

**SPECIAL ISSUE:  
PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS**

*Thematic Studies*

## **The UNESCO Regime for the Protection of World Heritage as Prototype of an Autonomy-Gaining International Institution**

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### **A. Introduction**

The Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention),<sup>1</sup> which entered into force on 17 December 1975, established a complex governance regime at the international level. The rationale behind the establishment of this regime was the international communities' realization that the world contained natural and cultural sites which were so unique and outstanding that they should by no means become embroiled in the onslaught of human material progress. It was argued that these sites must be protected and conserved for posterity since they, irrespective of the territory in which they were located, belonged to all peoples and, thus, formed part of the common heritage of mankind.<sup>2</sup> Although the United Nations Educational, Scientific

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<sup>1</sup> UNTS, Vol. 1037, No. 15511.

<sup>2</sup> See World Heritage Convention, Preamble, recitals 2, 5 and 6; in literature e.g. Germana Canino, *Il ruolo svolto dall'UNESCO nella tutela del patrimonio mondiale culturale e naturale*, in LA PROTEZIONE DEL PATRIMONIO MONDIALE CULTURALE E NATURALE A VENTICINQUE ANNI DALLA CONVENZIONE DELL'UNESCO DEL 1972, 1, 45-46 (Maria C. Ciciriello ed., 1997); MARIA E. E. CASTELLI, PROTECCIÓN JURÍDICA DEL PATRIMONIO CULTURAL DE LA HUMANIDAD 17-21 (1987); MANLIO FRIGO, LA PROTEZIONE DEI BENI CULTURALI NEL DIRITTO INTERNAZIONALE 281-310 (1986); Rudolf Dolzer, *Die Deklaration des Kulturguts zum "common heritage of mankind"*, in RECHTSFRAGEN DES INTERNATIONALEN KULTURGÜTERSCHUTZES 13, 17-20 (Rudolf Dolzer, Erik Jayme & Reinhard Mußnug eds., 1994); Frank Fechner, *Prinzipien des Kulturgüterschutzes*, in PRINZIPIEN DES KULTURGÜTERSCHUTZES 11, 33-34 (Frank Fechner, Thomas Oppermann & Lyndel V. Prott eds., 1996); Markus Müller, *Kulturgüterschutz: Mittel nationaler Repräsentation oder Wahrung des Gemeinsamen Erbes der Menschheit?*, in PRINZIPIEN DES KULTURGÜTERSCHUTZES 257, 268-271 (Frank Fechner, Thomas Oppermann & Lyndel V. Prott eds., 1996); Sabine von Schorlemer, *Der internationale Schutz von Kulturgütern gegen Umwelteinflüsse*, in PRINZIPIEN

and Cultural Organization (UNESCO) regime for the protection of World Heritage is seemingly afforded with weak instruments, such as the inscription of properties on the World Heritage List or on the List of World Heritage in Danger, its activities increasingly play a role, not least in national administrative procedures. The cases of Yellowstone National Park in the United States,<sup>3</sup> Cologne Cathedral<sup>4</sup> and Dresden Elbe Valley in Germany,<sup>5</sup> and Kakadu National Park in Australia<sup>6</sup> are only a few examples in this regard.

In the following explanations, the regime for the protection of world heritage will be examined more closely. The examination will reveal a prototype scenario whereby an international institution has attained a wide range of autonomy. It has its own organizational structure, though not legally independent; self-contained decision-making structures that have, to a large extent, been emancipated from the multilateral processes due to a deviation from the principle of consensus; consultation powers extensively involving experts in its proceedings, who are democratically unaccountable to the citizens of the States Parties to the underlying international agreement; instruments capable of having binding effect towards the States Parties; and it maintains a dialogue with local authorities, without utilizing the central government as mediator. Naturally the tendency become more and more autonomous raises questions of legitimacy since autonomy is tantamount to less input-legitimacy. However, the case of the world heritage regime demonstrates that autonomy can at the same time also lead to a gain of efficiency and effectiveness, which contributes to a higher level of output-legitimacy. Thus, the world heritage regime provides for a fine example of the advantages and disadvantages of international bureaucracies.

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DES KULTURGÜTERSCHUTZES 225, 246-47 (Frank Fechner, Thomas Oppermann & Lyndel V. Prott eds., 1996).

<sup>3</sup> See JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* 46-48 (1998).

<sup>4</sup> See Kerstin Odendahl, *Protecția bunurilor culturale în dreptul internațional – literă moartă sau protecție eficientă?*, 4 II *CAIETE DE DREPT INTERNATIONAL* 11-17 (2006); Diana Zacharias, *Cologne Cathedral versus Skyscrapers – World Heritage Protection as Archetype of a Multilevel System*, 10 *MAX PLANCK YEARBOOK OF UNITED NATIONS LAW (MAX PLANCK UNYB)* 273-366 (2006).

<sup>5</sup> See. German Federal Constitutional Court, 17 *LANDES- UND KOMMUNALVERWALTUNG (LKV)* 509-513 (2007); Higher Administrative Court of Saxony, 60 *DIE ÖFFENTLICHE VERWALTUNG (DÖV)* 564-568 (2007); Armin von Bogdandy & Diana Zacharias, *Zum Schutz der Weltkulturerbekonvention im deutschen Rechtsraum*, 26 *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ)* 527-532 (2007); Ulrich Fastenrath, *Der Schutz des Weltkulturerbes in Deutschland*, 59 *DÖV* 1017-1027 (2006); Michael Kilian, *Die Brücke über die Elbe: völkerrechtliche Wirkungen des Welterbe-Übereinkommens der UNESCO*, 18 *LKV* 248-254 (2008).

<sup>6</sup> See S. Javed Maswood, *Kakadu and the Politics of World Heritage Listing*, 54 *AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS* 357-372 (2000); BEN BOER & GRAEME WIFFEN, *HERITAGE LAW IN AUSTRALIA* 87 (2006).

*I. Background, Objectives and Legal Foundations of the Convention*

The idea of international cooperation and support concerning the protection of world cultural heritage was already established in the nineteenth and early twentieth century.<sup>7</sup> It gained momentum in 1946 after the Egyptian government decided to build the Aswan High Dam, which would have flooded the valley containing the Abu Simbel and Philae temples, which are treasures of ancient Egyptian civilization. In 1959, UNESCO, following a request for assistance by Egypt and Sudan, launched an international protection campaign. That campaign facilitated the dismantling of the temples, relocation to dry ground and their subsequent reassembly. This logistical effort cost approximately US\$ 80 million, half of which was donated by some 50 countries, illustrating the importance of shared responsibility in the conservation of outstanding cultural sites. Its success led to other protection campaigns, such as saving Venice and its lagoon in Italy and the archaeological ruins at Moenjodaro in Pakistan, as well as the restoration of the Borobodur Temple compounds in Indonesia.<sup>8</sup>

Against this background, voices were raised calling for the institutionalization of international support. Hence, UNESCO initiated, with the help of the International Council on Monuments and Sites (ICOMOS), which is an international non-governmental organization of professionals dedicated to the conservation of historic monuments and sites,<sup>9</sup> the preparation of a draft convention on the protection of world heritage. The impetus for the convention's content came not least from the United States. At a White House Conference in Washington D. C. in 1965 Russell Train, an American conservationist and legal advisor to the then US President Richard Nixon, recommended the establishment of an international trust "to identify, establish, develop and manage the world's superb natural and scenic areas and historic sites for the present and future benefit of the entire world citizenry." Train, who is regarded as one of the spiritual fathers of the world heritage concept<sup>10</sup> (a concept which was later for the first time enshrined in para. 1

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<sup>7</sup> See UNESCO World Heritage Centre, *WORLD HERITAGE: CHALLENGES FOR THE MILLENNIUM 26-28* (2007). The brochure can be downloaded under: [http://whc.unesco.org/documents/publi\\_millennium\\_en.pdf](http://whc.unesco.org/documents/publi_millennium_en.pdf).

<sup>8</sup> See UNESCO World Heritage Centre, *Brief History*, available at: <http://whc.unesco.org/en/169/>.

<sup>9</sup> Maria C. Ciciello, *L'ICCROM, l'ICOMOS e l'IUCN e la salvaguardia del patrimonio mondiale culturale e naturale*, in *LA PROTEZIONE DEL PATRIMONIO MONDIALE* (note 2), at 110, 119 and 122; Gilbert H. Gornig, *Der internationale Kulturgüterschutz*, in *KULTURGÜTERSCHUTZ – INTERNATIONALE UND NATIONALE ASPEKTE* 17, 45-46 (Gilbert H. Gornig, Hans-Detlef Horns & Dietrich Murswiek eds., 2007).

<sup>10</sup> See David J. Haigh, *World Heritage – Principle and Practice: a Case for Change*, 17 *ENVIRONMENTAL AND PLANNING LAW JOURNAL* 199 (2000).

of the 1970 Declaration of Principles Governing the Sea Bed and Ocean Floor<sup>11</sup>), also stressed the importance of the international community's acceptance that "throughout the world there exist natural and cultural areas of such unique values that they are truly a part of the heritage not only of the individual nations but of all mankind".<sup>12</sup> In 1968, the International Union for Conservation of Nature and Natural Resources (IUCN, now called World Conservation Union), which is, like ICOMOS, a non-governmental organization, developed similar proposals for its members, which are States and government agencies, political and economic integration organizations, international and national non-governmental organizations and affiliates.<sup>13</sup> These proposals were approved by the Stockholm Conference on the Human Environment, the first global intergovernmental meeting on the environment.<sup>14</sup> Eventually, the World Heritage Convention was adopted by the General Conference of UNESCO on 16 November 1972 in Paris. Currently, the Convention has some 184 countries as States Parties.<sup>15</sup>

The World Heritage Convention seeks to protect immovable<sup>16</sup> and tangible cultural heritage (monuments, groups of buildings, and sites) and natural heritage (natural features, geological and physiographical formations, and natural sites) that exemplify "outstanding universal value" (see recitals 7 and 8 of the Preamble and

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<sup>11</sup> See ROBIN R. CHURCHILL & ALAN V. LOWE, *THE LAW OF THE SEA* 227 (3rd edition, 1999).

<sup>12</sup> Quoted by Harold K. Eidsvik, *The World Heritage Convention Yesterday, Today and Tomorrow*, in PROCEEDINGS OF A WORKSHOP SESSION ON CRITICAL ISSUES FOR PROTECTED AREAS HELD DURING THE 18TH SESSION OF THE GENERAL ASSEMBLY OF IUCN 15 (1990).

<sup>13</sup> IUCN Statutes, Part III, s. 4; the Statutes are available at: <http://www.iucn.org/members/Documents/Statutes.pdf>.

<sup>14</sup> See Action Plan for the Human Environment, Recommendation No. 99, in Report on the United Nations Conference on the Human Environment 1972, available at: <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1511&l=en>.

<sup>15</sup> UNESCO World Heritage Centre, *World Heritage: States Parties*, available at: <http://whc.unesco.org/en/statesparties/>. About the history of the Convention in more detail, see Thomas Fitschen, *Internationaler Schutz des kulturellen Erbes in der Welt*, in *INTERNATIONALER KULTURGÜTERSCHUTZ UND DEUTSCHE FRAGE* 183, 185-189 (Wilfried Fiedler ed., 1991); Francesco Francioni, *Thirty Years On: Is the World Heritage Convention Ready for the 21st Century?*, 12 *ITALIAN YEARBOOK OF INTERNATIONAL LAW* 13, 15-16 (2002); BARBARA GENIUS-DEVIME, *BEDEUTUNG UND GRENZEN DES ERBES DER MENSCHHEIT IM VÖLKERRECHTLICHEN KULTURGÜTERSCHUTZ* 140-143 (1996); Robert L. Meyer, *Travaux Préparatoires for the UNESCO World Heritage Convention*, 2 *EARTH LAW JOURNAL* 45-81 (1976); MARTIN P. WYSS, *KULTUR ALS EINE DIMENSION DER VÖLKERRECHTSORDNUNG* 125-131 (1992); Russell Train, *The World Heritage Convention – The First Twenty Years and Beyond*, speech held at the 16th session of the World Heritage Committee on 7 December 1992, available as Doc. WHC-92/CONF.002/12 of 14 December 1992 at: <http://whc.unesco.org/archive/repcom92.htm#inf1>.

<sup>16</sup> See KERSTIN ODENDAHL, *KULTURGÜTERSCHUTZ* 136 (2005).

arts. 1 and 2 of the Convention). Hence, it can be framed within the broader context of international environmental law.<sup>17</sup> Moreover, the Convention views the protection of world heritage as primarily a domestic matter;<sup>18</sup> States Parties are requested to take responsibility for world heritage listings that are located within their territories. This is noted, for instance, in art. 4 sentence 1 of the Convention. The provision reads that each State Party recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory belongs primarily to that State.

However, the World Heritage Convention is not least a reaction to the observation that the protection of world cultural and natural heritage at the national level is often a piecemeal process due to the scale of financial investment it requires coupled with insufficient economic, scientific and technical resources of the country where the property is located (*cf.* recitals 3 and 7 of the Preamble). Hence, the idea of solidarity comes into play, and the Convention facilitates the international community's participation in the protection of world heritage by granting collective assistance which, although not absolving the State concerned of its responsibility, serves as an effective complement thereto (*cf.* recital 8 of the Preamble). The provision for said collective assistance is art. 6 para. 1 of the Convention. It states that the States Parties, whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage of outstanding universal value is situated, recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate. This recognition manifests itself in the States Parties undertaking, in accordance with the provisions of the Convention, to assist in the identification, protection, conservation and preservation of such heritage; this assistance must take place, if necessary, in a financial, artistic, scientific or technical manner (*cf.* arts. 4 sentence 2 and 6 para. 2 of the Convention).<sup>19</sup>

Moreover, governance under the World Heritage Convention is defined in art. 7 as a system of international cooperation and assistance designed to support States Parties in their efforts to conserve and identify the world heritage. As such, the Convention has often been qualified in academic discourse as a cooperation agreement providing measures which are secondary to those present in individual

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<sup>17</sup> See Maswood (note 6), at 357.

<sup>18</sup> See Ljudmila Galenskaya, *International Co-operation in Cultural Affairs*, 198 III RECUEIL DES COURS 265, 277 (1986); GENIUS-DEVIME (note 15), at 288-289; WYSS (note 15), at 130-131.

<sup>19</sup> SABINE VON SCHORLEMER, *INTERNATIONALER KULTURGÜTERSCHUTZ* 134 (1993).

States.<sup>20</sup> This qualification, however, is a simplification because it neglects both the institutional setting and the existing compliance mechanisms.<sup>21</sup> It seems to be more adequate to speak of an agreement establishing an international regime which deals with the protection of world cultural and natural heritage as a typically non-transboundary problem<sup>22</sup> and is characterized by an emphasis on cooperative aspects. First and foremost the cooperative aspects do not affect the relationship between the States Parties to the Convention but rather the relationship between the international institution and the individual State Party, which implies a multilevel dimension.

## *II. Governance of World Heritage Protection in Action: A Survey*

The activities of the international institution established under the World Heritage Convention are molded by decisions in individual cases and are, thus, typical executive decisions from a national point of view. In this respect, one can distinguish between two types of decisions:

The first type is the inscription of a property on the World Heritage List (art. 11 para. 2 of the Convention) and, as the case may be, additionally on the List of World Heritage in Danger (art. 11 para. 4 of the Convention). The *actus contrarius* of listing is the deletion of a property from the World Heritage List or its removal from the List of World Heritage in Danger. Currently, 851 properties have been inscribed on the World Heritage List, 660 of which are cultural, 166 natural and 25 mixed properties.<sup>23</sup> From 1977 to 2006, 58 sites were inscribed on the List of World Heritage in Danger, 16 of which have eventually been removed; two were removed and later re-inscribed.<sup>24</sup> A deletion of a property from the World Heritage List has been exercised on a single occasion, in the case of the Arabian Oryx Sanctuary in Oman.<sup>25</sup> However, on several occasions the States Parties concerned were

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<sup>20</sup> See Fitschen (note 15), at 183, 196; Müller (note 2), at 257, 269 with further references.

<sup>21</sup> See Zacharias (note 4), at 273, 318-322.

<sup>22</sup> See Maswood (note 6), at 357, 358.

<sup>23</sup> UNESCO World Heritage Centre, World Heritage List, available at: <http://whc.unesco.org/en/list>; see also UNESCO World Heritage Centre (note 7), at 36-37.

<sup>24</sup> UNESCO World Heritage Centre (note 7), at 45.

<sup>25</sup> UNESCO World Heritage Centre, Twenty-two sites inscribed on the UNESCO's World Heritage List, and one deleted during the Committee meeting in Christchurch, available at: <http://whc.unesco.org/en/news/365>; see for the situation before the 2007 meeting Peter Strasser, "Putting Reform into Action" - *Thirty Years of the World Heritage Convention*, 11 INTERNATIONAL JOURNAL OF CULTURAL PROPERTY 215, 219 and 254 (2002).

cautioned that non-compliance with their duties under the Convention would result in delisting.<sup>26</sup>

The second type is the allotment of international assistance, financed by the World Heritage Fund (art. 13 paras. 1, 3 and 6 of the Convention). International assistance may include, *inter alia*, emergency assistance for sites that have suffered or are in imminent danger of severe damage due to sudden and unexpected natural or man-made phenomena; preparatory assistance for the drafting of nominations for the World Heritage List; technical cooperation covering the provision of experts and/or equipment for the conservation or management of world heritage sites; assistance for either the training of specialized staff at all levels in the fields of identification, protection, conservation, presentation and rehabilitation of world heritage or for education, information and awareness-raising (see arts. 22 and 23 of the World Heritage Convention as well as paras. 235 and 241 of the Operational Guidelines 2005<sup>27</sup>). In 2005 the total annual amount allocated for international assistance was approximately US\$ 1 million. This figure has been steadily declining since 2002. From 1998 to 2005 787 grants were approved, amounting to nearly US\$ 20 million. Non-State actors, mainly the International Centre for the Study of the Preservation and Restoration of Cultural Property in Rome (ICCROM), a scientific intergovernmental organization with currently 119 Member States,<sup>28</sup> and IUCN, were allocated approximately a seventh of the total funds. These funds were primarily used for training programs at the regional level.<sup>29</sup>

The procedures for the inscription of a property on the World Heritage List and for the allotting of international assistance commences with a nomination for listing or a request for assistance by the State Party in which the property constituting the cultural or natural heritage is situated.<sup>30</sup> The nomination or request is evaluated by the so-called Advisory Bodies (*i.e.* ICOMOS, IUCN and, in cases concerning a request for assistance, also ICCROM.<sup>31</sup> The Intergovernmental Committee for the

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<sup>26</sup> See Zacharias (note 4), at 273, 276 with references.

<sup>27</sup> Available at: <http://whc.unesco.org/archive/opguide05-en.pdf>.

<sup>28</sup> See ICCROM, *ICCROM Member States*, available at: [http://www.iccrom.org/eng/00about\\_en/00\\_01govern\\_en/memstates\\_en.shtml](http://www.iccrom.org/eng/00about_en/00_01govern_en/memstates_en.shtml); Ciciriello (note 9), 110, 111-112.

<sup>29</sup> See UNESCO World Heritage Centre (note 7), 50.

<sup>30</sup> See arts. 11(1), 13(1) and 19 of the World Heritage Convention and para. 120 of the Operational Guidelines 2005.

<sup>31</sup> See art. 13(7) of the Convention; paras. 35, 37, 143 to 146 and 248 to 250 of the Operational Guidelines 2005.

Protection of the Cultural and Natural Heritage of Outstanding Universal Value, which is also known as the World Heritage Committee and is established under art. 8 of the Convention, bases its decisions on the Advisory Bodies' evaluations and recommendations.<sup>32</sup> Once a property has been inscribed on the aforementioned lists or international assistance has been allotted, a process of monitoring ensues.<sup>33</sup>

On the basis of a synopsis of the historical foundations, the declarations in the Preamble and the wording of the majority of provisions of the World Heritage Convention, one could draw the conclusion that international assistance is the defining characteristic governing the protection of world heritage. The entire Convention exudes the idea that the international community must, as a bearer of guarantee to balance deficiencies, offer assistance to those State Parties which, although willing, cannot sufficiently cope with the task of protecting and conserving the world heritage sites in their territories. Therefore, the international institution is concerned with exercising a quintessential State-esque function. Since the protection of world heritage is governed primarily through the distribution of funds, an administration of public services would appear to be an apt categorization.

Social reality, however, appears to suggest otherwise since the inscription of properties on the World Heritage List has, over time, become an important yardstick for adjudging the reputation of States – not least in the developed countries where the prospect of receiving financial support from the international community rarely plays a decisive role in nominations. The listing is not a classical means of regulatory administration. Nor is it a unilateral infringement of the rights of the State Party concerned, whereby the State Party occupies a subordinate position to that of the international institution. Furthermore, the World Heritage Committee has rightly pointed out that it is not allowed to use the instruments laid down in the World Heritage Convention as a means of punishing or sanctioning a State Party.<sup>34</sup> Reconciliation of this definitional ambiguity requires a compromise categorization. For instance that the governance mechanism is a special type of cooperative regulatory administration because it unilaterally determines the duties of the State Party (although a request is regularly necessary) or that it is an accreditation or certification administration. Either way, it is a multifaceted

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<sup>32</sup> See arts. 11(2), 13(3) and 21(3) of the Convention; paras. 153 to 160 and 247 to 254 of the Operational Guidelines 2005.

<sup>33</sup> See UNESCO World Heritage Centre (note 7), 20.

<sup>34</sup> See e.g. UNESCO World Heritage, *World Heritage in Danger*, available at: <http://whc.unesco.org/pg.cfm?cid=158>.

administration, responsible for delivering services as well as determining, or even giving rise to, duties incumbent upon States Parties.

## **B. Legal Analysis**

### *I. Institutional Framework*

The World Heritage Convention was adopted by the General Conference of UNESCO on the basis of art. 1 para. 2 lit. c of the UNESCO Constitution.<sup>35</sup> The international bureaucracy for the protection of world cultural and natural heritage operates under the umbrella of UNESCO. However, the World Heritage Convention does not constitute a monolithic administrative authority consisting of only one actor but entrusts a series of actors with collective administration, in particular the General Assembly of States Parties, the World Heritage Committee and its Secretariat (World Heritage Centre), the Advisory Bodies (ICOMOS, IUCN and ICCROM), the Director-General and the General Conference of UNESCO. The role and competencies of these bodies at the international level as well as their relationship and responsibilities towards each other are not precisely defined in the Convention and leave room for discussion.

The General Assembly of States Parties, the meetings of which take place biannually during the ordinary sessions of the General Conference of UNESCO,<sup>36</sup> has two tasks: it elects the members of the World Heritage Committee and determines the size of the World Heritage Fund (arts. 8 para. 1 and 16 para. 1 of the Convention). During its infancy, the General Assembly dealt in principle only with these aforementioned matters.<sup>37</sup> Issues of “other business” were rarely raised. One can find, for instance, calls to reflect upon problems related to world heritage threatened by various causes, including war,<sup>38</sup> or an appeal for assistance of a world heritage site that had been damaged during an earthquake.<sup>39</sup> Following the adoption of a resolution that sought to ensure an equitable representation of

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<sup>35</sup> UNTS, Vol. 4, No. 1580.

<sup>36</sup> See in this context the Rules of Procedure of the General Assembly of States Parties to the World Heritage Convention, available at: <http://whc.unesco.org/en/garules/>.

<sup>37</sup> See Strasser (note 25), at 215, 228.

<sup>38</sup> 6th General Assembly Report, para. 22, available as Doc. CC-87/CONF.013/6 of 31 October 1987 at: <http://whc.unesco.org/archive/ga87.pdf>.

<sup>39</sup> 7th General Assembly Report, para. 20, available as Doc. CC-89/CONF.013/6 of 13 November 1989 at: <http://whc.unesco.org/archive/ga89.pdf>.

different regions and cultures in the Committee at its 7<sup>th</sup> session in 1989,<sup>40</sup> the General Assembly extended its field of deliberation. At its 9<sup>th</sup> session in 1993, the General Assembly “recommended that its future sessions devote more time to debates of substance aimed at defining general policy directives for the implementation of the Convention” and adopted on that occasion a declaration concerning the increasing threats to world cultural and natural heritage sites.<sup>41</sup> This decision, which had the potential to start a mission creep *via* institutional practice, can be regarded as an attempt to gain more influence on, and more power to control, the World Heritage Committee.

Accordingly, at the next session in 1995 the General Assembly paid great attention to the controversial issue of new monitoring activities related to the way in which world heritage sites were conserved. It decided to defer the discussion until the 11<sup>th</sup> session in 1997 and requested that the Committee prepares a report and a proposed resolution.<sup>42</sup> This instigated a debate questioning whether the General Assembly had the right to initiate such an action, in particular whether it could give instructions to the Committee.<sup>43</sup> Hence, the Bureau of the World Heritage Committee during its 24<sup>th</sup> session in June/July 2000 asked the Legal Advisor of UNESCO for clarification regarding the division of competencies between Assembly and Committee. In his reply, the Advisor argued that there was a “general legal principle of deferring to the plenary body which can deal with any question related to the Convention”. Following this view, the Bureau noted that “the World Heritage Convention is different from many other international conventions in that all the substantive powers are assigned to the Committee and not to the General Assembly. The Committee can transfer powers to the General Assembly.”<sup>44</sup> Thus, the General Assembly with its aforementioned decisions found at the 9<sup>th</sup> and 10<sup>th</sup> session acted *ultra vires*; it does not have extensive reserve competencies which facilitate the substantial governance of the World Heritage Committee, particularly with regard to the prescription of general policy. Rather, the General Assembly merely functions as electing body and as guardian over the budget; additionally, it fulfils tasks that are delegated to it by the Committee.

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<sup>40</sup> *Id.* at para. 12.

<sup>41</sup> 9th General Assembly Report, paras. 30 and 32, available as Doc. CC-93/CONF.003/6 of 2 November 1993 at: <http://whc.unesco.org/archive/ga93.pdf>.

<sup>42</sup> 10th General Assembly Report, paras. 15 to 31, available as Doc. WHC-95/CONF.204/8 of 22 November 1995 at: <http://whc.unesco.org/archive/genass95.htm>.

<sup>43</sup> See Strasser (note 25), at 215, 229.

<sup>44</sup> Report of the Bureau of the World Heritage Committee, 24th session, VI para. 7, quoted by World Heritage Committee Report, 26th session, para. 37, available as Doc. WHC-02/CONF.202/12 of 4 June 2002 at: <http://whc.unesco.org/archive/2002/whc-02-conf202-12e.pdf>.

The World Heritage Committee forms the core of the international institution for the protection of world heritage. According to art. 8 sentence 1 of the Convention, it is established within UNESCO. The institutional bond to UNESCO manifests itself in the Director-General of UNESCO appointing, as part of the UNESCO Secretariat, the secretariat which shall assist the Committee (art. 14 para. 1 of the Convention), preparing the Committee's documentation and the agenda of its meetings, and having the responsibility for the implementation of its decisions (art. 14 para. 2 of the Convention). Thus, the Committee is at first merely a Conventional organ, but through its secretariat it is affiliated with UNESCO and it, thus, operates effectively as a sub-organ of UNESCO. The reason for this parallel structure may be that the organs and sub-organs of UNESCO cannot be used, not least because of budgetary reasons, for regimes which do not include all Members of the organization.

The Committee consists, and this is a further institutional multi-level aspect, of representatives of 21 States Parties to the World Heritage Convention that are elected for a term of six years by the General Assembly (arts 8 para. 1 sentences 2 and 3 and 9 para. 1 of the Convention).<sup>45</sup> Furthermore, art. 8 para. 2 of the Convention stipulates that the composition of the Committee shall ensure an equitable representation of the different regions and cultures of the world. This requirement, which can be categorized as an element fostering legitimacy, indicates that the Committee is not a mere rubber stamp for the elected States Parties. Rather, it is desirable that the representatives of the States, who must be "persons qualified in the field of the cultural or natural heritage" (art. 9 para. 3 of the Convention), do not originate from the State that appoints them.<sup>46</sup> This desideratum is in practice, however, rarely observed. The Committee meets at least once a year and manages its meetings according to Rules of Procedure,<sup>47</sup> which it has adopted pursuant to art. 10 para. 1 of the Convention. It establishes its Bureau (consisting of the chairperson, five vice-chairpersons and a recording secretary<sup>48</sup>) which meets during the sessions of the Committee as frequently as deemed necessary and is responsible for the daily affairs of the Committee.<sup>49</sup>

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<sup>45</sup> See also Fitschen (note 15), at 183, 198.

<sup>46</sup> Haigh (note 10), at 199, 201.

<sup>47</sup> Available at: <http://whc.unesco.org/pg.cfm?cid=223>.

<sup>48</sup> See about the actual members UNESCO, Bureau of the World Heritage Committee, available at: <http://whc.unesco.org/en/bureau/>.

<sup>49</sup> Maswood (note 6), at 357, 361.

The main functions of the Committee are (in cooperation with States Parties), *inter alia*, to identify cultural and natural properties of outstanding universal value which are to be protected under the World Heritage Convention and to inscribe those properties on the World Heritage List (art. 11 para. 2 of the Convention); to examine the state of conservation of properties inscribed on the World Heritage List through a process of reactive monitoring and periodic reporting (arts. 11 para. 7 and 29 of the Convention); to decide which properties inscribed on the World Heritage List are to be inscribed on, or removed from, the List of World Heritage in Danger (art. 11 paras 4 and 5 of the Convention); to decide whether a property should be deleted from the World Heritage List (*cf.* art. 11 para. 2 of the Convention; para. 192 of the Operational Guidelines 2005); to define the procedure by which the requests for international assistance are to be considered and to carry out studies and consultations, if necessary, before reaching a decision (art. 13 paras. 1 and 3 of the Convention); to periodically review and evaluate the implementation of the Convention (*cf.* arts. 11 para. 7 and 29 of the Convention); and to adopt and revise the Operational Guidelines (*cf.* art. 11 para. 5 of the Convention; para. 24 of the Operational Guidelines 2005). Moreover, the Committee develops strategic objectives in order to facilitate the implementation of the World Heritage Convention which are periodically reviewed and revised to ensure that new threats towards world heritage are addressed effectively (para. 25 of the Operational Guidelines 2005).<sup>50</sup> Thus, the World Heritage Committee has a very wide range of competencies, covering nearly all administrative activities under the World Heritage Convention. It is the central decision-making body in an operative sense.

Additionally, the Committee is free to determine its own procedures. It can, within the framework of the Convention, implement its objectives and prioritize the order of its actions and has complete autonomy with respect to its final decisions. This is already indicated by the fact that, on the one hand, it determines the criteria that govern whether a property belonging to the cultural or natural heritage may be inscribed on the World Heritage List and in the List of World Heritage in Danger (art. 11 paras. 2 sentence 1 and 5 of the Convention) and that, on the other hand, the contractual arrangements concerning international assistance are concluded on its behalf and not on behalf of UNESCO (art. 13 para. 3 of the Convention). Thus, the Committee is afforded with a measure of legal personality and forms insofar a sub-organization of UNESCO. The legal personality is, however, limited to the tasks laid down in the World Heritage Convention. More precisely, it can be described as

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<sup>50</sup> The first "Strategic Orientations" adopted by the Committee in 1992 are contained in annex II of Doc. WHC-92/CONF.002/12 (note 15). In 2002, the World Heritage Committee revised its strategic objectives; the Budapest Declaration on World Heritage is available as Doc. WHC-02/CONF.202/5 at: <http://whc.unesco.org/archive/2002/whc-02-conf202-25e.pdf#decision.9>.

the sum of external competencies and powers of the Committee to fulfill effectively its functions under the Convention towards (other) subjects of international law.<sup>51</sup>

The World Heritage Centre, which operates under its full name “UNESCO World Heritage Centre”, was established in 1992 to serve as the Committee’s secretariat.<sup>52</sup> It is assigned with primarily organizational and promotional tasks (*cf.* art. 14 para. 2 of the Convention; Budapest Resolution on World Heritage 2002;<sup>53</sup> para. 28 of the Operational Guidelines 2005). It generally supports the administrative activities of the Committee and its Bureau; in particular it communicates and collaborates with the States Parties and the Advisory Bodies (*cf.* rule 43 of the Rules of Procedure of the World Heritage Committee 2003). Furthermore, it works in close cooperation with other sectors and field offices of UNESCO (para. 27 of the Operational Guidelines 2005); it functions insofar as a liaison office between World Heritage Committee and UNESCO.

The non-governmental organizations ICOMOS and IUCN, which had been quite active in the process of drafting the World Heritage Convention, and the intergovernmental organization ICCROM are explicitly named as Advisory Bodies to the World Heritage Committee in arts. 13 para. 7 and 14 para. 2 of the Convention. The roles of the Advisory Bodies are, *inter alia*, to advise on the implementation of the Convention in the field of their expertise (art. 13 para. 7 of the Convention); to monitor the way in which world heritage properties are conserved and review requests for international assistance submitted by States Parties; to evaluate properties nominated for inscription on the World Heritage List and to present evaluation reports to the Committee; and to attend meetings of the Committee and its Bureau in an advisory capacity (art. 8 para. 3 of the Convention; paras. 31, 33, 35 and 37 of the Operational Guidelines 2005). Moreover, the Committee can call on other international and non-governmental organizations with appropriate competence and expertise to assist in the implementation of its programs and projects (para. 38 of the Operational Guidelines 2005), since the enumeration in art. 13 para. 7 of the Convention is non-conclusive. The Advisory Bodies do not form part of the institutional structure of UNESCO in the narrow sense of the word; they remain on the periphery as external experts. However, they play an important role in the international institution’s activities. Through

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<sup>51</sup> See about legal personality in international law, *e.g.*, ICJ, *Reparations Case*, ICJ Reports 1949, 174; Bardo Faßbender, *Die Völkerrechtssubjektivität internationaler Organisationen*, 37 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRRECHT 17-49 (1986).

<sup>52</sup> See Circular Letter No. 16 of the General-Director of UNESCO of 21 October 2003, available at: <http://whc.unesco.org/circs/circ03-16e.pdf>.

<sup>53</sup> See (note 50).

evaluation and recommendation, they regularly predetermine the later decision of the World Heritage Committee.

Finally, the General Conference of UNESCO receives the reports of States Parties concerning their legislative and administrative measures *vis-à-vis* the World Heritage Convention and of the World Heritage Committee (art. 29 paras. 1 and 3 of the Convention). It is not itself a part of the governance mechanism for the protection of world heritage.

In summary, the international institution consists of various bodies within the structures of UNESCO as well as of non-governmental and intergovernmental organizations. The World Heritage Committee, which would be better described as "intergovernmental", is the executive core of the institution, whereas the General Assembly of States Parties, the World Heritage Centre and the Advisory Bodies revolve around it, the latter not least by providing practical assistance. The Committee's integration into UNESCO is achieved not least by the activities of the World Heritage Centre and by the Committee's duty to report to the General Conference of UNESCO. Moreover, the Committee has decision-making autonomy; in particular the General Assembly of States Parties is not entitled to give binding orders to it.

## *II. Substantial Steering by Means of Operational Guidelines*

The general task of the international institution for the protection of world heritage, and therefore the World Heritage Committee, is to take measures "for the protection of the cultural and natural heritage of outstanding universal value". This is expressed in recital 8 of the Preamble to the World Heritage Convention which reads that the Convention shall establish an effective system of collective protection of the cultural and natural heritage of outstanding universal value as well as through the Committee's full name, laid down in art. 8 para. 1 sentence 1 of the Convention.

This vague prescription of objectives notwithstanding, the World Heritage Convention also contains definitions for world cultural and natural heritage in arts. 1 and 2. These definitions determine and refine the objects pertaining to the type of protection which the Convention strives for. Furthermore, the Convention states with greater precision the instruments the Committee can utilize of in order to fulfill its objective. Thereby, the Convention focuses, as already mentioned, on listing and granting assistance. Accordingly, art. 11 para. 2 of the Convention stipulates that the World Heritage Committee shall establish, keep up to date and publish, under the title "World Heritage List," a list of properties forming part of the cultural heritage and natural heritage, which it considers as having outstanding

universal value in terms of such criteria as it shall have established. Furthermore, the Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title "List of World Heritage in Danger", a list of the property appearing in the World Heritage List for the conservation of which major operations are necessary and for which, in principle, assistance has been requested by the State Party concerned (art. 11 para. 4 sentence 1 of the Convention). Again, art. 11 para. 5 of the Convention stipulates that the Committee should define the criteria on the basis of which a property belonging to the cultural or natural heritage may be included in the World Heritage List or in the List of World Heritage in Danger. Thus, the Convention itself endows the Committee with the competence to formulate the requirements which a property must meet in order to qualify for inscription on one of the two lists.

Art. 13 of the World Heritage Convention reads that the World Heritage Committee shall receive and study requests for international assistance formulated by States Parties with respect to property forming part of the cultural or natural heritage, situated in their territories, and included or potentially included in the lists referred to in art. 11 of the Convention (para. 1 sentence 1). The Committee shall decide on the action to be taken with regard to these requests and determine, where appropriate, the nature and extent of its assistance (para. 3). Furthermore, it shall determine in that context the order of priorities for its operations, thereby bearing in mind, *inter alia*, the respective importance for the world cultural and natural heritage of the property requiring protection, the need to give international assistance to the property most representative of a natural environment or of the genius and the history of the peoples of the world (para. 4). These prescriptions of actions remain vague and allow to the Committee a broad margin for evaluation and appreciation. In particular, the notions "respective importance for the world heritage" and "most representative of a natural environment or of the genius and the history of the peoples" invites considerable interpretation. The Convention does not explicitly stipulate that the Committee is obliged to make general and abstract inferences based upon said notions nor does it exclude it from doing so; instead, the Committee's duty to make inferences concerning certain points also suggests a need to clarify additional aspects in the Convention.

After all, the World Heritage Convention comprises fundamental notions that need to be delineated. In particular this applies to the crucial notion "outstanding universal value" as a prerequisite for the enshrining of a property on the World Heritage List. This notion was left deliberately<sup>54</sup> undefined in the Convention.<sup>55</sup>

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<sup>54</sup> See Strasser (note 25), at 215, 217.

<sup>55</sup> See Mark M. Boguslavsky, *Der Begriff des Kulturguts und seine rechtliche Relevanz*, in RECHTSFRAGEN DES INTERNATIONALEN KULTURGÜTERSCHUTZES (note 2), at 3, 7.

The term was introduced to limit the Convention's application to the protection of the most important places of cultural and natural heritage in the world.<sup>56</sup> That is the reason why the Convention provides that the Committee decides on the criteria for the inscription of properties on the lists.

The Committee fulfilled this task during its first session by issuing the "Operational Guidelines for the Implementation of the World Heritage Convention".<sup>57</sup> The original version of the Operational Guidelines was based on a "Main Working Paper" prepared by the Committee's Secretariat in cooperation with the Advisory Bodies,<sup>58</sup> since the World Heritage Convention does not comment on the procedure or form in which the necessary delineation shall take place. Over the past thirty years, the Operational Guidelines have been revised twelve times,<sup>59</sup> and their content has been extended from 27 paragraphs in 1977 to 290 paragraphs, including 9 annexes, in February 2005.<sup>60</sup>

The reform procedure which brought about the Operational Guidelines 2005 commenced with a decision by the World Heritage Committee in 1999 to organize an international meeting of experts.<sup>61</sup> As a consequence, in the following year the "International Expert Meeting on the Revision of the Operational Guidelines for the Implementation of the World Heritage Convention" took place, where experts of cultural and natural heritage from all regions of the world and representatives of the Advisory Bodies analyzed the existing provisions and recommended a number of changes.<sup>62</sup> On the basis of these recommendations the World Heritage Centre, through a collaborative process involving its own personnel as well as representatives of States Parties and of the Advisory Bodies,<sup>63</sup> prepared a first draft

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<sup>56</sup> Sarah M. Titchen, *On the Construction of "Outstanding Universal Value,"* 1 CONSERVATION AND MANAGEMENT OF ARCHAEOLOGICAL SITES 235, 236 (1996); Fitschen (note 15), at 183, 191.

<sup>57</sup> See (note 27).

<sup>58</sup> See World Heritage Committee Final Report, first session, para. 56, available as Doc. CC-77/CONF.001/9 of 17 October 1977 at: <http://whc.unesco.org/archive/repcom77.htm>.

<sup>59</sup> UNESCO World Heritage Centre (note 7), at 32.

<sup>60</sup> See also Strasser (note 25), at 215, 247; Zacharias (note 4), at 273, 307.

<sup>61</sup> See World Heritage Committee Report, 23rd session, chapter XIII para. 12, available as Doc. WHC-99/CONF.209/22 of 2 March 2000 at: <http://whc.unesco.org/archive/repcom99.htm>.

<sup>62</sup> International Expert Meeting on the Revision of the Operational Guidelines for the Implementation of the World Heritage Convention, Final Report, available as annex to Doc. WHC-2000/CONF.202/17 of 30 May 2000 at: <http://whc.unesco.org/canterbury/final-eng.pdf>.

<sup>63</sup> World Heritage Committee Report, 24th session, chapter VI para. 4, available as Doc. WHC-2000/CONF.204/21 of 16 February 2001 at: <http://whc.unesco.org/archive/repcom00.htm>.

of the revised Operational Guidelines.<sup>64</sup> In the course of discussions, this draft was modified several times. Thereby, the World Heritage Committee invited the States Parties to the Convention to provide comments on the then prevailing draft with annotated revisions.<sup>65</sup> Furthermore, it gave the Centre and the Advisory Bodies the task of reviewing these comments, verifying that they complied with its decisions and subsequently integrated them into the Operational Guidelines.<sup>66</sup> Thus, the Operational Guidelines which, according to a decision of the Committee, entered into force on 2 February 2005<sup>67</sup> can draw legitimacy from the participation of experts and of States Parties, which is the typical dual legitimacy structure used for the international institution and its activities under the World Heritage Convention. In fact, a number of States Parties tabled comments and proposals for alternative formulations to the drafts of the revised Operational Guidelines,<sup>68</sup> so that the Bureau could rightly note that there was “teamwork” on the part of the Secretariat, the Advisory Bodies and the representatives of States Parties.<sup>69</sup>

The Operational Guidelines play an essential role in the implementation of the Convention. A note in the original version stated that “these guidelines, which will need adjusting or expanding to reflect later decisions of the World Heritage Committee, are of crucial importance, in that they provide a clear and comprehensive statement of the principles which are to guide the Committee in its future work.”<sup>70</sup> In fact, the Committee in its work treats the Operational Guidelines as if they were not merely a nonbinding commentary to the Conventional provisions but binding secondary law. As far as one can discern, there are no

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<sup>64</sup> See World Heritage Committee Report, 26th session, annex II, available as Doc. WHC-02/CONF.202/14A of 23 May 2002 at: <http://whc.unesco.org/archive/2002/whc-02-conf202-14ae.pdf>; Strasser (note 25), at 215, 248-250.

<sup>65</sup> World Heritage Committee Report, 25th session, chapter VI, available as Doc. WHC-01/CONF.208/24 of 8 February 2002 at: <http://whc.unesco.org/archive/repcom01.htm#sec6>.

<sup>66</sup> World Heritage Committee, Decisions adopted at the 27th session, para. 10, available as Doc. WHC-03/27.COM/24 of 10 December 2003 at: <http://whc.unesco.org/archive/decrec03.htm#sec10>.

<sup>67</sup> World Heritage Committee, Decisions adopted by the World Heritage Committee at its 7th extraordinary session, chapter 4A para. V, available as Doc. WHC-04/7EXT.COM/17 of 13 January 2005 at: <http://whc.unesco.org/archive/2004/whc04-7extcom-17e.pdf>.

<sup>68</sup> See World Heritage Committee (note 65), chapter VI para. 1 (3rd prong).

<sup>69</sup> Bureau of the World Heritage Committee Report, special session, chapter III para. 22, available as Doc. WHC.2000/CONF.202/4 Rev. 1 (SPE) of 16 January 2001 at: <http://whc.unesco.org/archive/repbur00ss.htm#sec3>.

<sup>70</sup> Note 1 sentence 2 under para. 3 of the Operational Guidelines 1977, Doc. CC-77/CONF.001/9 of 19 October 1977, 56, available at: <http://whc.unesco.org/archive/repcom77.htm>.

deviations from or violations against the Guidelines in practice. The Committee acts within the procedural rules and observes the substantial stipulations, which underpins the Convention.

Notwithstanding, the legal quality of the Operational Guidelines is not clear.<sup>71</sup> The Committee describes them as “flexible working documents”,<sup>72</sup> not least since they can be amended much more easily than the Convention. Primarily, the Operational Guidelines, which are general and abstract rules, are akin to the internal law of an international organization. The Committee has bound itself by abstract norms with regard to, for instance, making use of margins of appreciation when deciding whether a property belongs to the cultural or natural world heritage or not, and exercising discretion when deciding whether, and what kind of, international assistance is to be granted. Thus, the Operational Guidelines do not only serve the standardization and simplification of the administrative procedures but also guarantees more transparent, foreseeable and calculable decisions at the international level. As a consequence, the States Parties can prepare their national heritage or rather environmental and historic monument protection policies for international deliberation and know with certainty, *inter alia*, whether construction planning or investments will be granted.<sup>73</sup>

Moreover, the Guidelines function as external governance instruments. They have the character of an administrative regulation in the sense of the notion used in German law. Although they are not directed to subordinate authorities, they foster a uniform administrative practice of the States Parties, especially regarding nominations of properties for inscription on the World Heritage List. Accordingly, the Operational Guidelines 2005 identify as their key users not only the Committee and the Advisory Bodies but also the States Parties, which are mentioned from the outset (para. 3) and are, furthermore, directly addressed by a series of provisions. For instance, the Guidelines encourage the States Parties to ensure the participation of stakeholders in the identification, nomination and protection of world heritage properties (para. 12), to bring together their cultural and natural heritage experts in regular intervals to discuss the implementation of the World Heritage Convention

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<sup>71</sup> See with regard to the dispute about the legal significance of the Operational Guidelines during the 1996 session World Heritage Committee Report, 20th session, chapter XVII para. 7 and annexes 1-4 to IX, available as Doc. WHC-96/CONF.201/21 of 10 March 1997 at: <http://whc.unesco.org/archive/repcom96.htm>; Strasser (note 25), 215, 246.

<sup>72</sup> See UNESCO World Heritage Centre (note 7), at 32.

<sup>73</sup> See e.g. World Heritage Newsletter No. 27 of May to August 2000, available at: <http://whc.unesco.org/news/27newsen.pdf>, which mentions that one important function of the Operational Guidelines is to ensure that States Parties to the Convention are “well informed about the principles which guide the work of the World Heritage Committee.”

(para. 14) or to participate in the implementation of the Global Strategy for a Representative, Balanced and Credible World Heritage List<sup>74</sup> (para. 56). With these provisions, the Guidelines aim at educating the States Parties how to improve their national administrative procedures; they function as State-directed codes of conduct. Furthermore, the Guidelines, by containing the criteria for a property to be inscribed on or deleted from the World Heritage List as well as the priority principles for the granting of assistance, help the States Parties recognize which properties situated in their territories are of such a value that they should be conserved for future generations. Thus, they create an international standard for determining the historic monuments and natural sites which in any case deserve domestic protection, irrespective whether they are listed or not (*cf.* also art. 12 of the Convention).

### *III. Procedural Regime*

The administrative procedure is loosely stipulated in the World Heritage Convention. The relevant provisions are specified and completed by the Operational Guidelines and by the Rules of Procedure<sup>75</sup> which guide the internal decision-making process of the World Heritage Committee.

#### *1. Three-Part Structure of the Procedure of Decision-Making*

##### *a) Procedure of Listing*

Before being able to initiate the procedure of listing by the nomination of a property, the States Parties have to prepare and submit to the World Heritage Committee a Tentative List.<sup>76</sup> The Tentative Lists,<sup>77</sup> include, with documentation about the location and significance, the heritage sites that the States Parties plan to nominate in the next five to ten years.<sup>78</sup> Thus, they are planning tools, since they allow the Committee and the Advisory Bodies to compare nominated sites with similar ones that might be nominated in future so that they can select only those of outstanding universal value.<sup>79</sup> As previously mentioned, States Parties are

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<sup>74</sup> See World Heritage Committee Report, 25th session, available as Doc. WHC-01/CONF.208/14 of 31 October 2001 at: <http://unesdoc.unesco.org/images/0012/001264/126443e.pdf>.

<sup>75</sup> See (note 47).

<sup>76</sup> See art. 11(1) sentence 1 of the Convention.

<sup>77</sup> Available at: <http://whc.unesco.org/en/tentativelists>.

<sup>78</sup> See art. 11(1) sentence 2 of the Convention, para. 62 of the Operational Guidelines 2005.

<sup>79</sup> See para. 70 of the Operational Guidelines 2005.

encouraged to prepare their Tentative Lists with the participation of a wide variety of stakeholders, including site managers, local and regional governments, local communities, NGOs and other interested parties and partners (para. 64 of the Operational Guidelines 2005). However, in practice at least half of the European countries do not involve local stakeholders in the preparation of their Tentative Lists and at least two thirds draft their Lists without any public consultation.<sup>80</sup>

The States Parties formally nominate properties, on the basis of the Tentative Lists, for inclusion on the World Heritage List. They can only nominate sites located within their boundaries.<sup>81</sup> In the case of sites that extend beyond national borders a joint transboundary or transnational nomination can be made;<sup>82</sup> then, a horizontal cooperation between States Parties takes place. Para. 123 of the Operational Guidelines 2005 indicates that the participation of local people in the nomination process is essential to foster shared responsibility with the State Party in the maintenance of the property. Thus, the States Parties are encouraged to prepare nominations in conjunction with site managers, local and regional governments, local communities, NGOs and other interested parties (*cf.* also para. 12 of the Operational Guidelines 2005). Again, neither the Convention nor the Guidelines stipulate an obligation of the States Parties to involve local stakeholders or to carry out a public consultation. Even governments of territorial entities below the level of the State Party need not be given the possibility to participate, which can prove problematic particularly in federal states. The World Heritage Convention contains a federal clause in the form of art. 34, but it only clarifies that federal or central governments have exactly the same obligations for the implementation of the Convention as those States whose governments take a unitary form and places the responsibility on the national government to persuade the lower levels to carry out the provisions of the Convention notwithstanding the lack of direct federal or central government power.<sup>83</sup>

The States Parties' nomination dossiers – which must contain details about the property, the justification for inscription, the state of conservation, the actual operating protection system and the management plan (*cf.* para. 132 of the Operational Guidelines 2005) – are evaluated by the Advisory Bodies, that is by

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<sup>80</sup> See UNESCO World Heritage Centre (note 7), at 35.

<sup>81</sup> See Fitschen (note 15), at 183, 192-193.

<sup>82</sup> See paras. 134, 135 and 139 of the Operational Guidelines 2005.

<sup>83</sup> See Australian High Court, *Commonwealth v. Tasmania (Franklin Dam Case)* [1983] 158 CLR 1; Ben Boer, *Article 34*, in *THE 1972 WORLD HERITAGE CONVENTION*, 355, 356 (Francesco Francioni ed., 2008); von Bogdandy & Zacharias (note 5), at 527, 530; Zacharias (note 4), at 273, 330-331.

ICOMOS for cultural heritage and IUCN for natural heritage sites. A joint evaluation by both of them takes place in the case of mixed sites and some cultural landscapes (*cf.* paras. 144 to 146 of the Operational Guidelines 2005). The Advisory Bodies examine whether or not the properties nominated by the States Parties have outstanding universal value, meet the additional conditions of integrity and/or authenticity and the requirements of protection and management (para. 143 of the Operational Guidelines 2005). Thereafter, they forward their recommendations to the World Heritage Committee. The concerned States Parties may send, at least two working days before the opening of the new session of the Committee, a letter to the Chairperson if they think they have identified factual errors in the evaluation of their nomination made to the Advisory Bodies. Thereafter, this letter will be distributed to the members of the Committee and may be read by the Chairperson following the presentation of the evaluation (para. 150 of the Operational Guidelines 2005). Thus, the States Parties have the possibility to make a counter-statement to the Advisory Bodies' evaluation.

The participation of the Advisory Bodies at evaluation stage is not explicitly stipulated in the World Heritage Convention. According to art. 11 para. 7 of the Convention, the Committee shall, with the agreement of the States concerned, coordinate and encourage the studies and research needed for the drawing up of the World Heritage List and of the List of World Heritage in Danger. This indicates that the Committee is allowed to enlist the support of experts for the purposes of assessment whether a property forms part of the world heritage. Moreover, art. 13 para. 7 of the Convention, with regard to the granting of international assistance, reads that the Committee shall cooperate with international and national governmental and non-governmental organizations that have similar objectives to those of the Convention; thereby, ICCROM, ICOMOS and IUCN are named as examples. Hence, it seems reasonable that the Committee uses the expertise of these organizations also for the evaluation of nominated properties.

The World Heritage Committee decides whether a property should be inscribed on the World Heritage List, or whether the nomination should be referred back to the State Party for additional information or deferred for more in depth assessment, or a substantial revision by the State Party (*cf.* art. 11 para. 2 of the Convention; paras 153, 159 and 160 of the Operational Guidelines 2005). The Committee is not bound by the Advisory Bodies' evaluations and recommendations,<sup>84</sup> although in practice it regularly avoids making use of its capacity to deviate. In order to include a property in the World Heritage List the consent of the State concerned is necessary (art. 11 para. 3 sentence 1 of the Convention), which is usually seen to have been

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<sup>84</sup> See World Heritage Committee (note 71), chapter XVII para. 8.

given with the submission of the nomination. Furthermore, art. 11 para. 6 of the Convention states that the Committee, before refusing a request for inclusion in the World Heritage List or the List of World Heritage in Danger, shall consult the State Party in whose territory the property in question is situated. Thus, the procedure is framed by strong consensual elements.

The World Heritage Committee's decisions need not be based on unanimity; rather, art. 13 para. 8 of the Convention reads that decisions of the Committee shall be taken by a majority of two-thirds of its members present and voting. This means a further weakening of the already remote representation of the States Parties through the Committee but strengthens the autonomy of the Committee at the national level.

*b) Procedure for Granting Assistance*

Like the procedure of listing, the procedure of granting international assistance starts with an initiative of the State Party concerned.<sup>85</sup> The States Parties must submit a formal request for assistance according to arts. 13 para. 1 and 19 sentence 1 of the World Heritage Convention, which they are, in principle, only entitled to do when they have paid their contribution to the World Heritage Fund (*cf.* para. 237 of the Operational Guidelines 2005).<sup>86</sup> The requests should contain any information and documentation necessary to enable the Committee to arrive at a decision (art. 19 sentence 2 of the Convention); and must even be supported by experts' reports whenever possible (art. 21 para. 1 sentence 2 of the Convention).

The Advisory Bodies, which means ICOMOS and ICCROM in the case of cultural sites, ICOMOS, ICCROM and IUCN in the case of mixed sites, and IUCN in the case of natural sites,<sup>87</sup> evaluate the requests and make recommendations. This support of the World Heritage Committee can be based on art. 13 para. 7 in conjunction with art. 21 para. 3 of the World Heritage Convention reading that the Committee, before coming to a decision, shall carry out such studies and consultations as it deems necessary. Additionally, art. 24 of the Convention stipulates that international assistance on a large scale shall be preceded by detailed scientific, economic and technical studies. Thus, an evaluation by experts is recognized by the Convention as an important procedural stage in certain cases. Moreover, one can argue that the constant consultation of experts over a period of

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<sup>85</sup> See GENIUS-DEVIME (note 15), at 316-317.

<sup>86</sup> UNESCO World Heritage Centre (note 7), at 47.

<sup>87</sup> See paras 248 to 250 of the Operational Guidelines 2005.

more than thirty years has led to a duty to consult them, at least if the nomination is not going to be refused already because of formal reasons. Thus, the mere possibility of consultation has become an obligation *via* "institutional practice".<sup>88</sup>

Thereafter, the Committee decides on the action to be taken with regard to the request, determines, where appropriate, the nature and extent of its assistance and authorizes the conclusion, on its behalf, of the necessary contractual arrangements with the government concerned (*cf.* arts 13 para. 3 and 26 of the Convention). After all, one can also discern a three-part structure of the administrative procedure, consisting of application, evaluation and formal decision.<sup>89</sup>

## 2. *Reporting and Monitoring*

The implementation of the World Heritage Convention in general and of the obligations arising from listing or granting assistance in particular by the States Parties is mainly supervised by the World Heritage Committee and by the General Conference through periodic reporting and reactive monitoring. Periodic reporting means a six-year cyclical review of States Parties' policies and legislation, as well as the organization, management and conservation of the world heritage sites situated in the prevailing territories.<sup>90</sup> It shall provide an assessment of the application to the Convention by the State Party and also an analysis whether the outstanding universal value of the properties inscribed on the World Heritage List is being maintained over time. Reactive monitoring takes place in reference to properties that are under threat, which means that they are inscribed, or plan to be inscribed, on the List of World Heritage in Danger, and in the procedures for the eventual deletion of properties from the World Heritage List.<sup>91</sup> It is primarily a policy guidance tool, aimed at providing benchmarks, orientations and deadlines to the actions of the States Parties.<sup>92</sup> Finally, there must be monitoring of the implementation of international assistance within one year of the completion of the activities for which the assistance had been granted (para. 256 of the Operational Guidelines 2005).

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<sup>88</sup> See JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 87 (2005).

<sup>89</sup> See Strasser (note 25), at 215, 218; LÉON PRESSOUYRE, *THE WORLD HERITAGE CONVENTION - TWENTY YEARS LATER* 46 (1996).

<sup>90</sup> See arts. 11(7) and 29 of the Convention; para. 199 of the Operational Guidelines 2005.

<sup>91</sup> Para. 169 of the Operational Guidelines 2005.

<sup>92</sup> UNESCO World Heritage Centre (note 7), at 20.

When the reporting or monitoring reveals a breach of Convention duties and obligations on behalf of the States Parties, the international institution only has a limited arsenal of instruments at hand to ensure compliance, since there is no legal penalty, sanction, or remedy provided for under the World Heritage Convention.<sup>93</sup> If a property is included in the World Heritage List, the Committee can, as a measure of compliance,<sup>94</sup> either inscribe it on the List of World Heritage in Danger or threaten to delete it completely from the World Heritage List.<sup>95</sup> These measures have the potential to stimulate the motivation of the State Party to take the necessary steps to avert the threat to the property or to encounter its negative results not least because they are means of naming and shaming.<sup>96</sup> They announce publicly that the present steps taken by the State Party in order to protect the property forming part of the world heritage are insufficient. Thus, they can be interpreted as measures of "reputation enforcement".<sup>97</sup> The effectiveness of these measures has been well demonstrated in the case of Cologne Cathedral, where the Mayor of the City of Cologne was eventually prepared to make concessions with regard to the construction planning concerning the surroundings of the Cathedral.<sup>98</sup>

#### *IV. Legal Effects of Listing*

The legal classification of listing is disputed. According to some scholars, the inscription of a property on the World Heritage List does not constitute obligations of the State Party in whose territory the property is situated; decisive for the existence of world heritage and for the State Party's obligations resulting from that status are only the substantial criteria mentioned in arts. 1 and 2 of the Convention. The listing is at best a formal confirmation of a status that is already given, and has the function of a clarification;<sup>99</sup> it has, thus, merely a declaratory character. To corroborate this opinion one could argue on the basis of art. 3 of the Convention. This provision reads that it is for each State Party to identify and delineate the

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<sup>93</sup> BOER & WIFFEN (note 6), at 70.

<sup>94</sup> See Zacharias (note 4), at 273, 310-322.

<sup>95</sup> BOER & WIFFEN (note 6), at 70.

<sup>96</sup> See CHRISTINA HOTZ, DEUTSCHE STÄDTE UND UNESCO-WELTERBE. PROBLEME UND ERFAHRUNGEN MIT DER UMSETZUNG EINES GLOBALISIERTEN DENKMALSCHUTZKONZEPTES 42 (2004).

<sup>97</sup> See Giandomenico Majone, *Delegation of Regulatory Powers in a Mixed Polity*, 8 EUROPEAN LAW JOURNAL 319, 337 (2002); Peter T. Leeson, *Contracts without Government*, 18 JOURNAL OF PRIVATE ENTERPRISE 35-36 (2003).

<sup>98</sup> See Zacharias (note 4), 273, 366.

<sup>99</sup> See Fastenrath (note 5), at 1017, 1019 and 1026-1027.

different properties situated on its territory mentioned in arts. 1 and 2. Thus, the State Party concerned would appear to be capable in conclusively assessing the quality of a property that is to be nominated. Moreover, art. 11 para. 1 sentence 1 of the Convention stipulates that every State Party shall submit to the Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the World Heritage List. One could read this passage in the sense that the qualification as world cultural or natural heritage is fixed before the inscription on the World Heritage List takes place.

However, this view overlooks the complex assessment procedure at the international level that includes an evaluation of the Advisory Bodies. This procedure would be entirely superfluous if the listing had no effects under international law; the World Heritage Committee could restrict its activities to automatically including the national lists in the World Heritage List. Notwithstanding, the inscription on the List is not a necessary constituent factor for further measures; in particular it is not a compelling prerequisite for the eligibility of the affected property for international assistance. Instead, assistance can already be granted if a property is potentially suitable for inclusion in the List (*cf.* arts. 13 para. 1 sentence 1 and 20 of the Convention).

Hence, the effects of listing must be linked directly with the world heritage status of the property or must be related to the property's protection. Since the World Heritage Committee examines whether a property forms part of the world heritage, its final positive decision ascertains this quality in a legally binding way so that the State Party cannot arrive at a deviating assessment. Thus, the decisions can be described as accreditation, which means a formal positive determination of the qualitative status with which various rights or duties are directly linked; with regard to the latter they have constitutive effect. This qualification of listing was rightly recognized by the High Court of Australia which stated in *Queensland v Commonwealth* that "[f]rom the viewpoint of the international community, the submission by a State Party of a property for inclusion in the World Heritage List and [the later] inclusion of the property in the List by the Committee are the means by which the status of a property is ascertained and the duties attaching to that status are established. The State Party's submission of a property is some evidence of its status but the Committee's listing of a property is conclusive. [...] As the procedures for evaluation adopted by the Committee are extensive, the Committee's decision [...] assures the international community that the property has outstanding universal value as part of the cultural heritage or natural heritage." These procedures placed the State Party "under an international duty to protect and conserve" the property in question.<sup>100</sup>

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<sup>100</sup> *Queensland v. Commonwealth* [1989] 167 CLR 232, 240-242.

The aspect that the accreditation gives rise to duties incumbent upon States Parties is also emphasized by a body of literature which argues that the listing carries with it a "heavy international responsibility [for the State Party] to protect and enhance the World Heritage values over the years;" hence, the State Party, when nominating a property, "must be fully aware of the long term obligations" connected with the positive decision of the World Heritage Committee which it strives for.<sup>101</sup> The rationale behind these duties is that the inscription of a property on the World Heritage List consolidates and, thus, activates the State Party's primary obligations under the Convention with regard to the objective of protection and conservation. These obligations are formulated vaguely and openly in arts. 4 and 5 of the World Heritage Convention but the accreditation of a property concentrates these abstract rules into sufficiently concrete stipulations which bind the State Party, since all questions of interpretation and evaluation are decided.<sup>102</sup> As a consequence, the State Party shall endeavor, *inter alia*, to integrate the protection of that item of world heritage into comprehensive planning program (art. 5 lit. a of the Convention) and to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the protection, conservation, presentation and rehabilitation of this heritage (art. 5 lit. d of the Convention). The last point could, for example, mean that the State Party has to pass a historic monument act or to take efficient supervisory measures in the field of construction planning to ensure that regional or local governments which are not addressees of the Convention for their part protect the properties which have the status of world heritage.<sup>103</sup>

#### V. Oversight

The oversight of the international institution is restricted to the General Conference of UNESCO receiving and, should the need arise, reacting to the World Heritage Committee's biannual reports on its activities according to art. 29 para. 3 of the Convention. This weak instrument might be regarded as being sufficient in the light of the consensual administrative procedure which requires an intensive consultation between the Committee and the States Parties and is, to a large extent, able to guarantee that faults are avoided or at least revised. Thus, the reports have

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<sup>101</sup> Jane A. Vernhes, *Implementation of the World Heritage Convention in South East Asia and the Pacific*, in PROCEEDINGS OF A WORKSHOP SESSION ON CRITICAL ISSUES FOR PROTECTED AREAS, held during the 18th session of the General Assembly of IUCN on 1 December 1990, at 26; see Haigh (note 10), at 199, 205-206; VON SCHORLEMER (note 19), at 132-133.

<sup>102</sup> von Bogdandy & Zacharias (note 5), at 527-528; Zacharias (note 4), at 273, 308.

<sup>103</sup> See with regard to the measures of the federal, state and municipal level in Germany Zacharias (note 4), 273, 331-360.

the function of enabling the General Conference to control whether the general policy of the Committee is in line with the targets of the World Heritage Convention. Consequently, this oversight appears to be more a political than a strict, legal one.

### **C. Assessment and Conclusion**

#### *I. Principles*

There are a series of principles that determine the shape and the activities of the international institution for the protection of world heritage. These principles can be divided into four groups.

The first group consists of principles which constitute, not least as Conventional objectives, the coordination of the world heritage protection system, laid down in the Preamble of the World Heritage Convention. These are the principle of ecologically sustainable development,<sup>104</sup> which is consolidated by the precautionary principle and the inter-generational principle,<sup>105</sup> the principle of cooperation, and the principle of subsidiarity.

The principle of ecologically sustainable development, which is a leading substantial principle, is prominent in all recitals of the Preamble of the Convention, since they suggest the increasing threats to the stock of world cultural and natural heritage by both the traditional causes of decay, changing social and economic conditions and to the need to preserve this heritage as part of the common heritage of mankind. Moreover, art. 5 lit. a of the Convention states that the world heritage must be given a “function in the life of the community”, and art. 5 lit. d of the Convention stipulates that it must be identified, protected, conserved, presented and rehabilitated. Thus, the maintenance of the world heritage has priority even over achieving a balance with the economic development.

The precautionary principle is mentioned in art. 5 lit. c of the Convention stipulating that the State Party shall endeavor to develop “scientific and technical studies and research” and to work out the necessary operating methods as well as making it “capable of counteracting the dangers” that threaten its cultural or natural heritage. This means that the State Party is not allowed to take deliberate action that might damage the world heritage site. A detailed assessment of the

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<sup>104</sup> See Haigh (note 10), at 199, 208 and 211-212.

<sup>105</sup> See FRIGO (note 2), at 189.

likely environmental impacts on the site must be conducted.<sup>106</sup> The inter-generational principle is contained within art. 4 sentence 1 of the Convention. The provision reads that each State Party recognizes a duty to ensure the “transmission to future generations” of the world heritage. This duty requires that the degree of present damage must be kept to a minimum so that it does not erode the world heritage and destine it to a “death of a thousand cuts”.<sup>107</sup>

The principle of cooperation, which is a formal, structural principle, can be deduced from the sum of provisions in the Convention providing that the World Heritage Committee can only act on an initiative of the State Party concerned or with the consent of the State Party or must, at least, consult the State Party (*cf., e.g.,* arts. 11 paras. 1, 3 and 6, 13 paras. 1 to 3 and 19 of the Convention). In the context of the World Heritage Convention, the principle is meant to apply vertically and not horizontally, although art. 7 of the Convention appears to indicate a different conclusion. The principle of subsidiarity which is closely connected with the principle of cooperation and can be understood both formally, with regard to competencies, and substantially, with regard to the manner and extent of the measures to be chosen, states that international assistance only takes effect when the State Party is not able to adequately fulfill the task of world heritage protection within its own resources. It is laid down in particular in recitals 3 and 5 of the Preamble and in arts. 4, 7, 21 para. 1 and 25 of the Convention.

The second group concerns the representation of the States Parties in the governing bodies of the international institution or, more generally, the formal relation or connection between the national and the international level. It is, thus, a structural principle. The appointment of World Heritage Committee members follows the principle of an equitable representation of the different regions of the world (*cf.* art. 8 para. 2 of the Convention). The first and the second group of principles belong to the substantive and institutional framework of the international institution or describe the international institution in its entirety as a governance regime.

The third and the fourth group of principles contain legal principles governing decision-making. The third group is related to the administrative procedure, and the fourth group consists of material prescriptions for the final decision. Regarding procedure, one can discern the principle that no action shall be made without the initiative or at least consent of the State Party concerned (*cf.* arts. 11 paras. 1, 3 and 6, 13 paras. 1 to 3 and 19 of the Convention), apart from measures to enhance compliance for which the majority vote in the Committee has special importance.

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<sup>106</sup> Haigh (note 10), at 199, 211.

<sup>107</sup> See *id.* at 199, 208.

One could in this context also mention voluntary subjection to the decision-making power of the international level with regard to specific properties. Furthermore, one can identify the principle that decisions must be preceded by evaluations made by external experts, which means by the Advisory Bodies (*cf.* arts. 13 para. 7 and 21 para. 3 of the Convention; paras. 143 to 151 of the Operational Guidelines 2005). A third procedural principle is the principle of transparency. Any final decision of the World Heritage Committee must be made public; and even the application (nomination or request) of the State Party and the reports of the Advisory Bodies are published (*cf.* para. 187 of the Operational Guidelines 2005). Regarding material provisions, one might investigate a principle of burden-sharing, since art. 25 of the Convention provides that, as a general rule, only part of the cost of work necessary shall be borne by the international community; the contribution of the State benefiting from international assistance shall constitute a substantial share of the resources devoted to each program or project, unless its resources do not permit this.

## *II. Multilevel Dimension*

The relationship between the international and the national level is hierarchical. The World Heritage Committee is the central decision-making body at the international level. It makes decisions that legally bind the States Parties who have subjected themselves to its power. However, the State Party's general duties under the Convention that are consolidated by the Committee's decision to inscribe a property on the World Heritage List are formulated in such a way that affords the State Party with a broad scope for action. In particular, it can, to a large extent, decide which measures it may take to protect, conserve and rehabilitate the listed property (*cf.* arts. 4 sentence 2 and 5 of the Convention). However, the situation is somewhat dissimilar when the State Party avails itself of the granted international assistance. In which case, it must comply with the conditions set out in the agreement with the Committee (*cf.* art. 26 of the Convention).

## *III. Legitimacy: Experts versus Representation?*

The legitimacy of the governance of world heritage protection is based on four pillars: the representation of the States Parties in the World Heritage Committee, albeit flawed; the substantive formulation of the Committee's activities within the broad scope already set out in the Convention ratified by the States Parties; the intensive participation of the State Party concerned in the procedures of listing and granting assistance which guarantees that the rights and interests of the State Party are considered; and, finally, the inclusion of and reference to external expertise. The deficits that characterize the representation of States Parties could be

counterbalanced by efficiency gains and increased acceptance of the entire governance mechanism through reliance on independent expertise.

On the one hand, the governance of world heritage protection is articulated in the body of literature as highly efficient.<sup>108</sup> In fact, the consensual and cooperative approach results in a high acceptance of the Committee's decisions by the States Parties. Moreover, the often intensive consultations with public authorities "at the grass roots level" like regional governments and municipalities which are regarded as "partners in the protection and conservation of world Heritage" (para. 40 of the Operational Guidelines 2005) in the processes of consultation and evaluation are suited to give the World Heritage Committee and the Advisory Bodies a factual, though not legal, standing in administrative procedures on the national, regional or local level. The Committee and Advisory Bodies are known by the domestic authorities and there seems to be, thus, no psychological obstacle to involve them as experts bringing in the global perspective.

On the other hand, the efficiency and acceptance of the UNESCO world heritage regime suffer from three weaknesses. Firstly, the Committee can, in principle, only become active upon an explicit request of a State Party. The absence of said request negates the inscription of a property on the World Heritage List as well as the protection of the international community,<sup>109</sup> even if the State Party deliberately (be it for political, economic or religious reasons) neglects the cultural or natural heritage.<sup>110</sup> In order to remedy this situation the Convention itself would need to be amended. Similarly the rules concerning the members of the Committee requires amendment in order to guarantee the full representation of all States Parties, since the current democratic deficits in the appointment of the Committee's members are compensated by the States Parties' strong participatory rights in the administrative procedure.

Furthermore, there are no adjudicative mechanisms present in the Convention to afford the States Parties with the possibility to review Committee decisions, in particular the referral or deferral of a nomination and, thus, the refusal to enshrine a nominated property in the World Heritage List at present or the inscription of a property on the List of World Heritage in Danger. Since the States Parties are also not able to take action in any external tribunal such as the International Court of

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<sup>108</sup> ODENDAHL (note 16), at 137.

<sup>109</sup> FRANK FECHNER, RECHTLICHER SCHUTZ ARCHÄOLOGISCHEN KULTURGUTS 98-99 (1991); GENIUS-DEVIME (note 15), at 316; ODENDAHL (note 16), at 137.

<sup>110</sup> Fitschen (note 15), at 183, 200; *see* Francioni (note 15), at 13, 30-32.

Justice or the Permanent Court of Arbitration<sup>111</sup> (exemplified in the cases of Cologne Cathedral and Dresden Elbe Valley where a system of dispute settlement or management could have been helpful), perhaps a kind of appellate body should be established within the framework of the UNESCO world heritage regime for cases of conflict.<sup>112</sup>

Ultimately, the compliance mechanisms at hand are problematic insofar as they cannot efficiently guarantee that the States Parties act in accordance with the Convention, since the ultimate threat for a State Party which does not comply with its Conventional duties is delisting and, thus, withdrawing the international protection from a property that has outstanding universal value.<sup>113</sup> Hence, the Committee, for example, abandoned its plan to inscribe Kakadu National Park on the List of World Heritage in Danger in view of a proposed uranium mine in an enclave within the Park because of the resistance mounted by Australian Government. This decision reflected a “rational choice to prevent defection and non-compliance that could potentially be more damaging to the heritage regime”.<sup>114</sup> The national authorities must carefully weigh such a decision. Moreover, they may consider the delisting simply as one kind of cost among others of, for instance, a measure of planning.<sup>115</sup> As the German Federal Constitutional Court held in its preliminary decision of 29 May 2007 concerning the Dresden Elbe Valley where it stated that the City of Dresden, if necessary, would accept the loss of the title of world heritage when the wish of the people to construct a bridge over the Valley, as articulated in a local referendum, was to be respected;<sup>116</sup> here a decision which was found on the local level by a means of direct democracy was regarded as having more weight than a decision of the autonomous, expertocratic international institution.<sup>117</sup> A solution to such cases would be, again, an amendment to the Convention which allows sanctions. But this would mean a change to the Convention’s character.

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<sup>111</sup> See BOER & WIFFEN (note 6), at 70.

<sup>112</sup> See Francioni (note 15), at 13, 36.

<sup>113</sup> See Zacharias (note 4), at 273, 320-322.

<sup>114</sup> Maswood (note 6), at 357, 358.

<sup>115</sup> See Markus Scheffer, *Der Volkswille als Leerformel*, in FAZ NO. 123 of 30 May 2007, 37.

<sup>116</sup> Federal Constitutional Court (note 5), at 513. See Dieter Bartetzko, *Pilatus lebt*, in FAZ NO. 130 of 8 June 2007, 33; Reinhard Müller, *Bürgerwille und Völkerrecht*, in FAZ NO. 136 of 15 June 2007, 12.

<sup>117</sup> See Daniel Hildebrand, *Waldschlöfchen ohne Brücke: über Aussetzung und Selbstausschaltung von Demokratie*, 40 KRITISCHE JUSTIZ 184-192 (2007). Regarding supposed democratic deficits of the world heritage regime and possible reforms, see Natasha Affolder, *Democratising or Demonising the World Heritage Convention?*, 38 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 341-361 (2007).

After all, the international institution for the protection of world heritage is an example of a widely autonomous regime. The autonomy guarantees to a certain degree independence from the States Parties and their ideas, which is expressed at best by the restricted competences of the General Assembly of States Parties towards the World Heritage Committee. Consequently, the institution can focus more precisely on its core task, without having the obligation and need to extensively consider national politics. However, it is just this point which undermines its acceptance by administrative authorities of the States Parties, which must implement the World Heritage Convention into their national legal systems. The institutional distance strengthens the impression of national bureaucracies that the international level does not sufficiently acknowledge regional and local interests, that it is too technocratic and, to say it in one word, remote.