

GERMANY

LEGAL BASIS

- 1. Is your State a party to international legal instruments guaranteeing the immunity of State owned cultural property on loan (including bilateral agreements) such as the *United Nations Convention on Jurisdictional Immunity of States and Their Property* (2004)?**

Germany has decided not to ratify the 2004 United Nations Convention on Jurisdictional Immunity of States and Their Property because of doubts regarding the applicability of its Article 12, the so-called “tort exception,” to military activities, including the activities of armed forces during an armed conflict. Germany continues, however, to observe developments concerning the interpretation of this Article.

- 2. Does your State recognise the customary international law nature of Part IV of the *United Nations Convention on Jurisdictional Immunity of States and Their Property* (2004)? More specifically, does your State consider that, pursuant to a rule of customary international law, cultural property owned by a foreign State while on temporary loan is not considered as property specifically in use or intended for use by the State for other than government non-commercial purposes?**

In light of the history of negotiations concerning Part IV (Articles 18–21) on “State immunity from measures of constraint in connection with proceedings before a court” and the fact that almost ten years after its conclusion the 2004 Convention has been ratified by 16 States only and thus not yet entered into force, Germany considers it premature to make an explicit statement to the effect that Part IV of the 2004 Convention should be considered to reflect customary international law or not.

- 3. Has your State adopted a national legislation on immunity concerning:**
 - a. Specifically cultural objects of foreign States; or**
 - b. more generally, property of foreign States intended for official/public use; or**
 - c. more generally, cultural objects either owned by foreign States or by private individuals?**

If so, please provide information concerning national legislations (in particular title, source and content; if possible, please provide official translations in French or in English and/or references to online sources).

Section 20 of the German Act to Prevent the Exodus of German Cultural Property—an English-language translation of which is reproduced intra—provides for the option to grant immunity from seizure for cultural objects on loan in Germany. This provision covers all foreign cultural objects, owned by foreign States or private individuals. Immunity from seizure can be guaranteed prior to importing by issuing a so-called “legally binding commitment to return cultural property on loan” (in German: rechtsverbindliche Rückgabebezugung). This document is issued by the Office of the Federal Government Commissioner for Culture and the Media or by designated authorities of the Länder (federal states), in consultation with the Office of the Federal Government Commissioner, depending on whether the object is on loan to a museum or an institution within the ambit of federal or state competence.

Act to Prevent the Exodus of German Cultural Property

[Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung]

(first published on 8 July 1999 and amended by Article 2 of the Federal Act of 18 May 2007 [Federal Law Gazette 2007 Part I, p. 757])

Section 20

(1) If a foreign cultural object is to be temporarily lent for an exhibition on the territory of the Federal Republic of Germany, the competent supreme Land authority may, in consultation with the central federal authority, make a legally binding commitment to the lender to return it at the appointed time. In the case of exhibitions organized by the Federation or by a direct federal legal entity, the competent authority shall decide on the making of this commitment.

(2) The commitment shall be made in writing before the cultural object is brought into the country, using the term "legally binding commitment to return." It may not be retracted or revoked.

(3) The commitment shall have the effect that no conflicting third party rights to the cultural object may be asserted against the lender's right to return.

(4) Legal action for recovery, orders of attachment, impoundment and confiscation shall be inadmissible until after the return of the object to the lender.

This Act can be found in German, English, French and Spanish in the UNESCO national law database at <http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/unesco-database-of-national-cultural-heritage-laws/>

4. Does your State consider that there are limitations to the rule of immunity of State owned cultural property on loan, in particular in the event of an armed conflict or when there are return obligations deriving from international or European law?

The legally binding commitment to return cultural property on loan pursuant to Section 20 of the German Act to Prevent the Exodus of German Cultural Property has the effect that no conflicting right of a third party to the cultural object may be asserted against the lender's right to return. Legal action for recovery, orders of attachment, impoundment and confiscation shall be inadmissible until after the return of the object to the lender. There is no limitation to it.

However, the interrelation between national provisions granting immunity from seizure and the obligations under Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012 (Recast) appears to require legal interpretation, although it has so far not been tested in practice. Therefore, Germany in 2013 has introduced this aspect in the proceedings on the recast of Directive 93/7/EEC, with the aim of clarifying whether immunity from seizure is a matter of legal priority or whether the obligation to return under the Directive prevails. Germany would have preferred to have a clarification on this within the new Directive favoring immunity from seizure in view of the mobility of collections among European institutions and in view of the limited period of time of the loan. However, the new Directive has no such provision; thus, this legal matter remains unsolved.

5. Does your State consider that the rule of immunity of cultural property extends to other categories of property other than those owned by a State, i.e. property in possession or control of a State (such as property belonging to a State museum)?

Yes, see the answer to question 3 *supra*.

NATIONAL PRACTICE AND PROCEDURE

6. Is there national case-law in the field of immunity of State owned cultural property on loan? If so, please provide information on these decisions (date of the judgment, authority that issued the judgment, name of the parties, main

points of law, French or English translation of the judgment or summary of the judgment in English or in French).

German case law has repeatedly recognized the immunity from seizure under customary international law, conceived as a manifestation of the sovereign immunity of a State. This applies particularly to cultural property of a foreign State, when it is owned by the foreign State and given on loan by an authority of that State to a German institution. See decision of the Federal Court of Justice [Bundesgerichtshof] of 1 October 2009 – docket no VII ZB 37/08 (downloadable in the German language at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=ef66494ee680f89838c0adbceb305f29&nr=49933&pos=0&anz=1>).

In the case of the “Qatna” exhibition the Higher Regional Court of Berlin [Kammergericht Berlin] in its decision of 5 March 2010 – docket no 18 W 2/10 (the press release on this ruling is downloadable in the German language at <http://www.berlin.de/sen/justiz/gerichte/kg/presse/archiv/20100308.1225.158173.html>) – dismissed the request for an attachment on cultural property of the Arab Republic of Syria, shown in an exhibition at Stuttgart, on the appeal level. The request was made by a victim of the attack against the cultural center “Maison de France” in Berlin on 27 August 1983 in order to secure her personal injury claim. Syria was the owner of the cultural property. The court ruled that this property served sovereign purposes: The purpose of the exhibition “Treasures of Ancient Syria – The Discovery of the Kingdom of Qatna” was the presentation and dissemination of the cultural heritage of Syria. The Court held that according to general rules of international law it is recognized that such State-owned cultural property is immune from seizure.

7. Does your State resort to “letters of comfort” or other practice guaranteeing the recognition of the immunity from seizure of State owned cultural property on loan?

Yes, see the answer to question 3 *supra*.

8. Is the immunity granted automatically to State owned cultural property on loan or is it subject to approval by a State authority?

The legally binding commitment to return cultural property on loan, granting immunity as stated in the first paragraph of the answer to question 4 *supra*, shall be made upon application. The immunity is thus not granted automatically to State-owned cultural property on loan. The proceedings under Section 20 (see answer to question 3 *supra*) are the same regardless of the owner of the cultural property on loan.