



The 1995 UNIDROIT Convention’s Influence on the Development of Customary International Law for the Return of Cultural Property: The European Court of Human Rights 2024 Judgment in the Case of The J. Paul Getty Trust v. Italy

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Introduction

The case involves a confiscation order issued by Italian authorities to recover cultural property held in the collection of a U.S.-based museum. On the surface, the issue appears to be a simple question of ownership. The reality is a trans-national, years-long dispute involving human rights, cultural property, and the development of customary due diligence requirements related to cultural property acquisitions.

The *Victorious Youth* is a bronze statue ("the Bronze" or "the Statue") from the classical Greek period currently in the collection of the J. Paul Getty Museum ("the Getty").¹ After the

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¹ The parties to this case include the J. Paul Getty Trust and several of its board of trustees but for the purposes of this note the trust, trustees, and museum will be referred to collectively as “the Getty.”

Bronze was discovered in the Adriatic Sea in 1964, it passed through several hands, resurfaced in Munich in 1972, and was ultimately purchased by the Getty in 1977.²

For nearly three decades, Italian authorities attempted to recover the statue but were unsuccessful.³ In 2007, Italian officials initiated enforcement proceedings in domestic courts leading to the contested confiscation order now at issue.⁴ The Getty unsuccessfully appealed to Italy's Court of Cassation which upheld the lower court's confiscation order.⁵ The Court determined the Bronze had been illegally exported from Italy in contravention of Italian cultural heritage and customs law and negligently acquired by the Getty.⁶

In 2019, after the Court of Cassation's final ruling, the Italian Ministry of Justice sent an international request to U.S. authorities through a bi-lateral Mutual Legal Assistance Treaty ("MLAT").⁷ The process, which requires the U.S. Attorney General to certify the request and submit it to a competent domestic court, is still underway.⁸ Following Italy's 2019 MLAT request, the Getty brought suit in the same year against Italy in the European Court of Human Rights ("ECHR") alleging the confiscation order violated their right to peaceful enjoyment of their possessions as protected by Article 1 of Protocol No. 1 ("Art1 P1").⁹

Though novel, *Getty v. Italy* is not the first cultural property dispute brought before the ECHR under Art1 P1. In a case predating *Getty v. Italy*, a Swiss art dealer named Ernst Beyeler brought suit against Italy in 1998 arguing Art1 P1 had been violated "... on the ground that the Italian Ministry of Cultural Heritage had exercised a right of pre-emption over a Van Gogh

² The J. Paul Getty Trust v. Italy, App. No. 35271/19, *see generally* ¶¶ 6-38 (factual background) (May 2, 2024), <https://hudoc.echr.coe.int/?i=001-233381>

³ Italian authorities made numerous attempts to recover the Bronze after learning it was in Munich. *See*, *Getty v. Italy*, Eur. Ct. H.R. at ¶16 (1973: Italian Ministry official requested German authorities to "intervene to prevent any resale... ." German authorities conducted interviews but determined evidence was insufficient for indictment), *See also* ¶ 20 (1974: Italian Authorities opened an official investigation making a second request to German Authorities for assistance. The request was denied), ¶ 40-41 (1977: after the Bronze was imported to U.S., Italian customs authorities requested U.S. Customs Service to investigate whether it had properly entered the U.S.. Investigators found no violation of U.S. customs law.), ¶ 62 (1989: General Director for Archeological Objects of the Italian Ministry for Cultural and Environmental Heritage requested Getty return the Bronze through a direct plea to the then Director of the Getty. The request was denied.); ¶ 63-64 (1995: Italian Ministry of Foreign Affairs, through the Italian Consulate in Los Angeles, attempted to negotiate with then curator of antiquities at the Getty for the return of the Bronze. The restitution request was dismissed as "unrealistic.")

⁴ *Getty v. Italy*, Eur. Ct. H.R. at ¶¶ 68, 76

⁵ *Id.* at ¶ 94.

⁶ *Id.* at ¶ 95

⁷ *Id.* at ¶ 104, *See also*, Treaty on Mutual Legal Assistance in Criminal Matters, It.-U.S., Nov. 9, 1982, U.S. TIAS 85-1113

⁸ *Getty v. Italy*, Eur. Ct. H.R., at ¶ 105

⁹ *Id.* at ¶ 190

painting which, he alleged, he had lawfully purchased.”¹⁰ Though both claims were brought under the same Article and Protocol (Art1 P1), the contested measures were different. Beyeler contested Italy’s right of pre-emption while the Getty contested Italy’s confiscation order. In both cases, the ECHR noted Art1 P1 comprises three distinct rules: “the first rule... is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule...covers deprivation of possessions and subjects it to certain conditions; the third rule...recognizes that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest... .”¹¹

In *Beyeler*, the Court found Beyeler “had to bear a disproportionate and excessive burden” and therefore Art1 P1 had been violated.¹² In *Getty* the Court went the other direction, finding no violation of their right to peaceful possession of property under Art1 P1.¹³ How did the Court arrive at this determination and what influence did the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“the Convention”) play in its reasoning? The analysis in the following pages is limited to examining the Court’s possible rationale for referencing the 1995 UNIDROIT Convention in its 2024 judgment regarding the *Victorious Youth*, while probing the development of norms in customary international law related to cultural property, highlighting the broader impacts of the Convention and the ECHR’s judgment in this case.

Discussion

The ECHR relies on the Convention as a normative standard-setting framework and yardstick for measuring the development of international practices related to the return of stolen or illegally exported cultural property. In *Getty*, the Court noted the Convention is not directly applicable to the relationship between Italy and the U.S. because the U.S. is not party to the Convention.¹⁴ As such, the Convention could not be used as a mechanism to directly facilitate the return of the statue in question. However, the Court observed the relevance of Articles 1, 2, 5, 6, and 9 of the Convention in contemplating its judgement. The Court cited Article 1 because the dispute is of “an international character” about “the return of cultural objects;” Article 2 to demonstrate the Statue falls within the definition of “cultural object;” Article 5 to point to the obligations of a “competent authority” when faced with a “request” for the return of a cultural object illegally exported; Article 6 to address the question of compensation and good faith, and Article 9 to highlight that the rules of the Convention are a minimum standard.¹⁵

¹⁰ *Beyeler v. Italy*, 2000-I Eur. Ct. H.R. 57. at ¶ 74

¹¹ *Id.* at ¶ 98, *See also Getty v. Italy*, Eur. Ct. H.R. at ¶¶ 272

¹² *Beyeler v. Italy*, Eur. Ct. H.R. at ¶ 122

¹³ *Getty v. Italy*, Eur. Ct. H.R. at ¶ 409

¹⁴ *Getty v. Italy*, Eur. Ct. H.R. at ¶ 159

¹⁵ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects arts. 1, 2, 5, 6, 9, Jun. 24, 1995, 2421 U.N.T.S. 457.

The Court relies on these Articles of the Convention as persuasive authority to strengthen its final judgement and support three findings. First, that Italy’s confiscation order of the *Victorious Youth* falls within the “public or general interest” exception to the general rule for the protection of personal property embodied in Art1 P1 thus allowing Italy to lawfully interfere with the Getty’s right to peacefully enjoy its possession; second, that the legal basis for the confiscation order was “sufficiently clear” and “foreseeable” and thereby in accord with the principles of lawfulness; and third, that no violation of Art1 P1 occurred.

1. Protection of Cultural Objects is in the “General or Public Interest”

The European Convention on Human Rights “guarantees the right to the protection of property.”¹⁶ The general rule is “every natural or legal person is entitled to the peaceful enjoyment of his possessions.”¹⁷ The Getty alleged their right to the peaceful enjoyment of their possessions was unlawfully violated by Italy’s order to confiscate the *Victorious Youth*.¹⁸

It is crucial to note the protection of property as a human right is not, however, absolute. States are entitled to control “the use of property in accordance with the general interest” if it strikes a “fair balance” between the “demands of the general interest of the community” and the “requirements of the protection of the individual’s fundamental rights.”¹⁹

Here, the ECHR found that Italy’s order to confiscate the Bronze was in the “public or general interest” with a view to protecting Italy’s cultural heritage and thus a justifiable “interference” of the Getty’s right to the “peaceful enjoyment” of their “possessions.”²⁰ To underpin the position that the protection of cultural property is a legitimate interest in general, the Court noted the development in international and European law of several treaties, including the 1995 UNIDROIT Convention, regulating issues concerning the protection and return of cultural heritage.²¹ In doing this, the Court uses the existence of the Convention as justification for finding the protection of cultural property a “public or general interest” thereby reinforcing the Convention's authority and expanding its impact on international legal standards.

¹⁶ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 3, 1952, ETS No. 009

¹⁷ *Getty v. Italy*, Eur. Ct. H.R. at ¶ 190 (quoting Article 1 of Protocol 1)

¹⁸ *Id.* at ¶ 269

¹⁹ *Getty v. Italy*, Eur. Ct. H.R. at ¶¶ 272-281

²⁰ *Id.* at ¶ 360

²¹ *Id.* at ¶¶ 149, 358

2. Legal Basis for Confiscation “Sufficiently Clear,” “Foreseeable,” and “Lawful”

Once the ECHR determined that the protection of cultural property was a “general interest” (and thus an exception to the established rule protecting private property), it had to determine if Italy’s legal basis for the interference with the Getty’s possession of the *Victorious Youth* comported with the principles of lawfulness. To assess the legality of the measure taken, the Court looked at whether the measure was “sufficiently clear,” “foreseeable,” and “lawful.”²²

The Getty argued the Italian law permitting confiscation lacked clarity because it lacked a statute of limitations.²³ The Getty pointed to the Convention’s three-year time-limit, arguing that imposition of a statute of limitations was the norm *and* that the appropriate statute of limitations was three-years.²⁴ The Court noted the Getty had been in possession of the Statue “without any interruption...since 1977,” which, according the Getty, should have time-barred Italy’s claim.²⁵ Considering this argument, the Court referenced the Explanatory Note to the 1995 UNIDROIT Convention, observing that in some countries an absence of a statute of limitations was, in fact, a “distinctive feature” that provided greater opportunity for the recovery of stolen or unlawfully exported cultural property.²⁶ On this basis, the Court found “the absence of a time-limit is not a factor that, on its own, can automatically lead to the conclusion that the interference in question was unforeseeable or arbitrary and therefore incompatible with the principle of lawfulness.”²⁷

Regarding due diligence, the Court found both Italian domestic law and case-law established a due diligence requirement with respect to cultural objects and was thus not “unforeseeable” at the time the Getty acquired the Bronze.²⁸ The Court acknowledged that, while the standard had evolved over time, it clearly maintained that the purchaser must “demonstrate their lack of involvement in the criminal offense,” by proving their purchase took place “ignoring, *without fault*, the illicit origin of the object.”²⁹ The Court conducted the “without fault” analysis — inclusive of which was an examination of due diligence — as part of the fair balancing test, discussed in more detail in the next section.

²² *Id.* at ¶ 325

²³ *Id.* at ¶ 286

²⁴ *Id.*

²⁵ *Id.* at ¶ 265

²⁶ *Id.* at ¶ 323, *See also*, Marina Schneider, UNIDROIT Secretariat, UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report, 506-7 (2000).

²⁷ *Getty v. Italy*, Eur. Ct. H.R. at ¶ 324

²⁸ *Id.* at ¶ 301

²⁹ *Id.* at ¶ 304 (italics added for emphasis)

3. “Due Diligence” as Part of a “Fair Balance” Analysis to Determine Whether Italy’s Confiscation Order Violated Art1 P1

Having determined that protection of cultural property is a general interest and that the legal basis for confiscation was clear and foreseeable, the Court conducted an analysis balancing the general interest of the community against the individuals’ property rights by looking at the “reasonable relationship” between the “means employed” (the confiscation order) and the “aim sought” (return of the statute).³⁰ As part of this balancing test, the ECHR considered whether the due diligence standard laid out in Italian domestic law and case-law was unreasonable.

The due diligence standard used by the Italian district court to assess the Getty’s acquisition of the Bronze is almost identical to the due diligence standard outlined in the Convention — including placing the burden of proving good faith on the possessor. The Court of Cassation found the lower courts assessment reasonable, noting that during the negotiations, Mr. Getty Senior had expressed serious doubts as regards the provenance and that the Getty’s representatives had asked for information exclusively from the vendor’s representative failing to ask the competent authorities whether relevant Italian law had been complied with.³¹

The ECHR, in reviewing the Court of Cassation’s finding that the Getty had failed to meet the due diligence standard required by Italian law, specifically cited Article 4 Paragraph 4 of the Convention which explains the concept of due diligence under the Convention. The Court does this to support its position that a higher standard of diligence for cultural property acquisitions is not only justified but “nowadays enshrined” in international agreements, concluding that the Italian courts had not acted “manifestly unreasonabl[y].”³²

Conclusion

The principles of the Convention — binding as law for State Parties like Italy — take on a soft law dimension for non-State Parties like the U.S.. With increased judicial references to the Convention, and reliance on its principles by parties to disputes, it is further integrated into national and international legal discourse paving the way for the principles outlined in the Convention to be accepted as customary norms.³³

³⁰ *Id.* at ¶ 374

³¹ *Id.* at ¶ 97

³² *Id.* at ¶¶ 382, 356

³³ For other instances where courts and parties to disputes have relied on the Convention as a normative instrument see *Government of the Islamic Republic of Iran v. The Barakat Gallery, Ltd*, EWCA Civ 1374 (2007) (where the Iranian Government sued a London-based gallery in the Queen’s Bench Division of the UK’s High Court for the restitution of illicitly excavated cultural property. The Court cited the 1995 UNIDROIT Convention as evidence of “the international acceptance of the desirability of protection of ... national heritage”); *Tribunal Fédéral Suisse*

In *Getty v. Italy*, the European Court of Human Rights' references to the 1995 UNIDROIT Convention — alongside both Parties' reliance on the Convention in their arguments before Italy's domestic courts — highlight the Convention's growing significance as a normative instrument in international law. It is a clear expression of a developing international public order when, in disputes involving states not party to a convention, the convention's principles are being explicitly invoked by non-state parties to substantiate their claims. In that vein, when the ECHR employs the Convention as a backstop for its decision that holds the protection of cultural property as a legitimate aim under the Human Rights Convention and that the protection of cultural property is a matter of general community interest in the context of property rights (within the framework for human rights) it signals the emergence of a due diligence standard in customary law for bona fide purchasers of cultural property. This raises a pivotal question: at what point do the principles enshrined in a hard law convention transition into the realm of customary international law? The evolution of due diligence requirements for purchasers of cultural property, though not yet crystallized in customary international law, is undeniably progressing toward that status. This progression marks a notable shift, underscored by the considerable impact of the 1995 UNIDROIT Convention in international and domestic legal discourse.

Though the UNIDROIT Convention is not universally ratified, its principles operate as both hard and soft law, shaping *opinio juris*, standardizing practices that foster consistency within the international framework for the acquisition of cultural property, and contributing to the development of customary international law. The dual influence of hard law convention and soft law norms highlights the dynamic and evolving nature of international legal standards in the protection of cultural property and the valuable role played by the 1995 UNIDROIT Convention.

[Federal Supreme Court of Switzerland], 08 April 2005, No. 5C.60/2004 (where the Tribunal cited Articles 3(1), 4, 5(1), 6, 8, and 9 of the UNIDROIT Convention as “concrete expression[s] to the imperative need for efficiency in the fight against international trafficking in cultural objects.”); *République de l'Equateur contre S.A. Tajan*, Tribunaux de Grande instance (TGI) [ordinary courts of original jurisdiction] Paris, 1ère ch., 1ère sect., 24 Jan. 2007 (where Ecuador sued a French auction house for the restitution of Pre-Colombian antiquities. Ecuador relied on the Convention to support their argument for restitution of the property. The court rejected the application of the Convention explaining France had signed but not ratified it).