sup>102</sup>

#### *D. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*

The UNIDROIT Convention, adopted in Rome in 1995, provides rules for acquisition of title over stolen or illicitly exported cultural property, restitution and compensation of good faith purchasers that exercised due diligence, statutes of limitations on claims, and choice of law determinations.<sup>103</sup>

Under the Convention, a cultural object is defined as that which, on religious or secular grounds, is important for archaeology, prehistory, literature, art or science and belongs to one of the Convention's prescribed categories.<sup>104</sup> One of the initial provisions of the Convention explicitly states that a possessor of stolen cultural property is required to return it.<sup>105</sup> The Convention also specifies the statute of limitations, requiring a claim for restitution to be brought "within a period of three years from the time when the claimant 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 time of the theft."<sup>106</sup> However, the Convention allows a State to declare that a claim is subject to a statute of limitations

---

99. *Id.* art. 7(b)(i).

100. *Id.* art. 7(b)(ii).

101. *Id.* art. 13.

102. 1970 UNESCO Convention, *supra* note 89, art. 17(5).

103. Francioni, *supra* note 5, at 14.

104. 1995 UNIDROIT Convention, *supra* note 90, art. 2

105. *Id.* art. 3(1).

106. *Id.* art. 3(3).

of seventy-five years or as long a period as is provided in that State's law.<sup>107</sup>

Once it is found that a possessor indeed holds stolen cultural property and is required to return it, the possessor will receive "fair and reasonable compensation" on the condition that the possessor "neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object."<sup>108</sup> A number of factors will be considered in determining whether the possessor exercised due diligence, including the price paid, the character of the parties, whether the possessor consulted a reasonably accessible record of stolen cultural property and any other relevant information that could have been reasonably obtained or whether the possessor took any additional steps that a reasonable person would have taken in the circumstances.<sup>109</sup>

In order to facilitate the return of illegally exported cultural objects, the 1995 UNIDROIT Convention provides that a state may request a court or other competent authority of another state to order the return of cultural property that was illegally exported from the requesting state.<sup>110</sup> Furthermore, a cultural object that was temporarily exported from the requesting party for purposes including exhibition, restoration or research, and has not been returned in accordance with the permit regulating its export, shall be considered illegally exported.<sup>111</sup> Additionally, the court or competent authority shall order the return of an illegally exported cultural object if the requesting state establishes that the removal of that object conflicts with one or more enumerated public interests, or if the requesting party establishes that the object is of significant cultural importance.<sup>112</sup> The Convention requires that any request made to a court or other competent authority be supported with factual and legal information that may assist in the determinations as to whether the object was illegally exported, if removal conflicts with public interests or if the object is of significant cultural importance.<sup>113</sup> Nonetheless, the Convention provides that if the export of the object is no longer illegal at the time which return was requested, or the object was exported during the lifetime of the creator of the cultural object or

---

107. *Id.* art. 3(5).

108. *Id.* art. 4(1).

109. 1995 UNIDROIT Convention, *supra* note 90, art. 4(4).

110. *Id.* art. 5(1).

111. *Id.* art. 5(2).

112. *Id.* art. 5(3).

113. *Id.* art. 5(4).

within fifty years of the creator's death, then the provisions regarding return shall not apply.<sup>114</sup>

The Convention also protects possessors of cultural property who acquired such property after illegal export. The possessor will be entitled to fair and reasonable compensation if the possessor neither knew nor reasonably ought to have known that the object had been illegally exported at the time it was acquired by the possessor, which shall be determined through consideration of the circumstances including the absence of an export certificate required by the law of the requesting state.<sup>115</sup>

Finally, the Convention is subject to ratification, acceptance, or approval by signatory States.<sup>116</sup> Accordingly, Italy has ratified the 1995 UNIDROIT Convention, but the U.S. has not.

#### *E. U.S. – Italy Memorandum of Understanding in 2001 and 2016*

In 2001, the U.S. government and the Italian government entered into a Memorandum of Understanding (“the MOU”) with the goal of minimizing the incentive for looting objects from Italy’s archaeological sites and encouraging the return of stolen antiquities ranging from approximately the ninth century B.C. to approximately the fourth century A.D.<sup>117</sup> The U.S. government pledged to restrict importation of objects within this range, unless accompanied by an export license or certificate.<sup>118</sup> Further, the U.S. committed to offer the return of any material on the MOU’s Designated List.<sup>119</sup> In order to decrease instances of illegal export and import, the Italian government pledged to

114. 1995 UNIDROIT Convention, *supra* note 90, art. 7. The first exception under this article recognizes that it would be contradictory for the court or competent jurisdiction to apply export rules that the State no longer has in place and seeks to avoid a temporal conflict of laws issue. The second exception recognizes that many national systems exclude the work of a living artist from the scope of cultural heritage laws. For further explanation, see Marina Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, UNIF. L. REV. 2001-3 476, 540, available at <https://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatory-report-e.pdf> (last visited Sept. 19, 2019).

115. 1995 UNIDROIT Convention, *supra* note 90, art. 6(1)-(2).

116. *Id.* art. 11(2).

117. Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy, Jan. 19, 2001, Art. I(A), available at <https://eca.state.gov/files/bureau/it2001mou.pdf> (last visited Mar. 6, 2019) [hereinafter 2001 MOU].

118. *Id.* art. I(A).

119. *Id.* art. I(B).

reinforce the 1970 UNESCO Convention and continue to provide for the protection of its cultural property by instituting more severe penalties, promptly prosecuting looters, providing additional training for the Carabinieri Special Unit for the Protection of Artistic Patrimony, and intensifying investigations by this unit.<sup>120</sup> Both governments pledged to use their “best efforts” to facilitate contacts between U.S. and Italian museums for the promotion of increased and extended loans of Italian cultural objects.<sup>121</sup>

In January 2016, the U.S. agreed to extend the MOU (“the Revised MOU”) and incorporate an amended Article II to replace the existing Article II provisions.<sup>122</sup> The revisions include a pledge by the Italian government to “create and pursue innovative and effective ways to detect and stop the looting of archaeological sites”<sup>123</sup> and remove the provision regarding the Italian government’s commitment to strengthen cooperation with other Mediterranean countries to protect the cultural property of the region.<sup>124</sup> Additionally, the Revised MOU includes a reporting provision that requires each government to inform the other of the effectiveness of the agreement via interim reports.<sup>125</sup>

#### *F. Relevant U.S. Law*

On a national level, the U.S. adopted the National Stolen Property Act of 1934 (NSPA) which prohibits transportation in interstate or foreign commerce of goods, valued at \$5,000 or more, that have been “stolen, converted or taken by fraud.”<sup>126</sup> The 1970 UNESCO Convention is enforceable under the NSPA, which enables “foreign countries’ cultural patrimony legislation to be effectively enforced within U.S. territory by U.S. courts.”<sup>127</sup> In order for an object to qualify under the NSPA, it must be “stolen” and though the NSPA does not define the term, the Supreme Court has held that “stolen” should be

---

120. *Id.* art. II(C).

121. *Id.* art. II(G).

122. Diplomatic Note, Embassy of Italy in Washington, D.C. to U.S. Dep’t of State, Prot. N. 123 (Jan. 12, 2016) [hereinafter MOU Amended].

123. *Id.* art. II(D)(3).

124. 2001 MOU, *supra* note 117, art. II(D).

125. MOU Amended, *supra* note 122, art. II(K).

126. 18 U.S.C. §§ 2314-2315 (2006).

127. *Summary of Law – National Stolen Property Act*, COAST, available at <https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20National%20Stolen%20Property%20Act.pdf?redirect=301oc> (last visited Feb. 17, 2019).

broadly construed.<sup>128</sup> Thus, “stolen” includes “all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny.”<sup>129</sup>

The NSPA provides criminal sanctions, whereas the 1983 Convention on Cultural Property Implementation Act, to be addressed below, provides civil remedies.<sup>130</sup> Violators of the NSPA shall be fined and/or imprisoned for up to ten years.<sup>131</sup> Additionally, the NSPA’s scienter requirement, which requires the knowledge that goods were illegally obtained from the country of origin, is a heavy evidentiary burden.<sup>132</sup>

The 1983 Convention on Cultural Property Implementation Act (CPIA) is the belated implementation of the U.S.’s acceptance of the 1970 UNESCO Convention.<sup>133</sup> The CPIA puts restrictions on the importation of cultural property from a nation with which the U.S. has a relevant agreement. It also authorizes the President to issue an emergency decree imposing import restrictions and the CPIA provides for the seizure and forfeiture of undocumented objects.<sup>134</sup>

A request may be filed by a state party to the 1970 UNESCO Convention that fears that the pillaging of cultural property is jeopardizing the requesting party’s cultural heritage.<sup>135</sup> Requests will be considered by members of the Cultural Property Advisory Committee (“CPAC”), which is composed of eleven members appointed by the President in a number of categories including, (1) two members representing the interests of museums; (2) three members who are experts in the fields of archaeology, anthropology, ethnology, or related areas; (3) three members who are experts in the sale of

---

128. Yael Weitz, *Government Remedies Against Possessors of Stolen Art Objects*, HERRICK (Aug. 2011), available at <http://www.herrick.com/publications/government-remedies-against-possessors-of-stolen-art-objects/> (last visited Mar. 6, 2019).

129. *Id.*; see *U.S. v. Turley*, 352 U.S. 407, 417 (1957).

130. *Summary of Law – National Stolen Property Act*, *supra* note 127.

131. 18 U.S.C. § 2314-2315 (2006).

132. *Summary of Law – National Stolen Property Act*, *supra* note 127.

133. 19 U.S.C. §§ 2601-2613 (2006).

134. *Convention on Cultural Property Implementation Act (CPIA) of 1983: Fact Sheet*, ARCHAEOLOGICAL INST. OF AM. (Apr. 1, 2010), available at <https://www.archaeological.org/convention-on-cultural-property-implementation-act-cpia-of-1983-fact-sheet/> (last visited Sept. 15, 2019) [hereinafter CPIA Fact Sheet].

135. *Id.*

archaeological, ethnological or other cultural property; and (4) three members who represent the general public's interests.<sup>136</sup>

In its criteria for recommendations, the CPAC must make four determinations: (1) that the cultural patrimony of the requesting state party is in jeopardy due to the pillage of archaeological materials; (2) that the requesting party has taken measures to protect its cultural patrimony; (3) that U.S. import restrictions, either alone or in concert with actions taken by other market nations, would be of substantial benefit in deterring the serious pillaging situation, and (4) import restrictions would promote the interchange of cultural property among parties for cultural, scientific, and educational purposes.<sup>137</sup> After its deliberations, the CPAC is to prepare a report for the President including the findings regarding the request and the Committee's recommendation.<sup>138</sup>

## VI. WHAT LAW SHOULD APPLY AND WHAT SHOULD HAPPEN TO THE STATUE OF A VICTORIOUS YOUTH?

### *A. The Italian Courts' Incorrect Application of Italian Law and the Italian Government's Weak Claim under Italian Law*

The Italian government's legal claim to the Getty bronze relies on Law No. 1089/39, which gives the Italian state title to any cultural property discovered on its territory and requires any cultural property to obtain a proper export license.<sup>139</sup> The Italian government relies on the Italian Civil Code of 1942 and Italian Law No. 42/04 to support its stance that because Italian antiquities are inalienable state property, the Bronze, too, was inalienable cultural property belonging to Italy.<sup>140</sup>

The Italian government argues that the discovery of the statue and subsequent transport of the statue into and within the Italian territory was not properly reported to the Ministry of Culture, nor to the relevant Customs Authority in breach of the Law No. 1089/39.<sup>141</sup> The Italian government also argues that the concealment of the statue "unequivocally demonstrates the awareness on the part of the suspects of the relevant historical and archaeological value of the find and the

136. 19 U.S.C. § 2605(b)(1)(A)-(D) (2006).

137. CPIA Fact Sheet, *supra* note 134.

138. 19 U.S.C. § 2605(f) (2006).

139. Law No. 1089/39, *supra* note 71, art. 23, 36, & 44.

140. Lanciotti, *supra* note 64, at 306; *see* Law No. 42/04, *supra* note 82.

141. 2010 Ordinanza, *supra* note 23, at 4.

will to avoid the particular protection regime provided by Italian legislation for the protection of its cultural heritage.”<sup>142</sup>

Following the Bronze’s discovery in 1964, it appears that neither the fishermen nor the Barbettis notified Italian government officials.<sup>143</sup> In addition, the Barbettis did not obtain an export certificate under Law No. 1089/39 before the sale of the Bronze to the unidentified person from Milan.<sup>144</sup> This is likely because the Italian Ministry of Culture did not issue an export license for the Bronze between 1964, the year of its finding, and 1973 when it reappeared.<sup>145</sup> However, it would not be necessary for the fishermen or the Barbettis to report the finding of the Bronze to the Italian government in 1974 if the statue was found in international waters – a likelihood that Judge Mussoni acknowledged in the 2009 decision.<sup>146</sup> Nevertheless, Judge Mussoni found that it was sufficient that the Bronze had been discovered by Italian fishermen and brought back to Italy on a vessel under the Italian flag.<sup>147</sup> This finding was based upon a previous decision from another Italian court regarding the discovery of a bronze statue in the fishing nets of an Italian vessel off the coast of Sicily.<sup>148</sup> Under that case, finds of this type are governed by the Italian Code of Navigation which states that Italian vessels are considered part of the Italian territory.<sup>149</sup> This application of Italian maritime law implicates questions of applicability of the international rules of the law of the sea and underwater cultural heritage that were in force at that time. As the specific location where the Bronze was found is still in contention, the Bronze’s discovery could fall under differing legal frameworks depending on where the judge rules the statue was located.

Judge Mussoni’s assertion that Italian law, particularly maritime law, is the proper governing law over the Getty Bronze is erroneous. The statue is undeniably of Greek origin, and despite the many court proceedings over the Bronze, no Italian court has found the statue’s discovery to have taken place within Italian territorial waters. The extension of Italian maritime law to the Bronze following a 1963 Tribunal decision is a last-ditch effort by the Italian courts to justify the

---

142. *Id.* at 4-5.

143. *See* 2006 Brief, *supra* note 28, at 14.

144. *See id.*

145. *Id.*

146. *See* Chechi, *supra* note 65, 4-6.

147. Lanciotti, *supra* note 64, at 308.

148. *Id.* at 309.

149. *Id.*



Italian government's claim to the Bronze. As the previous courts failed to tie the discovery of the Bronze to Italian territorial waters and there has been no conviction in Italy for illegal exportation for the statue, Italian law does not support the government's claim for return of the Bronze.<sup>150</sup> As stated by law professor and president of the Lawyers' Committee for Cultural Heritage Preservation, Patty Gerstenblith:

If the bronze was found in international waters, rather than Italian national waters, I am doubtful that any U.S. court would recognize it as stolen. ... While the Italians claim that the bronze was illegally exported, illegal export does not, by itself, make the bronze stolen or otherwise illegal in the U.S.<sup>151</sup>

Under the principles of international law, to be addressed in the next section of this note, illegal export in a foreign country is not actionable in the courts of another country and as such, there is no legal basis for a claim to the Bronze in U.S. courts based on illegal export in violation of Italian law.<sup>152</sup>

*B. International Law is Insufficient to Resolve Art Repatriation Issues between Nations*

The 1970 UNESCO Convention is the only relevant international, multilateral treaty to which both the U.S. and Italy are member parties.<sup>153</sup> Under the 1970 UNESCO Convention, among the categories of cultural property defined within the Convention, the Bronze would be classified under "original works of statuary art."<sup>154</sup> The Convention further indicates that for the purpose of the Convention, property that is found within the national boundaries of a territory is part of that territory's cultural property.<sup>155</sup> Here, however, the statue was found in international waters and not within the Italian territory, and thus would not qualify as Italian cultural property under the 1970 UNESCO Convention. The statue would not qualify as stolen property under Article 7 of the Convention either as it was not stolen from an Italian

150. Under Italian laws it is necessary for there to be a conviction against an individual for illegal exportation of the cultural object in order for the Italian courts to impose liability for the value of the illegally exported item on such exporter. See 2006 Brief, *supra* note 28, at 15.

151. Leila Amineddoleh, *The Getty Museum's Non-Victorious Bid to Keep the "Victorious Youth" Bronze*, Arts & Cultural Heritage Law Newsletter, 3 ABA SEC. INT'L L. 30, 31 (2011).

152. *See id.*

153. Lanciotti, *supra* note 64, at 317.

154. 1970 UNESCO Convention, *supra* note 89, art. 1(g)(ii).

155. *Id.* art. 4(b).

museum or similar institution.<sup>156</sup> Additionally, when the Victorious Youth was discovered in 1964, the 1970 UNESCO Convention had not yet been drafted and is not retroactive.<sup>157</sup> Furthermore, the statue was imported into the U.S. following its sale to the Getty in 1977, at which point neither the U.S. nor Italy had ratified the Convention.<sup>158</sup> As a result, the Bronze does not fall within the U.S.'s obligation to return cultural property to Italy as the item was neither stolen under the terms of the Convention's provisions nor was it illegally exported after the Convention entered into force.<sup>159</sup>

The 1995 Convention could not apply here as the U.S. is not a party to the Convention. However, it is important to note that the 1995 UNIDROIT Convention requires that a claim for restitution be brought "within a period of three years from the time when the claimant 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 time of the theft."<sup>160</sup> The Convention also allows for a State to declare that a claim is subject to a statute of limitations of seventy-five years or as long a period as is provided in that State's law.<sup>161</sup> These conflicting provisions leave an unclear statute of limitations that seems to be subject to easy manipulation at the discretion of the requesting party.

The U.S. and Italy did not enter into a treaty in the spirit of the 1970 UNESCO Convention until 2001. Under the 2001 MOU, the U.S. agreed to return any material on the "Designated List" to Italy.<sup>162</sup> However, the U.S. regulations that implement the 2001 MOU only apply to archaeological or ethnological material of the state, which means for the object to be of archaeological interest for the party, it must be of cultural significance, at least 250 years old, and normally discovered due to excavation, hidden or accidental digging or exploration.<sup>163</sup> Here, the Italians claim that the statue is of cultural significance and it is certainly more than 250 years old. Per the third requirement, the statue was discovered due to accidental digging or exploration, but the discovery did not take place on Italian territory, rather in international waters. Thus, the statue should not satisfy the

---

156. *Id.* art. 7(b)(i).

157. *See* 2006 Brief, *supra* note 28, at 16.

158. *Id.*

159. Lanciotti, *supra* note 64, at 319.

160. 1995 UNIDROIT Convention, *supra* note 90, art. 3(3).

161. *Id.* art. 3(5).

162. 2001 MOU, *supra* note 117, art. I(B); *see* 2006 Brief, *supra* note 28, at 16.

163. *See* 2006 Brief, *supra* note 28, at 16; *see* 19 CFR § 12.104.

meaning of archaeological material of the state, and therefore, does not qualify under the 2001 MOU.

Under international law, illegal export is not actionable in the courts of another country without an applicable and contrary treaty provision, and though the U.S. and Italy enacted the MOU in 2001, the provisions do not apply retroactively.<sup>164</sup> The Department of Justice has been silent on this issue thus far, though recently the Department has assisted numerous countries, including Italy, in the recovery of illicitly acquired cultural property.<sup>165</sup>

*C. Domestic Law in the U.S. and Italy Should Not Apply to Issues of Cultural Patrimony between the Nations*

Courts within the U.S. have been hesitant to accept the possibility of enforcing cultural heritage laws of a foreign State within the U.S.<sup>166</sup> In the absence of any specific applicable international rule or comprehensive protection framework for recovery of foreign cultural property, any claim from Italy for civil action within the U.S. to enforce its right to the Getty Bronze would have little chance of success.<sup>167</sup>

In cases where the U.S. courts have honored requests for return of cultural objects from a foreign State and demanded forfeiture of that property, the property was proven to be stolen and subject to the NSPA or the CPIA.<sup>168</sup> Here, however, neither the NSPA nor the CPIA will apply to the Bronze. The statue was legally imported into the U.S. by the Getty Museum in 1977 and thus, does not qualify under the NSPA which pertains to stolen property.<sup>169</sup> The Bronze is not subject to the CPIA as it was not enacted until 1983.<sup>170</sup>

Domestic laws of two opposing countries, in this case, the U.S. and Italy, should not be applied to disputes over the restitution of cultural property. Conflicting standards and an unclear method of enforcement between the two nations further complicate an already murky area of the law. The use of domestic law in restitution cases should be abandoned in favor of international law, which would clarify the types of objects

---

164. Stephen K. Urice, *Why the U.S. Should Not Assist Italy in Forfeiting a Rare Bronze*, N.Y. TIMES (Dec. 10, 2018), available at <https://www.nytimes.com/2018/12/10/opinion/justice-department-italy-bronze-antiquities.html> (last visited Feb. 17, 2019).

165. *Id.*

166. Lanciotti, *supra* note 64, at 322.

167. *Id.*

168. *Id.* at 323.

169. *Summary of Law – National Stolen Property Act*, *supra* note 127.

170. 19 U.S.C. §§ 2601, 2607 (2006).

that qualify as a nation's cultural property, the appropriate forum in which the claim is to be brought, and other significant variables such as statute of limitations, enforcement mechanisms and remedies. The application of international law will avoid conflict between nations at each phase of the litigation process, and avoid expensive, expansive legal battles like that over the Statue of the Victorious Youth.

## VII. ETHICAL CONSIDERATIONS AND PUBLIC POLICY

In consideration of the pertinent public policies and ethical concerns surrounding Italy's claim for the return of the Bronze, it is critical to recognize the statue's undisputed Greek origin. Though Greece has not thrown its hat into the ring, the fight between Italy and the Getty over this object requires consideration of the strength of Italy's claim of cultural patrimony with respect to an object that was not created in Italy and spent very limited time on Italian soil.

Ron Hartwig, speaking for the Getty Museum, emphasized the Museum's stance that the Bronze "is not part of Italy's extraordinary cultural heritage. Accidental discovery by Italian citizens does not make the statue an Italian object. Found outside the territory of any modern state, and immersed in the sea for two millennia, the Bronze has only a fleeting and incidental connection with Italy."<sup>171</sup> Nonetheless, locals in Fano argue otherwise. In an interview, Stefano Aguzzi, the town's mayor, said, "[t]he statue and its discovery has become part of our culture and folklore," adding, "[i]t's clear we have a claim to it."<sup>172</sup> Numerous local businesses are named after the statue's alleged Greek sculptor, Lysippos, and a larger-than-life sized duplicate of the Bronze has been erected at the entrance of the town's port.<sup>173</sup> Despite the locals' obvious affinity for and attachment to the statue, the Getty contends that this is not enough for a claim of patrimony. The Statue of a Victorious Youth has spent over forty years on display at the Getty Museum, in contrast to the approximately two years that the statue spent in Italy. As a staple of the Museum's collection, it is arguable that the damage caused to the Getty and within the U.S. by forfeiture of the statue would be much greater than that in Fano. Few people were able

---

171. Deb, *supra* note 19.

172. Povoledo, *supra* note 26.

173. *Id.*

to interact with the statue during the Bronze's brief period in Italy, whereas the Getty boasts nearly two million visitors each year.<sup>174</sup>

U.S. action upon forfeiture orders issued by the Italian courts would require the expenditure of the resources of the Department of Justice and American taxpayers' money to retrieve the Bronze from the Getty Museum.<sup>175</sup> This action would be contrary to public policy in favor of museums that make good faith purchases of foreign art and would honor a weak claim by a nation with a tenuous connection to the object. The Getty Museum's publicized acquisition of the Bronze in 1977 following inquiries to the seller, Heinz Herzer, regarding the statue's provenance and review of the 1968 decision by the Italian courts indicate a proper, good-faith purchase of the statue. A return of the Getty Bronze based on Italy's current claim, without any new information, would dramatically impact the marketability of foreign art and raise concerns for museums worldwide regarding their claims to legally purchased foreign objects.

While restitution is the appropriate legal and ethical response in some cases, in other cases, the demand for repatriation of objects under the pretext of a cultural property claim pushes the boundaries of restitution beyond the scope of international cooperation. Italy's demands for the return of the Getty Bronze exemplify the latter situation, and for this reason, the U.S. cannot accept Italy's claim for the statue as legitimate Italian cultural property. The Getty's counterclaim for the Bronze as a good-faith purchaser with legal right to the statue illustrates that there must be logical limits to the reach of cultural patrimony law.

### VIII. CONCLUSION

In conclusion, due to the lack of consistency, insufficient dispute resolution procedures, and the absence of a uniform mechanism for enforcement, the current international legal framework regarding the protection of cultural property fails miserably in a case like that of the Statue of a Victorious Youth. Differing notions as to what constitutes a country's cultural property, an absence of clear and consistent statutes of limitations, and inapplicability of the multilateral agreements to states which have not ratified them provide little clarity in a situation

---

174. See *About the Getty - Support from the Business Community*, J. PAUL GETTY TRUST, available at [https://www.getty.edu/about/development/business\\_community.html](https://www.getty.edu/about/development/business_community.html) (last visited Mar. 7, 2019).

175. Urice, *supra* note 164.

where the cultural property has a disputed history. The current international framework provides little to no guidance to courts in the U.S. or abroad as to the proper choice of law in a situation similar to this one, and as a result, the Getty Museum and Italy have engaged in a drawn-out, inconsistent legal battle with no end in sight. It is high time for organizations like UNESCO and UNIDROIT to promulgate new conventions on cultural property that provide concise, clear guidelines for the resolution of future repatriation cases. Until a new international framework is brought forth, courts will continue to rule inconsistently on claims of repatriation and objects like the Statue of a Victorious Youth will remain in limbo.

It is unclear which party will be declared victorious in the battle over the Bronze, but it is evident that the international legal framework for cultural property restitution claims is in need of an overhaul and that under the current scheme, the Statue of a Victorious Youth should remain in the Getty Museum.