

Report of the Federal Government on the protection of cultural property in Germany

**Report on the impact of the
Act implementing the UNESCO Convention of
14 November 1970 on the means of prohibiting and
preventing the illicit import, export and transfer of
ownership of cultural property
(Act Implementing the Cultural Property Convention)
and
prevention of the exodus of German cultural property**

Executive summary

With the ratification of the UNESCO Convention of 14 November 1970¹ in the year 2007, the Federal Republic of Germany assumed responsibility under international law to take national action to combat illicit trade in cultural property. To implement the Convention, the Bundestag and the Bundesrat adopted the Act on the Return of Cultural Property on 18 May 2007.² The Act was not uncontroversial in the legislative process: German legislators were faced with the twofold task of fulfilling the international obligations set out in the UNESCO Convention and at the same time avoiding unreasonable burdens and competitive disadvantages for the German art market. The 2007 Act on the Return of Cultural Property was consequently a political compromise by all the parties involved to achieve implementation that was neither too lax and hence damaging to Germany's reputation nor too strict and thus no longer practicable.³ In some respects, the provisions of the Act broke new legal ground: While the Council Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State had already been transposed into German law in 1998,⁴ the law had hardly been applied in practice. There had also been little practical experience with the application of the Directive in other EU Member States. With the adoption of the Act on the Return of Cultural Property in 2007, the Bundestag and Bundesrat therefore requested that the Federal Government submit a report on the impact of the Act.⁵ The requirement of an evaluation, which is met with the present report, was thus part of the political compromise forged in 2007.

The present evaluation report compiled by the Federal Government in cooperation with the competent supreme *Land* authorities sets out the legislation currently in force in the area of cultural property protection in Germany, reviews it in the light of current legislative developments at EU and international level and examines the problems

¹ Act on the Convention of 14 November 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property of 20 April 2007 (Federal Law Gazette [*Bundesgesetzblatt*] 2007, Part II, p. 626).

² Act implementing the UNESCO Convention of 14 November 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property and implementing Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State (Act on the Return of Cultural Property; *Kulturgüterrückgabegesetz – KultGüRückG*) of 18 May 2007 (Federal Law Gazette, Part I, p. 757). The Act entered into force on 29 February 2008.

³ See the explanatory memorandum to the Act on the Return of Cultural Property, Bundestag Printed Paper 16/1371 of 4 May 2006, general part, p. 12 [in German].

⁴ Act Implementing Directives of the European Communities on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and Amending the Act to Prevent the Exodus of German Cultural Property (*Kulturgutsicherungsgesetz – KultgutSiG*) of 15 October 1998, Federal Law Gazette, Part I, p. 3162.

⁵ Resolution of the German Bundestag of 1 February 2007 (Bundestag Printed Paper 16/4145) and Resolution of the Bundesrat of 9 March 2007 (Bundesrat Printed Paper 92/07) [both in German].

associated with application of the German laws. In addition, it compares the protective mechanisms chosen by other states in the area of protection of national treasures and gives an overview of transposition of the UNESCO Convention into the national law of other states party to the Convention.

In principle, a distinction must be made between two thrusts of action under the law on protection of cultural property:

- Prevention of the exodus of German cultural property,
- Protection of cultural property of foreign states that was illicitly exported from such states to Germany and must be returned to them.

Whereas prevention of the exodus of German cultural property has been enshrined in German legislation since 1955,⁶ protection of foreign cultural property on the basis of EU law and UN law has been regulated by statute in Germany since 1998 and 2007 respectively.⁷ Both thrusts of protective action dovetail and are thus two sides of one and the same coin; they are hence both also addressed in this report. The report concludes with key points for action and concrete proposals for improvements and recommends a comprehensive revision of the law governing the protection of cultural property in Germany in the coming electoral term.

The results of the evaluation can be summarized as follows:

1. Germany's ratification of the UNESCO Convention and the 2007 revision of the law governing protection of cultural property were politically correct and necessary:

- According to the estimates of international organisations, trafficking in cultural property ranks third in the area of international crime, after trafficking in weapons and drugs. Especially in crises and armed conflicts such as those in Afghanistan in 2001, Iraq in 2002/2003 and Syria and Mali today, museums and archaeological excavation sites have been plundered and cultural objects have been illicitly taken abroad. It is not just cultural property of national significance for the respective state of origin which is at stake here but rather

⁶ Act to Prevent the Exodus of German Cultural Property (*Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung – KultgSchG*) in the version published on 8 July 1999 (Federal Law Gazette, Part I, p. 1754), as most recently amended by Article 2 of the Act of 18 May 2007 (Federal Law Gazette, Part I, p. 757).

⁷ Act implementing the UNESCO Convention of 14 November 1970 on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property and implementing Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State of 18 May 2007 (Federal Law Gazette, Part I, p. 757). The Act entered into force on 29 February 2008.

protection of the cultural heritage of all humankind. Germany therefore remains committed to the international responsibilities it shouldered in 2007 with the ratification of the UNESCO Convention. Only through concerted international efforts can trafficking in cultural property be stemmed.

- The UNESCO Convention presently has 123 states parties. One can thus speak of a nearly universal acceptance of the Convention. In view of the increasing international importance of cultural property protection, any further abstinence on Germany's part would have considerably damaged its reputation from a foreign policy perspective. For many states, especially in the Mediterranean region, in Central and South America and in the Middle East, protection of cultural property against trafficking is an important and highly sensitive issue that can easily cause ill feeling at bilateral level. The ratification of the UNESCO Convention by the Federal Republic of Germany in 2007 was hence politically correct and necessary and was welcomed internationally.
- Another positive finding is that according to the Federal Statistical Office, the additional burden on the German art and antiques trade that was feared in 2007 as a consequence of the statutory recording obligations in respect of the purchase and sale of cultural property has failed to materialise.
- The possibility – created by the 2007 revision strengthening legislation to prevent the exodus of German cultural property – of also registering cultural objects in public ownership as objects of national importance and thus protecting them from export abroad has likewise proved to be right: Through the amendment of the Act to Prevent the Exodus of German Cultural Property, the possibility of protecting cultural property in public ownership pursuant to Directive 93/7/EEC was created, an option that had previously not been utilised in Germany. For the first time, the EU return mechanism has thus been activated for cultural objects of national importance that are in public ownership as well.

2. Existing need for further action to improve legislation:

- In 2007, German legislators were faced with the task of implementing the UNESCO Convention of 1970 in such a way as to both meet Germany's international obligation to effectively implement the Convention and also protect the interests of the German art and antiques trade from unreasonable burdens and competitive disadvantages. In contrast to Directive 93/7/EEC, the UNESCO Convention allows national legislators broad scope for implementation. This legislative scope was utilised in 2007, taking into account

the experience with the 1998 Act on the Return of Cultural Property and weighing all the interests to be taken into account. Already at that time, however, it was clear that in the coming years constant monitoring of the international market for cultural objects would be required in order to adapt or supplement existing provisions as necessary.⁸

- The assessment that prompted the evaluation requirement of the Bundestag and Bundesrat in 2007, namely that legislative adjustments could subsequently become necessary, has proved to be true. While the 2007 Act on the Return of Cultural Property indeed provides a statutory foundation, the cases in which it has been applied during reporting period 2008 – 2013 have revealed numerous shortcomings: Despite several requests for return submitted by foreign states since 2008, in not one single case has the Act on the Return of Cultural Property actually led to a return of cultural property. The Act's relatively high conditions for return could not be met by any state seeking a return. Existing difficulties associated with application of the Act could not be remedied by jurisprudence. The simplification of the process of returning illicitly exported cultural objects to their countries of origin⁹ envisioned by legislators in 2007 has failed to materialise in practice. The prerequisite enshrined in German law in observance of the principle of legal certainty, namely that an entitlement to return shall exist only for those cultural objects which have been entered in a public list of the country of origin that is accessible for inspection in Germany, has proved to be impracticable for cooperation with foreign states – also due in no small part to the multitude of cultural objects protected by those states. The provisions formulated in 2007 as a political compromise must therefore be improved through legislative adjustments in line with the experience gained by the Federal Government and the *Länder* during the period covered by this report.
- From a foreign policy perspective, the current implementation of the 1970 UNESCO Convention through the Act on the Return of Cultural Property has significantly strained the Federal Republic's bilateral and multilateral relations. Numerous illicitly exported cultural objects, especially from the countries of Central America but also from Egypt, Iraq, Iran, Turkey, Russia, China and other states, have been brought to Germany in recent years. In not one single instance could these – in some cases important – cultural objects be returned

⁸ See the explanatory memorandum to the Act on the Return of Cultural Property, Bundestag Printed Paper 16/1371 of 4 May 2006, general part, p. 13 [in German].

⁹ See the explanatory memorandum to the Act on the Return of Cultural Property, Bundestag Printed Paper 16/1371 of 4 May 2006, general part, p. 12 [in German].

to the country of origin on the basis of the Act on the Return of Cultural Property. This is incomprehensible to the affected states and is regularly the subject of high-level political talks, for cultural heritage is increasingly perceived both nationally and internationally as part and parcel of national or ethnic identity and as an economically significant tourism factor. Destruction, clandestine excavation, plundering and theft of cultural objects as well as trafficking in cultural property are proscribed by the international community and consequently play a recurrent and increasingly prominent role in bilateral relations and in multilateral fora such as the UN General Assembly, UNESCO and other UN bodies (such as UNODC) that deal with crime prevention issues. There have been negative repercussions in other internationally relevant policy areas as well: In negotiations on issues related to international organised crime, for instance, the Federal Government's demands are countered by other states' contentions that Germany itself insufficiently complies with the international obligation to combat trafficking in cultural property. This hampers solutions in the Federal Republic's interest in other relevant policy areas. From a foreign policy perspective, Germany should therefore strive for the swiftest possible revision of its transposition of the 1970 UNESCO Convention into national law. As one of the leading economic and trading powers, Germany must deliver in the area of cultural property protection as well. Germany will only live up to its standing in the UN and in the EU if it resolutely works to protect cultural property from trafficking and enacts effective measures.

- Whereas many of our Western partners confiscate hundreds of illicitly exported cultural objects belonging to other states in the course of import checks and return these objects in compliance with the UNESCO Convention, Germany has no effective import controls for illicitly exported cultural property. Only in a few cases has Germany succeeded in returning cultural property. In these few successful cases, such as the return of stolen objects to Turkey and Kosovo in the spring of 2013, return was not effected on the basis of the Act on the Return of Cultural Property but instead on the basis of criminal law provisions, voluntarily, or on the basis of other legal provisions.¹⁰
- There is not only a need for action to protect foreign cultural property from trafficking but also to improve the protection of German cultural property: The system for preventing the exodus of German cultural property is essentially based on provisions dating from 1919 and 1955 and, since the creation of the

¹⁰ Council Regulation (EC) No 1210/2003 of 7 July 2003 prohibiting the import and export of and the dealing in Iraqi cultural property.

EU Single Market in 1992 and the elimination of internal border controls within the Schengen area, no longer affords effective protection. Repurchases of important cultural objects that were previously in private ownership in Germany have posed considerable additional financial burdens for public budgets in recent years. In some cases the Federal Government and the *Länder* have had to spend double-digit millions to preserve important cultural objects for the German public. Numerous other EU Member States have already made adjustments to their legislation on import and export controls in order to protect cultural objects of national significance. Germany also urgently needs to adjust its legislation in this area.

- In the context of improvements in the legislation governing the return of cultural property (Act on the Return of Cultural Property of 2007) and adaptation of the provisions for preventing an exodus of German cultural property (Act to Prevent the Exodus of German Cultural Property of 1955) to bring these into line with EU standards, both acts could be merged into a single uniform piece of legislation, as they dovetail thematically and are two sides of one and the same coin. Further provisions of the body of law governing protection of cultural property could be incorporated into this legislation and thus form the basis for an effective and transparent legal regime on cultural property protection in Germany.
- Improvement of cultural property protection is not incompatible with economic interests: In Switzerland, for instance, the introduction of clear statutory due diligence requirements to be met by the art trade when buying and selling cultural objects has led to rising turnover in the art trade since 2005. The strict due diligence requirements, non-observance of which is subject to high fines, are even marketed as a competitive advantage vis-à-vis other centres of the art trade. At the same time, they enhance certainty of the law for all parties involved as well as the country's reputation as a centre of the art trade.
- The issues of clandestine excavations and trafficking in cultural objects are also taking on increasing importance in the public eye. In view of international cooperation with other institutions and in the interest of preserving their reputations, it is meanwhile standard practice for museums to refrain from purchasing cultural objects of uncertain provenance. This is not yet common practice in the art and antiques trade, however. While the major international auction houses meanwhile have provenance departments of their own to combat trafficking in cultural objects, illicitly excavated or illicitly exported cultural objects are nevertheless still offered and sold in the art and antiques

trade. Another problem – also in the context of consumer protection – is the counterfeiting of archaeological objects which are then sold as originals. Domestic debate on protection of cultural property is nowhere near as far along as the debate on species protection: It is generally known and accepted that trade in ivory and endangered species is prohibited. A comparable awareness in regard to cultural property is unfortunately still lacking.

3. Conclusions and timeframe for a revision of the law:

Statutory improvement of the German law on cultural property protection and its simultaneous adaptation to conform to EU standards are urgently needed. In terms of the legislative process, this can best be achieved by merging the acts presently in force to form a single statutory instrument governing cultural property protection. Comparisons with other European legal systems have confirmed this. Switzerland and Italy have also enacted uniform legislation in the area of cultural property protection. Moreover, a revision of the body of law offers the opportunity to strengthen the legal framework for cultural, academic and scientific exchange in the area of international loaning of cultural property.

A revision of the law governing cultural property protection in Germany must be seen in the context of current developments at EU level: In 2011, for instance, the EU Commission undertook an evaluation of Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. The outcome of this evaluation was that the EU Commission is now planning a revision of Directive 93/7/EEC for 2013 to close loopholes in protection and more effectively structure the return of unlawfully removed cultural objects within the EU. This revision of the Directive envisioned for 2013/2014 was the key reason prompting the Federal Government to refrain from submitting a legislative revision proposal during the 17th electoral term. The revision of the German law governing protection of cultural property could thus be combined with the necessary transposition of the amended EU Directive into German law as from 2013/2014.