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THE ROLE OF INTERNATIONAL LAW IN THE DISPUTE BETWEEN ITALY AND THE GETTY MUSEUM CONCERNING THE CASE OF THE VICTORIOUS ATHLETE

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A Nadia, Andrea e Miriana

siete il dono più grande della mia vita.

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Introduction

This work deals with one of the most recent cases of allegedly illegal international transfer of archaeological property: that of the statue of the Victorious Athlete, found in the off shore waters of Italy,not reported to the Italian authorities and then exported to the United States. This case has given rise to an endless dispute between Italy and the Getty Museum. The final judgment about the repatriation of the statue from the United States to Italy has come in 2019. So, the judicial process has been going on since the 1960s, but the repatriation has not yet taken place, so the dispute is still pending.

In general, the dissertation deals with the issue of the circulation of cultural goods in international and national contexts, attempting to provide a complete overview of the relevant rules. The focus will be on the analysis of the international legislation governing the field of illicit traffic of cultural objects, although an important place will be reserved for the internal regulations of the States involved in the litigation: Italy and the United States. To be precise, the case involves on one hand a public body, the Italian state, on the other hand a private body, the Getty Museum in Los Angeles.

Illicit embezzlement and transfer of cultural goods from one state to another are time-consuming phenomena of different derivation, which range from depredation in the course of a military conflict to export and illegal commercial practices, all of them equally likely resulting in a depletion of the assets of individual states. To this end, I would like to explore the path that has characterized the evolution of international legislation in this field, from the second half of the 20th century up to the present day; a development which, as it is often the case in international law, has found its original legal source primarily in the customs formed during armed conflicts, largely subsequently codified in international law conventions, EU regulations and directives and, at national level, in single texts. What will emerge in the course of the discussion is the fact that international law on the protection of cultural goods can be assimilated to a case of progressive formation, that is a process whose embryonic phase has been characterized by conflicts and selfish interests, but whose evolutionary path has been inspired by shared, superior and universal interests.

The case of the Victorious Athlete, starting from its discovery, proposes many issues of international law concerning cultural goods. The main object of this thesis is trying to answer each of the following questions. Firstly, how the theme of underwater heritage is regulated at international and national level. The object of art, which was later recognized as the statue of the Victorious Athlete belonging to the Greek sculptor Lisippo, was found by chance by an Italian fishing vessel in international waters out of the sea of Fano, in the Italian Region Marche. The finding of the artifact was never reported to the authorities, so that it was soon introduced by its finders in the illegal trade of works of art. After touring most of the world, the Victorious Athlete ended up at the J. P. Getty Museum, where it still resides. Given that, history also poses another challenge that will be attempted to face in the course of the discussion, that of the application of the concept of national heritage beyond the territory, being the statue found in international waters. The judgment of the Italian Court of Cassation of January 2nd, 2019 confirms once again the belonging of the statue to the Italian cultural heritage,

carrying with it an obligation of return for the current holders of the property. Another important issue on which the case will prompt reflection is whether there is indeed an obligation for other states, in this case for the United States, to recognize the effectiveness of laws criminalizing the illegal export of archaeological goods and more in general to give actuation to a foreign legislation in their territory.

The first and most famous book on international law and law of the sea in the western world was written by the Dutch jurist Hugo de Groot and published anonymously in 1609 under the title *Mare Liberum*. It was considered one of the cornerstones of the modern law of the sea from its origins and it gave rise to what is still called the doctrine of the freedom of the seas. The modern law of the sea defines the jurisdiction of the States on various fields of marine activity. In fact, an individual State cannot have exclusive power over some portions of the sea or produce actions, make claims or make decisions following its own political choices and safeguarding only its own interests. It must necessarily be subject to rules and constraints which, over the years and through the progressive evolution of the law of the sea, have created and are creating an orderly system for coexistence, respect for practices and a smooth conduct of procedures based on the use of the sea and its resources. Precisely in order to meet the needs and the protection of all States and international actors, the law of the sea has become an example of an international regime accepted and implemented by almost all States.

The dissertation is divided into five chapters. The first part, comprising the two first chapters, is an accurate illustration of the events and juridical measures taken for the resolution of the case. After a brief general analysis of the case in question, starting from the discovery of the statue until the confiscation order of 2010, I will analyze in detail the last final judgment of the Court of Cassation of 2019. The second part of the dissertation is addressed to answer the questions that such case poses. Attention will be focused first on the national and international legislation applicable to the case, with reflections both on the Italian and American one. Then I would like to go deeper into the issue of the illegal transfer of works of art outside country's borders and of the regulation of property rights on such objects. Obviously, I will not fail to deal with the importance that deserves the case of the Victorious Athlete in light of the international law protecting underwater cultural heritage to what extent I dedicated an entire chapter.

Issues of international law concerning the case of the Victorious Athlete are a lot, so much that the complexity of the settlement of the dispute led the jurisdiction to work on it for over fifty years. Among the most important topics there is the one about the place and the modalities of the finding of the statue. In fact, the main leverage point used by the Getty Museum to deny any right of ownership of Italy on the Victorious Athlete is the one concerning the place of its discovery. Being the object found in international waters, this would not belong to any particular state, but to the whole international community. However, we will see how the judge of the Court of Cassation has overcome this difficulty, taking as starting point the previous jurisprudence, noting that the vessel and all its accessories can be considered an extension of the Italian territory. Therefore, every archaeological object belonging to the territory of a state is to be considered public property of the state itself.

Another point that will be discussed is the theme of the good faith that the Getty Museum claims to have demonstrated during the purchase of the statue. The Italian court, on the other hand, will uphold the contrary, annulling any action brought by the Getty Museum on that point. The story is also very interesting from this point of view. In fact, the owner himself of the museum had interrupted negotiations for the purchase of the statue because of his uncertainty about the lawful origin of the object. After his death, however, the museum's Administration proceeded to purchase the statue, inquiring about its legitimate provenance only through the advisers of the party who was selling the item to the museum. This is, for the judge of the Court of Cassation and for that of the Court of Pesaro, testimony of the awareness of the Administration of the potentially illicit character of the transaction that was about to be completed.

It will also be analyzed the subject of the Italian legislation for the protection of cultural goods in force at the time of the discovery, in order to understand whether this could have any value for the purpose of resolving the case. Obviously, the main references will be made to the instruments of international law in force at the time and after the discovery. Among the most important, there are the United Nations Convention on the Law of the Sea and the UNESCO Convention for the Protection of Underwater Cultural Heritage.

There will be a discussion about the judgment confirming the confiscation order of the cultural property. Is there any obligation for the United States to execute this order? In such cases, can Italian law prevail over the American one or vice versa? Are the United States obliged to respect the law of a foreign state within its territory? As regards the specific field of cultural goods, we will see how international law for the protection of cultural goods has evolved over the years along with an awareness of its importance for States. From a position that provided for the absolute inapplicability of foreign public law, the jurisprudence moved to a more flexible version allowing, in exceptional cases, the recognition of the effects of the rules of public law of other States by setting limits on the availability of cultural goods, avoiding that the mere crossing of borders by an object of art is sufficient to ensure its immunity to the law of the territory to which it belongs.

As regards the judicial process, I will briefly present the first trial of 1966 against the alleged characters of the discovery and the subsequent introduction of the archaeological object within the illegal market of works of art. This process ended with the prescription of the crime and the acquittal of all those involved for the absence of proofs. The judiciary, however, never ceased to work on the case that has always been put under observation, since the Italian government's request to have the statue back was active and pressing. The next step will be therefore to examine the final judgment of the Court of Cassation of 2019, which confirms the order of confiscation of the statue and the absolute certainty of the Italian State's ownership on the object. What will emerge from the analysis of this judgment is the judge's belief that the statue belongs to the Italian State mainly because of its historical and cultural link with the territory and the population, not only for the technical aspects related to the method of finding.

Identifying which judicial system should have determined the application of the laws on property of the statue was not a simple obstacle to overcome. The dispute concerned the choice between Italian and American laws

on property rights. However, the case does not concern the ownership of a common object, but of a precious statue with an immense cultural value that is presumed to have been illegally transferred away from its national borders, the Italian ones.

The penultimate chapter of the thesis will discuss extensively the issue of international law regulating underwater cultural heritage, being the Victorious Athlete subject to this law. The first legal reference is undoubtedly the 1982 United Nations Convention on the Law of the Sea, an international treaty which defines rights and responsibilities of states in the use of the seas and oceans, setting guidelines for negotiations, management of the environment and natural resources. However, the Convention had shortcomings regarding the protection of the underwater cultural heritage. These shortcomings will be remedied in 2001 with the adoption of the UNESCO Convention on the Protection of Underwater Cultural Heritage. The title outlines the very specific character of the Convention. The UNESCO Convention sets a common standard for the protection of this heritage, providing preventive measures against the possibility of being plundered or destroyed.

This work wants to be a sort of voyage: both into the details of the Victorious Athlete case but also into the reflection about the system regulating cultural heritage in international and national level. Is there something to be reinforced or to be reviewed? Is the international legislation protecting cultural heritage strong enough to assure each state the respect of their art? Is the national legislation of the states involved in the litigation, Italy and United States, efficient in protecting cultural heritage inside and outside national borders? I do not presume to have the answers to all these questions, but through the analysis of the Victorious Athlete case I would like to understand how the international community, but also individual states reacted to such situation and how they treated the issue. How important is the protection of cultural heritage in the national agenda of the various states and in the conscience of citizens? In which measure a state can be ready to fight to get back a fundamental part of its culture?

PART I

CHAPTER 1

FROM THE FINDING OF THE BRONZE TO THE 2010 ORDIR

1.1 The finding of the Victorious Athlete

It was the far 1964, when a fishing-boat discovered that a strange object had remained trapped in its fishing net. In that ship into the wide see of Pedaso, a village in the province of Pesaro, the troubled story of what is today known with the name of Victorious Athlete started.

The statue, graven in bronze and attributed to the artist Lisippo, has Greek origin and seems to be dated IV century B.C. This does not mean necessarily that it originated in Greece, since at that time Greek colonies were present in the Italian peninsula and many artists were working in what is today Italy. What happened after the recovery has not been clarified with certainty yet, but it would seem that the fishermen, acknowledged the potential economic value that this would have been able to bring, had sold the statue.

No Italian authority that could be for instance Coast Guard, Police or Carabinieri was told of this recovery, so much that still today, although there has been a trial against the presumed promoters of the recovery and of the sale ended with the absolution of all the subjects involved, no one is recognized as guilty.

Chapter III of the Italian Code of Navigation is dedicated to the finding of wreckages underwater. In this specific case, of particular importance are articles 510 and 511[1]. They state as follow:

"Chi trova fortuitamente relitti in mare, o dal mare rigettati in località del demanio marittimo, entro tre giorni dal ritrovamento, o dall'approdo della nave se il ritrovamento è avvenuto in corso di navigazione deve farne denuncia all'autorità marittima più vicina e, quando sia possibile, consegnare le cose ritrovate al proprietario, o, se questi gli sia ignoto [...] all'autorità predetta. Il ritrovatore, che adempie agli obblighi della denuncia e della consegna, ha diritto al rimborso delle spese e a un premio pari alla terza parte del valore delle cose ritrovate, se il ritrovamento è avvenuto in mare, ovvero alla decima parte [...] se il ritrovamento è avvenuto in località del demanio marittimo."

Art. 510, Code of Navigation

"Per la custodia delle cose ritrovate, per la vendita delle medesime e per la devoluzione delle somme ricavate si applica il disposto dell'articolo 508. Tuttavia gli oggetti di interesse artistico, storico, archeologico o etnografico, nonché le armi, le munizioni e gli apparecchi militari, quando il proprietario non curi di ritirarli,

[1] Code of Navigation. Approved with R.D. March 30, 1942 n. 327. Published in Gazzetta Ufficiale della Repubblica Italiana n. 93, April 18, 1942

ovvero non si presenti nei termini indicati nel terzo comma del predetto articolo, sono devoluti allo Stato, salvo in ogni caso il diritto del ritrovatore all'indennità ed al compenso stabiliti nell'articolo precedente."

Art. 511, Code of Navigation

These articles permit to identify two particular violations: the first one concerns the finders of the wreckage that had the obligation to report, within three days from the recovery of the object, to the closest maritime authority (in this case that of Pedaso or Fano) the recovery of the statue with the consequent obligation to deliver it. If whoever on board of the fishing-boat had undertaken an action of that kind, according to the Code of Navigation he would also have had the right to a reward that, given the value of the statue, could have been significant. Nevertheless, the fishermen probably were not aware of this possibility of reward and they would have thought about holding the statue to see where the recovery would have conducted them and in particular how much money they would have gained from its sale. Another hypothesis could be that that the fishermen, although they knew of the obligation to report the recovery and of the consequent reward, had immediately perceived since immediately the elevated economic potential of the find coming therefore to the conclusion that the reward would never have been as high as the sum that they would have gained selling the statue for their own. It is not given to know how and why the fishermen have so acted, also because as we will see subsequently, any attempt of trial against the presumed promoters of the recovery ended with the absolution of the subjects or with the fall in prescription.

The quoted art. 511 of the Code of Navigation is very clear as it regards the theme of the ownership of findings underwater. After having indicated the objects of historical and archaeological interest among those of various type, the article clearly foresees that these become ownership of the state once the owner let the term for claiming their return expire[2]. This term is defined by the art. 508 of the same Code which fixes a six-month term from the moment of the publication by the authority of the notice of the recovery of the wreckage (when the owner is unknown) or an expiration date fixed by the authority (when the owner is known).

Nevertheless, can the Code of Navigation be worth as valid legislation of a case between Italy and a foreign private entity? With the purpose to understand if and in what measure the Code of Navigation could be used in this specific case it is enough for us to know that this would surely have decided for the illegitimate behaviour of the finders of the statue in the moment in which the subjects had been known and potentially prosecuted. Unfortunately however, there are no guilty. The Code of Navigation is law to all the effects in the Italian arrangement and any infringement determines the illegitimate behaviour of the subject or the subjects in matter that can be decided by a Court.

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[2] G. Acquaviva, T. Scovazzi, *Il dominio di Venezia sul Mare Adriatico nelle opere di Paolo Sarpi e Giulio Pace*, Milano, 2007

Among the reconstructions of the various movements that the work of art would have been able to complete following its recovery, the most accredited would seem to be the one narrated by Alessandra Lanciotti[3]. The fishermen, after having kept the statue hidden underground for some time, would have sold the Victorious Athlete to some dealers of art from Gubbio and these last ones would have illegally sold it abroad. After having been in London, the statue ended to Monk of Baviera where the bronze was restored to its original beauty and exposed it in a private gallery. In 1977 the Getty Museum of Los Angeles purchased the statue from the German restorer for an amount of money equal to 3.980.000 dollars and from that year the work of art is jealously exposed in the rooms of the American museum.

There are many matters of national and international law that the case hosts and only in the last January a conclusion seems to have come. The Court of Cassation has in fact decreed with judgment n. 22 of January 2, 2019 the forfeiture and the consequent repatriation in Italy of the Victorious Athlete. This is the last step of a judicial saga initiated in 1966 and extended for well 53 years.

[3] A. Lanciotti, *Patrimonio culturale sommerso: tutela dei beni archeologici e limiti alla cooperazione internazionale*, Archivio Penale - Rivista quadrimestrale di diritto, procedura e legislazione penale speciale, europea e comparata, Pisa, 2011

1.2 The judicial trial (1966-2010)

A first criminal trial against the presumed smugglers of the statue had been undertaken at the end of '60s, but it concluded with the acquittal of all the subjects accused of having received stolen goods. Following this trial, the administrators of the Getty Museum proceeded with the purchase of the statue, believing that the cultural item was totally free from ties with the Italian state and with any other country. In their dissertation, Gaito and Antinucci[4] recall all the steps that brought to the acquittal of the subjects suspected of the finding and selling of the Victorious Athlete. They underline that the Italian Prosecutor had tried more and more times to make the accusation against the Getty Museum consisting in the lack of good faith at the moment of the purchase of the work of art. They focused also on the fact that there was no evidence to substantiate that Italy had some property rights on the statue. As they described, the first trial developed in the Court of Perugia in 18th May 1966 and after various appeals a conclusion arrived in 1970 with a judgment of the Court of Appeal of Rome that concluded for the acquittal of the involved subjects. Other two following procedures were opened by the Magistrate of Gubbio, but they ended respectively with an acquittal in 1976 and with a decision not to proceed further in the following year.

In 2006 the Italian Minister of cultural goods, Francesco Rutelli, tried to bring back home the statue of Lisippo by non-judicial means. He threatened a sort of cultural embargo towards the Getty Museum if the statue had not been returned within the 31st of July of the following year. The Museum immediately proceeded to stipulate an agreement with the Italian government that foresaw the repatriation of forty cultural objects to Italy. Among these it missed the so desired statue and the Museum justified the missed restitution with the fact that it had been already ascertained that Italy did not have any right of property on it. On the article[5] published in the Getty Museum official website, with regard to the events of 2006, it is stated:

Dr. Brand informed Minister of Culture Francesco Rutelli that the Getty would not return the Getty Bronze given the substantial evidence that this statue was found in international waters in 1964 and was obtained by the Getty Museum only after Italian courts had declared that there was no evidence that the statue belonged to Italy. He advised the Minister that the Getty believes its ownership of the statue is not subject to reasonable challenge. […] He continued "While I am fully committed to ensuring that the J. Paul Getty Museum fulfils all its international obligations, I have an equal obligation to preserve and protect the Getty Museum's collection and abide by laws regulating California trusts. That means I cannot return objects, like the Statue of a Victorious Youth, to which Italy has – by its own admission – no legal claim, or objects for which there is insufficient or inconclusive evidence to support the Italian claim."

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[4] A. Gaito, M. Antinucci, *Prescrizione, terzo estraneo e confisca in executivis di beni archeologici (a margine della vicenda dell'Atleta Vittorioso di Lisippo)*, Bargi, Cisterna (edited by), La giustizia penale patrimoniale, Torino, 2011

[5] J. Paul Getty Museum to return 26 objects to Italy. Italian Ministry of Culture declines to honour earlier agreement to finalize a long-term cooperative relationship with the Getty, in www.getty.edu/news/press/center/statement_06_getty_italy_meeting, Current Press Releases, 2006

The case of the Victorious Athlete came back into the court in 2007. The Prosecutor of Pesaro hypothesized against the people involved in the recovery and in the marketing of the statue the crimes of omitted report of recovery, illegitimate export of works of art and embezzlement of the sea wreckages. In particular, in the trial the attention of the judge was set on the violations of the articles 48 and 66 of the law 1089 1st June 1939 (Safeguarding of items of artistic and historical meaning) and on the violation of art. 1146 of the Code of Navigation. Cited articles 48 and 66 state as follow:

Chiunque scopra fortuitamente cose mobili o immobili di cui all'art. 1 deve fame immediata denuncia all'autorità competente e provvedere alla conservazione temporanea di esse, lasciandole nelle condizioni e nel luogo in cui sono state rinvenute. Ove si tratti di cose mobili di cui non si possa altrimenti assicurare la custodia, lo scopritore ha facoltà di rimuoverle per meglio garantirne la sicurezza e la conservazione sino alla visita della autorità competente, e, ove occorra, di chiedere l'ausilio della forza pubblica. Agli stessi obblighi è soggetto ogni detentore delle cose scoperte fortuitamente. Le eventuali spese sostenute per la custodia e rimozione sono rimborsate dal Ministro per la educazione nazionale.

Art. 48, Law 1089/1939

Chiunque trasferisce negli Stati membri dell'Unione europea o esporta verso Paesi terzi cose di interesse artistico, storico, archeologico, etnografico, bibliografico, documentale o archivistico, nonché i beni di cui al comma 2 dell'articolo 35, senza aver ottenuto il prescritto attestato di libera circolazione o la prescritta licenza di esportazione, è punito con la reclusione da uno a quattro anni o con la multa [..] Il giudice dispone la confisca delle cose, salvo che queste appartengano a persona estranea al reato. […]

Art. 66, Law 1089/1939

Chiunque si appropria i relitti indicati negli articoli 510, 993 nei casi in cui ha l'obbligo della denuncia è punito con la reclusione fino a tre anni ovvero con la multa fino a euro 1032,00 (4). Per gli appartenenti al personale marittimo e al personale aeronautico e per le persone addette in qualsiasi modo ai servizi di porto o di navigazione ovvero che esercitano una delle attività indicate nell'articolo 68, la pena è aumentata fino a un terzo.

Art. 1146, Code of Navigation

These proceedings ended with a prescription of the crime for expiration of time limits, and the rejection of the application of confiscation of the statue advanced by the Prosecutor. Nevertheless, this last one immediately reiterated the request of confiscation of the statue finally welcomed by the judge that opened a new case.

In the order of June 12, 2009 the Court of Pesaro charged the Getty Museum with serious negligence and participation in illegitimate export of work of art. This judgment is very interesting for another reason: the

issue of the competent jurisdictions. In which measure do the Italian court and specifically the Court of Pesaro have competence in deciding about the case? With order of June 12, 2009 the judge of the execution decided that, for the case in dispute, the Court of Pesaro had a specific competence in as much as the facts happened partly or totally in the territory of its Province. The crew of the fishing-boat had in fact reached the harbor of Fano, disembarking there the statue and hiding it in that zone. The national jurisdiction extends itself to the facts happened on board of the boat beating Italian flag that, according to art. 4 of the Code of Navigation, has to be considered prolongation of the Italian state territory. The article states:

"Le navi italiane in alto mare e gli aeromobili italiani in luogo o spazio non soggetto alla sovranità di alcuno Stato sono considerati come territorio italiano"

Art. 4, Code of Navigation

In this order it is clear that for the Gip (Giudice per le Indagini Preliminari) the case presents crimes of illegitimate export of cultural items, in as much as the illegitimate behaviour would have happened, at least partly, on national territory.

In 2010 a new order of the Gip of Pesaro sets lights again on the case of the Victorious Athlete[6]. Once affirmed its own competence in deciding the case, the Gip examines other matters: from the circumstances of the recovery to the export and sale of the bronze to the Museum. Such circumstances would dress again great importance both for the identification of the juridical regime of the item, and to the goals of the statement of the crime of illegitimate export of cultural goods, basis for the decision of forfeiture.

Law n. 1089 of 1939 (well known as Bottai Law), the Legislative Decree n.490 of 1999 and the Code of Cultural Items and of the Environment of 2004 are the legislations at the basis of the order of 2010. Art. 23 of the Law n.1089 states that items of artistic, historical, archaeological or ethnographical interest are inalienable when the state or any other public entity is the legitimate owner. The Code of Cultural Items, also known as Urbani Code and approved with Legislative Decree n.42 of 2004, makes a distinction in art. 54 between absolutely inalienable items and items with a relative inalienability: according to the 2010 order, the Victorious Athlete falls into the first category so that the prohibition of alienation and exportation from the national territory is valid. The crime of "exit or illicit exportation" is criminally sanctioned and when the items leaves the country in this way, the law requires the forfeiture. This provision was present also in art. 66 of the Bottai Law and also in this case the punishment included the forfeiture of the item. Although the Italian law in force at the time of the recovery seems to be able to assure some right of ownership on the work of art or at least it seems to verify that the statue has illegally expatriated, also this judgment, as the preceding one, ended with nothing. The Getty Museum succeeded for the second time in challenging the decision of the Italian judge,

[6] Pesaro Tribunal, Ordinance of February 10, 2010 available at http://www.tribunale.pesaro.giustizia.it/

contesting some procedural vices to the trial. The statue remains in the United States. A definitive turn seems to arrive with a judgment of 2019. This judgement will be deeply analysed later in the dissertation.

1.3 Limits on the application of the Italian legislation

All norms on the safeguarding of national heritage should have a territorial application in the sense that the prohibition of alienation and exportation stated by the 1939 (Bottai) Law and by the Urbani Code are in force only for artistic items found within the borders of the Italian state[7]. This is without prejudice to the Italian jurisdiction over cultural property found in the wrecks of submerged vessels flying the Italian flag. Again, if the Victorious Athlete had undoubtedly been found within national borders, the aforesaid laws as the Italian jurisdiction in its total essence would not have had problems to make itself effective also for the United States. This for the simple reason that, both the United States and Italy are parties to the 1970 UNESCO convention on illicit traffic in cultural property and the United States has an obligation under this treaty to cooperate toward the return of cultural object illegally exported from other contracting Parties. Nevertheless, as already mentioned in the previous paragraph, the statue was found in the high sea and, as established by the Law of the Sea, the high sea is not ownership of any state, on the contrary it can be exploited by the whole international community. In the preceding paragraph we have considered the Italian ship that has found the statue as prolongation of the Italian territory. But the Italian ship was acting in international waters. This is one of the greatest dilemmas that has made the solution of this case so difficult. Based on various interpretations that we are going to analyze, the juridical regimes that have value regarding the competences on the case are different. If the idea that the statue has been found in international waters is considered alone, the only competence is of the international jurisdiction and particularly of the Law of the Sea. Instead, if we accept the idea that the statue was found in international water by a ship flying Italian flag the statue would have belonged to the Italian territory from the moment in which it has remained inserted in the nets of such ship, then the matter is quite different[8].

As it is stated in the order of 2009 at page 10:

"Nel caso di specie, le indagini non hanno consentito di individuare con certezza il luogo in cui si è verificato il ritrovamento della scultura e sulla base degli accertamenti esperiti, si può solo affermare […] che la statua fu verosimilmente rinvenuta in acque non territoriali. In tale senso depongono univocamente le dichiarazioni rese all'epoca dai pescatori, l'analisi della profondità della fossa ricavabile dalla natura delle concrezioni dei molluschi che incrostavano la statua, gli studi sulla morfologia dei fondali marini acquisiti in atti."

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[7] G. Barile, *Diritto internazionale e diritto interno*, Milano, 1957

[8] The authority is provided by the decision on Italian courts in the case of the Melqart of Sciacca, in Foro Italiano, 1963, I, p. 1317. On this case see also comment in T. Scovazzi*, The Protection of the Underwater Cultural Heritage*, Garabello (edited by), Leida, 2003, p. 19 ff.

The initial question was on the applicability not of the general Italian jurisdiction on the case, that can be admitted without problems, but on the applicability of the national regime of the archaeological items to this specific recovery.

At the time of the recovery (1964) the 1982 Montego Bay Convention[9] was not in force. The 1982 Convention dedicates to underwater cultural heritage two articles (149 and 303), but it does not discipline the recovery of items in the continental platform, where the bronze was probably found.

"All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin".

Art. 149, United Nation Convention on the Law of the Sea

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

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

Art. 303, United Nation Convention on the Law of the Sea

Neither the more specific UNESCO Convention on the protection of underwater cultural heritage of 2001[10] was in force in Italy, even if the state had already art. 94 of the Code of Cultural Items in reception of the Rules Concerning Activities Directed at Underwater Cultural Heritage, annexed to the UNESCO Convention with the application extended to underwater archaeological recoveries within the limit of 24 miles from the coastal zone. In 1964 also the Geneva Convention on the High Sea of 1958 was not in force in Italy, that signed the Convention in 1965. Nevertheless, a big part of the provisions of the 1958 Convention have become norms of international customary law, as for instance the principle of the liberty of the high sea. The judge in the 2009 order has invoked the principle of the liberty of the seas and that of the submission of the ship that is found in international waters to the power of government of the state of the flag. The judge affirmed that in case of recovery of sea wreckages of historical and artistic value from a ship beating Italian flag, the Italian law is applied and in particular the national legislation regarding cultural items[11].

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[9] United Nation Convention on the Law of the Sea. It was signed in Montego Bay December 10, 1982 and Italy ratified it in 1995. Published in Gazzetta Ufficiale della Repubblica Italiana n. 295 on December 19, 1994. Law December 2, 1994 n. 689

[10] UNESCO Convention on the Protection of Underwater Cultural Heritage of November 2, 2001. Italy ratified it in 2009. Published in Gazzetta Ufficiale della Repubblica Italiana n. 262 on November 10, 2009. Law October 23, 2009, n. 157

[11] Pesaro Tribunal, Ordinance of June 12, 2009 available at http://www.tribunale.pesaro.giustizia.it/

Although it is correct to affirm that, according to the international law, in the area of sea in which the recovery happened the principle of the “freedom of the high sea” is worth, according to the rule of the "first come, first served" the judge has the Italian law applicable in the case in matter. Particularly, in applying the law of the country and affirming that the object entangled in the net is subject to Italy’s jurisdiction, he has resorted to a very extensive interpretation of the concept of national territory, assuming therefore that also the accessories of the boat, as the fishing net, have to be considered territory in as much as they are pertinent to the hull that belongs in turn to the boat and therefore as a prolongation of the Italian territory[12].

History hosts a precedent of a case similar to that in examination and for which the same interpretation of national territory has been used: it is the case of the Melqart of Sciacca (1963). According to detailed reconstruction of Gianfranco Purpura[13], in 1955 a fishing-boat of Sciacca named Angelina Madre found entangled in its net a bronze figurine tall 36 cm. The figurine was discovered to be of Phoenician origins, and it was dated XIV-XIII sec. B.C. The name derives from the fact that the represented figure, according to most of the experts, would seem to be the Phoenician god Melqart, even if according to other opinions it would deal with the god of the storm and the war, Hadad. The figurine laid different days abandoned in an angle on the deck of the ship that had recovered it. In a first time, considering it an object of pure copper, they thought about melting it, but ascertained that it was made of bronze, the project was set aside. At the end Santo Vitale, the engineer of the ship, took the figurine with him and brought it in the residence of his father. For a few months, the Phoenician god rested suspended to the wall in the living room of the small residence, exposed to the indifferent looks of the visitors but the most acute look of a local collector of objects of art, Giovanni Tovagliari, determined its transfer. The figurine was swapped with two bottles of wine. The modest entity of the bargaining seems to have been the consequence of the fact that the family of the sailor attributed the power to negatively influence the course of the family stories to the threatening attitude of the oriental god. The "pupo", as it was called in the neighborhood St. Michael of Sciacca, had the fame of bringing bad luck.

Mr. Tovagliari had the figurine examined by a local researcher, Stefano Chiappisi, that promised to complete some search in Rome. In the meantime, the news of the discovery came up to the Superintendence of the Antiquities in Agrigento, that complained the immediate delivery of it. Mr. Tovagliari, put on the spot, gave the figurine to the municipality of Sciacca that delivered it to the local Library, where it was exposed for a few times. Nevertheless, the owner of the fishing-boat Angelina Madre, Michele Scaglione, that actually ignored that his sailors had recovered the Phoenician figurine, attracted by the possibility of a lavish profit, vindicated, five year after the recovery, his rights on the figurine, asking the sequestration and obtaining it. For three years, until 1963, the figurine was confined in the safe of a local credit institute waiting for a decision of the judge,

[12] A. Lanciotti, *Patrimonio culturale sommerso: tutela dei beni archeologici e limiti alla cooperazione internazionale*, Archivio Penale - Rivista quadrimestrale di diritto, procedura e legislazione penale speciale, europea e comparata, Pisa, 2011

[13] G. Purpura, *Sulle vicende ed il luogo di rinvenimento del cosiddetto Melqart di Selinunte*, Sicilia Archeologica - Rassegna periodica di studi, notizie e documentazione, Trapani, 1981; T. Scovazzi, *Dal Melqart di Sciacca all'Atleta di Lisippo*, Milano, 2011, p. 5 ff.

to which the heirs of the collector of art, the shipowner, the crew, the municipality of Sciacca and the Italian State were interested. In the meantime, the international scientific environment recognized the authenticity and the importance of the recovery and it increased the greed to become owner of it. For the judge Francesco Militello, entrusted to resolve the tangled story, the case was not easy. As the Court in the civil procedure did not have any possibility of an initiative of office in the acquisition of the tests, that is not being able to conduct any free investigations on the exact place of recovery, the judging organ did not have other possibility to decide the case through the testimonies unanimously declaring that the figurine had been recovered at a distance of over twenty sea miles from Capo Granitola on a muddy backdrop among 31 and 58 mt. of depth, while the boat was fishing shrimps.

As the object was recovered in international waters, it seemed that it was no other alternative than the attribution to the shipowner. The question for the judge was: admitted that the figurine had been found in international waters, how to make the Italian state the legitimate owner? Excluded the possibility to throw back the testimonies on the place of the recovery, he needed to find an unexceptionable juridical reasoning that excluded the ownership of the finder. The *fictio iuris* was offered by the interpretation of art. 4 of the Code of Navigation according to which the ship in high sea is considered part of the Italian territory and consequently subject to the Italian law. Now it is evident that for ship it must intend not only a floating hull, but also all of its accessories, from the tallest yard to the deepest net. As the figurine had not directly been recovered from the backdrop of the shipowner or from its men but drawn by the netk that is already Italian territory, it was possible to apply the 1939 Bottai Law on the recovery of archaeological objects, that assigns these items to the Italian state. With this sentence, that constituted a judicial precedent in the cases of archaeological objects recovered in international waters, the ownership of the figurine was assigned to the Italian State and submitted to the Superintendence to the Antiquities in Agrigento. Today the bronzy figurine of the Phoenician god is preserved in the National Museum of Palermo and every claim seems to have become extinct for a long time, also because some protagonists of the story are not alive anymore and even the fishing-boat "Angelina Madre" now lies on the bottom of the sea.

As the judge of Sciacca, also that of Pesaro has ended accepting the *fictio juris* according to which the notion of territory is wide not only to the ship beating Italian flag but also to all its accessories and prolongations. Therefore, our national law that privileges the public interest in damage of the private one as it regards cultural heritage, results applicable thanks to the fact that the ship that has thrown the fishing net was an Italian ship. If it was a ship of other nationality the recovery and the regime of ownership of the find would surely have been submitted to other discipline.

1.4 The provision of forfeiture

The preceding section has touched upon the issue of the absence of the obligation coming from international customary and treaty law regarding the ownership of the underwater cultural heritage, so that it is necessary that the order of forfeiture sent forth by the Court of Pesaro is recognized and made effective in the American legal system. And what if the Americans refused to recognize such action? The execution of the ordinance of forfeiture in the American territory, in application of the Italian law that punishes the crime of clandestine export, is connected by law to the amplest matter of the recognition of effectiveness of the norms in the State of location of the object[14].

In the infinite variety of their expressions, art and heritage reflect the variety of collective inclinations and social organizations of the communities that have produced and maintained them[15]. The international law for the protection of cultural items has evolved during the years together with the awareness of its importance for states. From a position that involved the absolute inapplicability of the foreign public law, the jurisprudence passed to a more flexible version allowing, in exceptional cases, the recognition of the effects of the norms of public laws of other States setting limits to the availability of the cultural items avoiding that the simple passage of the boarder is enough to assure the immunity of the item contended.

The rule generally followed in the past was in the sense that the foreign public laws of any type, such as penal laws and administrative laws, did not find any application and recognition in the local courts. There are various testimony cases of this, for instance it is possible to think about the 1983 case when the House of Lords decided regarding the case *Attorney General of New Zealand vs Ortiz* with the non-application of the New Zealand legislation that forbade the export of a wooden sculpture of great importance for the Maori cultural heritage[16]. A common attempt when looking to repatriation of cultural objects is to first determine whether that object was indeed owned by the state, and then to determine whether it was stolen. This case is a great example of courts looking to foreign jurisdictions to determine national ownership of cultural objects. Ambiguity as to whether national legislation vests ownership rights in a State has led to many jurisdictions

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[14] Pesaro Tribunal, Ordinance of February 10, 2010 available at http://www.tribunale.pesaro.giustizia.it/

[15] F. Francioni, *Public and Private in the International Protection of Global cultural Goods*, European Journal of International Law, Oxford, 2012, p. 719 ff.

[16] A Maori sculpture was illegally exported from New Zealand and sold to a European collector. Consequently, the item was sold to a London auction house. The New Zealand government claimed for its recovery, proving that by virtue of New Zealand legislation it was the owner and so entitled to the possession of the artefact. In a first sentence, the England Court of Appeal held that the claimant had not acquired title on the object. New Zealand so appealed to the House of Lords. At the time of the ruling, English principle was not to enforce a foreign sovereignty's penal law. The Court of Appeal and House of Lords were both sympathetic to New Zealand's attempt to retrieve their national cultural heritage, but held that only if an article was seized, not just through illegal export, was ownership transferred to the state.
See C. Finlayson, *Motunui Panels Returned to New Zealand*, National Party Press Release, Wellington, 2014
Available at: https://www.national.org.nz/news/news/media-releases/detail/2014/07/04/motunui-panels-returned-to-new-zealand

finding in favour of the defendants, rather than the State plaintiffs. An evolution has happened in 2007 when the case *Iran vs Barakat Galleries* has concluded with the acceptance of the application from the Iran law of the restitution of a series of ancient items purchased by a London Gallery according to the Iranian law stating that the archaeological finds are considered ownership of the State[17].

In the American jurisprudence the application of the foreign law for the guardianship of the cultural heritage faces many obstacles. Firstly, the foreign State cannot vindicate the ownership of a good without having ever had its real possession. An example is in the case *Peru vs Johnson*, in which the Peruvian government attempted without success a cause to recover some objects of pre-Colombian art seized to an American collector, Benjamin Johnson, because he did not succeed in showing his title of ownership. The problem was that the Peruvian government did not succeed in showing that the finds originated from excavations within the borders of modern Peru and it could not get their restitution. Another matter on which the American doctrine focuses is that recognizing the ownership of the foreign country means that a constitutionally guaranteed right is denied to the actual holder of the good.

The only principle that seems to be worth and on which American jurisprudence agrees is that of the respect for the inherent authority of a sovereign nation in accordance with the Act of State doctrine[18]. According to this doctrine, the American courts should not debate on the provisions by which the foreign State, in the exercise of its own sovereign powers inside its territory, attributes itself the ownership of some categories of items as for instance the archaeological recoveries because if one State chooses to nationalize a particular form of property within its own internationally recognized borders, other nations will grant defense to that determination. Think about the case *Stroganoff-Scherbatoff vs Weldon* of 1976[19]. Mr Stroganoff-Scherbatoff attempted two separate legal actions against the actual holders of a painting located in New York that had been dispossessed by the German government during the war, of which the man affirmed to be the true owner thanks to his right of succession. The Court welcomed the thesis of the defense according to which, in virtue of the Act of State doctrine, it could not be debated on the validity of a provision of sequestration of goods sent forth, in its territory, a foreign State officially recognized from the United States at the time of the cause. Nevertheless, also wanting to consider such applicable theory to the questions of restitution of the cultural

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[17] In the case in matter the Anglo-Saxon Court has maintained the principle affirmed in the Ortiz case confirming that the foreign law cannot be applied if of criminal nature, but it has considered that the norms of the Iranian law invoked to the protection of the cultural patrimony do not have such nature, since they are limited to regulate the right of ownership on the ancient objects recovered in Iranian territory.
See P. Gerstenblith, *Schultz and Barakat: Universal Recognition of National Ownership of Antiquities,* Art Antiquity and Law, Connecticut, 2009

[18] A. Lanciotti, *Patrimonio culturale sommerso: tutela dei beni archeologici e limiti alla cooperazione internazionale*, Archivio Penale - Rivista quadrimestrale di diritto, procedura e legislazione penale speciale, europea e comparata, Pisa, 2011

[19] The case concerns the confiscation of a private portrait of Van Dick in a Russian castle in 1921, following the emission of a decree enforced by the Soviet government. The painting was later transferred to Berlin to be auctioned off. The painting was purchased by Mr. Stroganoff-Scherbatoff and donated to the Metropolitan Museum of Arts in New York. In this case the claim made by the son and heir of the woman to whom the painting was confiscated was not accepted. One reason was the application of the Act of State doctrine, on the basis of which jurisdictional control of foreign laws or acts of sovereignty would not be admissible.

goods, this one could not be used with success in the case in examination, since there are no proofs of the fact that the Greek bronze has been recovered inside the borders internationally recognized of the Italian State if it is true that the statue has been found in the high sea.

The violation of a norm that allows the alienation of an object of art following an authorization to the export would not create an actionable offence under US law. As Urice points out, the possession of an illegally exported artwork that has been legally imported into the US cannot be subject to legal action merely because the item had been transported in violation of the export rules of the foreign state. Contrarily, the violation of a norm that considers the applicant state as unique holder of the right of ownership on the item would have another weight, to the extent that it is possible to suppose that the transfer to the foreign country has happened, not only without the controls on the export, but also without the consent of the owner, therefore in such case the violation of the norms on the export of the State of origin of the good could transform illegal export into theft, an actionable offence under US law[20].

Until today, jurisprudence shows that the cases in which the American courts have accepted the repatriation of cultural objects following the applications of foreign governments have happened in application of the American domestic law because the object resulted for instance stolen, on the basis of the National Stolen Property Act (NSPA), or because it entered among those listed for which the obligation of restitution is anticipated by the American Statute on Cultural Property Implementation Act (CCPIA) of 1983, which introduced into the US legal order the 1970 UNESCO Convention on the prevention and suppression of illicit traffic in cultural property. NSPA is a new source of the American jurisdiction: the National Stolen Property Act forbids the introduction in the American territory of objects stolen in violation of the law of the country of origin and it establishes that the item illegally imported shall be forfeited. In application of the NSPA the state must show that the holder of the vindicated cultural item knew that the same had been stolen.

Regarding this issue I can not fail to mention the case *United States v. McClain*. This case was about the attempt of several Mexican dealers to sell some archaeological objects removed from Mexico. As mentioned above, according to the NSPA dealing in property that has been stolen, unlawfully converted or taken, knowing the same to be stolen is a crime. According to Mexican law, pre-Columbian archaeological objects were State property. The Court of Appeals for the Fifth Circuit established the "McClain doctrine", according to which foreign patrimony laws vesting ownership in the State of cultural property found within its boundaries are acknowledged by the United States[21]. This is in details what happened. In May 1973 a man called Joseph Rodriguez arrived in Texas with a collection of pre-Columbian archaeological objects from Mexico to sell. Rodriguez entrusted two people, William and Ada Simpson in San Antonio to care and sell the items of the

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[20] D. A. Colson, *The United States, the Law of the Sea, and the Pacific*, J. Van Dyke (edited by), Consensus and Confrontation: The United States and the Law of the Sea Convention, Honolulu, 1985

[21] A. Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, UCLA Law Review 53, 1998

collection. He returned to Mexico. In February 1974 John McGauley, an FBI Special Agent, began investigating about the selling of some strange pre-Columbian objects. One of his informants, Travis Benkendorfer, contacted Mrs. Simpson with a cover story that he was interested in acquiring a part of these archaeological collection. Mrs. Simpson responded that her husband and his partner Patty McClain were awaiting a pre-Columbian artefact shipment to cross the Mexican border into California. One month later, William Simpson was arrested in California while attempting to purchase US $850,000 worth of antiquities. The same day, Patty McClain and Ada Simpson were arrested in San Antonio. The US District Court for the Western District of Texas convicted the defendants under the National Stolen Property Act (NSPA) for conspiracy to transport and purchasing of archaeological pre-Columbian artefacts from Mexico, despite having knowledge that the objects were stolen. There was clear evidence presented in the record of their involvement in the conspiracy, thus the defendants could be prosecuted. This verdict was appealed. The US Court of Appeals for the Fifth Circuit reviewed the first instance ruling. The decision was that the District Court's jury instructions were erroneous because they falsely instructed the jury that since 1897 Mexican law has declared pre-Columbian artefacts to be property of the Republic of Mexico, except when a permit or license has been issued to their export. In 1972 Mexico enacted a law that declared all archaeological objects within Mexico to be the property of the Nation[22].

[22] The McClain court stated "this Court, of course, recognizes the sovereign right of Mexico to declare, by legislative fiat, that it is the owner of its art, archaeological, or historic national treasures, or of whatever is within its jurisdiction; possession is but a frequent incident, not the *sine qua non* of ownership, in the common law or the civil law".
See J. H. Merryman and A. E. Elsen, *Law, Ethics and the Visual Arts*, London, 1998

1.5 International and national laws: about the ownership regulation

As already said before, although there is a judgment by the Court of Cassation (2019) affirming for the second time the obligation for the United States to return the Bronze to Italy, still today the statue is located at the Getty Museum. The need is finding a compromise between the ownership laws of the two countries to ensure that the Getty Museum, subjected to a decision of an Italian court, feel obliged to respect and implement it in practice as if it were derived from any American jurisdiction body. The 2010 order has remained uneven and a different end is expected for the last judgment of 2019. In 2010, the legal representative of the Getty Museum filed an appeal, but the Court of Cassation has converted this appeal into opposition by postulating the non-renounceable necessity that in the matter of confiscation all interested parties are guaranteed a double degree of judgment[23].

There is, however, a treaty which has a specific relevance in this case: it is the Treaty of Mutual Assistance in Criminal Matters between the Italian Republic and the United States of America, signed in Rome on 3rd May 2006 and entered into force on 1st February 2010. This specific agreement was concluded in the framework of the Treaty on Mutual Assistance between the European Union and the United States, signed in Washington on 25th June 2003, which in art. 3, co. 2 states the following:

L'Unione europea, a norma del trattato sull'Unione europea, provvede a che ciascuno Stato membro confermi, mediante strumento scritto tra di esso e gli Stati Uniti d'America, che il pertinente trattato bilaterale di mutua assistenza giudiziaria in vigore con gli Stati Uniti d'America è applicato come stabilito dal presente articolo.

Art. 3 - co. 2, Agreement on Mutual Legal Assistance Between the United States of America and the European Union

International cooperation between countries in criminal matters had already been the subject of another bilateral treaty dating back to 1982, the Bilateral Treaty between Italy and the United States, which, however, needed to be strengthened. Art. 1, co. b (2) of the 2010 Treaty provides a reciprocal obligation to assist and cooperate each other in the seizure and confiscation of properties. Below is the article as agreed:

2. Tale assistenza comprenderà: a) ricerca di persone; b) notifica di documenti; c) produzione di documenti e di atti; d) esecuzione di richieste di perquisizione e di sequestro; e) escussione di testimoni; f) trasferimento di persone per rendere testimonianza; e g) sequestro e confisca di beni. Altre forme di assistenza saranno prestate se compatibili con la legislazione dello Stato richiesto.

Art. 1 – co. b (2), Agreement on Mutual Criminal Assistance Between the Italian Republic and the United States of America

[23] Court of Cassation, Judgment of January 18, 2011 available at http://www.italgiure.giustizia.it/sncass/

Also art. 18 is relevant for the case in question and it establishes:

Le Parti Contraenti si forniranno reciproca assistenza nella misura permessa dai loro rispettivi ordinamenti, nel sequestro, immobilizzazione e confisca dei frutti e dei proventi dei reati.

La Parte Contraente che procederà alla confisca dei profitti e dei beni ai sensi del presente articolo ne disporrà secondo la propria legge nazionale e le procedure amministrative. Ciascuna Parte potrà trasferire tutti o parte di tali proventi o beni, o i proventi derivanti dalla vendita, all'altra Parte nella misura consentita dai rispettivi ordinamenti giuridici alle condizioni eventualmente stabilite.

Art. 18, Agreement on Mutual Criminal Assistance Between the Italian Republic and the United States of America

There would appear to be, without any doubt, an obligation for the American Government under the international law to follow up the confiscation order. Art. 18, however, contains the specific reference to the fact that the requested State of confiscation will dispose of it in accordance with its national law and administrative procedures. This means that, despite this international cooperation agreement is considered by the USA to be self-executing and therefore no internal transposition rules are necessary for its implementation, it remains that the execution of each individual request for legal assistance must be carried out in a manner compatible with the law of the requested State, including the rules on the protection of property in force in that jurisdiction. In other words, at the end of the day it is always the United States law that has the last decision on the application of a foreign jurisdiction in its country. This is the reason why the confiscation ordered by the 2010 order did not take place. The confiscation ordered by the 2019 order would appear to pose the same problems. The absence of a rule of customary law on the obligation to return illegally exported works of art from one territory to another and the reservation which States add on the application of the foreign jurisdiction in their territory are the highest obstacles to overcome.

CHAPTER 2

THE 2019 JUDGMENT OF THE COURT OF CASSATION

2.1 Two petitions against the order of 2018

2019 seems to have been the decisive year for the resolution of this case. As it has already been mentioned, the Victorious Athlete trial was one of the longest judicial disputes in the history of the Italian judiciary. The story, although at first glance could be easy to understand, hides pitfalls that took about fifty years to be overcome. The first trial took place in 1966 and it involved the prosecution of the subjects considered guilty of having illegally exported the archaeological find in a foreign country. This process ended with the acquittal of all the individuals involved. The judiciary, however, has never stopped working on the case that has always been placed under observation as the demand from the Italian government to have the desired statue back was active and pressing.

The turning point comes in 2010, when the Court of Pesaro issues a confiscation order against the American museum. This order, analyzed in the previous chapter, for the first time recognized the belonging of the Victorious Athlete to Italy with the consequent obligation to confiscation and repatriation. However, the many legal obstacles and the numerous problems of compatibility between Italian, American and international laws have ensured that the bronze remained exposed at the Getty Museum until today and therefore that there was no way to put into practice the confiscation order. But the Getty Museum did not want to renounce to the work of art and managed to obtain the annulment of the order for procedural defects, following the contestation of the lack of public sitting of the hearing in question. Two years later the Court of Pesaro pronounced again on the case, but the Getty Museum succeeded also in this occasion in delaying the time thanks to the postponement to a second instance.

The judicial saga goes on and the Italian Government does not want to give up the right of property on the bronze statue. In 2018 a new order of the Court of Pesaro decides again for the confiscation. History repeats itself and the Getty Museum appeals against this decision, but this time the ending is different. The two appeals brought by the Getty Museum are rejected in their entirety. The Victorious Athlete must return to Italy. In the afternoon of June 8, 2018 the judge of the execution of the Court of Pesaro Giacomo Gasparini had in fact rejected the opposition of the lawyers of the Getty Museum against the confiscation of the Victorious Athlete. The parties were waiting for the final decision from February 5, 2018 the date of filing of the illustrative pleadings and clarification of the conclusions. The Court had indicated a reserve period of about three months for the judgment, which arrived in that day and was welcomed with satisfaction by PM Silvia Cecchi, by the state lawyer Lorenzo D'Ascia and by the lawyer of the Association “Le Cento Città” Tristano Tonnini who has denounced the expatriation of the bronze.

The judgment is very clear. The judging authority, refusing any doubtful argument about the relationship between the statue and the Italian State has considered the relevant link between the object and the Italian

culture, which is also mentioned in the UNESCO and UNIDROIT treaties, on the basis of which it is possible to request the return of the unlawfully exported and stolen property. From an historical and cultural point of view the Victorious Athlete belongs to Italy. Sure of this idea, the judge of Pesaro states the mandatory and the necessary application of the confiscation order. Relevant is article 4 of the 1970 UNESCO Convention, stating that "The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory; cultural property found within the national territory; cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property; cultural property which has been the subject of a freely agreed exchange; cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property".

The defense of the museum, according to the judge, provided only thesis and not proof of the discovery of the statue in international waters and the argument would not be in any case straightforward. The argument of the Getty defense aimed at asserting that property titles formed after the commission of the crimes by subjects other than the third possessor of the good, has been rejected. The order states: "the only person who was and is the owner of the property, the Italian State, is also the holder of the power to recover it"[24]. The only position to be protected, therefore, is that of the person to whom the property belonged before the crimes were committed: Italy. According to the judge Giacomo Gasparini there is not even the limit of the extraneousness of the third party to the crime that would result from having behaved diligently at the time when the Museum purchased the Statue. After having examined the conduct of the Museum in depth, it appeared that the members of the Board were aware of the criminal proceedings initiated in Italy and concluded by judgments which, in fact, did not address the lack of documentary evidence of previous ownership transfers, the absence of authoritative and impartial opinions about the legitimate origin of the good and for having acted despite the rethinking of J. P. Getty after his death. All this demonstrated the absence of due diligence already in the years of the negotiations and the purchase, the trust purchaser was aware of the riskiness and recklessness of the purchase.

In the light of these considerations, the judge of the Court of Pesaro Gasparini reaffirmed by this third judgment what already established by his predecessors – by the two previous pronouncements of the Court by Lorena Mussoni in 2010 and by Maurizio Di Palma in 2012 in favor of the confiscation contested by the lawyers of the American museum. In the first case with the annulment for the defect consisting on the lack of publicity of the hearings, in the second with the referral of the case to Pesaro for a substantial second degree of judgment.

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[24] Pesaro Tribunal, Ordinance of June 8, 2018 available at http://www.tribunale.pesaro.giustizia.it/

The argumentative path seems to be even more sharp than that used by the first judge, reiterating how such an ablative measure is: “the instrument of protection necessary to enable the Italian State to regain the availability of the asset taken from its unavailable and illegitimate assets held by J.P. Getty Museum”[25]. In the course of the proceedings, the defendants of the museum had already indicated that they wanted to challenge a possible unfavorable verdict before the Italian Supreme Court and the ECHR for some alleged irregularities. It was already clear at the time that appeals would not be accepted anymore.

However, the representatives of the Getty Museum kept their promise and lodged two appeals against this order. The judgment n. 22 of January 2, 2019 rejects both and states for the fourth time that the confiscation order must be applied and that the Victorious Athlete belongs to Italy. The 2019 judgment begins by revoking its previous versions, which had already decided for the confiscation of the statue, presenting them in summary and reconnaissance. Subsequently, the judgment introduces the topic of the two appeals introduced by the defenders of the Getty Museum: Rimini and Gaito. In a petition of November 23, 2018 the defense of the museum formulated the request to deal with the judgment about the Victorious Athlete in form of public hearing and urged the Court of Cassation to raise questions of constitutional legitimacy of the articles 611[26] and 666[27] of the Code of Criminal Procedure, indicating as constitutional parameter art. 117[28] of the Constitution. The judgment of the Court of Cassation analyses one by one the above-mentioned situations and gives the reasons for their rejection. Both appeals were found to be wholly unfounded.

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[25] Pesaro Tribunal, Ordinance of June 8, 2018 available at http://www.tribunale.pesaro.giustizia.it/

[26] Code of Criminal Procedure (R.D. October 19, 1930 n. 1398), Ninth Book- Impugnazioni→ Title III - Ricorso per cassazione → Chapter II - Procedimento, Art. 611: “1. Oltre che nei casi particolarmente previsti dalla legge, la corte procede in camera di consiglio quando deve decidere su ogni ricorso contro provvedimenti non emessi nel dibattimento, fatta eccezione delle sentenze pronunciate a norma dell'articolo 442. Se non è diversamente stabilito e in deroga a quanto previsto dall'articolo 127, la corte giudica sui motivi, sulle richieste del procuratore generale e sulle memorie delle altre parti senza intervento dei difensori. Fino a quindici giorni prima dell'udienza, tutte le parti possono presentare motivi nuovi e memorie e, fino a cinque giorni prima, possono presentare memorie di replica. 2. Nello stesso modo la corte procede quando è stata richiesta la dichiarazione di inammissibilità del ricorso. Se non dichiara l'inammissibilità, la corte fissa la data per la decisione del ricorso in udienza pubblica”.

[27] Code of Criminal Procedure (R.D. October 19, 1930 n. 1398), Tenth Book- Esecuzione → Title III- Attribuzioni degli organi giurisdizionali → Chapter I- Giudice dell’esecuzione, Art. 666: “1. Il giudice dell'esecuzione procede a richiesta del pubblico ministero, dell'interessato o del difensore. 2. Se la richiesta appare manifestamente infondata per difetto delle condizioni di legge ovvero costituisce mera riproposizione di una richiesta già rigettata, basata sui medesimi elementi, il giudice o il presidente del collegio, sentito il pubblico ministero, la dichiara inammissibile con decreto motivato, che è notificato entro cinque giorni all'interessato. Contro il decreto può essere proposto ricorso per cassazione […]”.

[28] Constitution of the Italian Republic, Part II- Ordinamento della Repubblica → Title V- Le Regioni, le Provincie, i Comuni, Art. 117 in the website https://www.senato.it/1025?sezione=136&articolo_numero_articolo=117

2.2 Reasons for the contestation in the first petition

At this point, the individual grounds of appeal in the two actions brought by the defense may be examined. It is appropriate to begin with the first petition, that of the lawyer Gaito.

The first ground of appeal concerns the alleged lack of jurisdiction of the Italian judicial authority in this case. This claim is inadmissible. The reason is that the Court of Cassation has already expressed itself on the case both in 2014 and in 2015 judgments. It first referred the question of the constitutional legitimacy of the artt. 666, 667 e 676 of the Code of Criminal Procedure to the Costitutional Court, while in a second time it annulled the previous order made by the Court of Pesaro on 3rd May 2012 in relation to the present case. If the whole matter had not been the subject of the jurisdiction of that Italian judicial authority, the question of constitutional legitimacy raised would not have been relevant and the national court would be stripped of any responsibility or duty required by the situation. Moreover, there is no point in raising this objection now because the Italian judicial authority has been dealing with the case for about fifty years.

In the second ground of appeal, the defense of the Getty Museum held that the order issued by the Court of Pesaro was unlawful. The procedural model followed by that Court was characterized by a first phase in which, although public treatment had been requested, the followed procedure had been strictly chamber-style, and from a second stage in which the proceedings had taken place in the form of a public hearing. According to the applicant, the institutionalization of this hybrid procedure gave a reductive reading of the judgment. By judgment n. 49317 of 2015, the Court examined extensively the question of the lawfulness of the adoption of a non-participating proceeding at the first stage of the execution accident. The celebration in the form of public hearing of only one phase of the trial is guarantee as well of the fairness of the proceeding. The two procedural moments do not constitute two separate procedures, but two phases closely connected between them of a single process. This second ground of appeal is therefore also inadmissible.

The third ground of appeal is composed of three branches. First, it is alleged that the principle of *ne bis in idem* has been infringed. It provides for the inadmissibility of the submission of further requests to the executing court where they are made based on the same elements already assessed by the courts. The request of the Public Prosecutor Office of Pesaro for the confiscation of the property, according to the applicant, was not based on the occurrence of new elements compared to those already examined both by the Court of Appeal of Rome (by the judgment of 8 November 1970) and the Court of Pesaro (with the order for the closure of the limitation period of 19 November 2007). It also regrets the absence of a conviction as a necessary precondition for the possibility of ordering the confiscation of an asset connected with the crime for which it was carried out. Moreover, at the time of the dispute, the good is in the peaceful detention of a person who has been extraneous to the crime. Finally, the possibility of legitimately using investigative acts carried out abroad in the absence of a valid rogatory letter is contested. All three parts of this ground of appeal are unfounded.

As regards the first branch, the judgment of the Court of Appeal of Rome of November 8th, 1970 concerned the commission of the crime of receiving stolen property. The detention of the statue must have been considered flawed because it was an object listed in art. 67 of the then current law n. 1089 of 1939. On the other hand, in the final judgment before the Court of Pesaro, the contested fact concerned the illegal export of the statue constituting a cultural object outside the territory of the State, its introduction into that territory without the payment of border taxes and without having duly denounced it to the authorities responsible for the protection of the historical and artistic heritage.

The second aspect concerns the fact that confiscation has been deemed unlawful in the absence of a sentence or other act equivalent to it. The Court of Cassation also rejected this point, specifying that confiscation is a measure having a recovering character, in order to ensure the substantial respect of the public nature of the cultural object and thus the protection of the interest in its preservation, conservation and enjoyment.

As regards the third and last point, it should be noted that in the present case the applicant complained that a number of elements of knowledge used in the course of the judgments relating to the whole affair, and also in the context of the executive proceeding that led to the issue of the measure now censored, were employed abroad by delegation of investigation conferred to the judicial police by the Italian regulatory authority. The complaint, apart from the vagueness of its wording, does not specify which acts were concerned, nor does it indicate the time in which they had an effective impact on the taking of the contested decision. In addition it is also legally unfounded, in so far as it is based on the assumption that any type of judicial investigation carried out abroad must be preceded by rogatory letters in order to obtain cooperation in carrying out such activities by the judicial authority of the country where the investigations have been carried out. Moreover, the investigation activity carried out abroad by the Italian judicial police was physically carried out at the offices of the Italian consulates in the United States of America. Under the terms of the Vienna Convention[29], the consular authority is empowered to carry out judicial activities within its constituency.

The fourth ground of appeal alleges that the order in question was not read in open court immediately after the conclusion of the discussion by the last defense but was subsequently made public. Indeed, the Gip of the Court of Pesaro, exhausted the preparatory phase of the execution accident on February 5th, 2018, withheld the dispute in decision, reserving its decision, until the following 8th June, the date on which it lodged the reasons for its decision together with its operative part. The defense complains about this, by alleging the illegality of the decision adopted in this way because the principle of immediacy between the discussion of the criminal case and the subsequent deliberation of the decision taken on it was thus infringed. First of all, it should be noted that it is the legislator that, expressly derogating from the general principle of the immediacy

[29] Vienna Convention on Consular Relationship of April 24, 1963. Approved in Italy with law n. 804 of 1967, today substituted by art. 36 and ff. of dlgs n. 71 of 2011.

of the decision, allows the delay of the wording of the statement of reasons of the judgment to not proceed which can therefore be lodged within the period of 30 days from the discussion. This reason is also unfounded.

The fifth ground of appeal put forward by the appellant's defense concerns the finding that the court was circumventing the enforcement of the *jus superveniens*. These are provisions by which the legislator has laid down rules such that confiscation can only be applied after the criminal law has been established as being responsible for the offence, which, even for such limited purposes, constitutes confirmation of a previous conviction in the court of law prior to the one in which the confiscation was confirmed. But again, the plea cannot be upheld. It should be noted that, however, the mentioned legislation did not enter into force until the parties had already submitted their conclusions and the Court had withheld the file for the decision.

With regard to the sixth ground of appeal, the appellant claims that the proceedings took place in front of the executing court with the presence of the parties represented by the defendant and the Public Prosecutor and also of other persons who are not parties to the dispute, such as the Ministry for Cultural Assets and Activities. However, it must be remembered that the Italian state, which is directly concerned with the case, must be accepted in all its declinations. Furthermore, the involvement of the said Ministry was unavoidable, thus the sixth ground of appeal must also be rejected.

By the seventh ground of appeal, the appellant complained that the reasoning of the contested order was contradictory and illogical. In essence, the appellant's defense submits in that regard that the statement of reasons for the contested order did not give an adequate assessment of the evidence obtained in the proceedings and aimed at demonstrating the good faith of the purchaser Getty Museum at the time when he obtained the availability of the work of art by the Monastic merchant of art. The administration of that institution would have taken all the necessary information which, on the basis of due diligence, had been able to provide appropriate assurances as to the legitimate origin of the item in question. The Court of Cassation held that on the contrary, the Court of Pesaro has correctly excluded the extraneous nature of the representative organs of the Getty Museum to the offences contested in the last judgment and that it has therefore correctly ordered the confiscation of the statue. The concept of extraneity to the crime must be well understood. The Court of Pesaro recognized the behavior of the representatives of the Getty Museum as guilty. The latter, after the original negotiations for the acquisition of the statue conducted under the personal direction of J. P. Getty, the American billionaire founder of the museum in question, had not been positively defined because of the doubts expressed also by the authoritative partner who had joined the Getty in the negotiation (the administration of the Metropolitan Museum of Arts in New York) about the origin of the work of art. They decided however to purchase the artefact reassured by a series of opinions and conversations with the legal advisers of the vendor party. Requesting confirmation of the legitimacy of a sale to people who, although professionally qualified, were institutionally responsible for the protection of the seller's interests, constitutes behaviour for the purchaser connoted by inexplicable and unjustifiable distraction all the more so where it is considered the possibility to face a criminal proceeding. The Getty administrators should first of all have consulted the Italian

legislation on the exportability and merchantability of cultural goods, whereas it would have been possible for that party to acquire from the national authorities responsible for the care and protection of artistic and cultural goods. However, the Administration of the Getty Museum did not do this, being satisfied with the only information provided by the selling party and therefore legitimately considered by the Court of Pesaro not independent. The thesis according to which the Museum could have been in good faith at the time of the purchase of the statue has no foundation, reason why also this motivation is rejected.

The eighth ground of appeal is the last ground of appeal of the first petition. With reference to the complaint concerning the recurrence of the conditions of confiscation, the applicant first contested the absence of a ruling on the criminal relevance of the alleged fact and therefore an effective finding of liability. Moreover, the applicant claimed that the Court of First Instance did not provide any reply to the complaint that before applying the confiscation measure the possibility of applying a less burdensome procedure should have been considered. According to the Court of Cassation there is no doubt that the statue attributed to the Sicilian Lisippo was transferred, once found on the Italian vessel, to the territory of the State and that it was subsequently in the absence of the mandatory denunciation of its discovery, transferred beyond national borders. All this is a manifestation of the violation of art. 174 of dlgs n. 42 of 2004, therefore of amendment to art. n. 66 of law n. 1089 of 1939, of which the provision referred above constitutes the legislative continuation. Hence the application of compulsory confiscation of what has been illegally exported outside the State without payment of due customs duties. The confiscation of the statue which has been illegally exported must therefore be regarded as legally justified. In addition, there is a presumption of public ownership of cultural goods, with the result that, on the basis of a now far-reaching regulatory tradition, they belong to the State by virtue of the law. From all the provisions contained in the Civil Code and in the special legislation regulating the findings and discoveries of goods constituting part of the national historical artistic heritage and the related regime of belonging, we derive the general principle of state ownership of items of archaeological or historical-artistic interest and of the exceptional hypothesis of private domination over the same objects.

2.3 Reasons for the contestation in the second petition

Turning now to the scrutiny of the other appeal lodged in the interest of Clark, as a representative of the Getty Museum, the Court observes that the first of the grounds of appeal concerns the fact that the procedure before the Court of First Instance is considered fictitious. The defense of the party has argued that the procedure was induced by the Public Prosecutor Office of Pesaro in full awareness of the already well-matured prescription of the contested crimes or of the death of the subject under investigation. The issue is meaningless for many reasons. The fact that a crime has been prescribed is not in itself an inevitable obstacle to the assertion of the criminal responsibility of the person who committed that crime. Moreover, the investigations of the Public Prosecutor Office were the result of a complaint lodged by the association "Le Cento Città" which, by constituting a criminal offence, ordered the Public Prosecutor Office responsible for the territory concerned to carry out the appropriate criminal investigations, unless it then asked for the case to be closed.

By the second claim, the applicant contested the fact that the Court of Pesaro did not consider that the Californian law was applicable as law regulating the relationship between the statue and the Getty Museum instead of the Italian one in the present case, given that the work of art had been in the spaces of the Getty Museum for several decades. The type of dispute in question does not have as its object the legitimacy or not of the title of purchase that the Getty Museum can boast on the property subject to confiscation, since obviously, whatever that title is, it can be trumped by the lawful adoption of the authoritative measure issued by the Italian judicial authority on the basis of the applicable Italian law. Indeed, if the very abstract legitimacy of the title of purchase of the statue by the Getty Museum were in question, then there would be no point in discussing the confiscation. It is not possible to order the acquisition of an asset to a person who has never been legally deprived of it. Moreover, it must logically be considered that a rule which protects the detention of a stolen object in favor of a person who has not been extraneous to the commission of the crime is contrary to public order and must yield before the application of the necessary national implementing legislation.

Regarding the third plea in law, alleging failure to apply the rules of conventional private international law, it is pointed out that the complaint is entirely generic. Since United States did not accede to the 1995 UNIDROIT Convention, it did not indicate which provisions he intended to complain or were improperly applied, nor it has identified the consequences that such infringements would have had as regards the material effectiveness of the decision taken by the Court of Pesaro. That ground of appeal is also rejected.

By its fourth plea in law, the defense alleges infringement of the obligation to state reasons as to the existence of strong links between the national cultural environment and the artefact in question which, demonstrating their belonging to the Italian artistic heritage, justify their particular protection. In particular, the defense of the Getty Museum does not agree that the statue belongs to the national cultural heritage because of the alleged permanence of its author, the Sicilian Lisippo, in the territory of the peninsula. Also, the fact that belonging to Italy is a consequence of the way in which the statue was found, that is on a seabed covered with encrustations dispersed in the course of a transport supposed to lead to the Italian coast, is contested. The Court

answers the allegations by stating that there is no doubt that the Victorious Athlete, as an artistic expression whose discovery led to be brought within the national territory, is an object which forms part of the artistic heritage of the State. This finding is based not only on the clear fact that the work was found by an Italian vessel and hoisted on board it, thus already entering the national territory, but it is justified by its belonging to that cultural continuity which has, since the beginning of its development, linked the Italian and then Roman civilization to the very first Greek cultural experience, of which the Roman one can be said to be the follower. The work of territorial military pervasion of the Romans in Greece was begun only in 146 BC with the fall of Corinth and the defeat of the Achaean League. However, we must remember the previous conquest of Macedonia, factor not casually remembered where it is considered that just the sculptor Lisippo owes part of his fame to the fact of having been author of bronze statues representing the features of Alexander the Macedonian. The Greek influence on the Italian territory is obvious. Many of the most important Greek historical cultural figures were born in what were then the Greek colonies in Italic territory, others lived there until claiming. It is also known that the first literary artistic expressions related to Latinity were immediately attributable to personalities formed in the Greek environment. The existence of a *continuum* between the Greek civilization, imported into the Italian territory, and the subsequent Roman cultural experience can only be deduced. *Continuum* of which the presence off the coast, in what are now the Marche Region, of the statue in dispute is a confirmation. It can reasonably be deduced that, whether it was transported by a ship sailed in turn from the Italian territory (it is in fact documented the presence of Lisippo in what is today the city of Taranto) whether it had been transported by a vessel from the Ionian coast of the Greek peninsula, the place of destination was one of the Adriatic ports of the Italian peninsula, further evidence of the belonging of the artefact to the cultural orbit of the country. The significant cultural link between the statue and the national environment makes it clear that the special protection afforded to the property in question is justified, also through its necessary material repurchase to the national artistic heritage, violated because of its illegal export abroad.

By its subsequent plea in law, the second defense of the Getty Museum challenged the application of art. 174 of Legislative Decree n. 42 of 2004 on the grounds that it occurred at the time of the facts, as well as in relation to the identification of the outlines of the notion of "person extraneous to the crime" and the misrepresentation of the category of items *extra commercium*. This article states as follows:

1. Chiunque trasferisce all'estero cose di interesse artistico, storico, archeologico, etnoantropologico, bibliografico, documentale o archivistico, nonché quelle indicate all'articolo 11, comma 1, lettere f), g) e h), senza attestato di libera circolazione o licenza di esportazione, è punito con la reclusione da uno a quattro anni o con la multa da euro 258 a euro 5.165.

2. La pena prevista al comma 1 si applica, altresì, nei confronti di chiunque non fa rientrare nel territorio nazionale, alla scadenza del termine, beni culturali per i quali sia stata autorizzata l'uscita o l'esportazione temporanee.

3. Il giudice dispone la confisca delle cose, salvo che queste appartengano a persona estranea al reato. La confisca ha luogo in conformità delle norme della legge doganale relative alle cose oggetto di contrabbando.

4. Se il fatto è commesso da chi esercita attività di vendita al pubblico o di esposizione a fine di commercio di oggetti di interesse culturale, alla sentenza di condanna consegue l'interdizione ai sensi dell'articolo 30 del codice penale.

Art. 174, Code of the Cultural Goods and of the Environment - Part Four, Title II, Chapter I

This fifth ground of appeal was also considered to be unfounded. As regards the first aspect, it is enough to point out that the above provision relates to a relationship of regulatory continuity with the pre-existing art. 66 of law n. 1089 of 1939, which also provided for the confiscation of cultural goods that had been illegally exported to foreign countries. As regards the concept of person not criminally involved, reference is made to what has already been said in relation to the similar question contained in the first appeal. It has already been established that the presumption of good faith of the purchaser is not accepted in the case in question. Finally, as regards the claim that the asset would not be an item *extra commercium* it is recalled that the Court of Cassation has already stated in this regard that cultural objects subject to the regime of public property are not eligible for valid possession for the civil party.

By its sixth ground of appeal, the second defense of the Getty Museum complained about the breach of law and the illogicality of the reasoning with regard to the concept of subjective good faith and the presumption of not guilty. The judgment repeats again that the Court of Pesaro rightly inferred that the representatives of the museum were not extraneous to the commission of the crime of illegal export. Without carrying out with due diligence the appropriate checks on the legitimate origin of the work of art in question, they have with guilty superficiality proceeded to the purchase on the basis of partisan information that had been provided by the lawyers who sponsored the interests of the sellers, without acquiring any element from public entities or otherwise third parties with respect to the deal. The subjective good faith, which consists in the conscious conviction that it does not harm the subjective positions of other individuals by its behavior, cannot be legitimately based on the conduct in question.

In the seventh ground of appeal, the applicant still complained that the contested order was inadequate to assess the validity of the checks carried out by the administration of the Getty Museum before proceeding to the purchase of the statue. In the applicant’s view, those verifications are such as to exclude the involvement of that institution in the commission of the offence referred to in art. 174 of Legislative Decree n. 42 of 2004. The applicant notes that the failure to consider the checks carried out by the Getty Museum to be exhaustive by acquiring information about the statue from what the applicant considers to be professionals, that is, the vendor’s lawyers, would correspond to the application of behavior alien to the American experience, in which relying on professionals is common practice. However, the evaluation of the diligence with which the organs of the Getty Museum proceeded to purchase the statue cannot be conducted on the basis of abstract rules, but

on the basis of rules of experience that follow the canon of prudence. This statement of reasons is completely unfounded.

The eighth ground of appeal is the last one. The defense has complained the failure of the applicability of ordinary usucaption, an institution which involves the acquisition of the original property as a result of possession extended in time, even regardless of the possessor's good faith. The defense also reiterated that the possession of cultural goods, being things that are presumed *extra commercium*, is not valid for the integration of the mode of purchase of the property in question. In fact, if the Getty Museum had obtained the property of the statue with a legitimate title or in its original title, then it would be free from the effects of the confiscation ordered. However, the existence of an abstractly legitimate title of ownership is the logical presupposition of confiscation, otherwise, since the good has never been removed from the sphere of State ownership, it would not make sense to refer to the confiscation institution, since something that is already owned by the State could not be the object of confiscation. This last reason is also completely meaningless.

2.4 Concluding observation

The preceding sections have tried to give an explanation as exhaustive as possible about the refusal of the individual grounds of appeal of the two claims lodged by the Getty Museum defence against the order issued by the Court of Pesaro dated 8th June 2018 and that decided to confiscate the statue in dispute. The Getty has tried to render null the order that obliges it to return the work of art. Every single ground of appeal has been rejected and the Court of Cassation has largely reconfirmed the decision of the Court of First Instance.

The last part of the 2019 judgment of the Court of Cassation, which has so far been considered, refers to a statement containing additional grounds for appeal. Gaito maintained that confiscation was a criminal offence, challenged the legality of its imposition as it would be a measure that interferes with the peaceful enjoyment of private property, without provision being made for a gradual adaptation of the purpose and effects of the measure. Once again, it is said that confiscation was ordered without first establishing the responsibility of someone, through a fair criminal trial. Both profiles are not worthy of support. With reference to the first, as already illustrated the purpose of the measure of confiscation provided by art. 174 of Legislative Decree n. 42 of 2004 is that of recovering and not of sanctioning[30]. In fact, it aims primarily to bring the good under the protective wing of the State, which will guarantee its safekeeping, conservation and availability for the community as an object of historical and cultural importance. As regards the proportionality of the measure, it has already been observed that, in view of its stated aim, there is no scope for graduation, since the interest that underlies its adoption can only be satisfied by the material and stable recovery to the public goods of the cultural object in question. Concerning the profile of not getting a fair trial, the Constitutional Court points out that this objection is completely unfounded because the judgment before the Court of Pesaro was held in public hearing and with the insurance in favor of the Getty Museum of all the related rights to the exercise of defense.

The judgment closes by stating that the two appeals lodged in the interest of Stephen Clark, as the legal representative of J. P. Getty Trust, must both be rejected and the claimant must be charged, according to Italian criminal law[31], to the payment of costs.

The Marche Region, taking note of the judgment of the Court of Cassation, intervened by submitting a motion entitled *Support for the return to Italian territory of the statue "Victorious Athlete" by Lisippo and its location in the city of Fano*[32]. This document is an expression of the commitment that the President and the Regional

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[30] Legislative Decree n. 42 of 2004, art. 174 (3): "Il giudice dispone la confisca delle cose, salvo che queste appartengano a persona estranea al reato. La confisca ha luogo in conformità delle norme della legge doganale relative alle cose oggetto di contrabbando".

[31] Code of Criminal Procedure (R.D. October 19, 1930 n. 1398), art. 616 (1): "Con il provvedimento che dichiara inammissibile o rigetta il ricorso, la parte privata che lo ha proposto è condannata al pagamento delle spese del procedimento. Se il ricorso è dichiarato inammissibile, la parte privata è inoltre condannata con lo stesso provvedimento al pagamento a favore della cassa delle ammende di una somma da duecentocinquantotto euro a duemilasessantacinque euro, che può essere aumentata fino al triplo, tenuto conto della causa di inammissibilità del ricorso. Nello stesso modo si può provvedere quando il ricorso è rigettato".

[32] Motion n. 447 presented on January 28, 2019 by councilors Minardi e Rapa. Available at http://www.consiglio.marche.it/banche_dati_e_documentazione/atti_di_indirizzo_e_controllo/mozioni/pdf/moz44710.pdf

Council will ensure that the statue returns home and that in particular it is placed in the city from which it was taken, Fano. The foreword reconstructs the whole story of the discovery of the statue, which has not been exhaustively explained in the previous pages. After having emphasized that the statue, of undisputed cultural value, has been found in the Adriatic Sea by a vessel of Fano and that the Court of Pesaro has repeatedly issued orders for the confiscation of the archaeological find by ordering the seizure of it wherever it is located and its return to the Italian State, still today the property is on display at the Getty Museum.

The motion also recalls that the Marche Regional Legislative Assembly has already pronounced twice on the matter: one in the previous legislature (sitting of 22 March 2011) when it shared and strongly supported the mission in the United States of the President of the Regional Council to ask for the repatriation of the property representing the entire community of the Marche, and a second in the current legislature (sitting of 5 April 2016). In that occasion the President of the Regional Council promised to undertake any necessary action in consultation with the other local institutions and the Ministry for Cultural Heritage and Activities to bring back in Fano the statue of the Victorious Athlete.

The motion proceeds by stating that it has taken note of the last sentence of the Court of Cassation, which rejects the appeals lodged by the lawyers of the "Paul Getty Museum" against the most recent confiscation order of the Court of Pesaro of 8th June 2018, this means that the Italian civil juridical authority has stated that the statue must return to the Italian State. The protection and enhancement of cultural heritage has always represented a constant commitment of the Region. The legislative assembly committed the President and the Regional Council to put in place every useful action to ensure the return of the statue by Lisippo in the Italian territory and to support, with adequate financial resources, any initiative aimed at ensuring that this important object of archaeological, historical and artistic interest is properly placed in the city of Fano, where it was originally transported after its discovery and where it represents a cultural identity symbol.

PART II

CHAPTER 3

JURIDICAL INSTRUMENTS: FOCUS ON THE RESOLUTION OF THE CASE

3.1 The legal proceedings against the fishermen

The judicial process involving the dispute between the Getty Museum and the Italian State manifests its embryonic form in the trial of the fishermen who discovered and retrieved the Victorious Athlete.

In 1965 the Carabinieri were anonymously informed that such Pietro, Fabio and Giacomo Barbetti had made a trip to Germany to sell an ancient statue of value. The Carabinieri then proceeded searching their homes.

The investigation led to the hypothesis that the Barbetti and a certain Don Giovanni Nagni had been charged with the violation of article 67 of Law No. 1089 of 1939, which punished the undue possession of antiquities or art discoveries[33].

In a first phase, the trial ended with the acquittal of all the defendants. However, at the request of the Public Prosecutor to the Court of Appeal in Perugia, the Barbetti were again accused of receiving and the priest of aiding and abetting so that the trial was reopened again and the subjects were this time sentenced by judgment. The Court of Cassation annulled this judgment and referred it back to the Court of Appeal of Rome which in 1970 definitively discharged the accused for lack of evidence. For the judges of the Court of Appeal it lacked evidence about the nature of the archaeological find and the place of its discovery; engraved also the fact that in the meantime the statue had been given to a person resident in Milan, losing its tracks.

A new phase of the process reopened in 1972, when the Carabinieri discovered that the Victorious Athlete was with an art collector in Munich. The Court of Gubbio opened a new procedure for clandestine export of works of art and asked the Munich authorities to cooperate in this regard, but they objected. The alleged crime was not in fact included among those who could justify the extradition of the work of art, according to the German legislation. In 1974 the proceedings were closed and the collector confirmed his possession on the statue.

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[33] Law June 1, 1939 n. 1089, Tutela delle cose d'interesse artistico e storico, art. 67: “Chiunque s'impossessa di cose di antichità e d'arte, rinvenute fortuitamente, ovvero in seguito a ricerche od opere in genere, è punito ai sensi dell'art. 624 del Codice Penale. Quando il reato sia commesso da coloro ai quali venne fatta la concessione o data l'autorizzazione di cui agli artt. 45 e 47, ovvero sia commesso su cose mobili di cui all'articolo 1, di proprietà pubblica o oggetto di notifica, da parte di persona diversa dal proprietario, sono applicabili le disposizioni dell'art. 625 del Codice Penale”.
Published in Gazzetta Ufficiale della Repubblica Italiana n. 184 on August 8, 1939

The Court of Pesaro reopened a new trial in 2007, following the request of the Public Prosecutor's Office. In addition to the Barbetti, were involved in the process also Mrs Pirani and Ferri, captains of the two fishing boats involved in the discovery of the statue. The violations contested to all the involved subjects concerned articles 110[34] (connected to art. 66 of the law n. 1089 of 1939[35]), 483[36] and 476[37] of the Penal Code. In addition for Mrs Pirani and Ferri also the violation of articles 510[38] and 511[39] of the Code of Navigation, articles 46[40] and 68[41] of the law n. 1089 of 1939 and articles 97 and following of the law n. 1424 of 1940[42].

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[34] Penal Code (R.D. October 19, 1930 n. 1398), Pena per coloro che concorrono nel reato, art. 110: "Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilita, salve le disposizioni degli articoli seguenti".

[35] Law June 1, 1939 n. 1089, Tutela delle cose d'interesse artistico e storico, art. 66**:** "Chiunque trasferisce negli Stati membri dell'Unione europea o esporta verso Paesi terzi cose di interesse artistico, storico, archeologico, etnografico, bibliografico, documentale o archivistico, nonché i beni di cui al comma 2 dell'articolo 35, senza aver ottenuto il prescritto attestato di libera circolazione o la prescritta licenza di esportazione, è punito con la reclusione da uno a quattro anni o con la multa da lire 500.000 a lire 10 milioni […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 184 on August 8, 1939

[36] Penal Code (R.D. October 19, 1930 n. 1398), Falsità ideologica commessa dal privato in atto pubblico, art. 483: "Chiunque attesta falsamente ad pubblico ufficiale in un atto pubblico è punito con la reclusione fino a 2 anni".

[37] Penal Code (R.D. October 19, 1930 n. 1398), Falsità materiale commessa dal pubblico ufficiale in atti pubblici, art. 476: "Il pubblico ufficiale, che, nell'esercizio delle sue funzioni, forma, in tutto o in parte, un atto falso o altera un atto vero, è punito con la reclusione da uno a sei anni".

[38] Code of Navigation, Capo III (Del ritrovamento di relitti in mare), art. 510 - Diritti ed obblighi del ritrovatore: "Chi trova fortuitamente relitti in mare, o dal mare rigettati in località del demanio marittimo, entro tre giorni dal ritrovamento, o dall'approdo della nave se il ritrovamento è avvenuto in corso di navigazione deve farne denuncia all'autorità marittima più vicina e, quando sia possibile, consegnare le cose ritrovate al proprietario, o, se questi gli sia ignoto e il valore dei relitti superi euro 0,03 all'autorità predetta. Il ritrovatore, che adempie agli obblighi della denuncia e della consegna, ha diritto al rimborso delle spese e a un premio pari alla terza parte del valore delle cose ritrovate, se il ritrovamento è avvenuto in mare, ovvero alla decima parte fino a euro 5,16 di valore e alla ventesima per il sovrappiù, se il ritrovamento è avvenuto in località del demanio marittimo".
Approved with R.D. March 30, 1942 n. 327 in Gazzetta Ufficale della Repubblica Italiana n. 93, April 18, 1942

[39] Code of Navigation, Capo III (Del ritrovamento di relitti in mare), art. 511 - Custodia e vendita delle cose ritrovate: **"**Per la custodia delle cose ritrovate, per la vendita delle medesime e per la devoluzione delle somme ricavate si applica il disposto dell'articolo 508. Tuttavia, gli oggetti di interesse artistico, storico, archeologico o etnografico, nonché le armi, le munizioni e gli apparecchi militari, quando il proprietario non curi di ritirarli, ovvero non si presenti nei termini indicati nel terzo comma del predetto articolo, sono devoluti allo Stato, salvo in ogni caso il diritto del ritrovatore all'indennità ed al compenso stabiliti nell'articolo precedente".
Approved with R.D. March 30, 1942 n. 327. Published in Gazzetta Ufficale della Repubblica Italiana n. 93, April 18, 1942

[40] Law June 1, 1939 n. 1089, Disciplina dei ritrovamenti e delle scoperte, art. 46: "Nel caso di cui all'articolo precedente, le cose ritrovate appartengono allo Stato. Al proprietario dell'immobile è corrisposto dal Ministro in denaro o mediante rilascio di una parte delle cose ritrovate, un premio che in ogni caso non può superare il quarto del valore delle cose stesse. Eguale premio spetta al concessionario, salvo quanto possa essere stato stabilito fra concessionario e proprietario dell'immobile. In caso di non accettazione del premio fissato dal Ministro, si applicano le disposizioni di cui all'art. 44, terzo comma. Quando solo il concessionario non accetti il premio fissato dal Ministro, il secondo membro della commissione è nominato dal concessionario, il quale deve anticipare le spese del giudizio innanzi alla commissione stessa".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 184 on August 8, 1939

[41] Law June 1, 1939 n. 1089, Sanzioni, art. 68: "Senza pregiudizio di quanto è disposto nell'articolo precedente, chiunque trasgredisca le disposizioni degli artt. 45, 47 e 48 è punito con l'arresto fino a un anno e l'ammenda da L. 300.000 a L. 3.000.000. Ove la trasgressione produca un danno in tutto o in parte irreparabile, si applica la disposizione dell'art. 59".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 184 on August 8, 1939

[42] Law September 25, 1940 n. 1424, Legge doganale, Contrabbando nel movimento delle merci attraverso i confini di terra e gli spazi doganali, art.97: "E' punito con la multa non minore di due e non maggiore di dieci volte i diritti di confine dovuti chiunque: a) introduce di notte merci estere attraverso il confine di terra ovvero le introduce di giorno per vie non permesse, salve le eccezioni di cui all'art. 13; b) scarica o deposita merci estere nello spazio intermedio tra la frontiera e la più vicina dogana; c) è sorpreso con merci estere nascoste sulla persona o nei bagagli o nei colli o nelle suppellettili o fra merci di altro genere od in qualunque mezzo di trasporto, per sottrarle alla visita doganale; d) asporta merci dagli spazi doganali senza aver pagato i diritti

The Public Prosecutor of Pesaro in the same year requested again the dismissal of the trial, resulting the crimes extinguished by statute of limitations. However, he asked the Judge for preliminary investigations to order the confiscation of the statue in relation to Article 66 of Law 1089 of 1939. The judge only accepted the first request from the prosecutor. As far as confiscation is concerned, in 2007 the judge considered that the holder of the object, the Getty Museum, should be considered extraneous to the crime of violation of the mentioned article.

The 2007 was the last year in which attempts were made to involve the alleged finders of the Victorious Athlete in a court case. Unfortunately, this remains one of the bitterness of the whole affair. The fact of not being able to obtain justice in any way for the work of art unlawfully removed from the Italian cultural heritage is a cause of trouble for anyone who cares the theme, from authorities and associations to the citizens of the city of Fano who would like to get back a fundamental piece of their past. The greater damage remains the uncertainty that, although there is a confiscation order, it is not well known how, when and if the Victorious Athlete will be able to return to Italy. To this it is added the frustration that who would have delivered immediately the work of art to the Italian authority after its discovery, has preferred to deprive the territory of its history and to do his own interests. There will never be any punishment.

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dovuti o senza averne garantito il pagamento; e) porta fuori del territorio del Regno, nelle condizioni prevedute nelle lettere precedenti, merci nazionali o nazionalizzate soggette a diritti di confine; f) detiene merci estere, quando ricorrano le circostanze prevedute nel secondo comma dell'art. 94 per il delitto di contrabbando".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 256 on October 31, 1940

3.2 International legislation applicable to the case

As regards the instruments of international law serving to the resolution of the case, there are only two: the UNESCO Convention on the means of Prohibiting and Preventing the illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 and the Treaty on Mutual Criminal Assistance Between the Italian Republic and the United States of America of 2006.

For what concerns the rest of the international regulations that could help to solve the case, such as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 or the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001, these are not applicable because either one or the other party of the dispute does not recognize their effectiveness.

The only international treaty in this field binding the two countries is the 1970 UNESCO Convention, which counts 139 States Parties. The ratification of the 1970 Convention by the United States was accompanied by various reserves and understandings, one of which is that the agreement has no self-executing character and cannot derogate from the subjective rights accrued in the internal legal systems of the United States. Italy has been a party to the Convention since 1978, while the United States signed it in 1983. Article 1 of the Convention lists a number of cultural goods which are classified as internationally protected and for which there is a mutual obligation of return. These include the products of regular or clandestine archaeological excavations or archaeological discoveries[43]. However, although the Victorious Athlete falls into this category, it should be remembered that the United States made a reservation at the time of ratification by which they stated that they considered their selves bounded by the whole Convention, with Article 7 b(i)[44] and Article 9[45] in a special exceptional form.

[43] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art.1: "For the purposes of this Convention, the term `cultural property' means 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 which belongs to the following categories: […] products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 49 on February 24, 1976

[44] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art.7: "The States Parties to this Convention undertake: […] (b)(i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 49 on February 24, 1976

[45] UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art.9: "Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 49 on February 24, 1976

The first provision requires the prohibition of importation of cultural goods included in the definition where they have been found or have been stolen by a Museum or other public institution since the entry into force of the Convention and provided that the property in question appears to have been inventoried before the theft. The second provision, on the other hand, contains a rather general obligation to carry out export controls, import and international trade of archaeological and ethnological material from those contracting States whose cultural heritage is endangered by the looting of such material. In addition to having limited their participation in compliance with the above mentioned articles, the United States also stated that they did not consider the rules to be retrospective. They specified that they could only apply entry controls and import restrictions on archaeological and ethnological material from another State Party if it was specifically part of the cultural heritage at risk of the latter State; therefore, any form of control imposed by other States will not be automatically implemented through import controls[46]. In other words, the United States, although they have adhered to this international instrument to combat the illicit traffic of cultural goods, have no intention to accept the obligation to grant extra-territorial effects to the protectionist legislation of other States party to the same Convention.

From the point of view of the United States, the commitment to recognize the validity of any foreign legislation on national territory applies only after the conclusion of specific bilateral agreements with the State in question. This specific agreement goes under the name Memorandum of Understanding (MOU). Italy and the United States concluded an agreement of this kind in 2001, concerning precisely the limitation of exports of their assets to foreign countries, but this also does not apply in the case in question having the statue crossed the American borders in 1977.

As regards the issue of the instruments of international law applicable to the present case, it is of fundamental importance to mention another one: the Treaty on Mutual Criminal Assistance between the Italian Republic and the United States of America, signed in Rome in 2006 and entered into force on February 1, 2010[47]. Few days before, the confiscation order of the Victorious Athlete was issued. This specific agreement was concluded in the light of Article 3(2) of the Treaty on Mutual Legal Assistance between the European Union and the United States signed in Washington in 2003, aiming to increase criminal cooperation between the two countries, which was formalized in a previous treaty between Italy and the USA in 1982.

Article 1(g) of the 2003 Treaty provides for a reciprocal obligation to assist in the seizure and confiscation of property[48]. Article 18 states that the Contracting Parties shall provide each other with mutual assistance, to the

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[46] B. Feldman, *Proceedings of the Panel on the US Enabling Legislation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, Syracuse J. Int'l L. & Comm., 1976, p. 97 ff.

[47] Law March 16, 2009 n. 25. Published in Gazzetta Ufficiale della Repubblica Italiana n. 72 on March 27, 2009

[48] Treaty on Mutual Criminal Assistance between the Italian Republic and the United States of America, Obbligo di concedere assistenza, art.1: "1. Le Parti Contraenti, su richiesta ed in conformità con le disposizioni del presente Trattato, si impegnano a prestarsi reciproca assistenza per le istruttorie e i procedimenti penali. […] g) sequestro e confisca di beni. […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n.72 of March 27, 2009

extent permitted by their respective laws, in the seizure, immobilization and confiscation of the fruits and proceeds of crime. In addition, the confiscated contracting party will act in accordance with its national law and administrative procedures. We can mention an initial answer to one of the questions on which this dissertation is based: there would be an international obligation for the American Government to follow up the confiscation order in its territory, even if, under the provisions of Article 18, the State requested of confiscation will dispose of the order in accordance with its national law and administrative procedures. This means that, despite the existence of this particular agreement, the execution of every single judicial request from a foreign country must be carried out compatibly with the law of the requested State. The US rules will therefore determine whether and to what extent the Italian jurisdiction will have its effects.

3.3 Italian legislation applicable to the case

This paragraph aims to be a detailed analysis of all the Italian legal texts and specific articles that have been taken into consideration to give an outcome to the case of the Victorious Athlete. Particular references will be made to the legislation cited in the last two judgments, the 2010 ordinance and the 2019 judgment. I shall, of course, refrain from repeating the analysis of all the legislation discussed in the two preceding paragraphs.

In 2007, as already said, the prosecution of the alleged finders of the statue returns to courtrooms after the request of the Public Prosecutor of Pesaro. People involved in the discovery were again accused of illegal commercialization of the statue, failure to report discovery, illegal export of works of art and misappropriation of marine wrecks. The violations concerned Articles 66 and 68 of Law 1089 of 1939, which has already been widely discussed, but also Article 48 of the same Law and Article 1146 of the Naval Code. According to Article 48, anyone who accidentally discovers something must immediately report to the competent authority and provide for its temporary storage, leaving it in the condition and place where it was found[49]. While as far as Article 1146 of the Naval Code is concerned, this states that anyone who takes possession of marine wrecks mentioned in Articles 510 and 993, in cases where the obligation to report exists, is punished with imprisonment and fine[50].

As for the Naval Code, another very important article to be mentioned is number 4. This article states that Italian ships on the high seas and Italian aircraft in place or space not subject to the sovereignty of any State are considered Italian territory. Also the importance of this article has already been discussed extensively, in particular this was very useful to the judge to state how also the accessories of the vessel, as the net on which the statue was entangled, are to be considered extension of the Italian territory being the ship flying the Italian flag considered as such. This article was fundamental to justify the membership of the Victorious Athlete to the Italian State.

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[49] Law June 1, 1939 n. 1089, *Disciplina dei ritrovamenti e delle scoperte*, art. 48: "Chiunque scopra fortuitamente cose mobili o immobili di cui all'art. 1 deve fame immediata denuncia all'autorità competente e provvedere alla conservazione temporanea di esse, lasciandole nelle condizioni e nel luogo in cui sono state rinvenute. Ove si tratti di cose mobili di cui non si possa altrimenti assicurare la custodia, lo scopritore ha facoltà di rimuoverle per meglio garantirne la sicurezza e la conservazione sino alla visita della autorità competente, e, ove occorra, di chiedere l'ausilio della forza pubblica. Agli stessi obblighi è soggetto ogni detentore delle cose scoperte fortuitamente. Le eventuali spese sostenute per la custodia e rimozione sono rimborsate dal Ministro per la educazione nazionale".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 184 on August 8, 1939

[50] Code of Navigation, *Appropriazione indebita di relitti marittimi o aerei*, art. 1146: "Chiunque si appropria di relitti indicati negli articoli 510, 993 nei casi in cui ha l'obbligo della denuncia è punito con la reclusione fino a tre anni ovvero con la multa fino a lire due milioni. Per gli appartenenti al personale marittimo e alla gente dell'aria e per le persone addette in qualsiasi modo ai servizi di porto o di navigazione ovvero che esercitano una delle attività indicate nell'articolo 68, la pena è aumentata fino a un terzo. Multa, da ultimo, così aumentata dall'art. 113, l. 24 novembre 1981, n. 689".
Approved with R.D. March 30, 1942 n. 327. Published in Gazzetta Ufficale della Repubblica Italiana n. 93, April 18, 1942

The law n. 1089 de 1939, as we can well understand, offers many points of reflection regarding the resolution of the case of the Victorious Athlete. Another fundamental article which is important to mention, apart from all those already extensively analyzed, is Article 23. According to this article, things of artistic and historical interest are inalienable because they belong to the State[51]. In this regard it is also necessary to recall Article 54 of the Code of Cultural Heritage, o Urbani Code, which takes up the theme of article 23 just described and distinguishes between absolutely inalienable cultural goods and goods for which a relative inalienable is provided. The judge is certain that the Victorious Athlete falls into the first category and therefore it is subject to the absolute prohibition of alienation and export from the national territory, according to article 65 of such Code[52].

Of fundamental importance is also Article 53, which states once again how cultural goods belonging to the State, regions and other territorial public bodies constitute national cultural heritage[53]. The Urbani Code therefore punishes the crime of illegal exit or export of goods belonging to the State's cultural property, also with confiscation[54]. In this regard it is good to recall article 66 of the law n. 1089 of 1939 in force at the time of the recovery of the statue, as this also provided in the same case the fine and the confiscation of the property.

In 1964, when the Victorious Athlete was found, the Geneva Convention on the High Sea of 1958 was not yet in force for Italy, however also the norms of such Convention have been taken in consideration by the judge in order to derive the general principles applicable to our case, including that of freedom of the seas and that of subjection of the ship in international waters to the power of the state whose flag it flies. All this in order to arrive to assert that in case of discovery in high sea of marine wrecks from a ship flying the Italian flag, the law to be applied is the Italian one with particular reference to the national rules on cultural heritage.

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[51] Law June 1, 1939 n. 1089, art. 23: "Le cose indicate negli artt. 1 e 2 sono inalienabili quando appartengono allo Stato o ad altro ente o istituto pubblico".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 184 on August 8, 1939

[52] Urbani Code, *Uscita definitiva*, art. 65: "È vietata l'uscita definitiva dal territorio della Repubblica dei beni culturali mobili indicati nell'articolo 10, commi 1, 2 e 3. […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n.45 of February 24, 2004

[53] Urbani Code, *Alienazione e altri modi di trasmissione*, art. 53: "I beni culturali appartenenti allo Stato, alle regioni e agli altri enti pubblici territoriali che rientrino nelle tipologie indicate all'articolo 822 del codice civile costituiscono il demanio culturale. I beni del demanio culturale non possono essere alienati, né formare oggetto di diritti a favore di terzi, se non nei limiti e con le modalità previsti dal presente codice".
Published in Gazzetta Ufficiale della Repubblica Italiana n.45 of February 24, 2004

[54] Urbani Code, Uscita o esportazione illecite, art. 174: "1. Chiunque trasferisce all'estero cose di interesse artistico, storico, archeologico, etnoantropologico, bibliografico, documentale o archivistico, nonché quelle indicate all'articolo 11, comma 1, lettere f), g) e h), senza attestato di libera circolazione o licenza di esportazione, è punito con la reclusione da uno a quattro anni o con la multa da euro 258 a euro 5.165. 2. La pena prevista al comma 1 si applica, altresì, nei confronti di chiunque non fa rientrare nel territorio nazionale, alla scadenza del termine, beni culturali per i quali sia stata autorizzata l'uscita o l'esportazione temporanee. 3. Il giudice dispone la confisca delle cose, salvo che queste appartengano a persona estranea al reato. La confisca ha luogo in conformità delle norme della legge doganale relative alle cose oggetto di contrabbando. 4. Se il fatto è commesso da chi esercita attività di vendita al pubblico o di esposizione a fine di commercio di oggetti di interesse culturale, alla sentenza di condanna consegue l'interdizione ai sensi dell'articolo 30 del codice penale".
Published in Gazzetta Ufficiale della Repubblica Italiana n.45 of February 24, 2004

As for the regulation of the property of the statue, particular reference is made to the law n. 218 of 1995 with its articles 51 and following. The judge has established that the current holder of the object of art has not legally acquired the property, thus violating Italian private law[55].

In support of the order of confiscation of the statue it is also invoked the decree of the President of the Republic of January 23, 1973 known under the name of Approval of the Single Text of the Legislative Provisions in Customs Matters. In such decree the light comes on the article 301, that states as in the cases of smuggling is always ordered the confiscation of things object of the crime and things that are products of it or profit[56].

Further support for the relic's belonging to the Italian State is Article 91 of Legislative Decree No. 42 of January 22, 2004, which has already been extensively discussed. This article in fact states that things found underground or on the seabed belong to the State and are part of the property or unavailable heritage[57].

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[55] Law May 31, 1995 n. 218, Possesso e diritti reali, art. 51: "1. Il possesso, la proprietà e gli altri diritti reali sui beni mobili ed immobili sono regolati dalla legge dello Stato in cui i beni si trovano. 2. La stessa legge ne regola l'acquisto e la perdita, salvo che in materia successoria e nei casi in cui l'attribuzione di un diritto reale dipenda da un rapporto di famiglia o da un contratto".
Published in Gazzetta Ufficiale della Repubblica Italiana n.128 of June 3, 1995

[56] Approval of the Single Text of the Legislative Provisions in Customs Matters, Delle misure di sicurezza patrimoniali. Confisca, art. 301: "1. Nei casi di contrabbando è sempre ordinata la confisca delle cose che servirono o furono destinate a commettere il reato e delle cose che ne sono l'oggetto ovvero il prodotto o il profitto. 2. Sono in ogni caso soggetti a confisca i mezzi di trasporto a chiunque appartenenti che risultino adatti allo stivaggio fraudolento di merci ovvero contengano accorgimenti idonei a maggiorarne la capacità di carico o l'autonomia in difformità delle caratteristiche costruttive omologate o che siano impiegati in violazione alle norme concernenti la circolazione o la navigazione e la sicurezza in mare. 3. Si applicano le disposizioni dell'articolo 240 del codice penale se si tratta di mezzo di trasporto appartenente a persona estranea al reato qualora questa dimostri di non averne potuto prevedere l'illecito impiego anche occasionale e di non essere incorsa in un difetto di vigilanza. 4. Nel caso di vendita all'asta di mezzi di trasporto confiscati per il delitto di contrabbando, qualora l'aggiudicazione non abbia luogo al primo incanto, l'asta non può essere ripetuta e i mezzi esecutati vengono acquisiti al patrimonio dello Stato. 5. Le disposizioni del presente articolo si osservano anche nel caso di applicazione della pena su richiesta a norma del titolo II del libro VI del codice di procedura penale".
Published in Gazzetta Ufficiale della Repubblica Italiana n.291 of December 14, 1990

[57] Legislative Decree No. 42 of January 22, 2004 art. 91, Appartenenza e qualificazione delle cose ritrovate: "1. Le cose indicate nell'articolo 10, da chiunque e in qualunque modo ritrovate nel sottosuolo o sui fondali marini, appartengono allo Stato e, a seconda che siano immobili o mobili, fanno parte del demanio o del patrimonio indisponibile, ai sensi degli articoli 822 e 826 del codice civile. 2. Qualora si proceda per conto dello Stato, delle regioni, degli altri enti pubblici territoriali o di altro ente o istituto pubblico alla demolizione di un immobile, tra i materiali di risulta che per contratto siano stati riservati all'impresa di demolizione non sono comprese le cose rinvenienti dall'abbattimento che abbiano l'interesse di cui all'articolo 10, comma 3, lettera a). E' nullo ogni patto contrario".
Published in Gazzetta Ufficiale della Repubblica Italiana n.45 of February 24, 2004

3.4 American legislation applicable to the case

The fact that there is any obligation under international law for a State to follow up measures taken by another State, means that the State addressed should recognize and make effective the foreign provision. For this reason, the execution of the order of confiscation of the Victorious Athlete is connected to the wider question of the recognition of the effectiveness to the rules of a foreign public law. Is it therefore possible to enforce Italian law abroad and more specifically in the United States?

Time has passed from a position which completely denied this possibility to a more flexible one, which allows, in specific cases, the recognition of effects to the rules of other legal systems which limit the availability of cultural goods. The case, as is well known, was decided in Italian Courts and not in the US Courts, looking only at the application of Italian law in this matter and punishing its violations by the Getty Museum.

The 2019 judgment highlights this issue, which is a further reason for the Museum's complaint, that California law was not consulted. In view of the fact that the statue has been in american territory for several years, the law that should have been used for the resolution of the case should have been, according to the defenders of the Getty Museum, the Californian law in application of the principle of *lex rei sitae* provided for in art. 51 of Law No. 218 of 1995. This article states that the possession, ownership and other rights in rem of movable and immovable property are governed by the law of the State in which the property is located[58]. However, the type of dispute now in question does not deal with the legitimacy of the purchasing title through which the Getty Museum bought the victorious Athlete. Therefore, the article is not suitable to justify the application of Californian law in place of the Italian one.

In order to facilitate the return of cultural objects considered to be publicly owned under the legislation of the country of origin, American case law suggests invoking the principle of respect for the inherent authority of a sovereign nation in accordance with the Act of State doctrine. According to this doctrine, the American courts should not review the measures by which the foreign state, in the exercise of its sovereign powers within its territory, attributes the ownership of a certain categories of property. In fact, if a State decides to make public a particular property contained in its borders, the other States should ensure the defense of that decision[59]. However, Americans do not share the fact that the belonging of the Victorious Athlete to Italy derives from the fact that the latter has been found within Italian national borders (having been found in international waters) For this reason the application of this principle is deficient.

[58] Law May 31, 1995, n. 218. Riforma del sistema italiano di diritto internazionale privato. Capo VIII, Diritti reali, art. 51: Possesso e diritti reali "1. Il possesso, la proprietà e gli altri diritti reali sui beni mobili ed immobili sono regolati dalla legge dello Stato in cui i beni si trovano. 2. La stessa legge ne regola l'acquisto e la perdita, salvo che in materia successoria e nei casi in cui l'attribuzione di un diritto reale dipenda da un rapporto di famiglia o da un contratto".
Published in Gazzetta Ufficiale della Repubblica Italiana n.128 of June 3, 1995

[59] P. Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, Connecticut, 2011, p. 197 ff.

Recently, American jurisprudence has tended to differentiate according to the very nature of the transfer of a cultural asset from one country to another. The infringement of a rule which in some way permits the export of the goods is not regarded as an offence by the American jurisprudence. However, the infringement of a rule which considers the requesting State to be the lawful owner of the property would have a greater weight. The transfer, which took place without the consent of the owner and without due control, would immediately take the characteristic of the theft.

The cases in which the American courts have accepted requests for the repatriation of cultural objects made by foreign States have been regulated by the National Stolen Property Act (NSPA) or the Convention on Cultural Property Implementation Act of 1983, which has already been discussed in previous chapters. I just want to point out that the NSPA prohibits the import of goods into American territory when this is contrary to the law and states that the imported material must be confiscated. The requesting State must prove that the State which held the property in question knew that it had crossed the border illegally.

CHAPTER 4

THE REGULATION OF UNDERWATER CULTURAL HERITAGE

4.1 The United Nation Convention on the Law of the Sea

As already said several times in the course of the dissertation, the trade in cultural goods is one of the three major illicit traffics of our time along with that of arms and drugs. Many of the artistic objects that become commodities for this type of trade come from the subsoil of the states, both of the land and of the sea. States have rights not only on the mainland, but also on a well-defined sea area which forms an integral part of the state territory. In general, if everything that belongs to the subsoil of a national territory belongs to the state in question, also everything that is found on the marine subsoil of the portion of sea on which the state has right to exercise its jurisdiction is public property.

States are often the protagonists of various maritime issues of legal nature, such as illegal migration, piracy and illegal sea trade. The need for a jurisdiction regulating the activities of states in territorial and extra-territorial waters is obvious. Drawing boundaries at sea may not be a simple operation but delimiting the geographical limits of the intervention of states is the first step to regulate their range of action. The juridical reference is undoubtedly the United Nations Convention on the Law of the Sea (UNCLOS III), an international treaty that defines rights and responsibilities of States in the use of the seas and oceans, defining guidelines governing the negotiations, the environment and the management of natural resources.

The definition of UNCLOS III took place as a result of a long process of negotiation between states which began in 1973. It took nine years to reach the signing of the above Convention which took place in Montego Bay (Jamaica) on 10 December 1982 and came into force on 16 November 1994. Nowadays, 166 States have signed the Convention, including the whole European Community. As far as the United States is concerned, although the Convention has been signed it has never been ratified by the Senate and therefore cannot yet be applied in the relations between the United States and the other signatory countries. On the contrary, Italy ratified the Convention with Law 2 December 1994, No. 689. The main concern of the United States was the protection of traditional fishing and shipping interests, which they did not want to restrict, particularly in a time when US policy was aimed at increasing wealth and maintaining national security, the promotion of public and private well-being and the expansion of community interests. For this reason, President Reagan and his administration rejected the Convention. The relationship between Italy and the United States, regarding the resolution of the Victorious Athlete's case, cannot therefore be regulated by that Convention.

In the twentieth century nations realized that, in light of the economic development on the maritime routes of the last post-war period, the concept of freedom of the seas seemed obsolete. This principle, which dates back to the 17th century, stated that national law was limited to sea bands extending from coastlines for about three nautical miles applying the principle of the "gunfire" developed by the Dutch jurist Cornelius van Bynkershoek. The sea area beyond this belt was considered "international waters", that is, property of no

particular state. The principle also required a widely shared revision to safeguard national jurisdiction over the exploitation of marine resources, mainly mining and fishing resources, beyond the three-mile limit. At the end of 40s, some countries began to declare unilaterally the extension of their international waters to 12 or, in some cases, even 200 nautical miles. In 1956, the UN held its first conference (UNCLOS I) in Geneva, Switzerland, after which were signed the following treaties in 1958: The Convention of the High Sea, The Convention on the Continental Shelf, The Convention on the Territorial Sea and the Contiguous Zone and the Convention on Fishing and Conservation of Living Resources on the High Seas. Despite being an important step forward, UNCLOS I left open the controversial problem of the breadth of territorial waters that displeased small states whose economies were based on coastal marine activities. A second Conference (UNCLOS II) was then convened in 1960, again in Geneva, but it was a failure because the rights of small states were not considered by the bipolar system existing during the Cold War period. A third and final conference was held in 1973 in New York. The work was complex and after nine years the Convention (UNCLOS III) was finally signed in Montego Bay on 10 December 1982.

Going into the details of the division of marine spaces envisaged by UNCLOS would risk to lose the main theme of the dissertation, it is sufficient to specify that the first 12 miles from the baseline are considered an integral part of the territory of the State so that States can exercise their plenty jurisdiction. In the following miles and depending on the type of area, the State continues to exercise its powers, but these powers become increasingly limited. In the contiguous area extending up to 24 miles from the baseline, for example, the coastal State retains the right to punish infringements committed within its territory or territorial sea and to prevent infringements of its laws or regulations in customs matters, tax, health and immigration. In the exclusive economic zone, the sea area extending for 200 nautical miles from the baseline, the coastal State can still exercise the right of exclusive exploitation of natural resources.

A major step forward achieved by UNCLOS III was the redefinition of international waters by passing from sea “of no one” to sea “of everybody”. The difference is substantial. On 17 December 1970 the United Nations General Assembly, by Resolution 2749-XXV[60], proclaimed the mineral resources lying on the seabed beyond national jurisdiction to be common heritage of humanity. These are mainly polymetallic nodules containing manganese, nickel, copper, cobalt lying above the ocean floor at depths between 4000 and 6000 meters. The prospects presented by these mineral resources, of considerable strategic value, have raised the question of the regime under which future exploitation must take shape[61]. The resolution provides the exploration and exploitation of the International Seabed Area through a specific international regime, based on an institutional mechanism established by means of an international treaty of universal and generally accepted character. The

[60] Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, in http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/2749(XXV)&Lang=E&Area=RESOLUTION
[61] T. Scovazzi, *Elementi di diritto internazionale del mare*, Milano, 2002, p. 111

Convention is very clear and speaks of mineral resources, which can be exploited by all states as belonging to the common heritage of humanity.

As regards the cultural heritage lying on the seabed of the high seas, the 1994 Convention is vague and ambiguous. There are only two articles dealing specifically with the subject: articles 303 and 149. The first states that States have an obligation to protect archaeological or historical objects found at sea and must cooperate to this end. The coastal State may consider that their removal without its approval is the cause of an infringement of the laws and regulations provided in the same article[62]. The second, which concerns the objects in the International Area, is a generic rule: "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin"[63]. States which are expressly mentioned in this article have a priority role in the protection of a collective interest and are those most directly linked to objects found at the bottom of the sea. Notwithstanding the existence of the two norms mentioned above, no provision of the Convention analyses archaeological and historical objects located at the bottom of the continental shelf. While it is certain that these objects do not fall within the sovereign rights of the coastal State, at the same time the question arises as to which regime is applicable in such a situation of regulatory vacuum. The easiest answer, but unfortunately less acceptable, is that there would be a sort of grey area, in which the traditional principle of freedom of the sea would apply[64]. In this situation, it would seem that the Convention on the Law of the Sea, apparently under the traditional principle of the freedom of the sea, protects hunters of marine treasures, either to the detriment of coastal States or States of cultural, historical or archaeological origin, which have a link with objects, or to the detriment of the interests of humanity as a whole. It would appear, therefore, that the Convention, instead of directly protecting historical and archaeological objects, would give priority to those interests of a private nature which often result in the looting and uncontrolled trade in goods which should belong to a common cultural heritage[65].

The international community seems to have only recently realized the immense value of the underwater cultural heritage, something which the smugglers have always had very clear. The UNESCO Convention on

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[62] United Nation Convention on the Law of the Sea, art. 303: "1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose. 2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article. 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges. 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 295 on December 19, 1994. Law December 2, 1994 n. 689
[63] United Nation Convention on the Law of the Sea, art. 149
Published in Gazzetta Ufficiale della Repubblica Italiana n. 295 on December 19, 1994. Law December 2, 1994 n. 689
[64] T. Scovazzi, *Elementi di diritto internazionale del mare*, Milano, 2002, p. 147
[65] T. ScovazzI, *Elementi di diritto internazionale del mare*, Milano, 2002, p. 149

the Protection of Underwater Cultural Heritage was signed only in 2001. This topic will be discussed in detail in the next section, for now it is good to remember that the importance of this Convention is given by the recognition of the immense intangible value of the underwater cultural heritage that far exceeds the economic one[66]. The Convention recognizes the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.

[66] N. Ferri, *The Right to Recovered Underwater Cultural Heritage: The Neglected Importance of Article 149 of the UN Law of the Sea Convention*, Borelli, Lenzerini (edited by), Cultural Heritage, Cultural Rights, Cultural Diversity, Boston, 2012, p.253

4.2 The UNESCO Convention on the Protection of Underwater Cultural Heritage

The failings of the Convention on the Law of the Sea if 1994 were remedied six years later, with the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage. The title outlines the very specific character of the Convention, which seeks to protect a specific aspect of international law: the underwater cultural heritage. As we have seen, the 1994 Convention dealt with the subject in a very vague and free interpretation. Only two articles were devoted to the aspect of the underwater cultural heritage and given the increasing importance of the issue in the consciences of the States, UNESCO championed itself to create a special protection regime.

Before going on with the analysis, it is important to clarify that the 2001 UNESCO Convention. does not determine property titles over underwater relics, but aims only at their protection as cultural heritage assigning to States the responsibility of control over different maritime zones.

The UNESCO Convention establishes a common standard for the protection of this heritage, providing preventive measures against the possibility of being plundered or destroyed. The Convention, which entered into force the 2nd January 2009, consists of a preamble, 35 articles and an annex. In the preamble of the Convention it is immediately emphasized that the underwater cultural heritage is considered an integral part of the cultural heritage of humanity and an element worthy of protection by virtue of its importance as historical and cultural element[67]. The Convention first clarifies that the underwater cultural heritage consists of all traces of human existence having a cultural, historical or archaeological character, partially or totally submerged for at least 100 years. The definition of underwater cultural heritage therefore includes sites, structures, buildings, human remains, sunken ships, aircraft and other vehicles sunk, along with their archaeological and natural context and finally prehistoric objects[68]. General principles of the Convention are set out in art. 2: the obligation for the States to preserve the underwater cultural heritage in the interests of the whole humanity and to take consequential measures; the in situ conservation of underwater cultural heritage as a priority option before authorizing or undertaking any action on it; the prohibition of exploitation of

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[67] UNESCO *Convention on the Protection of the Underwater Cultural Heritage,* preamble: "The General Conference of the United Nations Educational, Scientific and Cultural Organization, meeting in Paris from 15 October to 3 November 2001, at its 31st session, Acknowledging the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage, Realizing the importance of protecting and preserving the underwater cultural heritage and that responsibility therefor rests with all States, […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 262 on November 10, 2009). Law October 23, 2009, n. 157

[68] UNESCO *Convention on the Protection of the Underwater Cultural Heritage,* art. 1: "For the purposes of this Convention: 1. (a) "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 262 on November 10, 2009). Law October 23, 2009, n. 157

underwater cultural heritage for commercial purposes. Member States are also expected to monitor compliance with submerged human remains[69]. The Annex to the Convention contains 36 rules, consisting of very detailed practical provisions concerning activities aimed at the protection of underwater cultural heritage. They include rules relating to the construction of a project, guidelines concerning the competence and qualification of people required to carry out operations on underwater cultural heritage, methodologies on the conservation and management of sites.

The Annex to the Convention is defined as *Rules concerning activities directed at underwater cultural heritage*. It represents the ethical and operational code for underwater archaeology. Rules contained in it concern the design of the underwater archaeological intervention, the codification of the skills and qualifications required for the various operators involved, the management of funding, as well as documentation of the different operational phases. The 36 rules therefore provide a framework for responsible management of the submerged cultural heritage, both in the sea and in inland waters, and provide an operational scheme directly applicable to the different actions targeting the submerged assets. The regulation is today the reference document in the field of underwater archaeology. The Rules contained in the Annex must be considered as an integral part of the wider legal instrument of the 2001 Convention. For this reason, all the countries that ratify the Convention formally adhere to this regulation and undertake to harmonize their national legislation with such rules.

On April 8, 2010 the Convention and the Annex entered into force in Italy through Law n. 157 of October 23, 2009. The law, composed of 12 articles, contains a series of measures aimed at the practical implementation of the principles of the Convention in order to ensure an effective mechanism for the protection and promotion of the cultural riches present in our backgrounds. In fact, already before the entry into force of law 157/2009, the Code of Cultural Heritage and Landscape in art. 94 incorporated the provisions of the Convention and its Annex, as regards the archaeological and historical assets found in the area between 12 and 24 nautical miles[70].

Unfortunately, the 2001 Convention was not a great success for the international community. Nine states voted against the Convention, nineteen abstained. The main concern lays in the limits that the Convention would place on their scope as regards the rights and freedoms enshrined in the 1994 Convention. Its ratification process was therefore very slow, so much that the Convention entered into force only in 2009, after having

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[69] UNESCO *Convention on the Protection of the Underwater Cultural Heritage,* art. 2: "1. This Convention aims to ensure and strengthen the protection of underwater cultural heritage. 2. States Parties shall cooperate in the protection of underwater cultural heritage. 3. States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention. 4. States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 262 on November 10, 2009). Law October 23, 2009, n. 157

[70] Law February 8, 2006 n. 61, "Istituzione di zone di protezione ecologica oltre il limite esterno del mare territoriale".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 52 on March 3, 2006.

obtained the twentieth ratification. The 2001 Convention does not modify in any way the system of subdivision of maritime areas provided for by UNCLOS III but obliges states to regulate their activities in accordance with the rules laid down by the UNESCO Convention.

As Tullio Scovazzi states, the greatest demonstration of human civilization lies in the seabed. There are studies showing that in the past at least the 5% of the ships sailing every day foundered, sinking into the abyss and dragging with them immense treasures[71]. Today, states have increased their capacity to explore the seabed through technology. The will is to bring to light such objects of arts to welcome them into the cultural heritage of each individual state and of all humanity, but above all to avoid the illegal traffic of archaeological finds[72].

The Italian and the American regimes are different as regards also the aspect of the underwater cultural heritage, so much that it is not possible to rely on the Convention for the resolution of the Victorious Athlete's case, in fact the 2001 Convention does not deal with the issue of ownership of the cargo or the ships, but only with standards of protection. The Italian regime gives priority to the public interest of the State to protect the cultural heritage for the wellness of the national community. Any private activity involving cultural heritage must be authorized by the public authorities and in any case, this is not encouraged. In the United States, on the other hand, the courts apply the law of salvage" and the law of finds" to cases concerning underwater cultural heritage. In some countries, the concept of salvage relates to rescuing a ship from imminent danger. However, for the United States this consist also in the appropriation of old objects found abandoned on the seabed. For the American jurisdiction, this law is valid in all the seas and oceans around the world.

[71] P. Throckmorton, The Sea Remembers – Shipwrecks and Archaeology, Boston, 1987, p. 9
[72] T. Scovazzi, *The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage*, Borelli, Lenzerini (edited by), Cultural Heritage, Cultural Rights, Cultural Diversity, Boston, 2012, p. 267

4.3 Flying the State flag in the sea

When talking about nationality of a vessel or aircraft, reference is made to the criterion of linking such property with the legal order of a given state[73]: states, therefore, exercise sovereignty over those ships and aircraft flying their flag. It is to consider that the freedom of sea and air navigation belongs to the state under whose flag and responsibility the means of navigation move and not to the individual. Through registration in the state registries, as confirmed in the UNCLOS Convention, ships and aircraft are granted the nationality of the state[74].However, it should be noted that, as regards ships, the UNCLOS Convention in art. 93 states that such means of transport may fly the flag of other entities with legal personality under international law, such as the United Nations, its specialized agencies and the International Atomic Energy Agency[75].

On the attribution of nationality to ships and aircraft, the doctrine has emphasized that because of a strong public intervention in the transport sector, only one nationality can be granted to a ship and therefore stateless vessels cannot enjoy freedom of navigation[76]. About the possession of more than one nationality, the 1994 Convention expressly provides for the prohibition to the ship to own more than one nationality[77]. Likewise, in national law the navigation code states the prohibition of registration in Italian registers for those vessels that are already in possession of the nationality of other states[78].

Article 143 of the Navigation Code, modified by art. 7, legislative decree 30 December 1997, n. 457, converted into law 27 February 1998, n.30, lists the requirements for the application for nationality to the ship and states that “Rispondono ai requisiti di nazionalità per l’iscrizione nelle matricole o nei registri di cui all’articolo 146: le navi che appartengono per una quota superiore a dodici carati a persone fisiche giuridiche o enti italiani o di altri Paesi dell’Unione europea; le navi di nuova costruzione o provenienti da un registro straniero non

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[73] S. Zunarelli, M. Comenale Pinto, *Manuale di diritto della navigazione e dei trasporti*, Milano, 2016

[74] United Nation Convention on the Law of the Sea, art. 91: “1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect”.
Published in Gazzetta Ufficiale della Repubblica Italiana n. 295 on December 19, 1994. Law December 2, 1994 n. 689

[75] United Nation Convention on the Law of the Sea, art. 93: “The preceding articles do not prejudice the question of ships employed on the official service of the United Nations, its specialized agencies or the International Atomic Energy Agency, flying the flag of the organization”.
Published in Gazzetta Ufficiale della Repubblica Italiana n. 295 on December 19, 1994. Law December 2, 1994 n. 689

[76] Zunarelli, M. Comenale Pinto, *Manuale di diritto della navigazione e dei trasporti*, Milano, 2016

[77] United Nation Convention on the Law of the Sea, art. 92: “Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry”.
Published in Gazzetta Ufficiale della Repubblica Italiana n. 295 on December 19, 1994. Law December 2, 1994 n. 689

[78] Code of Navigation, art. 145: “Non possono ottenere l'iscrizione nelle matricole o nei registri nazionali le navi che risultino già iscritte in un registro straniero. Agli effetti degli articoli 149 e 155 del codice della navigazione possono ottenere l'iscrizione in speciali registri nazionali, le navi che risultino già iscritte in un registro straniero ed in regime di sospensione a seguito di locazione a scafo nudo […]”.
Approved with R.D. March 30, 1942 n. 327. Published in Gazzetta Ufficiale della Repubblica Italiana n. 93, April 18, 1942

comunitario, appartenenti a persone fisiche, giuridiche o enti stranieri non comunitari i quali assumano direttamente l'esercizio della nave attraverso una stabile organizzazione sul territorio nazionale con gestione demandata a persona fisica o giuridica di nazionalità italiana o di altri Paesi dell'Unione europea, domiciliata nel luogo di iscrizione della nave, che assuma ogni responsabilità per il suo esercizio nei confronti delle autorità amministrative e dei terzi, con dichiarazione da rendersi presso l'ufficio di iscrizione della nave, secondo le norme previste per la dichiarazione di armatore".

Requirements for obtaining the attribution of nationality vary according to the laws of the State: article 91 of the Convention of Montego Bay establishes the principle of the freedom of States to determine the conditions for registering ships in their registers[79]. It is well known that some States are particularly available and require flexible conditions to be classified as flags of convenience or shadow flags. This practice makes registration easier, where other countries have more stringent and binding rules, and it is often used to enjoy a favorable tax regime, even if compromising safety and working conditions on board.

The ITF (International Transport Workers Federation) constantly updates a list of countries that use their own flags for this purpose. Although there is no international definition of the necessary requirements[80], the UNCLOS Convention sets in article 91 that there should be an effective link between the nationality of the vessel and the State flag, i.e. the genuine link. However, there are several difficulties in the implementation of this principle since, in the absence of sanctions for ships flying flags of convenience, states have exclusive jurisdiction and do not allow any interference in the means of transport. The current trend of traditionally maritime states, used to stem the phenomenon of the flag of convenience, is to provide for international registers to be added to ordinary registers with less stringent requirements for the granting of nationality. Italy, with legislative decree n. 457 of 1997, converted into law n. 30 of 1998, has also provided tax and tax relief, as well as facilitations for the embarkation of non-Community seafarers. However, it should be noted that boarding on this international register is only permitted for vessels engaged in international trade.

Vessels are subject to the exclusive power of the flag state, thus representing an extension of nationality even outside the territorial waters. The principle of exclusive jurisdiction of the flag state, however, is subject to derogations when the ship enters the areas under the sovereignty of another coastal State. Exceptions are provided in cases of: piracy, since the pirate ship carrying out violence against other ships can be captured by each State and can be subject to repressive measures; war smuggling in peacetime, where a civil war is being waged, the State may visit and capture, also in international waters, any ship intending to support the

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[79] United Nation Convention on the Law of the Sea, art. 91: "1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship. 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 295 on December 19, 1994. Law December 2, 1994 n. 689

[80] To underline a failed attempt due to lack of ratifications: the Geneva Convention of 7 February 1986 on the conditions of registration of ships.

insurgents; visiting rights, which allow warships to see ships on the high seas where there is a well-founded suspicion that the ship is engaged in piracy or slave trading, or which would trigger unauthorized radio and television broadcasts, or that is using the flag fraudulently.

Article 4 of the Navigation Code reads as follows: “Italian ships on the high seas and Italian aircraft in place or space not subject to the sovereignty of any State are considered as Italian territory”. In the case of the Victorious Athlete, the problem lies in the fact that this was not found within the national borders, that is within the territorial sea limit (which was at that time 6 nautical miles from the Italian coast) but was found in international waters. Assuming that the object was found in the high sea, it is necessary to consider the applicability of the norms of the international law of the sea. At the time of the discovery, however, the 1982 Montego Bay Convention and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage were not yet in force. To be precise, not even the previous Geneva Convention of 1958 on the high seas had entered into force for Italy at the time of the recovery of the statue and in any case such agreement does not contain any specific rules on underwater archaeological finds, but only very general principles on the freedom of the high seas, which reflect the content of one of the oldest customs of international law.

However, rules of the Convention on the high seas were invoked by the court to derive from them general principles applicable to the case, including that of freedom of the seas and that of the submission of the ship in international waters to the governing power of the flag State. It follows that the freedom of use of the international sea is ultimately guaranteed by the principle of common international law that each vessel is subjected exclusively to the power of the State of which it is flying the flag, so that it can be established that in the event of the discovery on the high seas of marine wrecks of historical and artistic value by a vessel flying the Italian flag, as in the present case, Italian law and, in particular, national rules on cultural goods shall apply[81]. In order to be able to apply national law and to assert that the object entangled in the network is property of the State, a very broad interpretation of the concept of national territory has been used, leading to the conclusion that accessories of the boat, such as fishing nets as appliances of the hull, are in turn considered extensions of the Italian territory when navigating the high sea (article 4, Navigation Code).

The sense of protecting the hidden cultural heritage lies in the fact that both, states and private individuals have a right to claim its ownership. Although the priority should be to protect this cultural heritage with respect for the whole of humanity, the interests of those who claim its ownership cannot be neglected. There are no legal instruments which absolutely state that the right of public property over cultural objects must be more important than the preservation of such objects as an expression of culture and tradition[82].

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[81] Pesaro Tribunal, Ordinance of June 12, 2009 available at http://www.tribunale.pesaro.giustizia.it/

[82] P. Vigni, *Historic Shipwrecks and the Limits of the Flag State Exclusive Rights, The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage*, Borelli, Lenzerini (edited by), Cultural Heritage, Cultural Rights, Cultural Diversity, Boston, 2012, p. 279

4.4 The evolution in the protection of underwater cultural heritage

When talking about objects of great artistic and historical value, such as the underwater cultural heritage, generally there are two visions about their legitimate ownership: the international vision, which embraces the idea that cultural property is cultural heritage of humanity; and the national one, based on the fact that cultural property belongs to its territory of origin and must remain there. This also leads to two other different approaches to the circulation of cultural goods: on one hand, the international vision encourages trade and the movement of works of art within the limits of legality; on the other hand, the national vision totally discourages this practice and embraces the idea that all objects belonging to the national cultural heritage should remain within its borders[83].

International law protecting cultural heritage has developed steadily throughout the second half of the 20th century, above all through the development of contract law which accompanied and determined the process of the so-called internationalization of cultural goods. In the specific case of the underwater cultural heritage, however, the situation is characterized by a slower evolution. It took many decades to have a more clear and accurate discipline concerning the underwater cultural heritage at a supranational level, that is today an integral part of the so-called heritage of mankind. Thanks to the activity conducted by UNESCO in the last 20 years, which resulted in the mentioned adoption of the Paris Convention of 2001, the underwater cultural heritage is currently subject of great interest for the whole international community, as well as for individual states.

The awareness of the large number of archaeological and historical objects located on the seabed, as well as the rapid evolution of technology and modern underwater research equipment have undoubtedly made easier in recent decades to recover objects even at great depths. Current rules are the result of a rather complex development of national and international laws. In order to understand the regulatory structure on which the law of the sea applied to the underwater heritage, it is necessary to examine some of the most important historically attitudes manifested by States at the beginning of the modern age regarding the right of appropriation of underwater and recovered goods.

Initially the rule in the management of the relations between States involved in the discovery of a buried good on the seabed was expressed by the theory of the domination of the seas, under which the major maritime powers extended their sovereignty over coastal waters and hence over objects found there by virtue of mere superiority of their naval forces. This rule ended up imposing for a long time the monopoly of few States in the exploitation of the sea, first to restricted zones and gradually to more and more extensive areas. The theory of the domination of the seas was gradually replaced by the principle of the freedom of the seas. This principle was not accepted peacefully, since it was difficult for states traditionally enjoying exclusive access to sea areas to agree to relinquish control over them. However, in the earliest period between the beginning of the 20th

[83] A. Lanciotti, *The Dilemma of the Right to Ownership of Underwater Cultural Heritage: The Case of the "Getty Bronze",* Borelli, Lenzerini (edited by), Cultural Heritage, Cultural Rights, Cultural Diversity, Boston, 2012, p. 301

century and the age of decolonization, the principle of freedom of the seas undoubtedly dominated international law, by promoting and stimulating trade between colonies and countries of origin. Since the end of the Second World War, however, the dichotomy which foresaw the exploitation of the sea not only as a commercial or military communication route, but also as a source of biological and mineral resources was accentuated, leading individual governments to pay ever greater attention to all the gains that could be derived from it. In fact, the decrease of resources on the mainland and the increasing push to look for new raw materials led economic operators to value the mineral potential present in the marine backdrops and to invest in the development oceanography and extractive techniques. At this point the principle of the freedom of the seas, rather than representing an opportunity for states, began to constitute a limit to the exploitation of resources.

The principle of the freedom of the seas began to be mere theory, because it was penalized by restrictions on exploitation imposed on individual states by international law which had meanwhile been trained to regulate the matter. It has been transformed into a residual criterion valid exclusively for the open sea. In recent years the international community has tried to face the changes in the interests of states in a renewed scenario in which the conflict to be reconciled was between the industrialized and the developing countries, and therefore between countries able to access the resources of the seabed and those that do not enjoy this faculty[84]. Difficulties encountered in the effort to protect national interests of all the countries have progressively accelerated the process of internationalization of the marine spaces, leading to consider the resources of the seabed common heritage of mankind. But the complexity of the interests has led the international community to regulate the matter of exploitation, protection and conservation of marine environments and underwater cultural heritage in imprecise and confusing way.

It is clear that, since this is a fundamental part of the world heritage, the underwater heritage deserves universal protection, or an organic and more rational discipline in a forward-looking perspective for the protection of the general interest of all people and states. This is the view of international organizations such as the UN, UNESCO and the Council of Europe. At the same time, however, there is a substantial difficulty in ensuring compliance with these special provisions, since the exploration of the submarine heritage requires a rather complex control activity to be carried out in practice. Many of the submerged objects that represent the expression of the underwater cultural heritage go back to populations no longer existing and very often without a real heir, lacking in several cases an historical and cultural continuity with a modern state.[85]

First enemies of underwater archaeological heritage are the so-called wreckers. They are divers dedicated to the hunting of submerged wrecks to retrieve ancient and precious objects for profit or for personal collecting. They are the equivalent in the sea of those people in the mainland hunting for antiquities to exploit

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[84] S. Matysik, *Legal problems of Recovery of Historical Treasures from the Seabed*, Scientific and Technological Revolution and the Law of the Sea, Warszawa, 1974, p. 141

[85] F. M. Aburn, *Deep sea Archaeology and the Law*, International Journal of Nautical Archaeology and Underwater Exploration, Hingham, 1973, p. 159

their cultural economic value. In both cases, these are obviously illegal activities. With reference to underwater archaeology today this phenomenon is better defined with the expression "archeomafie": these are criminal organizations operating in clandestine excavations, theft and international illicit traffic of works of art and sunken archaeological finds. They take advantage from the difficulty of carrying out a close control of the coasts by the national authorities to conduct raids of archaeological finds and works of art on the seabed. The reason is that these goods, unknown until they are found, escape research because they are never catalogued. In some countries deprived of the maritime coast, private companies have been set up to equip maritime shipments for the recovery from the sea floor of sunken and remained assets at the bottom of the seas. Such companies in most cases are driven by the sole purpose of profit, so that the need to guarantee the integrity of the goods themselves becomes superfluous. This fuel the phenomenon of the circulation on the international market of works of art and archaeological finds of unknown origin, euphemism used by foreign museums to define artifacts almost always of illicit origin.

Article 303 of the UN Convention on the Law of the Sea merely lays down a very general precept, providing for all Member States a mere obligation to protect the underwater heritage, supplemented by an equally vague obligation to cooperate to this end. The content of article 303 could not offer an instrument for the real protection of the underwater heritage, since no further mechanism was provided to prevent or repress illegal removals or illegal commercialization. A decisive step is taken in 2001 with the UNESCO Convention on the Protection of the underwater Cultural Heritage. According to article 7 of the UNESCO Convention, coastal States in the exercise of their sovereignty have the exclusive right to legislate on this matter and the power to order the recovery of submerged wrecks[86]. The recognition of these powers is affirmed in a declarative principle of state prerogatives already customarily acquired by the coastal state itself.

The need to set up a system capable of guaranteeing the protection of submerged items was born only with the UN Convention on the Law of the Sea, which persuaded States Parties to take action in this regard. This is the result of the choice to use in article 149 the expression of common heritage of mankind regarding underwater heritage, involving all states in the general obligation to protection. Article 149 of the Convention establishes the obligation for States Parties to preserve or dispose of the goods found in the International Area in the interest of mankind, giving priority, where possible, to the law of the State of cultural origin and, in alternative, to that of historical or archaeological origin. With regard to the criterion of "State of origin", this presents interpretative doubts: with this expression it is possible to refer to the State in whose territory the good existed, as to the national State of the author or of that in which the particular culture of which the good is expression has developed, or rather of those States that can be considered successors of that culture.

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[86] *UNESCO Convention on the Protection of the Underwater Cultural Heritage*, art. 7: "1. States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 262 on November 10, 2009. Law October 23, 2009, n. 157

Within the most important principles enshrined in the 2001 UNESCO Convention and better regulated in the Annex, reference should be made to the obligation to preserve the underwater cultural heritage *in situ* as a preferential option and to the prohibition of commercial exploitation of the underwater cultural heritage. The preference for the conservation *in situ* of the cultural heritage found on the bottom of the seas is motivated by the desire to respect the environmental and atmospheric context in which the cultural good is found. Water in fact, also according to the most recent methodologies of underwater archaeology, can preserve the item in a sort of temporal capsule that better preserves its most peculiar characteristics. The principle of the *in situ* conservation is an archaeological translation of the best known precautionary principle that has emerged in the international law of environment: facing the uncertainty about the consequences of a removal of the submerged archaeological object, it is preferable a careful management, based on the study and better management of the finding in its natural environment[87]. From a strictly legal point of view, this principle assesses the protection of underwater cultural heritage *in situ* as a priority option, at least if no intervention on heritage is allowed under certain conditions. However, there are exceptions to this principle. It is expressly established that recovery can be carried out when justified by the aims of scientific research and in order to guarantee the maximum and definitive protection of the patrimony[88]. One of the arguments put forward against the principle of *in situ* conservation was based on the belief that a wreck exhibited in a museum was without doubt safer, from the point of view of protecting attempts to plunder, than the seabed .However, practice has shown that *in situ* conservation is indeed a preferable method.

[87] G. Le Gurun, *La métamorphose encore inachevée du statut des biens culturels sous-marins*, Parigi, 2002, p. 358
[88] G. Carducci, *La Convenzione UNESCO sul Patrimonio Culturale Subacqueo*, Milano, 2002

4.5 Some of the most relevant juridical cases on underwater finds

In the course of the last two centuries there have been cases of finds of ancient relics on the bottom of the oceans than turned into objects dedicated to circulation activities and illicit trade, missing at the time of their discovery any relevant legislation. However, even after the consolidation of a regulatory system to protect underwater cultural heritage, there have been cases of friction between states or between states and private entities for the appropriation of artistic objects lying on the bottom of the sea. This paragraph wants to narrate some of the most relevant cases similar to the finding the Victorious Athlete, in order to understand how jurisprudence has behaved relatively to each of them. It is important to clarify that 2001 UNESCO Convention does not determine property titles over archaeological underwater items but aims only at their protection as cultural heritage by setting responsibility of control over different maritime zones.

The first case I would like to examine is the one that caused in 1864 the recovery of the historic ship *Alabama*, sunk 7 miles from the French coast during the War of secession. In 1936 an English diver, William Lawson, recovered from the seabed of that area a brass bell bearing the engraving "C.S.S. Alabama". Lawson traded the bell with the owner of a bar in the Island of Jersey, Great Britain, for some drinks. The island was bombarded some time later and the bell disappeared. It reappeared only in 1990 during an auction in New York City, belonging to an antique dealer, Richard Steinmetz, who claimed to be able to prove his rightful ownership, having purchased it from another antique dealer. But the sale of the bell was suspended after the claim of the ownership by the American government. The government cited as motivation the fact that American state property on warships is never subjected to limitations, contradicting the thesis of the antiquarian according to which at the time of the discovery the war vehicle of the American army was only a wreck and no longer a ship. The District Court of New Jersey, and then the Court of Appeal of the Third Circuit, accepted the claim made by the state, given that the American Constitution clearly states that the property of the State always remains so, unless Congress explicitly renounces to[89]. Therefore, the fact that this artifact was found in the seabed was considered not relevant. At the time there was not in fact a discipline dedicated to the underwater cultural heritage, such that any further observation about the area of discovery or about the possibly of an historical and cultural link with another State was not taken into consideration.

The one proposed represents only one case in many other existing findings of archaeological underwater objects that have aroused the interest of the international community to establish an adequate and universal protection system. Another case that contributed to fuel the conviction of the international community to intervene in the regulation of the matter related to underwater objects, is that of the discovery of the *Titanic*. The Titanic sank on April 12,1912 in Newfoundland. It was discovered at great depth only in 1985 thanks to very complex techniques and research conducted by an American private company of a finder of submerged

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[89] Sent. United States of America v. Richard Steinmetz, in West's Federal Reporter, Vol. 973, 1992, p. 212.
Available at https://law.justia.com/cases/federal/appellate-courts/F2/973/212/386226/

treasures, Mr. Ballard. According to the American jurisdiction, the company that performs the recovery of a good of historical or cultural value obtains the rights of exception on the object, opposable against anyone who makes further and different claims. The judge ordered to perimeter the area around the wreck for a square of 100 nautical miles per side to define the space within which the company of Mr. Ballard could claim rights on the wrecks, as furniture and miscellaneous furnishings, which may have been found as a result of continued research. It should also be noted that the company owning the *Titanic* was still in existence at the time of its discovery. However, Mr. Ballard had to contend with the insurance company of the ship, which had acquired ownership rights on the *Titanic*. The dispute ended with an agreement between Mr. Ballard and the insurance company which gave the former all the rights on the ship. On this occasion too, in the absence of an international regulation of the matter, the issue was resolved trying to satisfy the economic interests of both parties. The decision of the judge is not compatible with international law, since the principle of the freedom of the seas does not allow the affirmation of exclusive titles on such a large free sea area of 100 square miles.

One of the most similar cases to that of the Victorious Athlete, who has seen again Italy involved, is that of the Venus of Cyrene. Although this is not a relic found at the bottom of the sea, I believe that the analysis of such a case is useful in order to understand the dynamics in the relationships between states and relative interests when they are subjected to the obligation to return a good expression of the cultural heritage. The object of art in question consists of an acephalous marble statue of Aphrodite, named Venus of Cyrene. It is the Roman copy of a statue from the Hellenistic age that belonged to the statuary complex of the Great Baths of Cyrene. The statue was recovered by the Italian troops in 1913 during the military occupation of the Cyrenaica and transferred in Italy in 1915 in order to preserve it from the risk of destruction during the war period. With respect to the period in which the work of art was discovered, the Italian Court considered that the assumption that the statue had been found in national territory was not configurable. In fact, the Royal Decree of annexation of November 5, 1911, n. 1247 (later converted in law 25 February 1918, n. 82) qualified the Tripolitania and the Cyrenaica Italian possessions. Only with the Treaty of Peace between Italy and the Ottoman Empire of October 18, 1912 (executive in Italy by law of December 16, 1912 n. 1312) Turkey ceded to Italy the Tripolitania and the Cyrenaica. That Treaty was therefore not sufficient for the transfer of Italian sovereignty to the territory, since there was no effective control of these regions until 1920. The alleged Italian sovereignty over Libyan territory did not exist at the time of the discovery. It should be borne in mind that the Minister for Cultural Heritage and Activities of Italy, by decree of August 1, 2002[90], in execution of the restitution agreement concluded between the Italian State and the Libyan State, ordered the transfer of the Venus of Cyrene from the Italian territory to the Libyan one, no longer considering interest of the State to maintain its ownership.

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[90] Agreement signed by Corte dei Conti on August 8, 2002 and published in Gazzetta Ufficiale della Repubblica Italiana n.190 of August 14, 2002

One aspect of the story to address is the one related to the linkage between the good and its culture of origin or even State of origin. In fact, it is not clear which would be the state of belonging of the good, since at the time of its discovery there was no Libyan state, nor was there any other State exercising its power of government over the territory, excepted Italy. The delicate point of the whole story is in fact linked to the colonial domination and to the obligation to return the goods stolen by the colonial power during this dominion. If an exception is made for cultural goods stolen during military occupations, for which the obligation to return has been made clear by numerous international treaties, e.g. treaties of peace at the end of the conflicts, for cultural goods stolen during the colonial domination there is not an international legislation nor a general consensus on how to proceed with the restitution[91].

Cannot fail to mention also the case of Melqart of Sciacca, which has already been analyzed in detail during the course of this dissertation. Cases of underwater and abandoned vestiges found along Italian coasts have been numerous over the years, especially in view of the geopolitical position always held by Italy. As already mentioned, the case represents an important legal precedent regarding the elaboration of the theory that also the accessories of the ship are to be considered national territory, as well as the ship itself[92].

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[91] A. Albano, *La restituzione alla Libia della Venere di Cirene*, Innovazione & Diritto, Napoli, 2008

[92] T. Scovazzi, *Il saccheggio del patrimonio culturale sottomarino*, U. La torre, G. Moschella, F. Pellegrino, M.P. Rizzo, & G. Vermiglio (edited by), Studi in memoria di Elio Fanara, Milano, 2008

CHAPTER 5

THE ITEM TRANSFERRED ABROAD AND THE REGULATION OF ITS OWNERSHIP

5.1 The application of the Italian laws on ownership for the resolution of the case

Identifying the competent law and the competent forum to regulate and adjudicate the ownership of the statue was not a simple obstacle to overcome. The controversy was about the choice between the Italian and the American laws on the right of ownership. However, the case is not discussing the ownership of a common object, but of a precious statue with an immense cultural value that is presumed to be illicitly transferred far from its national borders, the Italian ones. After the recovery, the bronze statue has changed different owners and it has turned for different countries. This means that each state in which the Victorious Athlete has sojourned could have claimed its licit possession. It is easy to understand that this would create not indifferent problems to the resolution of the case. What really counts for the judgment are not the sojourning countries, but the one of origin and the one that now is detaining the statue in its territory one of its nationals is convinced to have the legitimate title to it. In the two previous examined judgments (2010 and 2019) the judge has assumed that the concept of national territory was extended also to the extensions of the fishing boat, so that the net has to be considered Italian territory. This leads to the fact that the utilization of the Italian legislation for the resolution of the case is given for granted, not without discontent of the American part.

In the 2010 ordinance the judge has focused the attention on the individualization of the norms of the national legislation applicable to the case. There is one norm from the Italian jurisprudence that suits the case very well. The judge stated that the actual holder of the object did not acquire the ownership of the Victorious Athlete according to articles 51 and following of the law n. 218/1995[93] on the reform of the Italian system of private international law. The 1995 law was signed the 31th May 1995. Art 51 states as follow:

"Il possesso, la proprietà e gli altri diritti reali sui beni mobili ed immobili sono regolati dalla legge dello Stato in cui i beni si trovano. La stessa legge ne regola l'acquisto e la perdita, salvo che in materia successoria e nei casi in cui l'attribuzione di un diritto reale dipenda da un rapporto di famiglia o da un contratto".

Art. 51, Law 31th May 1995

Nevertheless, from the point of view of the international law, the moving abroad of an item subjected to limits of inalienability can allow to elude the guardianship predisposed by the State of its precedent situation, determining the competence of another law[94]. In the 2010 decision it is possible to read that in the procedure in matter, the individualization of the applicable judicial regime is given by the fact that the good was found in Italy, before its transfer to foreign countries. The law of reference also under the civilian profile is therefore

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[93] Pesaro Tribunal, Ordinance of February 10, 2010 available at http://www.tribunale.pesaro.giustizia.it/

[94] A. Lanciotti, *Patrimonio culturale sommerso: tutela dei beni archeologici e limiti alla cooperazione internazionale*, Archivio Penale - Rivista quadrimestrale di diritto, procedura e legislazione penale speciale, europea e comparata, Pisa, 2011

the Italian one, even if currently the sculpture is set abroad. Art. 51 of the law considered before states as criterion of individualization of the regulatory law on the right of ownership the place of situation of the good. Nevertheless, the judge has not taken into consideration that the place of situation of the item is a varying condition if related to a mobile good, since this, for its nature, can be easily moved from one State to another with the consequent change of the regulatory laws on its possession. It so determines a sequence of laws not only in time, but also in space and in such cases to come to a solution references are made to the law of the place in which the item is found at the moment in which the fact or the action of transferring the good happened.

During the purchase of the statue by the American museum, the Victorious Athlete was in a foreign territory. The statue has touched different places before landing in the United States. It would seem in fact that it has travelled among London, Munich of Baviera and Brazil to finally arrive in Boston. Both the contract of purchase by the Getty Museum and delivery of the statue did not happen in Italy. These circumstances set some obstacles to the individualization of the regulatory law on the ownership. The Italian State could be considered owner of the statue by a native title, but actually also this statement can be doubted. According to the international law of the sea and to the principle that the high sea is not subject to the ownership of any state, the Victorious Athlete should have been considered heritage of the mankind. Subsequently, the statue has been object of various transfers and probably also of various trading in foreign territory and such purchases will surely have been regulated by the law of the territory in matter. It cannot be certainly pretended that the foreign State in which the contended good is found during the application of repatriation has to respect the ties of no-trading of cultural items imposed by the Italian legislation, unless the State in matter is not tied to Italy by an international treaty that force in such sense. Art. 51 of the 1995 law itself at the second paragraph underline as the law in the matter regulate the purchase and the loss of the items, save for the existence of specific family relationships or contracts regulating such actions.

In addition, at the time of the transfer of the statue, the Directive 93/7 EEC of the Council of 15th March 1993 was not in force[95]. This Directive has introduced a uniform procedure of recovery of cultural items transferred from one country to the other of the European Community. The Directive establishes the obligation for the member State to return that cultural good that has been transported illegally on its territory and that results to belong to the cultural heritage of another member State. Nevertheless, this Directive, as in general the European legislation, has value only for member States of the European Union and it is not applicable in the relationship whiten a State member and the United States.

The national protectionist legislation on archaeological items is applicable also when the crime of clandestine export has been partly perpetrated on national territory. However, someone affirms that the regulatory law on

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[95] The amendment to this Directive was published in *Gazzetta Ufficiale della Repubblica Italiana* July 31, 2014 n. 57. It concerns the Directive 2014/60/EU of the European Parliament and of the Council of May 15, 2014 on the return of cultural objects unlawfully removed from the territory of a member state, and amending Regulation (EU) n. 1024/2012 (Recast).

possession and ownership does not necessarily lead to the application of the *lex fori* when the contended good is living with valid title in a foreign country. As Alessandra Lanciotti comments, the Italian law could have been applied without contestation if the legislation safeguarding the cultural heritage had belonged to the category of norms of necessary application, that are those Italian norms that must be applied despite the call of the foreign law[96]. The sense of the classification of such norms in this way means the prevalence of the public interest regarding national cultural objects. The presence of classified norms as norms of necessary application stops any reference to the foreign law, but this is not the case. An entire chapter of this dissertation is dedicated to the discussion around the fact that a peremptory force should be granted to the laws protecting the cultural heritage of the State, both in the national and international vision. States always demonstrate to be disposed to fight for their identity and for the safeguarding of their cultural items that are gladiators of their national history and evolution, the Victorious Athlete case is a vivid example of this, but sometimes national jurisprudence has hard time to find universal laws and principles driving decisions on cultural heritage in this sense.

The 1970 UNESCO Convention is central in the resolution of this case. Both the United States and Italy are parties of the Convention and the treaty commits the contracting parties to return the cultural goods illegally exported. The question is whether under this Convention the Victorious Athlete has been the subject of illicit export and illicit import. With reference to the restrictive norm of article 51 of the law 218/1995, the analysis is on the applicability of the 1970 UNESCO Convention.

[96] A. Lanciotti, *Patrimonio culturale sommerso: tutela dei beni archeologici e limiti alla cooperazione internazionale*, Archivio Penale - Rivista quadrimestrale di diritto, procedura e legislazione penale speciale, europea e comparata, Pisa, 2011

5.2 The concept of the due diligence of the purchaser

One of the main charges against the Getty Museum by the Italian State regards the conduct of the museum at the moment of the purchase of the statue. According to the Italian legislation, the Getty Museum is guilty of not having exercising due diligence in purchasing the work of art. The Museum is in fact accused of not having ascertain itself about the nature of the origin of the statue. Before purchasing an object of art with some value, it is good to take information about the provenience of such item and to take all the necessary measures to guarantee the legality of the transaction.

Objects of arts are without any doubts within the most desired prays by criminal organizations, being cultural objects sources of huge and illicit gains. Non all the objects of art are transferred illicitly from one country to the other, others follow the way of the legality. Such objects are sold with valid title attesting the legality of the transaction, that could be a purchase or a donation. The issue of the valid title for the detention of an object of arts will be developed in the following paragraph. When buying an object of art, of any type or value, fundamental is the ascertain that such item has not been stolen or illegally exported from its country of origin to other places. Sometimes this evaluation is not easy to conduct, but to be considered in good faith is enough to demonstrate to have had the intention to act in such sense. A behaviour demonstrating good faith could be, for instance, the consultation of a catalogue of stolen works of art or asking for some counsels to Carabinieri.

For what concerns the international law, juridical references are to be found in two different Conventions: the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* of 1970 and the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* of 1995. The 1970 Convention establishes a system of international cooperation to prevent and combat the theft and the illicit traffic of items belonging to the cultural heritage of the states adhering to the Convention. Italy has authorized the ratification and given execution to the Convention with the law n. 873 of October 30th, 1975. The Convention entered into force in Italy on January 2nd, 1979. Art. 1 gives a detailed definition of what is a cultural property[97], art. 6 establishes a system of valid export certificates[98]. Art. 7 is enlightening for the case in question. It poses the obligation for the states to introduce measures act to

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[97] UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* del 1970, art. 1: "For the purposes of this Convention, the term `cultural property' means 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 which belongs to the following categories […]".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 49 on February 24, 1976

[98] UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* del 1970, art. 6: "The States Parties to this Convention undertake: (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations ; (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate; (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 49 on February 24, 1976

prevent the purchase by museums or similar institutions of works of art illegally exported from one state part of the Convention to the other. It establishes also the obligation, under the specific request of the state of origin, to return the cultural object illegally exported. A compensation is provided to the innocent purchaser extraneous to the crime[99]. Such article specifies that the prohibition of purchase illegal exported works of art is directed only to museums and similar institutions. The individual person is not mentioned. However, this is not the only weakness of the Convention. Besides not involving individuals in the hypothesis of theft of illicit transfer, the disposition about the compensation to the innocent purchaser is vague and no criterions to define the amount of such compensation are established.

The 1995 Convention was meant to fill such gaps. The UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* of 1995 clarifies the issues of valid title for the detention of a work of art and of the involvement of individuals in the crime of purchasing stolen or illegally exported cultural objects. Art. 3 reiterates the concept that who is in possession of a stolen or illegally exported work of art has the obligation to turn it back to the legitimate owner[100]. However, it is possible that the purchaser is in good faith. This possibility is demonstrated by the existence of some valid title of the transaction, as a contract or a donation. Second paragraph of the mentioned article specifies that every archaeological object illicitly excavated from the national soil must be considered stolen to the national heritage. What belongs to the national soil is characterized by the publicity of its nature. The purchaser, before proceeding with the acquisition of a work of art, must exercise due diligence. If it is proved that the purchaser has act in such sense, but the objects falls in the category of stolen or illegally exported cultural items, the purchaser is in good faith. Although this one is obliged to return the object, the right to a compensation is granted. The 1995 Convention established also the time for the restitution of the works of art: with some exception, in general the object must be returned within three years after the legitimate owner claims the object back.

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[99] UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* del 1970, art. 7: "The States Parties to this Convention undertake: (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; (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution; (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 49 on February 24, 1976

[100] UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* del 1995, art. 3: "(1) The possessor of a cultural object which has been stolen shall return it. (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 153 on July 2, 1999

In the case of the Victorious Athlete, the Getty Museum was denied the possibility to classify itself as innocent purchaser in as much as the judge did not recognize due diligence at the moment of the acquisition of the statue. In the 2019 judgment, the one replying to the petitions of the Getty Museum against the 2018 ordinance, the seventh reason of the contestation by the museum was rejected exactly for this rationale. In 2018 the Court of Pesaro retained the mala fides of the Administration of the museum in buying the statue. Consequently, the Getty Museum was totally denied the extraneity to the contested crimes. The defence of the museum retained that the due diligence of the Administration in the moment of the transaction was demonstrated by the fact that they asked some specialists about the licit origin of the statue. However, the judge recognized that such individuals acted without any doubt in the interest of the purchaser incentivizing the transaction within the Getty Museum and the collector. The information that the Getty Museum collected about the origin of the statue were to be considered not impartial or reliable. In fact, the conduct of the representatives of the museum was evaluated as superficial. Moreover, although the previous negotiation for the purchase of the statue were interrupted because of the excessive economic request but also because the partner of the Getty Museum, the New York Metropolitan Museum of Arts, raised some doubts about the licit provenience of the statue, the Administration of the Getty Museum deliberated as well for the purchase of the object, reassured by the legal counsellors of the selling part. Asking some advice about the purchase of an object to people gaining advantages from such transaction is considered a behaviour lacking intelligence, even more if there is the possibility of committing a crime. The only information the museum collected about the statue originated from such source and so it is not possible for the Getty Museum to avail itself of the position of innocent purchaser for the purpose of the valid acquisition of title over the contested cultural object.

There is an aspect of the 1995 UNIDROIT Convention to consider: article 3(2) provides that a cultural object is to be considered stolen if acquired from illegal archaeological findings and if such nature of stolen is consistent with the law of the state where the archaeological object was found[101]. In the case of the Victorious Athlete, the judge did not examine this hypothesis even if Italy considers the statue found at sea as part of the national patrimony and its illegal export is equivalent to theft.

[101] *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects del 1995, art. 3: " (2) For the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place".*
(2) For the purposes of this Convention, a cultural object which has been unlawfully
excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.

5.3 The circulation of cultural objects in the market of goods

When talking about the circulation of cultural goods, in a certain sense the goods in question are included under the category of "merchandise". As all goods circulating and transiting from one state to the other, also the objects of arts need a valid certificate for such movements. However, the circulation and sale of works of art do not follow the same procedures of a simple commodity. The issue is much more delicate.

Rules about the circulation of goods differ according to the territory. Within the European Union, the question of the assimilation to "merchandise" of cultural goods was first dealt with by the Court of Justice in its judgment of 10th December 1968[102], which still is the expression of the European Court's guidance in this matter. The judgment put an end to a long-standing dispute between Italy and the European Community, which arose in 1960 concerning the compatibility with the EEC Treaty of a progressive tax (from 8% to 30% of the commercial value of the asset) provided by the Italian law in the event of an object of art leaving the Italian territory[103]. Italy, which on several occasions had been asked to abolish this tax in the exports to other Member States, argued in its submissions to the Court of Justice that the tax had no fiscal purpose, but it was aimed exclusively at the protection of cultural heritage according to article 36 TFEU[104]. In its defense the Italian State argued that the objects of art could not be assimilated to everyday simple goods of consume and they should be therefore excluded from the application of the provisions of the Treaty applicable to ordinary commercial goods.

After having established its jurisdiction in the field of cultural goods starting from an economic notion of "goods", the European judges considered that also cultural goods fall within the European concept of "goods" because they can be economically valued, and they are likely to be the subject of commercial transactions[105]. In essence, according to the European judges, the difference between commodity and non-commodity goods is solely and exclusively of an economic nature, in the sense that what it detects is the economic evaluability of the good, regardless of its own legal regime, when also national law considers the good to be a *res extra commercium.*

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[102] Judgment of December 10th, 1968 in «Raccolta della giurisprudenza della Corte di giustizia delle Comunità Europee», p. 562.

[103] It was the law June 1, 1939 n. 1089, whose art. 37 provided an export tax, progressively calculated on the commercial value of the goods reported.

[104] Treaty on the Functioning of the European Union (TFEU): art. 34 "Sono vietate fra gli Stati membri le restrizioni quantitative all'importazione nonché qualsiasi misura di effetto equivalente"; art. 35 "Sono vietate fra gli Stati membri le restrizioni quantitative all'esportazione e qualsiasi misura di effetto equivalente"; art. 36 "Le disposizioni degli articoli 34 e 35 lasciano impregiudicati i divieti o restrizioni all'importazione, all'esportazione e al transito giustificati da motivi di moralità pubblica, di ordine pubblico, di pubblica sicurezza, di tutela della salute e della vita delle persone e degli animali o di preservazione dei vegetali, di protezione del patrimonio artistico, storico o archeologico nazionale, o di tutela della proprietà industriale e commerciale. Tuttavia, tali divieti o restrizioni non devono costituire un mezzo di discriminazione arbitraria, né una restrizione dissimulata al commercio tra gli Stati membri"

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[105] In its judgment, the Court of Justice rejected the Italian position, alleging that cultural goods can be qualified only as «goods» so that they move freely; they, irrespective of the characteristics which distinguish them from other marketable goods, have in common with them the characteristic of being pecuniary assessable products and so capable of being the subject of commercial transitions.

According to the European jurisprudence, for the purposes of the application of the Communitarian legislation in the free movement of goods, what counts is their suitability, although potential and/or illegal, to be subjects of commercial transactions. Since this suitability is identifiable with reference to cultural goods, these are therefore subjected to the general rules which the Communitarian jurisprudence adopts about the free movement of goods in the single market and the primacy of the principle of free movement of goods over possible protectionist measures imposed by Member States and intended to restrict their intra-Communitarian circulation, with the exception provided by the Treaty itself in particular in article 36.

However, since the interpretation of a special rule such as art. 36 can only be restrictive, any exception to the rule of freedom of movement must be justified by necessity and must also respect the principles of proportionality and non-discrimination. It remains however that art. 36 is an important instrument for the protection of national cultural heritage, ensuring that Member States have the possibility to exploit the margins allowed by the same rule for the purpose of protection, including the possibility to define the notion of national cultural heritage which still is reserved to domestic legislation.

In the international context the notion of cultural good as "cultural heritage of the mankind", introduced by the 1954 Hague Convention, implies a system of values and rights for collective use and universal interest which correspond to the States joint obligations to its protection and that goes beyond the selfish interests of the individual territorial authorities on whose soil the cultural goods are located. On this last point it is to be noted that the relationship between international law and national law has always been contrasting: the first one wants to codify a common discipline for the circulation of works of art beyond the national borders; the second one varies according to the quantity and quality of cultural goods and works of art located within the national borders. In fact, there are countries c.d. "exporters of art" (e.g. Italy, France, Greece) and other countries c.d. "importers of art" (e.g. Great Britain, United States, Japan): the first ones, with large artistic heritage, are generally characterized by restrictive and protectionist legislations on the circulation of works of art, in order to ensure their preservation within national borders; the latter, on the other hand, tend to liberalize as much as possible such circulation and to set their internal legislation in this direction.

This is a difficult point of balance between conflicting interests, and many international bodies have made a decisive contribution since the second half of the 19th century, among which the most important is undoubtedly UNESCO. In this connection, reference should be made again to the 1970 *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. With regard to the circulation of cultural goods, the Convention, having established the illegality of export, import and transfer of ownership of cultural objects removed from the country of origin in violation of its law and in violation of the Convention, introduces a specific tool to combat their illegal export: the export certificate. This is a certificate issued by the exporting State in which it authorizes the export of the cultural

object and that accompanies the object during its journey[106]. The function of this certificate is both substantial and probative: substantial, because its issuing by the exporting State is in itself sufficient to make legal the exit of the cultural object from national borders; probative, because its circulation together with that of the good is a guarantee of the liceity of the export. The effectiveness of this instrument depends on the existence of two conditions: on the international side, effective cooperation between States on the mutual control and recognition of the lawfulness/illegality of exports of cultural goods; on the national one, adaptation of the national legislation both with regard to the controls to be carried out within the territory and to the penalties to be imposed in the event of violations of those obligations. However, the right of each State to classify and declare certain cultural goods inalienable remains. These are goods which, because of their important cultural interest, cannot be exported even temporarily, and for which any action of recovery is unavoidable.

The obligation to equip the cultural object with a certificate for the purpose of its circulation is provided only for exports, not for imports. However, the Convention provides the obligation for the adhering States to adopt measures to combat illegal international transfers at their national borders. In particular, the Convention commits States to undertake a number of initiatives, including: to set up one or more national services for the protection of cultural heritage with the task to elaborate a database of public and private cultural goods whose export would constitute a significant impoverishment of the national cultural heritage (art. 5 lett. a and b); to prohibit the export from its territory of cultural goods not accompanied by the export certificate (art. 6 lett. b and c); to impose criminal or administrative penalties on individuals who do not comply with the provisions on the export and import of cultural goods (art. 8); to oblige, under the possibility of criminal or administrative penalties, antiquarians to keep a register indicating the origin of each cultural object, the name and address of the supplier and the description and price of each good sold (art. 10 lett. a).

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[106] UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, art. 6: "The States Parties to this Convention undertake: (a) To introduce an appropriate certificate in which the exporting State would specify that the export of the cultural property in question is authorized. The certificate should accompany all items of cultural property exported in accordance with the regulations ; (b) to prohibit the exportation of cultural property from their territory unless accompanied by the above-mentioned export certificate; (c) to publicize this prohibition by appropriate means, particularly among persons likely to export or import cultural property".
Published in Gazzetta Ufficiale della Repubblica Italiana n. 49 on February 24, 1976

5.4 The presumed public ownership on cultural goods

The subject of cultural heritage is today regulated by the Legislative Decree n. 42/2004 (c.d. Code of cultural heritage and environment). Art. 2 of the Code includes in the definition of cultural heritage both cultural and environmental goods. This choice is consistent with the Italian legal tradition, as art. 9 of the Constitution that puts at a constitutional level the protection of the landscape and of the historical and artistic heritage for the purpose of promoting and developing culture[107]. The notion of cultural property is contained in articles 2, 10 and 11 of Legislative Decree n. 42/2004. According to the first provision, cultural property is immovable and movable property which is of artistic, historical, archaeological, ethnoanthropological, archival and bibliographic interest and having value for civilization. The other two provisions consider cultural goods the categories of things, both movable and immovable, that they list.

Categories of cultural goods are mentioned in articles 10 and 11 of the Code. General categories are differentiated according to their membership, public or private. In order to consider something as a cultural good in a juridical sense and therefore subject to the relative regime provided by the Code, it may not be sufficient that, for the objective presented characteristics, it is attributable to one of the categories indicated by the Code. In many cases, the administrative authority is required to assess the existence of these characteristics. As a result of this identification, it is formally considered a cultural object and therefore subject to the relevant regime. The qualification of something as a cultural good determines the subjection to a publicity discipline contained in the Code, which confers to the public authority powers concerning not the patrimonial use of the thing, but the preservation of culture and its enjoyment by the community.

The administrative functions in the field of cultural heritage have traditionally been divided between protection activities and valorization activities. In accordance with art. 3 of the legislative decree n. 42/2004, protection consists in the exercise of the functions and the discipline of activities directed to identify and ensure the protection and conservation of cultural heritage for public use. The rule adds that the exercise of the function of protection is also carried out through measures aimed at conforming and regulating rights and behaviors inherent to the cultural heritage. Valorization consists, on the other hand, in carrying out duties and regulating activities designed to promote knowledge of the cultural heritage and to ensure the best conditions for the public use of the heritage. It also includes the promotion and support of measures to preserve cultural heritage.

Also the Constitutional Court agrees that cultural goods are "primary constitutional values" which cannot be subordinated to other constitutionally protected values, including economic ones, thus outlining the need for its safeguard. The heritage of the State is therefore constituted not only by the material properties and by the assets of the available patrimony, but also by all those assets that can materially belong to ecclesiastical

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[107] Costituzione della Repubblica Italiana, art. 9: "La Repubblica promuove lo sviluppo della cultura e la ricerca scientifica e tecnica. Tutela il paesaggio e il patrimonio storico e artistico della Nazione" available at https://www.senato.it/documenti/repository/istituzione/costit uzione.pdf

institutions or to other private subjects, provided they have a public purpose: the State is responsible for their protection. It is not surprising that art. 9 of the Constitution refers to the historical and artistic patrimony of the Nation, and not to the patrimony of the State: the term Nation has, in fact, a broader value and it means not the State as public entity or public administration but the State-Community, that is to say the whole of all people who make it united by thought, culture, language, traditions and religion[108]. The concept of cultural heritage includes not only "things" but also what those things express, those values and interests of which they are bearers, from which they derive their profoundly valuable character, and not merely economic. The interest of the community is not based on goods but on the values inherent in them.

Of course, cultural heritage also includes the archaeological heritage. For what concerns Italy, archaeological assets are presumed, "with the exception of the evidence of their private ownership, coming from the Italian subsoil or seabed and therefore belonging to the inalienable patrimony of the State"[109]. In fact, in relation to things of archaeological interest found in Italy after the entry into force of law 20 June 1909, n. 364 on the inalienability of antiquities and fine arts, the claimant must provide proof that they have been found abroad or, in any case, demonstrate the exercise of legitimate causes of possession. Membership of the State of goods of historical and artistic value, introduced with the protectionist legislation at the beginning of the century and then strengthened by law 1° June 1939, n. 1089 (Bottai Law), is constantly confirmed also in the most recent legislative evolution. According to Legislative Decree no. 22 January 2004, no. 42 (the Code of Cultural Heritage and Landscape or Urbani Code) movable or immovable objects of historical, artistic and archaeological interest, found or discovered within the Italian borders, are part of the unavailable heritage.

The 2019 judgment specifies that the linkage of the statue with the Italian territory is given also and above all by a cultural, historical and traditional factor that links the object in question to the Italian civilization. The defense of the Getty Museum had in fact questioned the existence of such solid links between the Italian cultural environment and the artefact, due to the way in which the latter had been found. On the contrary, the judge considered that there was no doubt that the statue of the Victorious Athlete is an object that constitutes part of the Italian artistic heritage. This finding is based not only on the clear fact that the work was found by an Italian vessel and hoisted on board, but also and above all by the fact of its belonging to that cultural continuity that linked first the Italian civilization and then Roman one to the Greek cultural experience, of which Romans can be considered the continuers. Because of the important cultural link between the statue and the Italian national environment, the need for special protection is quite permissible. The statue must therefore be readmitted within the national artistic heritage

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[108] E. Battelli, *I soggetti privati e la valorizzazione del patrimonio culturale*, Roma, 2017

[109] Court of Cassation, Judgment of April 26, 2017 available at http://www.italgiure.giustizia.it/sncass/

5.5 The recovery of cultural items illicitly transferred abroad

A first distinction to be made with regard to the return of illicitly exported cultural goods concerns the manner in which such action took place, that is whether the act took place in time of peace or in time of war. International law provides different legislation. The intention of this paragraph is to go deeper into the issue of the restitution, first examining international law and then European one.

The recovery and restitution of the cultural object illegally exported in time of peace is regulated by the already widely analyzed UNESCO Convention of 1970. With regard to the recovery and return of stolen or unlawfully exported cultural goods, the Convention obliges the contracting States to introduce specific provisions within their legal systems to give adequate protection both to the owners of the stolen property and to third parties who are good faith purchasers of goods stolen or illegally exported. To this end the contracting States with the adoption of the Convention undertake: to prevent the acquisition of cultural objects unlawfully exported from the territory of another State Party to the Convention by museums located in their territory; to prohibit the importation of stolen cultural property into museums or similar institutions located in the territory of another State Party to the Convention, provided that such property has been inventoried by the institution who has suffered the theft; to return, after the request of the State of origin (or requesting State) any cultural goods unlawfully imported or stolen. In order to be able to exercise this request, which must be addressed through diplomatic channels to the opposing State (usually the one on whose territory is found the stolen or irregularly imported item) the requesting State has not only the burden of providing the evidence necessary to justify its claim for recovery and restitution, but also the obligation to pay fair compensation to the purchaser in good faith or to the person who legally owns the property of that object. In addition, the States party to the Convention undertake, within the framework of their national legislation, to grant the legitimate owner the right to claim his/her lost or stolen cultural property. The protections indicated above present multiple criticalities that make not easy the recovery/restitution of the cultural object stolen or illegally exported. Apart from the procedural aspect of the not-direct applicability of the provisions of the Convention within the contracting States, some obligations appear in some cases too general while in others difficult to implement[110]. In fact, in addition to a rather small number of specific commitments of binding nature, such as the preparation of the export certificate or the provision of penalties of criminal nature, the Convention provides for general commitments to be made by the contracting States, within the national legal framework. This means that the contracting States have considerable freedom of choice in fulfilling these commitments.

Of course, it is also to mention the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which deals with the critical issues of the 1970 Convention. The regulation of illicitly imported cultural goods is contained in Chapter III of the Convention. The assumption of the action of return is that the cultural object

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[110] The 1970 UNESCO Convention is not self-executing, which means that its provisions are not directly applicable in the contracting States. They need to transpose them into national law through implementing rules. See M. Frigo, *Le ròle des règles de déontologie entre droit de l'art et regulation du marché*, Journal du droit international, Parigi, 2007, p. 883 ff.

has been unlawfully exported, which is in the following two cases: where the goods are exported definitively from the territory of the State of origin or where, in the case of temporary export for the purpose of exposure, research or restoration under the authorization of the State of origin, such property has not been returned in accordance with the conditions of that authorization[111]. It should also be noted that provisions on illicit export do not apply when the export of the cultural object is no longer unlawful at the time of the request or if the good was exported when its author was alive, or within a period of 50 years after his death[112]. The active party involved in the action of return, that is the person entitled to bring proceedings for the return of the cultural object unlawfully exported, is solely and exclusively the State of origin (i.e. the requesting State). The passive party of the action of return is the holder of the cultural good which has acquired after its illicit export.

Within the European Union, the return of cultural objects unlawfully removed from the territory of a Member State is governed by Directive 2014/60/EU of the European Parliament and of the Council of 15th May 2014[113], to replace Directive 93/7 EEC. Its objective is to provide all Member States with a common instrument of mutual protection whereby the judicial authority of a Member State in which the cultural object is unlawfully present order its return to the Member State from whose territory the good has been unlawfully removed. Considering that restitution means the material return of the cultural object into the territory of the requesting Member State, the condition for the exercise of the restitution order is that the cultural object has been unlawfully removed from the territory of a Member State. This is the case when: the property has left the territory of the requesting Member State in violation of the rules on the protection of the national patrimony of that Member State or in violation of Regulation (EC) n. 116/2009 concerning the export of cultural goods, or when the cultural property has not returned in the territory of the requesting State after the expiry of the time limit fixed for a lawful temporary shipping or it is in a situation of breach of one of the other conditions of such temporary shipping. The action for the restitution of the cultural object unlawfully removed from its territory shall be brought by the requesting Member State against the holder and before the competent court of the requested Member State[114]. To be admissible, the application must be accompanied by the following documents: a document describing the object of the request and declaring that it is a cultural object; a declaration by the competent authorities of the requesting Member State that the cultural object has been unlawfully removed from its territory. The burden of proof, therefore, rests on the requesting State who will

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[111] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 5
Published in Gazzetta Ufficiale della Repubblica Italiana n. 153 on July 2, 1999

[112] UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, art. 7
Published in Gazzetta Ufficiale della Repubblica Italiana n. 153 on July 2, 1999

[113] Published in the Official Journal of the European Union. In Italy, Directive 2014/60 was transposed by legislative decree of 7th January 2016.

[114] Directive, art. 6(1). Doctrine has raised the question of the identification of the competent judge, with particular regard to systems, such as the Italian one, characterized by a dual jurisdiction (ordinary and administrative).The prevailing opinion is that, in this area, since these are subjective rights and not legitimate interests, the court should consider itself competent. There was, however, those who held the jurisdiction of the administrative court, being the required intervention solely on the basis of documents and in fact only to ascertain the proper exercise of the powers of the public authorities concerned.
See V. Caracciolo La Grotteria, *The circulation of cultural goods in Italian and Community law,* V. Caputi Jambrenghi (edited by), La cultura e i suoi beni giuridici, Milano 1999, p. 205

be required to prove to the competent court both the belonging of the item to its cultural heritage and the unlawful exit from its national territory. The court, after having established that it is a cultural object, falling within the scope of the Directive, unlawfully exported from the national territory of the requesting State, orders its restitution.

5.6 Cataloguing objects of art: a good way to prevent their illicit traffic

Drawing up a common strategy against crime in the art world means giving prevention a leading role. Criminal sanctions, where they exist, and attempts to recover assets unlawfully removed from cultural heritage are important, but not sufficient. The processes of supranational cooperation in criminal and police matters are also essential for recovering works of art and bringing those responsible to justice. But all this should only be part of a global policy aimed at reducing the total number of crimes in the art world.

It is necessary to affirm the importance of a series of measures aimed at reducing the opportunities for committing crimes. In other words, the aim of prevention must also be to reduce criminal opportunities. In other words, the most vigorous effort of states must take place before the damage is done and must be directed towards making criminals perceive not only a high risk of going to prison and losing their illicit proceeds, but also a high difficulty, first, to obtain illegally and, secondly, to circulate the works[115].

Prevention can act both on the supply side and on the demand side. Often, however, it is very difficult to act when the supply of goods to be trafficked is formed, especially if they are poor countries in the world[116]. Indeed, how can we prevent entire African villages from working for traffickers, given the conditions of need of citizens and the absence of national states, which certainly have far greater problems on their agenda? As a result, we can try to intervene more forcefully on demand, which in most cases comes from rich countries[117]. Many of the lines of action set out below respond precisely to the objective of reducing the demand for works.

A first step would be to improve safety and control standards for museums, art galleries, churches and archaeological sites. Also make more trained staff. One should then more closely control the activity of buying museums, galleries, art merchants and private individuals, requiring them to buy only items whose lawful origin is proven and forcing them to comply with these rules. The objective is therefore to develop a culture of legality and respect for the artistic heritage among both public and private subjects, thus defining codes of conduct[118].

The most important thing, however, is cataloguing. Documentation and classification systems should therefore be applied for objects in collections, both public and private. In this regard, we can mention the project carried out with great determination by the Paul Getty Museum, aiming at the realization of the single standard of

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[115] D. Liston, *A Decade of Major Cultural Property Theft over US$ 1M with Method of Theft and Lessons to Learn*, La Repubblica, Roma, 1998

[116] J.D. Murphy, *The Peoples Republic of China and the Illicit Trade in Cultural Property*, Boston, 1994, p. 227 ff.

[117] V. Ruggiero, *Economie sporche. L'impresa criminale in Europa*, Bollati Boringhieri (edited by), Torino, 1996, p. 176 ff.

[118] S. Sidibe, *Mali's Cultural Heritage: Combating Plundering. National Measures and International Criminal Police Review*, London, 1994, p. 8

identification of cultural objects to be used in the classification by museums, auction houses, galleries, law enforcement agencies, also private and aimed at the recovery[119].

The recovery of a cultural object that has been illegally exported or stolen from its owner depends in first place on the ability to locate it. The good that does not result from known and searchable registers can be very difficult to trace. One can therefore understand the importance of publicly or privately-owned databases that record the cultural assets to be traced.

For example, the International Councils of Museums (ICOM) has long been distributing lists of illicitly exported goods. The same body, in collaboration with the Getty Museum and other public and private institutions has developed a standard of identification of objects of art and of historical and archaeological interest that is destined to impose itself as a code useful for the protection and recovery of assets subject to illicit trafficking.

The development of targeted databases was already foreseen by the 1970 UNESCO Convention and there are now many nationally organized databases. Interpol also has its own database, which shares with the States that require consultation. In the field are also active several private companies that offer a service of prior registration of works to be protected[120]. Finally, the Principles for Cooperation on Mutual Protection and Transfer of Cultural Material adopted in Toronto in 2006 by the International Law Association reiterate the need to establish registers of cultural assets also accessible to third parties and which may facilitate the search by interested parties for the transfer of cultural goods. These initiatives are supported by the 1970 UNESCO Convention on Article 5, which facilitates the drafting and application of codes of conduct.

On the other side, museums and professional operators wanted to take shelter from damages of various kinds related to the purchase of objects of suspected origin by signing ethical codes. The proliferation of such documents in recent times hits attention and provides a measure of the growing sensitivity to this problem[121].

Certainly, in the quarrels involving prominent museums, such as that concerning the Victorious Athlete's case, the possibility for those who claim the return of the property to offer a way out as temporary exposures of the object in question may prove valuable. The new Urbani Code has opened the door to this solution by extending

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[119] R. Thornes, *Protecting Cultural Objects in the Global Information Society. The Making of Object ID*, The J. Paul Getty Trust, Los Angeles, 1997

[120]For example the *Art Loss Register*, that is the world's largest private database of lost and stolen art, antiques and collectables. Its range of services includes item registration, search and recovery services to collectors, the art trade, insurers and worldwide law enforcement agencies. These services are efficiently delivered by employing state of the art IT technology and a team of specially trained professional art historians. The worldwide team has been deliberately constructed so as to offer a range of language capabilities as well as specialities (modern art, old masters, antiquities).

[121] M. Frigo, *Le ròle des règles de déontologie entre droit de l'art et regulation du marché*, Journal du droit international, Paris, 2007, p. 883 ff.

up to four years the period of stay abroad of cultural goods belonging to Italy. The recent agreements between the Italy and the Getty Museum, thanks to which several works claimed by Italy have been returned, have also been successfully concluded thanks to this new law. On the other hand, precisely in order to facilitate the museum activity carried out by means of loans for works of art, some States, including the United States, have put into force laws precluding the possibility of foreclosure or seizure of important assets temporarily for the purpose of exposure[122].

[122] M. A. Sandulli, *Codice dei beni culturali e del paesaggio*, Milano, 2006

Conclusions

The job is over. In a very humble way and relying mainly on the existing doctrine and practice on the subject, I tried to examine the case of the Victorious Athlete in light of the norms of international and national law. The case of the Victorious Athlete, starting from its discovery, proposed many issues of international law concerning cultural goods.

The main objective of this thesis was to try to answer each of the following questions. Firstly, how the theme of underwater heritage is regulated at international level. Then, how the concept of national heritage beyond the territory is dealt with under international law. Another important issue on which the case rose reflection is whether there is indeed an obligation for other states to recognize the effectiveness of laws criminalizing the illegal export of archaeological goods coming from foreign legislations.

As we have seen how the use of the seas, whether regulated by treaties, rules or customary law, is always evolving. For about two hundred years, the freedom of the seas has been the only and prevailing rule of international law of the sea. It was only after 1945 that the experience of unchallenged freedom was seriously questioned. With the passage of time, ever since the principle of the freedom of the seas was elaborated, the different and new activities concerning the sea have contributed, on the one hand, to seek ever more solutions to the problems that arose, taking into account the presence of many international players, the interests at stake and the different policies characterizing each State; on the other hand, these activities have forced a change in the rules governing them, since technological progress has been made, navigation has evolved in means and time, needs have increased, pollution has created new complications, the protection of the environment has assumed a fundamental importance. New technologies for underground research as well as more advanced fishing or digging techniques have increased the awareness in the states of the richness that lies under their soil. Hence the obvious consequence of the desire to protect this heritage, which adds pieces to the already existing one and which integrates the research on history belonging to every civilization. Being deprived of such testimonies is not pleasing to any state that cares of its own past and identity, like Italy. This is the reason of recent regulations to protect the heritage lying in the subsoil but also of the tenacity demonstrated by the Italian state in order to get back home the Victorious Athlete.

Of all the attempts to codify the use of the sea, the most successful instrument was the United Nations Conference on the Law of the Sea of 1982. Although the practice of States is not uniform, the success of the Conference was not only that of concluding a treaty, but also that of conditioning today's law and the future international law of the sea, making the Convention a legal instrument regulating all activities relating to the use of the seas generally accepted. Yet, the Montego Bay Convention is not enough. Firstly, apart from the fact that almost all the States of the world have acceded to the Convention, there are some which are not yet bound by the Treaty, first and foremost the United States of America. The United States has not ratified this Convention because probably the possibility of using the seas more freely and almost completely independently seems to be of great importance. This decision is, of course, open to criticism. It is true that no

state can be forced to sign an international treaty unless it wishes to do so. This is obviously a problem, as many of the issues regulated by international law in this area need to be resolved by other means, which often lead to further difficulties and misunderstandings. This is exactly what happened in the dispute between Italy and the Getty Museum for the owning of the Victorious Athlete. We have already seen that the international standards applicable in this case are only the UNESCO Convention on the means of Prohibiting and Preventing the illicit Import, Export and Transfer of ownership of Cultural Property of 1970 and the Treaty on Mutual criminal assistance between the Italian Republic and the United States of America of 2006. However, these two regulations do not cover all matters relating to the case, so that it was necessary to proceed with reference to the Italian legislation governing the law of the sea and that of cultural goods with the consequent protest of the Getty Museum for not having, on the contrary, considered the Californian law. Is there any way to overcome this problem? The analysis of the case seems to give a negative answer. In addition, there is also the problem of enforcing Italian legislation in the United States, with the United States having the power to choose the way in which implement it. The United States has an obligation to implement the Italian measures, but the possibility to choose the ways in which put it into practice deprives the measure of a certain amount of strength that must be adapted in any case to American wishes. The proof of this lies in the fact that, despite the last sentence of January 2019 confirming the confiscation and the return to Italy of the Victorious Athlete, this is still at the Getty Museum and it is not clear if, how and when the United States will give actuation to the confiscation order.

In light of the analysis proposed, which sought to address different aspects, some further concluding remarks should be made, intending to agree once again on the revolutionary importance of the 2001 UNESCO Convention on Underwater Heritage and the value of international conventional instruments (multilateral, regional and bilateral) achieved. Indeed, the underwater cultural heritage represents an expression of a universal heritage which, by its scope and its intrinsic nature, belongs to every people. However, there seems to be a certain margin of doubt about the process of globalization of culture which. On a critical examination, UNESCO seems to express an idea of universal culture that is too close to the simple sum of the many national cultures, in a constant effort to involve different cultural subjects from nations, that is local communities, without taking proper account of any substantial differences. Each community attributes a different importance to its culture and is willing to protect it at different extent. Modalities depend first of all on what is meant by cultural heritage and on the efforts needed to protect its various forms. If the western part of the world is more "materialistic" in shaping its culture, on the contrary other peoples, especially in the east, are traditionally more linked to immaterial demonstrations of their identity through, for example, music or poetry. The international community wanted to protect this type of cultural heritage, which includes various manifestations of cultures and their diversity. States interest in maintaining and protecting the right of ownership on objects part of their cultural heritage lies partly in the economic value which such works of art embody, but above all in the intangible and intrinsic one which is immensely greater than any amount of money. Identity of people resides in its culture and tradition, elements of which art is the most significant manifestation.

Indeed, it is precisely the tendency towards the universality of this complex system of global protection of the underwater heritage that reflects itself in the lack of an adequate concrete control instruments. There must be no doubt that the submerged cultural heritage, as part of the generally considered cultural heritage, belongs to everyone, but such a statement is not simply to implement in practice. Undoubtedly the 2001 Convention on the Protection of Underwater Cultural Heritage has the great merit of considering and defining a system of rules to coordinate the activities of all States Parties in the interests of property itself which is the subject of protection. However, effective forms of protection cannot always be found.

What leads us to believe that rules and procedures laid down in the body of the conventional text adopted in Paris cannot be considered sufficient, is partly due to the impossibility of establishing a system of control over the activities of underwater archaeology, as it is in fact impossible to implement a system of prior checking because of the actual location of the underwater assets. The proliferation of bilateral or regional agreements, and in this sense it is necessary once again to underline the importance of the participation of the European Union and of many states of the Euro-Mediterranean area, would ensure more effectively the protection of property found off their coasts. The involvement of only few countries would be better able to influence the fight against illicit traffic in cultural goods, favored by criminal organizations.

On this issue, the Victorious Athlete's case raises further doubt. How is it possible, in the absence of a solid practice, to guarantee the respect of the underwater cultural heritage by private parties acting for personal and patrimonial interests? It has been established how it is possible, in fact, that some people find an object of inestimable value by chance and decide to exploit it on the illegal market. Although there are internal and international provisions that can impose the obligation to report the find, there is no corresponding control system in the event of a breach of the obligation.

Issues of international law concerning the case of the Victorious Athlete are a lot, so much that the complexity of the settlement of the dispute led the judicial system to work on it for over fifty years. Among the most important topics there is the one about the place and the modalities of the finding of the statue. In fact, the main leverage point used by the Getty Museum to deny any right of ownership of Italy on the Victorious Athlete is the one concerning the place of its discovery. Being the object found in international waters, this would not belong to any particular state, but to the whole international community. However, the judge of the Court of Cassation overcame this difficulty, taking as starting point the previous jurisprudence, noting that the vessel and all its accessories can be considered an extension of the Italian territory. Therefore, every archaeological object belonging to the territory of a state is to be considered public property of the state itself.

This point gave birth to another crucial aspect of the whole story: is there an obligation for the United States to execute the confiscation order? In such cases, can Italian law prevail over American law or vice versa? Are the United States obliged to respect the law of a foreign state within its territory? As regards the specific field of cultural goods, I underlined how international law for the protection of cultural goods has evolved over the years alongside with an awareness of its importance for States. From a position that provided for the absolute

inapplicability of foreign public law, the jurisprudence moved to a more flexible version allowing, in exceptional cases, the recognition of the effects of the rules of public law of other States by setting limits on the availability of cultural goods, avoiding that the mere crossing of borders by an object of art is sufficient to ensure its immunity to the law of the territory to which it belongs. However, in light of the case examined before the United States is likely to enforce Italian law and judicial decisions attributing ownership of the Victorious Athlete to Italy. The answer seems to be negative.

As regards the question whether an execution in the United States of an Italian judicial decision assigning ownership of the property to Italy is foreseeable, the answer I give is that yes, the American law provides for the recognition of foreign jurisdictions in its territory, but according to times and modalities that the American jurisdiction chooses for such application (Treaty of Mutual Assistance in Criminal Matters Between the Italian Republic and the United States of America, Article 18). This is one of the main reasons, perhaps the main one, for which despite there is an umpteenth Italian measure concerning the confiscation and the demand for repatriation, the Victorious Athlete is still at the Getty Museum and we do not know how or when the statue will come back home, because it is the American jurisdiction that decides. I therefore support the view that probably if there were a rule of customary international law obliging States to act in that sense, in particular to return illicitly exported objects forming part of the cultural heritage of other States, at this time the Victorious Athlete would already be at home or we would be more sure that its return soon or late will happen. Now it is all very uncertain. On the one hand it would appear as if the judgment of the Court of Cassation lost all its force, not having the possibility of complete worth in foreign territory.

To conclude, the situation on the legislation used to solve the case both at national and international level has been carefully analyzed and the result seems to be unsatisfactory although many care has been devoted to the protection of cultural heritage over the years. What, then, should change? How could the law on the protection of cultural heritage be strengthened? If the laws on the protection of cultural heritage were to be regarded as customary law, would it be easier and quicker to resolve disputes concerning works of art? Would states be more respectful of their own cultural heritage and that of the others? These are questions arising spontaneously at the end of the analysis of this case, since the main problem is the recognition and acceptance of measures deriving from the civil and criminal law of an external state. Customary law, in fact, binds all the states of the international community regardless of their voluntary adherence to the norms. Can international law on protection of cultural heritage be considered part of customary international law? Doctrine is divided on this issue: on the one hand, there are those who advocate the need for a stronger protection system, because the existing one is vague, in particular as regards the fulfilment of obligations and penalties by States; on the other hand, many are convinced that the criticism is unfounded and that there is more than a good reason to argue that the law on the protection of cultural heritage has in fact assumed the characteristics of customary law. The problem is precisely that on paper this thought has not yet been defined. The conclusive awarness of this dissertation is the belief that the protection of cultural heritage has become a key priority for states and

international organizations over the years. The expression "heritage" evokes in its most common meaning a set of objects, knowledge and memories that can have a preferential importance for an individual, as well as for a whole society. Moreover, the growing concern for the protection of cultural goods property owes its existence to the fact that culture is something closely linked to human rights and environment.

I am convinced that international protection of cultural goods is a customary law in formation and that there are already some rules governing international law which have embodied this characteristic. All this to reinforce the fact that the international community is absolutely convinced that cultural heritage is something to be protected at all costs and that no state should be deprived of it, although some of the instruments to its protection seem not to have acquired yet the strength they should. It is in the interest of the international community, of each state and individuals to protect every form of art and culture characterizing a territory because, although each individual is different from the other, although every nation is different from the other, there is one thing that unites all: the recognition of the identity in each culture.

Cultural heritage is a broad concept that includes the natural environment as well as the material one. It includes landscapes, historical places, sites and environments built by man, as well as biodiversity, collections, past and present cultural practices, life experiences and knowledge. It records and expresses the long processes of historical development which form the essence of different national, regional, indigenous and local identities and is an integral part of modern life. It's a dynamic landmark and a positive tool for growth and change. The specific cultural heritage and collective memory of each locality or community is not substitutable and is an important basis for present and future development.

The selection of heritage is, in fact, a social process that draws life and motivation from the present, whatever it may be, and that involves power, tradition, memory, identity. Each generation, each society delimits the set of cultural materials shaped by individuals and communities of the previous epochs that deserve to be handed down to posterity and therefore need to be protected. According to this dynamic vision, each generation reactivates the social process at the base of the identification and selection of what must be preserved.

Cultural identity is not a fossilized fact, but it implies a permanent act of identification which at the same time presupposes tradition and freedom. Cultural identity integrates in a permanent process cultural diversity, the particular and the universal, memory and project. The problem, as in the case of the Victorious Athlete, is that the economic value of art many times diverts attention from its deepest value and from the awareness that an object reflecting the culture of a particular nation acquires its greatest value precisely if it can be ambassador of that particular culture. Once the object is dragged away from the place where it acquires its greatest meaning, it loses much of its sense of existence. The hope is therefore that the Getty Museum, like any other public or private institution owning objects of art stolen from the cultural heritage of any other nation, aware of these arguments return without delay the statue of the Victorious Athlete to Italy, posing it in the place where it should have always belonged.

Cultural heritage is not only memory of the past, but also a heritage for the future. The responsibility for its preservation lies first in each citizen, who must be educated in this direction, then in states and international community. Problems concerning the preservation of cultural heritage are interwoven with the structure of the institutions called to solve them, also with the emergence of global interests and the need to take measures beyond the present.

Everyday life is intrusive and chaotic, the future is to be drawn. In this context, cultural heritage can play a role in reactivating the depth of history and in representing a valuable resource for a culturally equipped vision of the trajectories to come. Provided that heritage may become a focus of convergence for artists, cultural workers, citizens, it rediscovers voice and expression in contemporary languages, regaining a sentimental correspondence in the body of the local society. The preservation and valorization of material and immaterial cultural heritage is not only a call to an indisputable moral duty, but a possible declination to the construction of a desirable and shared future. Due to history, culture and geopolitical positioning cultural heritage is the very ribbon of every nation, in its infinite modulation and in comparison with the rest of the world.

There is the need of convergence between all forms of creativity and technological instrumentation addressed to culture. On the one hand, a decisive public role in promoting digitization; on the other hand, the task for the cultural enterprise to make the best use of all these innovations. Heritage is and can be a powerful economic lever, not only in generating tourist flows. The ability to use and value cultural heritage is generally a measure of the sustainability of local development. But the main theme that unites heritage and territory lies in the identification of the methods for a culturally equipped use of the territory, to react to the inability of too much urban planning and current architecture in building places and landscape making, to trace routes of sustainable development, although embroiled in the fragility of environmental conditions. A virtuous alliance between culture and manufacturing is the key to the development of models that, while productivity-oriented, do not destroy the landscape.

Cultural heritage has an important place in the society of many countries, including Italy, and it has exceptional dimensions. These dimensions exceed the ability to cope with them only through public resources, especially in countries where welfare is threatened with drastic cuts in its most essential components. The need for a governance allowing a substantial proportion of assets to be re-injected into ordinary economic cycles is an inescapable condition for keeping alive assets otherwise destined to the loss. The ability to make compatible in the fragility of the individual cultural good, conservation, development and economic values implies a cultural revolution in rethinking protection, but also on the private side in rethinking the impacts of development: It is a long-lasting process, but without alternatives to the horizon. The necessary step is feeding this process or starting where there is no track yet.

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Summary

THE CASE OF THE VICTORIOUS ATHLETE

INTERNATIONAL TRAFFIC OF ARCHAEOLOGICAL ITEMS AND NATIONAL CLAIMS

This work deals with one of the most recent cases of allegedly illegal international transfer of archaeological property: that of the statue of the Victorious Athlete, found in the offshore waters of Italy, not reported to the Italian authorities and then exported to the United States. This case has given rise to an endless dispute between Italy and the Getty Museum. The final judgment about the repatriation of the statue from the United States to Italy has come in 2019. So, the judicial process has been going on since the 1960s, but the repatriation has not yet taken place, so the dispute is still pending.

In general, the dissertation deals with the issue of the circulation of cultural goods in international and national contexts, attempting to provide a complete overview of the relevant rules. The focus will be on the analysis of the international legislation governing the field of illicit traffic of cultural objects, although an important place will be reserved for the internal regulations of the States involved in the litigation: Italy and the United States. To be precise, the case involves on one hand a public body, the Italian state, on the other hand a private body, the Getty Museum in Los Angeles.

Illicit embezzlement and transfer of cultural goods from one state to another are time-consuming phenomena of different derivation, which range from depredation in the course of a military conflict to export and illegal commercial practices, all of them equally likely resulting in a depletion of the assets of individual states. To this end, I explored the path that has characterized the evolution of international legislation in this field, from the second half of the 20th century up to the present day; a development which, as it is often the case in international law, has found its original legal source primarily in the customs formed during armed conflicts, largely subsequently codified in international law conventions, EU regulations and directives and, at national level, in single texts. What emerges in the course of the discussion is the fact international law for the protection of cultural goods can be assimilated to a case of progressive formation, that is a process whose embryonic phase has been characterized by conflicts and selfish interests, but whose evolutionary path has been inspired by shared, superior and universal interests.

The case of the Victorious Athlete, starting from its discovery, proposes many issues of international law concerning cultural goods. The main object of this thesis is answering each of the following questions. Firstly, how the theme of underwater heritage is regulated at international and national level. The object of art, which was later recognized as the statue of the Victorious Athlete belonging to the Greek sculptor Lisippo, was found by chance by an Italian fishing vessel in international waters out of the sea of Fano, in the Italian Region Marche. The finding of the artifact was never reported to the authorities, so that it was soon introduced by its finders in the illegal trade of works of art. After touring most of the world, the Victorious Athlete ended up at the J. P. Getty Museum, where it still resides. Given that, history also poses another challenge that I attempted

to face in the course of the discussion, that of the application of the concept of national heritage beyond the territory, being the statue found in international waters. The last definitive judgment of the Italian Court of Cassation of January 2, 2019 confirms once again the belonging of the statue to the Italian cultural heritage, carrying with it the obligation of return addressed to the current holders of the property. Another important issue on which the case prompts reflection is whether there is indeed an obligation for other states, in this case for the United States, to recognize the effectiveness of criminal and civil laws criminalizing the illegal export of archaeological goods coming from a foreign state and more in general to actuate the Italian legislation in their territory.

The first and most famous book on international law and law of the sea in the western world was written by the Dutch jurist Hugo de Groot and published anonymously in 1609 under the title *Mare Liberum*. It was considered one of the cornerstones of the modern law of the sea from its origins and it gave rise to what is still called the doctrine of the freedom of the seas. The modern law of the sea defines the jurisdiction of the States on various fields of marine activity. In fact, an individual State cannot have exclusive power over some portions of the sea or produce actions, make claims or make decisions following its own political choices and safeguarding only its own interests. It must necessarily be subject to rules and constraints which, over the years and through the progressive evolution of the law of the sea, have created and are creating an orderly system for coexistence, respect for practices and a smooth conduct of procedures based on the use of the sea and its resources. Precisely in order to meet the needs and the protection of all States and international actors, the law of the sea has become an example of an international regime accepted and implemented by almost all States.

The dissertation is divided into five chapters. The first part, comprising the two first chapters, is an accurate illustration of the events and juridical measures taken for the resolution of the case. After a brief general analysis of the case in question, starting from the discovery of the statue until the confiscation order of 2010, I analyzed in detail the last final judgment of the Court of Cassation of 2019. The second part of the dissertation is addressed to answer the questions that such case poses. Attention will be focused first on the national and international legislation applicable to the case, with reflections both on the Italian and American one. Then I go deeper into the issue of the illegal transfer of works of art outside country's borders and of the regulation of property rights on such objects. Obviously, I could not fail to deal with the importance that deserves the case of the Victorious Athlete in light of the international law protecting underwater cultural heritage.

Issues of international law concerning the case of the Victorious Athlete are a lot, so much that the complexity of the settlement of the dispute led the jurisdiction to work on it for over fifty years. Among the most important debates there is the one about the place and the modalities of the finding of the statue. In fact, the main leverage point used by the Getty Museum to deny any right of ownership of Italy on the Victorious Athlete is the one concerning the place of its discovery. Being the object found in international waters, this would not belong to any particular state, but to the whole international community. However, the judge of the Court of Cassation

has overcome this difficulty, taking as starting point the previous jurisprudence, noting that the vessel and all its accessories can be considered an extension of the Italian territory. Therefore, every archaeological object belonging to the territory of a state is to be considered public property of the state itself.

Another point very discussed is about the good faith that the Getty Museum claims to have demonstrated during the purchase of the statue. The Italian court, on the other hand, demonstrated the contrary, annulling any action brought by the Getty Museum on that point. The story is also very interesting from this point of view. In fact, the owner himself of the museum had interrupted negotiations for the purchase of the statue because of his uncertainty about the lawful origin of the object. After his death, however, the museum's Administration proceeded to purchase the statue, inquiring about its legitimate provenance only through the advisers of the party who was selling the item to the museum. This is, for the judge of the Court of Cassation and for that of the Court of Pesaro, testimony of the awareness of the Administration of the potentially illicit character of the transaction that was about to be completed.

There is a discussion about the judgment confirming the confiscation order of the Victorious Athlete. Is there any obligation for the United States to execute this order? In such cases, can Italian law prevail over the American one or vice versa? Are the United States obliged to respect the law of a foreign state within its territory? As regards the specific field of cultural goods, it emerged how international law for the protection of cultural goods has evolved over the years along with an awareness of its importance for States. From a position that provided for the absolute inapplicability of foreign public law, the jurisprudence moved to a more flexible version allowing, in exceptional cases, the recognition of the effects of the rules of public law of other States by setting limits on the availability of cultural goods, avoiding that the mere crossing of borders by an object of art is sufficient to ensure its immunity to the law of the territory to which it belongs.

As regards the judicial process, I presented the first trial of 1966 against the alleged characters of the discovery and the subsequent introduction of the archaeological object within the illegal market of works of art. This process ended with the acquittal of all those involved. The judiciary, however, never ceased to work on the case that has always been put under observation, since the Italian government's request to have the statue back was active and pressing. The next step was therefore to examine the final judgment of the Court of Cassation of 2019, which confirms the order of confiscation of the statue and the absolute certainty of the Italian State's ownership on the object. What emerges from the analysis of this judgment is the judge's belief that the statue belongs to the Italian State mainly because of its historical and cultural link with the territory and the population, not only for the technical aspects related to the method of finding.

Identifying which judicial system should have determined the application of the laws on property of the statue was not a simple obstacle to overcome. The dispute concerned the choice between Italian and American laws on property rights. However, the case does not concern the ownership of a common object, but of a precious statue with an immense cultural value that is presumed to have been illegally transferred away from its national borders, the Italian ones.

The penultimate chapter of the thesis discuss extensively the issue of international law regulating underwater cultural heritage, being the Victorious Athlete obviously part of this. The first legal reference is undoubtedly the 1982 United Nations Convention on the Law of the Sea, an international treaty which defines rights and responsibilities of states in the use of the seas and oceans, setting guidelines for negotiations, management of the environment and natural resources. However, the Convention had shortcomings regarding the protection of the underwater cultural heritage. These shortcomings will be remedied in 2001 with the adoption of the UNESCO Convention on the Protection of Underwater Cultural Heritage. The title outlines the very specific character of the Convention. The UNESCO Convention sets a common standard for the protection of this heritage, providing preventive measures against the possibility of being plundered or destroyed.

This work wants to be a sort of trip: both into the details of the Victorious Athlete case but also into the reflection about the system regulating cultural heritage at international and national level. Is there something to be reinforced or to be reviewed? Is the international legislation protecting cultural heritage strong enough to assure each state the respect of their art? Is the national legislation of the states involved in the litigation, Italy and United States, efficient in protecting cultural heritage inside and outside national borders? I do not presume to have the answers to all these questions, but through the analysis of the Victorious Athlete case I would like to understand how the international community, but also individual states reacted to such situation and how they treated the issue.

It was the far 1964, when a fishing-boat discovered that a strange object had remained trapped in its fishing net. In that ship into the wide see of Pedaso, a village in the province of Pesaro, the troubled story of what is today known with the name of Victorious Athlete started. What happened after the recovery has not been clarified with certainty yet, but it would seem that the fishermen, acknowledged the potential economic value that this would have been able to bring, had sold the statue. First violations concern articles 510 and 511 of the Naval Code: article 510 concerns the finders of the wreckage that had the obligation to report, within three days from the recovery of the object, to the closest maritime authority (in this case that of Pedaso or Fano) the recovery of the statue with the consequent obligation to deliver it; article 511 is very clear as regarding the theme of the ownership of findings underwater, foreseeing that these become ownership of the state once expired the term for claiming their ownership.

The fishermen, after having kept the statue hidden underground for some time, would have sold the Victorious Athlete. After having been in London, the statue ended to Monk of Baviera where the bronze was restored to its original beauty and exposed it in a private gallery. In 1977 the Getty Museum of Los Angeles purchased the statue from the German restorer for an amount of money equal to 3.980.000 dollars and from that year the work of art is jealously exposed in the rooms of the American museum. A first criminal trial against the presumed smugglers of the statue had been undertaken at the end of '60s, but it concluded with the acquittal of all the subjects accused. Other two following procedures were opened by the Magistrate of Gubbio, but

they ended respectively with an acquittal in 1976 and with a decision not to proceed further in the following year.

The order of June 12, 2009 by the Court of Pesaro is very interesting for what concerns the issue of the competent jurisdictions. In which measure do the Italian court and specifically the Court of Pesaro have competence in deciding about the case? The judge of the execution decided that, for the case in dispute, the Court of Pesaro had a specific competence in how much the facts happened partly or totally in the territory of its Province. The national jurisdiction extends itself to the facts happened on board of the boat beating Italian flag that, according to art. 4 of the Code of Navigation, has to be considered prolongation of the Italian state territory.

Law n. 1089 of 1939 (Bottai Law), the Legislative Decree n. 490 of 1999 and the Code of Cultural Items and of the Environment of 2004 are the legislations at the basis of the following order of 2010. The initial question was on the applicability not of the general Italian jurisdiction on the case, that can be admitted without problems, but on the applicability of the national regime of the archaeological items to this specific recovery. Art. 23 of the Law n. 1089 states that items of artistic, historical, archaeological or ethnographical interest are inalienable when the state or any other public entity is the legitimate owner. The Code of Cultural Items, also known as Urbani Code and approved with Legislative Decree n. 42 of 2004, makes a distinction in art. 54 between absolutely inalienable items and items with a relative inalienability: according to the 2010 order, the Victorious Athlete falls into the first category so that the prohibition of alienation and exportation from the national territory is valid. The crime of illicit exportation is criminally sanctioned and when the items leaves the country in this way, the law requires the forfeiture. This provision was present also in art. 66 of the Bottai Law and also in this case the punishment included the forfeiture of the item. Although the Italian law in force at the time of the recovery seems to be able to assure some right of ownership on the work of art or at least it seems to verify that the statue has illegally expatriated, also this judgment, as the preceding one, ended with no concrete effect. The Getty Museum succeeded for the second time in challenging the decision of the Italian judge, contesting some procedural vices to the trial. The statue remains in the United States.

In 2018 a new order of the Court of Pesaro decides again for the confiscation. History repeats itself and the Getty Museum appeals against this decision, but this time the ending is different. The two appeals brought by the Getty Museum are rejected in their entirety. The judgment is very clear. The judging authority, refusing any doubtful argument about the relationship between the statue and the Italian State, recognized the link between the object and the Italian culture. From an historical and cultural point of view the Victorious Athlete belongs to Italy and this is enough to claim the statue back, also according to article 4 of the 1970 UNESCO Convention.

The defense of the museum, according to the judge, provided only thesis and not proof of the discovery of the statue in international waters and the argument would not be in any case straightforward.

It would appear that there is no binding obligation coming from international customary and treaty law regarding the ownership of the underwater cultural heritage, so that it is necessary that the order of forfeiture sent forth by the Court of Pesaro is recognized and made effective in the American legal system. And what if the Americans refused to recognize such action? The execution of the ordinance of forfeiture in the American territory, in application of the Italian law that punishes the crime of clandestine export, is connected by law to the amplest matter of the recognition of effectiveness of the norms in the State of location of the object. In the American jurisprudence the application of the foreign law for the guardianship of the cultural heritage faces many obstacles. Firstly, the foreign State cannot vindicate the ownership of a good without having ever had its real possession. In addiction, recognizing the ownership of the foreign country means that a constitutionally guaranteed right is denied to the actual holder of the good. There is, however, a treaty which has a specific relevance in this case: it is the Treaty of Mutual Assistance in Criminal Matters between the Italian Republic and the United States of America, signed in Rome on 2006. Art. 1 of the Treaty provides a reciprocal obligation to assist and cooperate each other in the seizure and confiscation of properties. There would appear to be an obligation for the American Government under the international law to follow up the confiscation order. Art. 18, however, contains the specific reference to the fact that the State requested of confiscation will dispose of it in accordance with its national law and administrative procedures. This means that, despite this international cooperation agreement is considered by the USA to be self-executing and therefore no internal transposition rules are necessary for its implementation, it remains that the execution of each individual request for legal assistance must be carried out in a manner compatible with the law of the requested State, including the rules on the protection of property in force in that jurisdiction. In other words, at the end of the day it is always the United States law that has the last decision on the application of a foreign jurisdiction in its country. This is the reason why the confiscation ordered by the 2010 order did not take place. The confiscation ordered by the 2019 order would appear to pose the same problems. The absence of a rule of customary law on the obligation to return illegally exported works of art from one territory to another and the reservation which States add on the application of the foreign jurisdiction in their territory are the highest obstacles to overcome.

As regards the instruments of international law serving to the resolution of the case, there are only two: the UNESCO Convention on the means of Prohibiting and Preventing the illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 and the Treaty on Mutual Criminal Assistance Between the Italian Republic and the United States of America of 2006. For what concerns the rest of the international regulations that could help to solve the case, such as the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995 or the UNESCO Convention on the Protection of the Underwater Cultural Heritage of 2001, these are not applicable because either one or the other party of the dispute does not recognize their effectiveness.

The only international treaty in this field binding the two countries is the 1970 UNESCO Convention, which counts 139 States Parties. Italy has been part to the Convention since 1978, while the United States signed it

in 1983. Article 1 of the Convention lists a number of cultural goods which are classified as internationally protected and for which there is a mutual obligation of return. These include the products of regular or clandestine archaeological excavations or archaeological discoveries. However, although the Victorious Athlete falls into this category, it should be remembered that the United States made a reservation at the time of ratification by which they stated that the considered their selves bounded only by the obligations laid down in Article 7 b (i) and in Article 9. The United States recognize only these two articles of the Convention as a whole. The first provision requires the prohibition of importation of cultural goods included in the definition where they have been found or have been stolen by a Museum or other public institution since the entry into force of the Convention and provided that the property in question appears to have been inventoried before the theft. The second provision, on the other hand, contains a rather general obligation to carry out export controls, import and international trade of archaeological and ethnological material from those contracting States whose cultural heritage is endangered by the looting of such material. In addition to having limited their participation in compliance with the mentioned articles, the United States also stated that they did not consider the rules to be retrospective. They specified that they could only apply entry controls and import restrictions on archaeological and ethnological material from another State Party if it was specifically part of the cultural heritage at risk of the latter State; therefore, any form of control imposed by other States will not be automatically implemented through import controls. In other words, the United States, although they have adhered to this international instrument to combat the illicit traffic of cultural goods, have no intention to accept the obligation to grant extra-territorial effects to the protectionist legislation of other States party to the same Convention.

From the point of view of the United States, the commitment to recognize the validity of any foreign legislation on national territory applies only after the conclusion of specific bilateral agreements with the State in question. This specific agreement goes under the name Memorandum of Understanding (MOU). Italy and the United States concluded an agreement of this kind in 2001, concerning precisely the limitation of exports of their assets to foreign countries, but this also does not apply in the case in question having the statue crossed the American borders in 1977.

As regards the issue of the instruments of international law applicable to the present case, it is of fundamental importance to mention another one: the Treaty on Mutual Criminal Assistance between the Italian Republic and the United States of America, signed in Rome in 2006 and entered into force on February 1, 2010. Few days before, the confiscation order of the Victorious Athlete was issued. This specific agreement was concluded in the light of Article 3(2) of the Treaty on Mutual Legal Assistance between the European Union and the United States signed in Washington in 2003, aiming to increase criminal cooperation between the two countries, which was formalized in a previous treaty between Italy and the USA in 1982. Article 1 (g) of the 2003 Treaty provides for a reciprocal obligation to assist in the seizure and confiscation of property. Article 18 states that the Contracting Parties shall provide each other with mutual assistance, to the extent permitted

by their respective laws, in the seizure, immobilization and confiscation of the fruits and proceeds of crime. In addition, the confiscated contracting party will act in accordance with its national law and administrative procedures. We can mention an initial answer to one of the questions on which this dissertation is based: there would be an international obligation for the American Government to follow up the confiscation order in its territory, even if, under the provisions of Article 18, the State requested of confiscation will dispose of the order in accordance with its national law and administrative procedures. This means that, despite the existence of this particular agreement, the execution of every single judicial request from a foreign country must be carried out compatibly with the law of the requested State. The US rules will therefore determine whether and to what extent the Italian jurisdiction will have its effects.

It is the case to have a detailed analysis of all the Italian legal texts and specific articles that have been taken into consideration to give an outcome to the case of the Victorious Athlete.

In 2007 the prosecution of the alleged finders of the statue returns to courtrooms after the request of the Public Prosecutor of Pesaro. People involved in the discovery were again accused of illegal commercialization of the statue, failure to report discovery, illegal export of works of art and misappropriation of marine wrecks. The violations concerned Articles 66 and 68 of Law 1089 of 1939, but also Article 48 of the same Law and Article 1146 of the Naval Code. According to Article 48, anyone who accidentally discovers something must immediately report to the competent authority and provide for its temporary storage, leaving it in the condition and place where it was found. While as far as Article 1146 of the Naval Code is concerned, this states that anyone who takes possession of marine wrecks mentioned in Articles 510 and 993, in cases where the obligation to report exists, is punished with imprisonment and fine.

As for the Naval Code, another very important article to be mentioned is number 4. This article states that Italian ships on the high seas and Italian aircraft in place or space not subject to the sovereignty of any State are considered Italian territory. Also the importance of this article has already been discussed extensively, in particular this was very useful to the judge to state how also the accessories of the vessel, as the net on which the statue was entangled, are to be considered extension of the Italian territory being the ship flying the Italian flag considered as such. This article was fundamental to justify the membership of the Victorious Athlete to the Italian State.

The law n. 1089 de 1939 offers many points of reflection regarding the resolution of the case of the Victorious Athlete. Another fundamental article which is important to mention, apart from all those already extensively analyzed, is Article 23. According to this article, things of artistic and historical interest are inalienable because they belong to the State. In this regard it is also necessary to recall Article 54 of the Urbani Code, which takes up the theme of article 23 just described and distinguishes between absolutely inalienable cultural goods and goods for which a relative inalienable is provided. The judge is certain that the Victorious Athlete falls into the first category and therefore it is subject to the absolute prohibition of alienation and export from the national territory, according to article 65 of such Code.

Of fundamental importance is also Article 53, which states once again how cultural goods belonging to the State, regions and other territorial public bodies constitute national cultural heritage. The Urbani Code therefore punishes the crime of illegal exit or export of goods belonging to the State's cultural property, also with confiscation. In this regard it is good to recall article 66 of the law n. 1089 of 1939 in force at the time of the recovery of the statue, as this also provided in the same case the fine and the confiscation of the property.

In 1964, when the Victorious Athlete was found, the Geneva Convention on the High Sea of 1958 was not yet in force for Italy, however also the norms of such Convention have been taken in consideration by the judge in order to derive the general principles applicable to our case, including that of freedom of the seas and that of subjection of the ship in international waters to the power of the state whose flag it flies. All this in order to arrive to assert that in case of discovery in high sea of marine wrecks from a ship flying the Italian flag, the law to be applied is the Italian one with particular reference to the national rules on cultural heritage.

As for the regulation of the property of the statue, particular reference is made to the law n. 218 of 1995 with its articles 51 and following. The judge has established that the current holder of the object of art has not legally acquired the property, thus violating Italian private law.

In support of the order of confiscation of the statue it is also invoked the decree of the President of the Republic of January 23, 1973 known under the name of Approval of the Single Text of the Legislative Provisions in Customs Matters. In such decree the light comes on the article 301, that states as in the cases of smuggling is always ordered the confiscation of things object of the crime and things that are products of it or profit.

Further support for the relic's belonging to the Italian State is Article 91 of Legislative Decree n. 42 of January 22, 2004, which has already been extensively discussed. This article in fact states that things found underground or on the seabed belong to the State and are part of the property or unavailable heritage.

The use of the seas, whether regulated by treaties, rules or customary law, is always evolving. For about two hundred years, the freedom of the seas has been the only and prevailing rule of international law of the sea. It was only after 1945 that the experience of unchallenged freedom was seriously questioned. With the passage of time, ever since the principle of the freedom of the seas was elaborated, the different and new activities concerning the sea have contributed, on the one hand, to seek ever more solutions to the problems that arose, taking into account the presence of many international players, the interests at stake and the different policies characterizing each State; on the other hand, these activities have forced a change in the rules governing them, since technological progress has been made, navigation has evolved in means and time, needs have increased, pollution has created new complications, the protection of the environment has assumed a fundamental importance. New technologies for underground research as well as more advanced fishing or digging techniques have increased the awareness in the states of the richness that lies under their soil. Hence the obvious consequence of the desire to protect this heritage, which adds pieces to the already existing one and which integrates the research on history belonging to every civilization. Being deprived of such testimonies is

not pleasing to any state that cares of its own past and identity, like Italy. This is the reason of recent regulations to protect the heritage lying in the subsoil but also of the tenacity demonstrated by the Italian state in order to get back home the Victorious Athlete.

Of all the attempts to codify the use of the sea, the most successful instrument was the United Nations Conference on the Law of the Sea of 1982. Although the practice of States is not uniform, the success of the Conference was not only that of concluding a treaty, but also that of conditioning today's law and the future international law of the sea, making the Convention a legal instrument regulating all activities relating to the use of the seas generally accepted. Yet, the Montego Bay Convention is not enough. Firstly, apart from the fact that almost all the States of the world have acceded to the Convention, there are some which are not yet bound by the Treaty, first and foremost the United States of America. The United States has not ratified this Convention because probably the possibility of using the seas more freely and almost completely independently seems to be of great importance. This decision is, of course, open to criticism. It is true that no state can be forced to sign an international treaty unless it wishes to do so. This is obviously a problem, as many of the issues regulated by international law in this area need to be resolved by other means, which often lead to further difficulties and misunderstandings. This is exactly what happened in the dispute between Italy and the Getty Museum for the owning of the Victorious Athlete. We have already seen that the international standards applicable in this case are only the UNESCO Convention on the means of Prohibiting and Preventing the illicit Import, Export and Transfer of ownership of Cultural Property of 1970 and the Treaty on Mutual criminal assistance between the Italian Republic and the United States of America of 2006. However, these two regulations do not cover all matters relating to the case, so that it was necessary to proceed with reference to the Italian legislation governing the law of the sea and that of cultural goods with the consequent protest of the Getty Museum for not having, on the contrary, considered the Californian law. Is there any way to overcome this problem? The analysis of the case seems to give a negative answer. In addition, there is also the problem of enforcing Italian legislation in the United States, with the United States having the power to choose the way in which implement it. The United States has an obligation to implement the Italian measures, but the possibility to choose the ways in which put it into practice deprives the measure of a certain amount of strength that must be adapted in any case to American wishes. The proof of this lies in the fact that, despite the last sentence of January 2019 confirming the confiscation and the return to Italy of the Victorious Athlete, this is still at the Getty Museum and it is not clear if, how and when the United States will give actuation to the confiscation order.

In light of the analysis proposed, which sought to address different aspects, some further concluding remarks should be made, intending to agree once again on the revolutionary importance of the 2001 UNESCO Convention on Underwater Heritage and the value of international conventional instruments (multilateral, regional and bilateral) achieved. Indeed, the underwater cultural heritage represents an expression of a universal heritage which, by its scope and its intrinsic nature, belongs to every people. However, there seems

to be a certain margin of doubt about the process of globalization of culture which. On a critical examination, UNESCO seems to express an idea of universal culture that is too close to the simple sum of the many national cultures, in a constant effort to involve different cultural subjects from nations, that is local communities, without taking proper account of any substantial differences. Each community attributes a different importance to its culture and is willing to protect it at different extent. Modalities depend first of all on what is meant by cultural heritage and on the efforts needed to protect its various forms. If the western part of the world is more "materialistic" in shaping its culture, on the contrary other peoples, especially in the east, are traditionally more linked to immaterial demonstrations of their identity through, for example, music or poetry. The international community wanted to protect this type of cultural heritage, which includes various manifestations of cultures and their diversity. States interest in maintaining and protecting the right of ownership on objects part of their cultural heritage lies partly in the economic value which such works of art embody, but above all in the intangible and intrinsic one which is immensely greater than any amount of money. Identity of people resides in its culture and tradition, elements of which art is the most significant manifestation.

Indeed, it is precisely the tendency towards the universality of this complex system of global protection of the underwater heritage that reflects itself in the lack of an adequate concrete control instruments. There must be no doubt that the submerged cultural heritage, as part of the generally considered cultural heritage, belongs to everyone, but such a statement is not simply to implement in practice. Undoubtedly the 2001 Convention on the Protection of Underwater Cultural Heritage has the great merit of considering and defining a system of rules to coordinate the activities of all States Parties in the interests of property itself which is the subject of protection. However, effective forms of protection cannot always be found.

What leads us to believe that rules and procedures laid down in the body of the conventional text adopted in Paris cannot be considered sufficient, is partly due to the impossibility of establishing a system of control over the activities of underwater archaeology, as it is in fact impossible to implement a system of prior checking because of the actual location of the underwater assets. The proliferation of bilateral or regional agreements, and in this sense it is necessary once again to underline the importance of the participation of the European Union and of many states of the Euro-Mediterranean area, would ensure more effectively the protection of property found off their coasts. The involvement of only few countries would be better able to influence the fight against illicit traffic in cultural goods, favored by criminal organizations.

On this issue, the Victorious Athlete's case raises further doubt. How is it possible, in the absence of a solid practice, to guarantee the respect of the underwater cultural heritage by private parties acting for personal and patrimonial interests? It has been established how it is possible, in fact, that some people find an object of inestimable value by chance and decide to exploit it on the illegal market. Although there are internal and international provisions that can impose the obligation to report the find, there is no corresponding control system in the event of a breach of the obligation.

Issues of international law concerning the case of the Victorious Athlete are a lot, so much that the complexity of the settlement of the dispute led the judicial system to work on it for over fifty years. Among the most important topics there is the one about the place and the modalities of the finding of the statue. In fact, the main leverage point used by the Getty Museum to deny any right of ownership of Italy on the Victorious Athlete is the one concerning the place of its discovery. Being the object found in international waters, this would not belong to any particular state, but to the whole international community. However, the judge of the Court of Cassation overcame this difficulty, taking as starting point the previous jurisprudence, noting that the vessel and all its accessories can be considered an extension of the Italian territory. Therefore, every archaeological object belonging to the territory of a state is to be considered public property of the state itself.

This point gave birth to another crucial aspect of the whole story: is there an obligation for the United States to execute the confiscation order? In such cases, can Italian law prevail over American law or vice versa? Are the United States obliged to respect the law of a foreign state within its territory? As regards the specific field of cultural goods, I underlined how international law for the protection of cultural goods has evolved over the years alongside with an awareness of its importance for States. From a position that provided for the absolute inapplicability of foreign public law, the jurisprudence moved to a more flexible version allowing, in exceptional cases, the recognition of the effects of the rules of public law of other States by setting limits on the availability of cultural goods, avoiding that the mere crossing of borders by an object of art is sufficient to ensure its immunity to the law of the territory to which it belongs. However, in light of the case examined before the United States is likely to enforce Italian law and judicial decisions attributing ownership of the Victorious Athlete to Italy. The answer seems to be negative.

As regards the question whether an execution in the United States of an Italian judicial decision assigning ownership of the property to Italy is foreseeable, the answer I give is that yes, the American law provides for the recognition of foreign jurisdictions in its territory, but according to times and modalities that the American jurisdiction chooses for such application (Treaty of Mutual Assistance in Criminal Matters Between the Italian Republic and the United States of America, Article 18). This is one of the main reasons, perhaps the main one, for which despite there is an umpteenth Italian measure concerning the confiscation and the demand for repatriation, the Victorious Athlete is still at the Getty Museum and we do not know how or when the statue will come back home, because it is the American jurisdiction that decides. I therefore support the view that probably if there were a rule of customary international law obliging States to act in that sense, in particular to return illicitly exported objects forming part of the cultural heritage of other States, at this time the Victorious Athlete would already be at home or we would be more sure that its return soon or late will happen. Now it is all very uncertain. On the one hand it would appear as if the judgment of the Court of Cassation lost all its force, not having the possibility of complete worth in foreign territory.

To conclude, the situation on the legislation used to solve the case both at national and international level has been carefully analyzed and the result seems to be unsatisfactory although many care has been devoted to the

protection of cultural heritage over the years. What, then, should change? How could the law on the protection of cultural heritage be strengthened? If the laws on the protection of cultural heritage were to be regarded as customary law, would it be easier and quicker to resolve disputes concerning works of art? Would states be more respectful of their own cultural heritage and that of the others? These are questions arising spontaneously at the end of the analysis of this case, since the main problem is the recognition and acceptance of measures deriving from the civil and criminal law of an external state. Customary law, in fact, binds all the states of the international community regardless of their voluntary adherence to the norms. Can international law on protection of cultural heritage be considered part of customary international law? Doctrine is divided on this issue: on the one hand, there are those who advocate the need for a stronger protection system, because the existing one is vague, in particular as regards the fulfilment of obligations and penalties by States; on the other hand, many are convinced that the criticism is unfounded and that there is more than a good reason to argue that the law on the protection of cultural heritage has in fact assumed the characteristics of customary law. The problem is precisely that on paper this thought has not yet been defined. The conclusive awarness of this dissertation is the belief that the protection of cultural heritage has become a key priority for states and international organizations over the years. The expression "heritage" evokes in its most common meaning a set of objects, knowledge and memories that can have a preferential importance for an individual, as well as for a whole society. Moreover, the growing concern for the protection of cultural goods property owes its existence to the fact that culture is something closely linked to human rights and environment.

I am convinced that international protection of cultural goods is a customary law in formation and that there are already some rules governing international law which have embodied this characteristic. All this to reinforce the fact that the international community is absolutely convinced that cultural heritage is something to be protected at all costs and that no state should be deprived of it, although some of the instruments to its protection seem not to have acquired yet the strength they should. It is in the interest of the international community, of each state and individuals to protect every form of art and culture characterizing a territory because, although each individual is different from the other, although every nation is different from the other, there is one thing that unites all: the recognition of the identity in each culture.

Cultural heritage is a broad concept that includes the natural environment as well as the material one. It includes landscapes, historical places, sites and environments built by man, as well as biodiversity, collections, past and present cultural practices, life experiences and knowledge. It records and expresses the long processes of historical development which form the essence of different national, regional, indigenous and local identities and is an integral part of modern life. It's a dynamic landmark and a positive tool for growth and change. The specific cultural heritage and collective memory of each locality or community is not substitutable and is an important basis for present and future development.

The selection of heritage is, in fact, a social process that draws life and motivation from the present, whatever it may be, and that involves power, tradition, memory, identity. Each generation, each society delimits the set

of cultural materials shaped by individuals and communities of the previous epochs that deserve to be handed down to posterity and therefore need to be protected. According to this dynamic vision, each generation reactivates the social process at the base of the identification and selection of what must be preserved.

Cultural identity is not a fossilized fact, but it implies a permanent act of identification which at the same time presupposes tradition and freedom. Cultural identity integrates in a permanent process cultural diversity, the particular and the universal, memory and project. The problem, as in the case of the Victorious Athlete, is that the economic value of art many times diverts attention from its deepest value and from the awareness that an object reflecting the culture of a particular nation acquires its greatest value precisely if it can be ambassador of that particular culture. Once the object is dragged away from the place where it acquires its greatest meaning, it loses much of its sense of existence. The hope is therefore that the Getty Museum, like any other public or private institution owning objects of art stolen from the cultural heritage of any other nation, aware of these arguments return without delay the statue of the Victorious Athlete to Italy, posing it in the place where it should have always belonged.

Cultural heritage is not only memory of the past, but also a heritage for the future. The responsibility for its preservation lies first in each citizen, who must be educated in this direction, then in states and international community. Problems concerning the preservation of cultural heritage are interwoven with the structure of the institutions called to solve them, also with the emergence of global interests and the need to take measures beyond the present.

Everyday life is intrusive and chaotic, the future is to be drawn. In this context, cultural heritage can play a role in reactivating the depth of history and in representing a valuable resource for a culturally equipped vision of the trajectories to come. Provided that heritage may become a focus of convergence for artists, cultural workers, citizens, it rediscovers voice and expression in contemporary languages, regaining a sentimental correspondence in the body of the local society. The preservation and valorization of material and immaterial cultural heritage is not only a call to an indisputable moral duty, but a possible declination to the construction of a desirable and shared future. Due to history, culture and geopolitical positioning cultural heritage is the very ribbon of every nation, in its infinite modulation and in comparison with the rest of the world.

There is the need of convergence between all forms of creativity and technological instrumentation addressed to culture. On the one hand, a decisive public role in promoting digitization; on the other hand, the task for the cultural enterprise to make the best use of all these innovations. Heritage is and can be a powerful economic lever, not only in generating tourist flows. The ability to use and value cultural heritage is generally a measure of the sustainability of local development. But the main theme that unites heritage and territory lies in the identification of the methods for a culturally equipped use of the territory, to react to the inability of too much urban planning and current architecture in building places and landscape making, to trace routes of sustainable development, although embroiled in the fragility of environmental conditions. A virtuous alliance between

culture and manufacturing is the key to the development of models that, while productivity-oriented, do not destroy the landscape.

Cultural heritage has an important place in the society of many countries, including Italy, and it has exceptional dimensions. These dimensions exceed the ability to cope with them only through public resources, especially in countries where welfare is threatened with drastic cuts in its most essential components. The need for a governance allowing a substantial proportion of assets to be re-injected into ordinary economic cycles is an inescapable condition for keeping alive assets otherwise destined to the loss. The ability to make compatible in the fragility of the individual cultural good, conservation, development and economic values implies a cultural revolution in rethinking protection, but also on the private side in rethinking the impacts of development: It is a long-lasting process, but without alternatives to the horizon. The necessary step is feeding this process or starting where there is no track yet.

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