

Cologne Cathedral versus Skyscrapers – World Cultural Heritage Protection as Archetype of a Multilevel System

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I. Introduction

Cologne Cathedral is a massive High Gothic five-aisled basilica in the centre of Cologne, a fast-growing city in the Western German Federal State of North Rhine-Westphalia with more than one million inhabitants.¹ The building consecrated to St. Peter and Mary was constructed during a period of 632 years from 1248 A.D. and has been continuously maintained by the Cathedral Workshop (*Dombauhütte*).² The Cathedral is the most famous sight of Germany; in 2004, it received about six million visitors from all over the world, as many as the Eiffel Tower (*Tour Eiffel*) in Paris.³ The church's dimensions are vast: the basilica is 144.38 meters long, has a projecting transept 86.25 meters wide⁴ and a two-tower western façade with a surface of more than 7,000 square meters which is surpassed by no other sacred building in the world.⁵ With a height of 157.38 meters, the Cathedral is the second highest church in Germany (after the Munster in Ulm/ Baden-Württemberg) and the

¹ See the actual statistics in: Der Oberbürgermeister (ed.), *Statistisches Jahrbuch Köln 2004*, 2004, 15 et seq.

² Cf. World Heritage List, *Cologne Cathedral*, No. 292rev. of 18 August 1995, 23 et seq., available at: <http://whc.unesco.org/archive/advisory_body_evaluation/292.pdf>; for further information about the history of the construction of Cologne Cathedral see, e.g., K.G. Beuckers, *Der Kölner Dom*, 2004; D. Breuers, *Fenster, Pfeiler und Gewölbe: Die Geschichte des Kölner Doms*, 1999; L. Honnefelder/ N. Trippen/ A. Wolff (eds), *Dombau und Theologie im mittelalterlichen Köln. Festschrift zur 750-Jahrfeier der Grundsteinlegung des Kölner Doms und zum 65. Geburtstag von Joachim Kardinal Meisner*, 1998; A. Wolff, *Der Dom zu Köln: Seine Geschichte – seine Kunstwerke*, 3rd edition, 2001.

³ Cf. the article “Kölner Dom” available at: <http://de.wikipedia.org/wiki/K%C3%B6lner_Dom>.

⁴ See World Heritage List, see note 2, 24.

⁵ See note 3.

third highest in the world.⁶ Consequently, its silhouette, a landmark of Cologne and of the whole Rhine area, can be seen from a great distance. Accordingly, there is a proverb saying that the Cathedral directs the people of Cologne home⁷ and, indeed from most places in the city, the Cathedral's two towers are guides for orientation.

In February 1996, an expert mission of the International Council on Monuments and Sites (ICOMOS) visited Cologne. ICOMOS is an international non – governmental organization of professionals dedicated to the conservation of the world's historic monuments and sites. It is named in the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) as one of the three formal advisory bodies to the World Heritage Committee. ICOMOS recommended inscribing Cologne Cathedral on the World Heritage List (see for further details under III. 1.) on the basis of criteria (i), (ii) and (iv) of the then valid version of the Operational Guidelines of the World Heritage Committee.⁸ In 1996 the World Heritage Committee followed this recommendation.⁹ It was stated that apart from the exceptional intrinsic value and the artistic masterpieces it contains, the Cathedral testifies to the enduring strength of European Christianity. In its recommendation report the ICOMOS experts made a proposal for a buffer zone between the Cathedral and any buildings to be erected in its neighbourhood in the future. That proposal was accepted by the Federal Republic of Germany.¹⁰

In autumn 2003, the City Administration of Cologne, after having organized an expert hearing with architects and city planners, granted permission for the construction of a complex of skyscrapers on the other side of the Rhine opposite the Cathedral. Meanwhile, one high-rise building of that complex with a height of 103.5 meters had already been structurally completed; other, even higher skyscrapers up to a height of 120 meters would follow according to assurances the City had given to private investors. The planned new trade fair which has been

⁶ See note 3.

⁷ Cf. S. Sedlmayr, "Das Weltkulturerbe hat kaum Chancen in Wien. Der Kölner Dom ist bald weg", *TAZ* (Die Tageszeitung) *NRW* No. 7664 of 14 May 2005, 3.

⁸ Concerning these Guidelines see below note 150.

⁹ See World Heritage Committee, 20th Sess. (Merida, 1995), Doc. WHC-96/CONF. 201/21 of 10 March 1997, 66, available at: <<http://whc.unesco.org/archive/repcom96.htm>>.

¹⁰ See World Heritage List, see note 2, 25.

pre-financed with a sum of 300 million Euros by an investor should, thus, enjoy worthy surroundings.¹¹

With Decision 27COM 7B.63 the World Heritage Committee had requested Germany to provide a detailed report on the situation in order that the Committee could examine the state of the Cathedral at its 28th session, because it was feared that the buildings would block the view to the Cathedral from the western areas of the city. As Germany did not provide the Committee with the relevant information, the Committee after having threatened the German authorities for several times to delete the sacred building from the World Heritage List, at its 28th session in 2004 decided to inscribe Cologne Cathedral for the time being on the List of World Heritage in Danger. It was the first time that a cultural monument in Germany was put on the so-called Red List.

The Committee had argued that the Cathedral's visual integrity and the unique city silhouette of Cologne were threatened by the skyscrapers on the other side of the Rhine opposite the Cathedral. It regretted that the German authorities had not provided the information concerning the high-rise building projects in time and that the Federal Republic of Germany as State Party of the World Heritage Convention had not designated a buffer zone for the property, despite the Committee's request at the time of the inscription. The Committee urged the City of Cologne to reconsider the current building plans as to their visual impact on the World Heritage property of Cologne Cathedral and requested that any new construction should respect the visual integrity of the property. Moreover, Germany was requested to provide a detailed report on the situation, including the status of the building plans, visual impact studies as well as the development of a buffer zone, by 1 February 2005 for review by the World Heritage Committee at its forthcoming 29th session.¹² The German Commission for UNESCO added in its statement to that decision that all participants on the level of the Federal Republic, of the Federal State, and of the local authority should now work together to find a quick solution to the conflict on the basis of the

¹¹ Cf. the article "Jahn oder nein. Kölner Hochhaus-Streit wird schärfer", *F.A.Z.* (Frankfurter Allgemeine Zeitung) No. 163 of 16 July 2005, 31; Sedlmayr, see note 7.

¹² See World Heritage Committee, 28th Sess. (Suzhou, 2004), Doc. WHC-04/28.COM/26 of 29 October 2004, at 28 COM 15B.70, 116, available at: <<http://whc.unesco.org/archive/2004/whc04-28com-26e.pdf>>.

UNESCO Convention and enact the prerequisites for Cologne Cathedral to be withdrawn from the List of World Heritage in Danger.¹³

The Mayor of the City of Cologne proved to be both surprised and annoyed by the decision of the World Heritage Committee. He said that he had not been informed about the intentions of the Committee and, furthermore, the expansion of the city could not be prohibited. In a press release, the Mayor declared that it was impossible that a city should stop all further development because it had a cathedral. Of course, the development of Cologne had to and would be in accordance with the Cathedral. But there were obviously some people in the UNESCO who had an aversion to all kinds of high-rise buildings. The Mayor concluded: "We really did not make it easy for ourselves to decide on the development in the areas of Cologne on the right bank of the Rhine River. We have [...] proposed to the City Council a limitation of the height of the buildings that strictly observe the architecture and the dimensions of the Cathedral [...]. Regardless, we hold that the historic opportunity for the right bank of the Rhine must be taken to allow for the creation of a, from the architectural point of view, highly qualified and modern Cologne with economic importance for the whole city".¹⁴ Additionally, the head of the construction department of the City of Cologne, when asked by the press, answered that the city would not change its plans.¹⁵ In fact, in the following months the city organized a competition for the allocation of public land to be used to build further high-rise towers and granted planning consent for an 89 million Euro project concerning the construction of an office block of 110 meters in height.¹⁶

¹³ Deutsche UNESCO-Kommission e.V., "Welterbe in Gefahr. Kölner Dom steht auf der Liste des bedrohten Erbes", *unesco heute online* No. 6-7/2004 of June/July 2004, available at: <<http://www.unesco-heute.de/0704/roli.htm>>.

¹⁴ See Mayor F. Schramma, in: *Kölner Dom ist Weltkulturerbe – auch in Zukunft*, Press Release of the City of Cologne of 6 July 2004, available at: <<http://www.stadt-koeln.de/presse/mitteilungen/artikel/2004/07/03719-37k-10.Okt.2005>>.

¹⁵ Cf. M. Kretz-Mangold, *Der Dom, die Stadt und die Weltkultur. Die Kölner verstehen die Entscheidung der UNESCO nicht*, available at: <http://www.wdr.de/themen/kultur/1/weltkulturerbe_dom/rote_liste_reaktionen.jhtml>.

¹⁶ See note 11, 31; A. Rossmann, "Mer losse dr Dom opd Liste. Gnadenfrist: Kölns Weltkulturerbe-Status ist weiter in Gefahr", *F.A.Z.* No. 161 of 14 July 2005, 29.

The case was, for a long time, discussed controversially in the press. Some articles mentioned that Cologne had high unemployment figures and needed new impulses for the development of industry, especially service industry. Therefore, “in Cologne, economic growth must have priority over an inflationary [protection of] world cultural heritage.”¹⁷ Other articles harshly insulted UNESCO for being a very amorphous organization without a clear democratic structure so that no one could understand its decisions.¹⁸ For instance, a well-known German daily paper sarcastically stated: “Whether the high-rise buildings made sense under aspects of city planning or not, [whether they] would be architecturally valuable or not, [whether they] found users or not, all these points do not matter. The main thing is that you can see the Cathedral from every corner of the City”.¹⁹ The criticism even culminated in the naive question whether the City of Cologne should not leave the United Nations.²⁰

However, there had been also a multitude of articles condemning the City Administration because of its stubbornness and uncompromising attitude. It was argued that deleting Cologne Cathedral from the World Heritage List would be a disgrace of the first rank for the Federal Republic of Germany which was the mother country of the protection of historic monuments.²¹ In particular, the Chapter of the Metropolitan (*Domkapitel*) which is representative of the “High Cathedralic Church of Cologne (*Hohe Domkirche zu Köln*)”²² in a statement signed by the Provost and the Master Builder of the Cathedral pointed out that withdrawing the church from the List would be “a national shame, moreover a shame for the City of Cologne to which we seriously appeal to do everything to come to an agreement with the Cultural Heritage Committee.” Furthermore, the Chapter turned to the World Heritage

¹⁷ Cf. A. Rossmann, “Kreuz und Kröte. Die Kölner Dombaumeisterin nimmt die Unesco in Schutz”, *F.A.Z.* No. 175 of 30 July 2005, 33.

¹⁸ Cf. Rossmann, see note 17, 33.

¹⁹ Cf. the press review at D. Offenhäuser, “Über Welterbe und Sonstiges. Die UNESCO und die Deutsche UNESCO-Kommission im Spiegel der deutschen Presse”, *unesco heute online* No. 2/2004 of February 2004, available at: <<http://www.unesco-heute.de/0204/pre.htm>>.

²⁰ Cf. Rossmann, see note 17, 33.

²¹ Cf. Kretz-Mangold, see note 15; A. Rossmann, “Kölner Dom bleibt auf der Roten Liste der Unesco”, *F.A.Z.* online of 14 July 2005, available at: <<http://www.faz.net/s/Rub590E63896B724091BF63CECAEF28A1A7/DocE768A8B9510D74A408C7DA3B2D7E35320ATplEcommonSpezial.html>>.

²² Cf. World Heritage List, see note 2, 24.

Committee and asked whether the inadequate development on the other side of the Rhine River was really such an immense threat that the Cathedral must be taken from the List. The Chapter had the strong impression that the Committee wanted to make an example and criticize the city planning of Cologne but this resulted in punishing the Cathedral.²³ Besides, the Chapter mentioned that during the whole process it had neither been consulted by the Committee or ICOMOS nor by the City Administration,²⁴ although it bore the costs for the restoration and maintenance of the Cathedral which come to ten million Euros each year.²⁵ Finally, the Foreign Office of the Federal Republic of Germany sent a letter to the Mayor of the City of Cologne in which he was admonished to take “all necessary measures” and to avert “foreign policy damage.” That letter which seems to be the very first action of a German Federal authority towards the City of Cologne was, however, received by the Mayor with the statement that city planning did not fall into the Foreign Ministry’s competences.²⁶

Against this background, there was a heated debate²⁷ at the 29th session of the World Heritage Committee in 2005. The Committee recognized the need to develop and rehabilitate the area to ensure economic and social development and the fact that Germany had provided a detailed report on the current situation. It decided to retain Cologne Cathedral on the List of World Heritage in Danger and to examine the situation at its 30th session in 2006.²⁸ Nevertheless, the City of Cologne

²³ See the article “Nationale Schande. Appell zur Welterbestätte Kölner Dom”, *F.A.Z.* No. 157 of 9 July 2005, 33; cf. in that context the similar opinion of the biggest opposition party in the city council of Cologne as described in the article “Sonderparteitag. Kölner CDU zum Weltkulturerbe Dom”, *F.A.Z.* No. 221 of 22 September 2005, 33.

²⁴ Cf. A. Rossmann, “Höhenangst am Kölner Dom”, *F.A.Z.* No. 155 of 7 July 2004, 29.

²⁵ See note 3.

²⁶ Rossmann, see note 16, 29.

²⁷ Cf. A. Rossmann, “Tort am Rhein. Einstürzende Hochbauten: Kölner Reaktionen auf die Unesco”, *F.A.Z.* No. 162 of 15 July 2005, 31.

²⁸ See World Heritage Committee, 29th Sess. (Durban, 2005), Doc. WHC-05/29.COM/22 of 9 September 2005, at 29 COM 8C.2 and 29COM 7A.29, available at: <<http://whc.unesco.org/archive/2005/whc05-29com-22e.pdf>>; Deutsche UNESCO-Kommission e.V., *Kölner Dom bleibt vorerst Weltkulturerbe*, Press Release No. 31/2005 of 13 July 2005, available at: <<http://www.unesco.de/pdf/ua31-05.pdf>>. On 10 July 2006, the World Heritage Committee decided to remove Cologne Cathedral from the List

initially did not show any sign of being prepared to make concessions. Instead, the Mayor told a local newspaper that the City could not and would not give up the towers.²⁹ It appeared that the City Administration would try to sit the affair out, according to the famous proverb which describes the typical mentality of the people of Cologne.³⁰ The attitude of the City was, admittedly, not completely incomprehensible, for the City had organized the expert hearing with regard to the matters of the Cathedral before drawing up the building plans for the area on the right bank of the Rhine;³¹ thus, it held that it had done everything which was necessary to clear the admissibility of its planning. Furthermore, both forcing the investors or rather the owners of the property to tear down the already erected tower and cancelling the building permits and licenses, would lead to enormous claims for remedies.³² Under pressure from the UNESCO, the Federal Republic of Germany, the Federal State of North Rhine-Westphalia, the Chapter of the Metropolitan, and a part of the press, the City was in a difficult situation.

Finally, in December 2005, the City Council of Cologne capitulated and decided to amend the building plans concerning the right bank of the Rhine opposite Cologne Cathedral and to present the new concept at the next session of the World Heritage Committee in summer 2006. The official reason given for this measure was, on the one hand, that the City wanted to counteract the immense loss of prestige caused by the dispute with the UNESCO, and on the other hand, that it discovered that there would not be a sufficient demand for the premises in the high office blocks; even in the completed skyscrapers, many offices did not yet have leaseholders.³³ Whether the new concept will convince the World Heritage Committee so that it will withdraw Cologne Cathedral

of World Heritage in Danger, because the City of Cologne had offered to scale down its plans, Doc. WHC-06/30.COM/7A of 26 May 2006, 103. That decision took place shortly before this article was about to be sent to print. Thus, it could not be recognized in the following. Anyway, it does not change anything with regard to the arguments.

²⁹ See the article "Jahn oder nein", see note 11, 31.

³⁰ "There has as of yet always been a good end [*Et hätt noch immer jot je-jange*]", cf. Rossmann, see note 16, 29.

³¹ Cf. the Press Release of the City of Cologne, see note 14; Rossmann, see note 24, 29.

³² Cf. Rossmann, see note 21.

³³ Cf. A. Rossmann, "Dom bleibt Dom. Einstürzende Hochbauten: Köln fügt sich der UNESCO", *F.A.Z.* No. 294 of 17 December 2005, 33.

from the List of World Heritage in Danger cannot be foreseen; time will tell.

Anyway, the case is a prime example for possible problems concerning the compliance of international law to national legal systems, in particular those with a federal structure, for there are several stages of public authority from the national to the local level that, one after another, have to perform a legal transfer according to their prevailing competences. Moreover, the case, in the end, points out the effectiveness of global governance by information. Such governance mainly works on the basis of “reputation enforcement”;³⁴ its (reactive or rather repressive) instruments are naming and shaming.³⁵

Therefore, in the following, I will examine the dispute between the UNESCO and the City of Cologne in the context of the general compliance debate. In a second stage I will give an overview of the relevant provisions dealing with the protection of world cultural heritage on the international, national, and local level. Hence, the competences of the UNESCO, of the Federal Republic of Germany, of the Federal State of North Rhine-Westphalia, and of the City of Cologne will be described, and I will demonstrate how the single levels are linked to each other and should cooperate, which instruments ensure that lower authorities observe the instructions of the higher ones, and what limits or scopes must be respected. Finally, I will show how non-state actors affected by positive or negative measures of world cultural heritage protection, for instance the Chapter of the Metropolitan, have legal opportunities either to introduce their concerns into the process of decision-making or to claim that their rights or interests have not been sufficiently taken into account. By doing so, we may discover what went wrong in the Cologne case and how the conflict could have been avoided or, at least, defused in time.

³⁴ G. Majone, “Delegation of Regulatory Powers in a Mixed Polity”, *ELJ* 8 (2002), 319 et seq. (337); P.T. Leeson, “Contracts without Government”, *Journal of Private Enterprise* 18 (2003), 35 et seq.

³⁵ Cf. C. Hotz, *Deutsche Städte und UNESCO-Welterbe. Probleme und Erfahrungen mit der Umsetzung eines globalisierten Denkmalschutzkonzeptes*, 2004, 42.

II. Embedding the Cologne Case in the General Compliance Debate

The problem that states do not fulfil their obligations based on international agreements and treaties is well-known in international law; in particular it is a phenomenon which can quite often be observed in federal states where various levels, e.g. Federal, state and local authorities, are involved in the implementation or application of international standards or other kinds of international requirements. Indeed, it is a popular assessment in international law that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”,³⁶ which means, when turned into the negative, that there are nations which do not observe each principle of, or each obligation under, international law at any time, either generally or only in certain, exceptional cases. Against this background, the question may be asked why nations, in principle, comply with international law and what are the reasons why they sometimes do not.

In political and legal science, several theories have been elaborated in order to explain the mechanisms of compliance, of which only a few will be mentioned in the following:³⁷ an early approach which was that

³⁶ L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edition, 1979, 47.

³⁷ See in this context, e.g., J. Brunnée/ S.J. Toope, “Persuasion and Enforcement. Explaining Compliance with International Law”, *Finnish Yearbook of International Law* 13 (2002), 273 et seq. (280 et seq.); P.M. Haas, “Compliance Theories. Choosing to Comply: Theorizing from International Relations and Comparative Politics”, in: D. Shelton (ed.), *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System*, 2000, 43 et seq. (49 et seq.); B. Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law”, in: E. Brown Weiss (ed.), *International Compliance with Nonbinding Accords*, 1997, 49 et seq.; D. Hunter/ J. Salzman/ D. Zaelke, *International Environmental Law and Policy*, 1998, 439 et seq.; K. Raustiala/ A.M. Slaughter, “International Law, International Relations and Compliance”, in: W. Carlsnaes/ T. Risse/ B.A. Simmons (eds), *Handbook of International Relations*, 2002, 538 et seq. (539 et seq.); J. Friedrich, *Compliance with international law: the Kyoto Protocol’s compliance mechanisms as an effective tool to promote compliance?*, 2003, 9 et seq. (unpublished master thesis at McGill University, Montreal), on which are predominantly based the following explanations.

of *legal positivism* focused on the binding character of rules³⁸ but could not give any persuasive argument with regard to the fact that, on the one hand, some states ignore binding rules of international law whereas, on the other hand, the so-called soft law which is characterized by legally nonbinding instruments³⁹ enjoys widespread respect and obedience,⁴⁰ for instance in the fields of international environment protection, health, and education,⁴¹ and not least in that of world heritage protection⁴² which is essentially based on a system of governing by information enshrined in UNESCO's lists. The last criticism also applies to *political realism* which is, to a certain extent, a reaction to legal positivism. According to the political realists, the most powerful states of

³⁸ Cf., e.g., H.L.A. Hart, *The Concept of Law*, 1961, 209, 214 et seq., 229 et seq.

³⁹ See, e.g., E. Brown Weiss, "Introduction", in: id., see note 37, 1 et seq.; K.W. Abbott/ D. Snidal, "Hard and Soft Law in International Governance", *International Organization* 54 (2000), 421 et seq. (434 et seq.); A.E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law", *ICLQ* 48 (1999), 901 et seq.; H. Culot, "Soft Law et droit de L'OMC", *Revue Internationale de Droit Economique* 19 (2005), 251 et seq. (253 et seq.); H. Hillgenberg, "A Fresh Look at Soft Law", *EJIL* 10 (1999), 488 et seq.; C. Jabloner/ W. Okressek, "Theoretische und praktische Anmerkungen zu Phänomenen des 'soft law'", *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 34 (1983), 217 et seq.; J. Sztucki, "Reflections on International 'Soft Law'", in: J. Ramberg (ed.), *Festschrift till Lars Hjerper. Studies in International Law*, 1990, 549 et seq.; A.J.P. Tammes, "Soft Law", in: TMC Asser Instituut (ed.), *Essays on International and Comparative Law in Honor of Judge Erades*, 1983, 187 et seq.; D. Thürer, "'Soft Law' – eine neue Form von Völkerrecht?", *ZSchwR* 104 (1985), 429 et seq.; also the monographs of P. Dmochowski, *'Soft Law' internationale*, Vol. 1, 2001; W. Heusel, *'Weiches' Völkerrecht. Eine vergleichende Untersuchung typischer Erscheinungsformen*, 1991; J. Marquier, *Soft Law: Das Beispiel des OSZE-Prozesses. Ein Beitrag zur Rechtsquellenlehre*, 2003; S.H. Nasser, *Fontes e normas do direito internacional. Um estudo sobre o soft law*, 2004.

⁴⁰ Cf. A. Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, 1986, 74.

⁴¹ See, e.g., about the immense influence the OECD's PISA Project has on the national education policies: A. von Bogdandy/ M. Goldmann, "International Governance by Grading, Naming, and Shaming. A Legal and Institutional Reconstruction of the OECD's PISA Policy", forthcoming.

⁴² In general about "soft law" of the UNESCO H. Kremser, *"Soft Law" der UNESCO und Grundgesetz. Dargestellt am Beispiel der Mediendeklaration*, 1996.

the world cannot be constrained effectively by rules;⁴³ the influence of law generally ends where it contradicts the logic of power because no law enforcement exists against the powerful.⁴⁴ Hence, this doctrine maintains that the influence of international law depends on enforcement possibilities. Admittedly, there might not be any possibility of enforcing military sanctions against powerful states. But realism neglects that there are factors other than the possibility of enforcement which can be influential for the decision-making of states, in particular, for their decision in each single case of whether to comply or not. Furthermore, realism insufficiently explains the increase of international cooperation and legalization of such cooperation, in matters of economics as well as in other areas.⁴⁵ States cooperate to the extent that they give up a part of their sovereignty and, thus, weaken, at first glance, their position, in favour of supra-national entities like the European Union, and even the most powerful states follow decisions issued by international organizations and institutions such as the Dispute Settlement Body and the Appellate Body of the World Trade Organization (WTO).⁴⁶ As realism merely concentrates on the limitations of coopera-

⁴³ See e.g., the assessment of realism by D. J. Bederman, "Constructivism, Positivism and Empiricism in International Law", *Geo. L. J.* (2001), 469 et seq. (473).

⁴⁴ H.J. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, 5th edition, 1978, 298.

⁴⁵ Note the fact that multilateral regimes and institutions like NATO, the United Nations, the European Community and the WTO make a positive contribution to international security and economic relations, although there are competing expectations and theorising of realists: J.G. Ruggie, "Multilateralism: The Anatomy of an Institution", in: id. (ed.), *Multilateralism matters: The Theory and Praxis of an Institutional Form*, 1993, 3 et seq.

⁴⁶ Cf., e.g., the GATT Dispute Panel Reports in: *United States – Standards for Reformulated and Conventional Gasoline (complaint by Venezuela)*, WTO Doc. WT/DS2/R of 29 January 1996; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan (complaint by Japan)*, WTO Doc. WT/DS184/R of 28 February 2001. Both decisions were rulings against the United States, which reacted to them by amendments of their domestic law; see *United States – Standards for Reformulated and Conventional Gasoline. Status Report by the United States*, WTO Doc. WT/DS2/10/Add.7 of 19 August 1997; *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan. Status Report by the United States – Addendum*, WTO Doc. WT/DS184/15/Add.12 of 7

tion by certain power constellations and the lack of centralized enforcement, it fails to give a positive answer as to why compliance with international law takes place, despite possible inconveniences for powerful states. A third approach which comprises another approach to international law, in which rules and institutions both *reflect and advance state interests*, was predominant in the Cold War era⁴⁷ but was not distilled to an independent theory of compliance. It is, hence, based on the utilitarian assumption that states comply only if and insofar as it is within their political, military, economic or other kind of interest,⁴⁸ which could be, in the case of heritage protection, the interest in receiving financial support or even in being acknowledged as a famous cultural nation with an impressive history that left its marks for posterity in literature and in stone. Later, it was pointed out that the aspect of “interest” was too vague, and from a practical point of view, not easy to handle. Therefore, on the one hand, legal processes were invoked to show how the need for plausible justification and argument in international law binds state behaviour and systematically encourages states to move closer to compliance. On the other hand, it was claimed that there were a number of factors which weighed in favour of compliance, like reputation, reciprocity, norm observation, and domestic politics.⁴⁹ However, this does not yield a clear theory of why and when states do comply but was merely a cautious convergence of two approaches.

In the 1980s, *institutionalism* and *regime theory* were discovered to explain compliance mechanisms. They say that states establish regimes,

November 2003. The mentioned reports are available at: <http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm>.

⁴⁷ Cf. Raustiala/ Slaughter, see note 37, 540.

⁴⁸ Cf., e.g., M.S. McDougal, “International Law, Power, and Policy”, *RdC* 82 (1953), 137 et seq.; id., “The Impact of International Law upon National Law: A Policy-Oriented Perspective”, in: M.S. McDougal et al., *Studies in World Public Order*, 1960, 157 et seq.; M.S. McDougal/ F.P. Feliciano, *Law and Minimum World Public Order. The Legal Regulation of International Coercion*, 1961, 93 et seq.; Abr. Chayes, *The Cuban Missile Crisis: International Crisis and the Role of Law*, 1987, 41 et seq.; Henkin, see note 36, 49 et seq.; O. Schachter, “The Twilight Existence of Nonbinding International Agreements”, *AJIL* 71 (1977), 296 et seq.; R.A. Falk, “The Relevance of Political Context to the Nature and Functioning of International Law. An Intermediate View”, in: K.W. Deutsch/ S. Hoffmann (eds), *The Relevance of International Law. Essays in Honour of Leo Gross*, 1968, 133 et seq.

⁴⁹ See Henkin, see note 36, 39 et seq., in particular 49 et seq., and 60 et seq.; about the reasons why nations violate law *ibid.*, 68 et seq.

i.e. sets of explicit or implicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations,⁵⁰ and institutions, *i.e.* general patterns or categorizations of activity or formally or informally organized human-constructed arrangements,⁵¹ because and when such a cooperation is in their long-term interest.⁵² Largely relying on rational economic structures, the states' interest in cooperation and, thereby, also in integrating themselves into the prevailing regulatory system depends to a great extent on positive "payoff-structures" or rather positive cost-benefit calculations.⁵³ Hence, states comply in order to receive the benefits produced by the institutional arrangement, whereas states which do not comply after having made or shared the arrangement must expect to be excluded from possible benefits.⁵⁴ Possible benefits from the cooperation in multilateral regimes include, for example, lower transaction costs,⁵⁵ a better predictability of actions and reactions from other states, or the acquisition and maintenance of a good reputation and respect through participation and compliance with the regime.⁵⁶ The latter could be a decisive incentive in the Cologne case because neither the German State, the State of North Rhine-Westphalia nor the City of Cologne receive any direct financial support from UNESCO for protecting and preserving Cologne Cathedral, but they get a lot of visitors, in particular from foreign countries, which strengthens the turnover and, thus, the economic power of the city, region, and country. Incidentally liberal institutionalism has a broader notion of interests than does realism. Regarding international law, however, it does not seem to concede an important role since benefits are independent from the influence of legal rules as such.

⁵⁰ S.D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", *International Organization* 36 (1982), 185; see also O.R. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment*, 1989, 15 et seq.

⁵¹ R.O. Keohane, "International Institutions: Two Approaches", *International Studies Quarterly* 32 (1988), 379 et seq. (383).

⁵² K.A. Oye, "Explaining Cooperation under Anarchy", in: id. (ed.), *Cooperation under Anarchy*, 1986, 1, 2 et seq.

⁵³ Oye, see note 52, 1, 4 et seq.

⁵⁴ Young, see note 50, 72.

⁵⁵ Cf. in this context Keohane, see note 51, 386 et seq.

⁵⁶ Cf. R. Axelrod/ R.O. Keohane, "Achieving Cooperation under Anarchy: Strategies and Institutions", in: Oye, see note 52, 226, 250.

In contrast, the *theory of political economy* addresses the question of the role of international law for the functioning of international cooperation. It emphasizes the importance of incentives and disincentives in regimes to achieve compliance.⁵⁷ This does not refer to enforcement in the form of sanctions but rather to multilateral strategies which can deter non-compliance by offsetting the net benefits which a violator of the rules could gain from his non-compliance.⁵⁸ Accordingly, the greater the benefits a state can get from defection, the greater is the necessity for deterrence in form of a threat of being punished with disadvantages.⁵⁹ The costs for compliance rise with the depth of cooperation, *i.e.* the extent to which a treaty requires states to depart from what they would have done in its absence.⁶⁰ This means that the deeper the cooperation that is strived for by the agreement, the greater must be the costs or incentives envisioned by an enforcement strategy. Since the incentives and disincentives are set by legal provisions, the function of international law is to improve the incentive structures and, thus, the conditions for cooperation. The influence of law on the states' behaviour is, though, at best indirect:⁶¹ states follow the law because and as long as this makes economic sense, and the law can indirectly influence that decision by providing the necessary incentive structures. The function given to law in this approach is, after all, very limited. Incentives and disincentives of economic nature may not be the only aspects to improve state behaviour; legal rules and legal processes as such may have direct influence, too.

Therefore, by the end of the 1980s, the focus in the scholarly discussion concerning compliance turned to the quality of rules and rule-making processes and emphasized the importance of the fairness of these processes and the *legitimacy of legal rules*.⁶² It was stated that legal rules exerted a "compliance pull" when they were legitimate and

⁵⁷ G.W. Downs, "Enforcement and the Evolution of Cooperation", *Mich. J. Int'l L.* 19 (1998), 319 et seq.; see also G.W. Downs/ D.M. Roche/ P.N. Barsoom, "Is the good news about compliance good news about cooperation?", *International Organization* 50 (1996), 379.

⁵⁸ Downs, see note 57, 321.

⁵⁹ Downs, see note 57, 324.

⁶⁰ Downs/ Roche/ Barsoom, see note 57, 383 and 386.

⁶¹ J. Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories", *ZaöRV* 63 (2003), 255 et seq. (260).

⁶² See T.M. Franck, *The Power of Legitimacy among Nations*, 1990, 29 and 34; *id.*, "Legitimacy in the International System", *AJIL* 82 (1988), 705.

based on right processes.⁶³ Such conditions were, in turn, increased when the rules had four characteristics:⁶⁴ (1) *determinacy* (the ability of the text of the rule to transmit a clear message),⁶⁵ (2) *symbolic validation* (the communication of authority through certain cues that indicate the significance and validity of the norm),⁶⁶ (3) *coherence* (the rules must emanate from principles of general application)⁶⁷ and (4) *adherence* to secondary rules of “right process”. Regarding the last aspect, the secondary rules were ultimately legitimized through a rule of recognition by the international community.⁶⁸ This approach puts legal rules (back) into the centre of the discussion but the criteria for legitimacy does not seem very helpful. Legal rules that are most influential and fundamental are often the ones that are the least definite and the most open to interpretation. In fact, a low grade of determination of a norm allows a wide field of legal interpretation and, thus, flexible application.⁶⁹ Similarly, it is often a matter of perception how coherent a norm is with regard to its application and how it conveys symbolic authority. Probably most problematic is the criterion of adherence: a rule displaying the characteristic of adherence to secondary rules needs to be recognized by the community of states through a procedure following ultimate rules of recognition. This recognition can only be demonstrated “by the conduct of nations manifesting their belief in the ultimate rules’ validity as the irreducible prerequisite for an international concept of right process.”⁷⁰ The aspect of adherence as variable of legitimacy is, therefore, dependent on the conduct of the states as addressees of the rule. This gives rise to a circular argument because focusing on the power of legitimacy can be seen as an attempt to explain behaviour by looking at the actual compliance of actors:⁷¹ the basis for ultimate rules and, thus, of legitimacy of the primary rules is merely that states habitually act according to the latter ones.⁷² Notwithstanding this cri-

⁶³ Cf. Franck, *The Power of Legitimacy*, see note 62, 24.

⁶⁴ See also Raustiala/ Slaughter, see note 37, 538, 541.

⁶⁵ T.M. Franck, *Fairness in International Law and Institutions*, 1995, 31.

⁶⁶ Franck, see note 65, 34; id., see note 63, 91.

⁶⁷ Franck, see note 65, 38; id., see note 63, 152.

⁶⁸ Franck, see note 63, 194; id., see note 65, 45.

⁶⁹ Cf. Brunnée/ Toope, see note 37, 273, 288 et seq.

⁷⁰ Franck, see note 63, 194 (emphasis in original).

⁷¹ See, e.g., R.O. Keohane, “International Relations and International Law: Two Optics”, *Harv. Int’l L. J.* 38 (1997), 487 et seq. (493).

⁷² Franck, see note 63, 43.

tique, the legitimacy approach is important for drawing attention to the specific influence of legal rules for achieving compliance. Such influence is a result of a certain authority of legitimate rules; it has to do with the process of how rules evolve and operate. The observation or assumption that these processes have autonomous effects suggests that enforcement is not the only key to compliance. Nevertheless, it is still not clear in what exact way processes are influential, how legitimate rules look like and, finally, how compliance could be promoted by processes and rules without focusing on enforcement.

A part of these questions was answered in the early 1990s by the so-called *managerial model* which rejected sanctions and other “hard” forms of enforcement as decisive elements for achieving compliant behaviour in the context of regulatory agreements.⁷³ Observing that states have a “propensity to comply” with international law even in the absence of enforcement, this approach emphasizes three factors being relevant for compliance: first, norms are largely accepted and obeyed by the subjects of the legal system because their authoritative character creates a *feeling of obligation*. The norms’ authoritative character is based on a mixture of tradition, on the belief that some kind of order is necessary for social life⁷⁴ and, very importantly, on their *legitimacy*. The latter depends “on the extent to which the norm (1) emanates from a fair and accepted procedure, (2) is applied equally and without invidious discrimination, and (3) does not offend minimum substantive standards of fairness and equity”.⁷⁵ Thanks to their authority which is an *indigenous quality*, the norms play a central role in the conduct of international relations as actions can be most convincingly justified or attacked in terms of legal rules. The influence of law is, therefore, largely generated through *justificatory discourse*.⁷⁶ Thus, the managerial theory not only underlines the importance of legitimacy and fair procedure but stresses an independent influence of norms. Moreover, it proposes a way of looking at the processes through which legitimate international law can be influential. Second, compliance saves *transaction costs* because states do not have to continuously reconsider their policy deci-

⁷³ See Abr. Chayes/ A. Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements*, 1995, 3 et seq.; id., “On Compliance”, *International Organization* 47 (1993), 175 et seq.

⁷⁴ Chayes/ Handler Chayes, *The New Sovereignty*, see note 73, 116 et seq.

⁷⁵ Chayes/ Handler Chayes, *ibid.*, see note 73, 127.

⁷⁶ Cf. Chayes/ Handler Chayes, *ibid.*, see note 73, 118 et seq.

sions which would waste scarce governmental resources.⁷⁷ This reflects the already mentioned institutionalist thinking and rationalist paradigm, where cooperation takes place because it is beneficial to participants. Third, treaty-making processes which imply national and international negotiations, reconsiderations and reviews ensure, at least in democratic countries, that the rules established roughly represent the *national interests* of the country, even compliance might require a compromise. This goes back to the assumption that states would not have signed the treaty if they had not somehow managed to incorporate their interests or if the process had not reshaped their interests.⁷⁸ This last aspect is, again, deeply rooted in rationalist thinking as it explains commitments in terms of underlying interests. However, the analysis has difficulties in explaining why states sometimes comply even in cases where their interests changed *after* the process of ratification. Furthermore, there might be other reasons for states to sign treaties. For instance, states can be induced to accept a treaty because of internal pressure from nongovernmental organizations in the field of environment, human rights or historic monument protection or from industries or because of external pressure from other countries. States can also wish to gain a better international reputation by acting as others do.⁷⁹

As states tend to comply with international law due to the above mentioned factors, eventual non-compliance is, according to the managerial model, mainly caused by: ambiguity and indeterminacy of treaty language, limitations on the capacity of parties to carry out their undertakings under the treaties as well as unforeseen social, political and economic changes.⁸⁰ In the Cologne case, the first reason could be pertinent, since UNESCO and the City of Cologne as the competent national authority in Germany seem to have different views concerning the interpretation of national duties under the World Heritage Convention. The City of Cologne claimed that the UNESCO did not sufficiently recognize its interests when setting out the scope of its evalua-

⁷⁷ Cf. Chayes/ Handler Chayes, *ibid.*, see note 73, 4.

⁷⁸ Cf. Chayes/ Handler Chayes, *ibid.*, see note 73, 7.

⁷⁹ H.K. Jacobson/ E. Brown Weiss, "A Framework for Analysis", in: E. Brown Weiss/ H.K. Jacobson (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords*, 1998, 1, 2. About reputation as a factor to enhance compliance comprehensively G.W. Downs/ M.A. Jones, "Reputation, compliance and development", in: E. Benvenisti/ M. Hirsch (eds), *The Impact of International Law on International Cooperation. Theoretical Perspectives*, 2004, 117 et seq.

⁸⁰ See Chayes/ Handler Chayes, *The New Sovereignty*, see note 73, 10 et seq.

tion. Thus UNESCO had not applied the treaty norms in the right way. Anyway, since problems with compliance are hardly ever the result of wilful obedience, the managerial model provides a solution: a *management strategy* is needed that helps parties to overcome obstacles. That strategy should comprise several aspects. Problems with ambiguity of treaty language could be addressed by *informal dispute settlement*, including elements of negotiation and mediation,⁸¹ and the lack of capacity should be countered by enabling *capacity building* through the provision of technical and financial assistance.⁸² Central to the management of the treaty regime was, furthermore, the inclusion of mechanisms to promote transparency. Transparency which refers to the “accuracy, availability, and accessibility of knowledge and information about the policies and activities of parties to the treaty”⁸³ is important because it facilitates cooperation, provides reassurance and exercises deterrence against non-compliance. The main tools to achieve transparency are *information sharing procedures* and *monitoring*.⁸⁴ The four managerial measures merge “into a broader process of ‘jawboning’”, which essentially means that they, in combination with discourse, persuade miscreant states to change their ways.⁸⁵ Despite the interest in discourse which underlines the power of legal norms in shaping persuasive arguments, the fundamental reason why the management strategy is expected to work is that a state needs a good standing in the regimes established by the states in order to be able to participate in the international system securing economic growth and political influence. In fact, this is for most states the only way in the interdependent world to realize and express their sovereignty: by being a respected and reliable member of the community of states.⁸⁶ To keep that status, states might have to transcend and even put back their own interests in a particular regime.⁸⁷

The managerial approach with its emphasis on membership and reputation belongs to the spectrum of rationalist institutionalism. It is,

⁸¹ Chayes/ Handler Chayes, *ibid.*, see note 73, 207.

⁸² Chayes/ Handler Chayes, *ibid.*, see note 73, 25.

⁸³ Abr. Chayes/ A. Handler Chayes/ R.B. Mitchell, “Managing Compliance: A Comparative Perspective”, in: Brown Weiss/ Jacobson, see note 79, 39, 43.

⁸⁴ Cf. Chayes/ Handler Chayes, *The New Sovereignty*, see note 73, 135 et seq.

⁸⁵ Chayes/ Handler Chayes, *ibid.*, see note 73, 25 et seq.

⁸⁶ Cf. Chayes/ Handler Chayes, *ibid.*, see note 73, 27 et seq.

⁸⁷ Cf. Chayes/ Handler Chayes, *ibid.*, see note 73, 27.

though, located at one end of that spectrum, seeing enforcement of rules as only “a marginal factor in compliance calculations”.⁸⁸ Hence, it is opposed by the representatives of the other end, the political economists.⁸⁹ In particular, the critics claim that the managerial approach was not suitable for regimes of “deep cooperation” which are still rare in our days but will occur more and more in the future.⁹⁰ Examples verify, indeed, that states have been eager to include tougher enforcement measures as the level of cooperation increases, like in the context of GATT (cf. article 16 of the Dispute Settlement Understanding – DSU) or environmental agreements.⁹¹ However, the examples are incidents where states created stronger organizations, provided more formal rules or strengthened the position of courts. They may show that there is a need for more powerful international institutions and regimes in areas of deep cooperation but this does not necessarily mean that there is also a *need for enforcement structures* as a prerequisite for compliance. In the mentioned cases, states comply with supranational panel or court decisions without any direct enforcement and even without any incentive structures for various other reasons.⁹² Therefore, the critique and argumentation put forward by the opponents of the managerial approach cannot actually negate the finding that enforcement is not the (main or rather only) key to compliance, nor can they deny the importance of a management strategy based on legitimate rules. They are, though, not without weight, because focusing on strong institutions and incentive structures as tools to support management strategies could prove helpful in cases of treaty regimes which directly affect the economic interests of states. If States Parties of international agreements, especially in the field of trade and commerce, behave like completely rational, self-interested utility maximisers, they would rely on the information they have and make their decisions according to cost-benefit calculations, but not necessarily take into account reputational factors.⁹³ Incidentally this is the central difference between the purely rationalist perspective and the managerial approach which lays stress on

⁸⁸ See, e.g., Young, see note 50, 75.

⁸⁹ See also above in the text at footnote 57.

⁹⁰ Cf. Downs/ Rocke/ Barsoom, see note 57, 380 and 388 et seq.

⁹¹ Cf. Downs, see note 57, 335.

⁹² Cf. Raustiala/ Slaughter, see note 37, 538, 542.

⁹³ See F.V. Kratochwil, “How do norms matter?”, in: M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, 2000, 54 et seq.

legal norms and discursive processes as the bases of international law's power and influence.⁹⁴ Following the latter position, it is the normative force of the legal rules rather than the force of economic incentives that makes states comply. Nevertheless, the managerial approach remains rooted in rationalist thinking, because rationality does not exclude the consideration of such factors as reputation and social standing. These factors can be part of a rational strategy to receive the maximum material (economic) as well as immaterial (reputational) benefit from cooperation in an interdependent society of states. Thus, the theory of political economy and the managerial model are not that far away from each other; the difference lies in their prevailing emphases and prescriptions. The prescription linked to, and derived from the managerial approach is helpful to overcome difficulties of countries which are not willing to comply at all, whereas the political economists' approach emphasizes the importance of changing the incentive structures in cases where states are inclined to defect. Thus, both approaches are compatible as long as the enforcement-orientated measures do not destroy managerial efforts. In the final analysis rather than polarizing by acclaiming one of the two approaches and harshly refusing the other, it would seem to be more effective to combine managerial with incentive thoughts in a common strategy⁹⁵ saying that international law not only plays an indirect role by setting the incentive structures but also plays a direct one by helping to persuade and justify the processes of discourse.

Anyway, even this strategy still leaves open questions since it is based on the assumption that the state actors must be "jawboned" into compliance because their underlying interests are unalterable. The managerial aspect therefore cannot answer *how* legitimate rules in discursive processes lead to greater compliance. The reason is that it is still not clear why justificatory or persuasive processes culminate in changing the decision-making rationale of a state in cases where its underlying interests remain the same;⁹⁶ this would, in any case, mean that its in-

⁹⁴ Cf. Chayes/ Handler Chayes, *The New Sovereignty*, see note 73, 134.

⁹⁵ D.G. Victor, "International Environmental Agreements: Compliance and Enforcement. Enforcing International Law: Implications for an Effective Global Warming Regime", *Duke Environmental Law & Policy Law Forum* 10 (1999), 147 et seq. (168); see also J. Brunnée, "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol", *Tul. Environ. L. J.* 13 (2000), 223 et seq. (269); H.H. Koh, "Why Do Nations Obey International Law?", *Yale L. J.* 106 (1997), 2599 et seq. (2639).

⁹⁶ Cf. Koh, see note 95, 2640.

terests are not decisive. Thus, managerialism does not explore the full consequences of the focus on norms and discourse; as it is rightly pointed out in literature, it cannot explain why legitimacy enhances compliance.⁹⁷ But if the approach reconsiders and revises its starting position coming to the conclusion that state interests are flexible, one could possibly say that the discourse, framed and supported by authoritative arguments based on legitimate law, can change these interests to achieve voluntary compliance.

Consequently, the main criticism which is raised against the rationalist paradigm is that it takes interests and identities as *exogenously given*, thereby neglecting the possibility that internal social structures of the international regimes and, for that matter, legal rules might make states acquire certain identities which in turn shape the corresponding interests. Such factors could lead to compliance independently of the benefits a state can expect from the membership or participation in the international regime. Furthermore, the rationalists are blamed for not taking into account that there could be a reconstitution of interests during the processes of regime-participation.⁹⁸ In this regard, the theory advanced by institutionalism and managerialism remains inconclusive. Hence, a deeper inquiry into the processes by which legal rules can influence state actors through discourse and thus affect their underlying motivations is needed. There must be an examination of whether cooperation in international regimes and compliance with their law can go beyond rationalist strategies, whether interests can be reshaped and, again, what is the specific role of legal rules in such processes.

An attempt to penetrate further in that field is *constructivism* which emerged in the late 1980s. Although far from being a homogenous school of international relations theory, adherents to the constructivist approach share the belief that the objects and practices forming social life are intersubjectively construed.⁹⁹ Instead of taking social reality for granted, the constructivists identify it with a complex structure of “in-

⁹⁷ Brunnée, see note 61, 261.

⁹⁸ See in this context A. Wendt, “Anarchy Is What States Make of It: The Social Construction of Power Politics”, *International Organization* 46 (1992), 391 et seq.; J.G. Ruggie, “What Makes the World Hang Together? Neoliberalism and the Social Constructivist Challenge”, *International Organization* 52 (1998), 855 et seq. (863); A.C. Arend, *Legal Rules and International Society*, 1999, 125.

⁹⁹ See, e.g., J. Fearon/ A. Wendt, “Rationalism versus Constructivism. A Skeptical View”, in: Carlsnaes/ Risse/ Simmons, see note 37, 52, 57.

stitutional facts” that came into existence only because the actors agreed that they should exist and what they should mean. In other words: the actors construct the very bases of social reality by collectively imposing functions on brute physical or social facts which can be very well illustrated by the example of money which plays an important part in social reality but exists as money purely due to a collective intention to accept it as such.¹⁰⁰ Thus, the foundations of social reality are, at least to a large extent, “shared understandings, expectations, or knowledge”¹⁰¹ of the actors, resulting from their interaction. It springs from this importance of the collective agreement that law as a social institution is dependent on the “continued collective acceptance or recognition of the validity of the assigned function[s]”,¹⁰² because without the continuous acceptance of the rules, they cease to exist as such and the institution dies from lack of collective agreement. Constructivism argues that similar to individuals’ states through their interactions socially construct the international structure; the international structure is, thus, not only material but also social.¹⁰³ Since international law is part of the international structure, it can be seen as a socially constructed institution.¹⁰⁴ Furthermore, the interactions resulting in shared understandings not only constitute the international system but also shape and construct the identities of the international actors.¹⁰⁵ And since “identities are the basis of interests,”¹⁰⁶ interests are (indirectly) constructed as well, contrary to the assumptions of realism and institutionalism.¹⁰⁷

This could explain a part of the dispute in Cologne. Certain historic monuments and sites are protected by international law because there is

¹⁰⁰ See J.R. Searle, *The Construction of Social Reality*, 1995, 37 et seq.

¹⁰¹ See A. Wendt, “Collective Identity Formation and the International State”, *American Political Science Review* 88 (1994), 384 et seq. (385); id., “Constructing International Politics”, *International Security* 20 (1995), 71 et seq. (73).

¹⁰² Searle, see note 100, 45.

¹⁰³ See Arend, see note 98, 127.

¹⁰⁴ Cf. P.J. Katzenstein, “Introduction: Alternative Perspectives on National Security”, id. (ed.), *Culture of National Security. Norms and Identity in World Politics*, 1996, 1 et seq. (6); Arend, see note 98, 129.

¹⁰⁵ Kratochwil, see note 93, 56; Keohane, see note 51, 382.

¹⁰⁶ Wendt, see note 98, 398.

¹⁰⁷ See Wendt, see note 98, 403 et seq.; M. Finnemore, *National Interest in International Society*, 1996, 24; R.L. Jepperson/ A. Wendt/ P.J. Katzenstein, “Norms, Identity, and Culture in National Security”, in: Katzenstein, see note 104, 33 et seq.

a widespread view within the society of states that they are a part of the common heritage of mankind and that the individual states having such an item of cultural heritage in their territory must take the function of guardians in favour of the world community. The states may now adopt that function as a part of their national identity and develop their own interest in protecting the cultural assets because fulfilling this task is generally regarded as a responsibility of high quality and a characteristic for a state being a developed cultural state.

In fact, it is not only the Cuban Missile Crisis that indicates that identity and self-perception *matter* in shaping the interests of states and in determining whether states will comply with international law or not.¹⁰⁸ It is, though, much harder to grasp the *construction of identities*. To some extent, the shaping of identities is implied in the possibility of shared understandings. That actors can constitute social institutions through shared understandings reveals that they are abiding by certain rules upon which the institutions are founded. However, this does not yet explain why shared understandings constitute the identity of actors and do not merely result in rules that everybody agrees upon at a certain moment in time. According to an opinion in literature, actors follow the rules agreed upon because they have developed “background capabilities.”¹⁰⁹ In other words: “[A] person behaves the way he does, because he has a structure that disposes him to behave that way [...] and he has become to be disposed to behave that way, because that is the way that conforms to the rules of the institution”.¹¹⁰ Thus, actors develop a set of dispositions that are “sensitive to the rule structure”, which means that behaviour is rule-governed although the actors do not consciously follow the rules in each decision they make. The actors have developed the ability to live in a society having those rules as its basis; thus the actors are constituted by the rules that evolve from interaction on shared understandings.

Since one of the institutions that evolve during the shared understandings of the principal actors is international law, the constructivist approach says that international law can constitute the identity and interests of the actors.¹¹¹ The legal norms of international law, thus, do not only have a regulative but also a constitutive function: they consti-

¹⁰⁸ See in this context G. Allison, *Essence of Decision*, 1971, 197 and 203.

¹⁰⁹ See Searle, see note 100, 129.

¹¹⁰ Searle, see note 100, 144.

¹¹¹ See Jepperson/ Wendt/ Katzenstein, see note 107, 33, 54.

tute the international legal system as well as the actors¹¹² which are primarily the states. Moreover, the legal norms stipulate, for instance, under which conditions something is called a treaty, thereby triggering the basic rule of *pacta sunt servanda*.¹¹³ The links to and effects on compliance are obvious: state actors are likely to comply if the rules reflect a broad base of acceptance or of shared understanding. Once this is the case, international law can play its constitutive role.

In the final analysis constructivism gives a suitable explanation for the influence of law in the horizontal structure of the international society of states. By emphasizing identity and interest formation through the socialisation of actors, it not only fills the gaps of rational approaches such as institutionalism but is also able to account for the effects that social factors have on actors. Nevertheless, it still does not extensively answer the question how international law can influence the identity, i.e. what is the role of law in socializing the actors and, furthermore, whether international law can also play an active role in achieving those shared understandings that shape the actors' identities. Additionally, it remains silent on the question whether the law has certain qualities that make its influence unique and specific and, if so, whether the law's influence can be enhanced in some way.

These open points are the focus of the *interactional theory of law* which is mainly¹¹⁴ built on the foundations of the constructivist approach.¹¹⁵ According to that theory, law is continuously evolving through the interaction of the actors who are engaged in "mutual generative activity."¹¹⁶ In other words, law evolves as a pattern of expectations constructed between the actors when they interact in formal and informal institutions. At the same time, the processes of interaction shape the identities of the actors through a variety of elements such as

¹¹² Cf. Katzenstein, see note 104, 1, 6 and 20; A. Hurrell, "Conclusion: International Law and the Changing Constitution of International Society", in: Byers, see note 93, 327 and 346; Arend, see note 98, 130.

¹¹³ See, e.g., article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, UNTS Vol. 1155 No. 18232.

¹¹⁴ Another source of inspiration for that approach is the legal theory of L. Fuller, *The Morality of Law*, 1969.

¹¹⁵ See about the interactional theory in detail J. Brunnée/ S.J. Toope, "International Law and Constructivism: Elements of an International Theory of International Law", *Colum. J. Transnat'l L.* 39 (2000), 19 et seq.

¹¹⁶ J. Brunnée/ S.J. Toope, "The Changing Nile Basin Regime. Does Law Matter?", *Harv. Int'l L. J.* 43 (2002), 105 et seq. (114); cf. already Fuller, see note 114, 106.

membership of organizations, reputation, self-esteem, or the need for financial or administrative help. In line with most constructivists though, the main actors are the states; but other actors like nongovernmental organizations, cooperations, expert networks or epistemic communities also play a role in the processes and, thus, can have a share in forming a state's identity and interests.¹¹⁷ Applying these theoretical underpinnings, the representatives of the interactional theory propose that neither authority based on the hierarchy of norms nor the ability to enforce the law can provide for any specific binding character of the rules of international law as opposed to other norms of social practice.¹¹⁸ Rather, it is the "internal morality of law"¹¹⁹ which provides for the law's legitimacy and, thus, ultimately for its persuasiveness when shaping the actors. The emphasis on persuasion indicates that law exerts its constituting influence especially through argument and, thereby, through discourse.¹²⁰ Therefore, its constitutive role manifests itself in the ability to shape the discourse and the decision-making. It, thereby, exerts an influence which is in turn displayed in the shared meanings and legal rules that evolve in the process.¹²¹ Hence, the interactional theory says that the role of norms is not restricted to shaping the behaviour of actors once the shared meanings are established. Instead, the function of norms is much wider, starting at an earlier point; the rules already shape the interactional processes by providing the framework for the discourse between the actors. This shows that the interactional theory emphasizes processes of communication and the influence of law upon them; it assumes that the *power to shape discourse* is a beneficial characteristic of law.

Moreover, the theory tries to give an answer to the question of what is special about law to have such a power on the basis of three observations: first, law, which has persuasive argument and language at its hand as important and unique tools, shapes the individual and collective identities of the actors by influencing the actors' perceptions of each other and by categorizing actors into (opposing or uniting) groups.¹²² For instance, there are treaties designed to point out the common prob-

¹¹⁷ Cf. Brunnée/ Toope, see note 115, 69.

¹¹⁸ Brunnée/ Toope, see note 115, 51.

¹¹⁹ Brunnée/ Toope, see note 115, 56.

¹²⁰ Cf. Brunnée/ Toope, see note 37, 292 et seq.

¹²¹ S.J. Toope, "Emerging Patterns of Governance and International Law", in: Byers, see note 93, 91, 95; Katzenstein, see note 104, 1, 6.

¹²² Cf. Brunnée/ Toope, see note 116, 144 et seq.

lems, something which is also true for the World Heritage Convention that notes in its Preamble that the cultural heritage worldwide is increasingly threatened with destruction which is in particular caused by changing social and economic conditions. Thus such treaties do unite rather than divide and, thereby, provide the ground for effective “normative evolution” towards cooperation.¹²³ Second, law helps to differentiate between persuasive argument and pure rhetoric and, thus, establishes the framework for discourse.¹²⁴ Third, it is the specific legitimacy of law that provides the ground for persuasion.¹²⁵ In order to achieve maximum legitimacy and, thus, authority, the law must be transparent, fair and accountable.¹²⁶ This means that the interactional theory does not cut out the substantive content of a rule as a contributing factor for legitimacy. The reason for this is that the main influence of law, in its view, lies in the shaping of the interactions by providing for persuasive legal arguments and categorizations; arguments are more persuasive if they build not only on procedural but also on substantive values.¹²⁷ Accordingly, compliance mechanisms can be assessed on the basis of, on the one hand, fairness, transparency and accountability of the procedural rules and, on the other hand, justice and material fairness of their substantive values. Only under these preconditions will they be regarded as legitimate and persuasive and can they, as a consequence, develop their full potential in shaping the actors to comply with the rules. This speaks again in favour of the thesis that enforcement is not the key to compliance. Instead, adherence to legal norms can be promoted, *inter alia*, through “the design of processes of interaction and consultation” for regimes.¹²⁸ This underscores the importance of providing room for communicative exchange and discourse in the design of compliance mechanisms. If enforcement measures such as sanctions or other disincentives are employed, they must be founded on general acceptance or shared understandings derived from interaction. Conversely, if these premises are absent, even collective enforcement measures will be widely regarded as illegitimate and will be ineffective.¹²⁹ After all, it can be recorded as an insight linked to interaction theory that, as law shapes

¹²³ Brunnée/ Toope, see note 116, 154.

¹²⁴ Brunnée/ Toope, see note 116, 144.

¹²⁵ See in this context Brunnée/ Toope, see note 116, 156.

¹²⁶ Toope, see note 121, 98.

¹²⁷ Toope, see note 121, 103.

¹²⁸ Toope, see note 121, 99 and 106.

¹²⁹ Cf. Brunnée/ Toope, see note 37, 294.

discourse, compliance will be enhanced if the prevailing law is able to provide for unifying arguments, i.e. arguments which stress the common interests of the participants rather than the differences. Similarly, as law provides for the framework for arguments, compliance will be strengthened by legal rules that diminish the possibility to justify non-compliant behaviour.

In order to understand and possibly enhance the processes by which states can develop voluntary obedience instead of “grudging compliance”¹³⁰ under the influence of constitutive legal norms, it seems necessary to further analyze how these processes function. This is the task of the *theory of transnational legal process* which complements the interactional theory. This theory claims that the so-called “transnational legal process” which means the internalization of international norms can provide for the necessary link between externally existing rules and internal voluntary obedience.¹³¹ This process is described as follows: at first, transnational actors provoke *interactions* with one another in law-declaring fora, e.g. treaty regimes, domestic and international courts, nongovernmental organizations or conferences.¹³² The key agents in these interactions are transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities.¹³³ The term “transnational issue networks” in this regard means foremost the so-called epistemic communities,¹³⁴ i.e. “networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area.”¹³⁵ The interactions of the actors, in a second step, lead to a common *interpretation* of the norms in their application to certain situations.¹³⁶ As a result of this ongoing process, the international norm is, then, *internalized* into the domestic legal system of the

¹³⁰ Koh, see note 95, 2646.

¹³¹ Koh, see note 95, 2648.

¹³² See H.H. Koh, “The 1998 Frankel Lecture: Bringing International Law Home”, *Houston Law Review* 35 (1998), 623 et seq. (646 et seq.).

¹³³ Koh, see note 132, 645.

¹³⁴ Koh, see note 132, 648.

¹³⁵ P.M. Haas, “Introduction: Epistemic Communities and International Policy Coordination”, *International Organization* 46 (1992), 1 et seq. (3).

¹³⁶ Koh, see note 95, 2645.

participants by means of social, political or legal internalization.¹³⁷ As a consequence of the internalization, the state perceives the norm as binding and will, in principle, act accordingly; I will analyze in the following part whether there were in particular in this respect, deficiencies in the Cologne case since it does not seem to be clear at first glance and it is even doubted by some representatives at the local level whether the World Heritage Convention is binding for the municipal authorities in Germany. In sum, the process generates rules that will guide future interactions between the parties and ultimately shape the interests and identities of the participants.¹³⁸

The theory of transnational legal process emphasizes interactional processes that are norm-creating; it, thereby, focuses on the vertical processes by which these norms become part of a state's domestic structure and, thus, of its identity. Hence, the theory of transnational legal process shares important features with both constructivism and interactional theory. By clarifying that international horizontal interaction is not sufficient to explain identity formation, it complements and advances these approaches.¹³⁹ The theory may be criticized for merely describing an empirical pathway to obedience through internalization or, more precisely, a pathway to norm incorporation into domestic law without really explaining why and when states follow international rules.¹⁴⁰ But it rightly points out the importance of the participation of the civil society in order to establish long-term acceptance of the rules and, thus, ensure reliable long-term obedience.

To conclude, embedding the Cologne case in the general compliance debate revealed a series of possible explanations why the City of Cologne initially and for a long time has not accepted the view of the World Heritage Committee concerning an adequate buffer zone around Cologne Cathedral. However, the current development of the case also indicates that international law in the field of world heritage protection is not ineffective. After a process of discourse which was able to make the City of Cologne or rather its representatives feel ashamed or which, at least, reduced the City's reputation in the world community, the City signalled efforts to comply with the international norms and standards.

¹³⁷ For discussion of these aspects in detail Koh, see note 132, 641 et seq.; id., "Transnational Legal Process", *Nebraska Law Review* 75 (1996), 181 et seq. (204).

¹³⁸ Koh, see note 95, 2646; id., see note 137, 204.

¹³⁹ See also Brunnée/ Toope, see note 37, 273, 291.

¹⁴⁰ Raustiala/ Slaughter, see note 37, 538, 544.

In the following the legal situation will be examined a little more intensively. Thereby, the question about the binding force of the World Heritage Convention towards local, in particular municipal authorities in Germany will be answered.

III. The International Regime of World Heritage Protection: Competences, Authorities, and Decision- Making on the Level of UNESCO

UNESCO was established as a specialized agency in 1945 to promote the aims set out in article 1 para. 3 of the UN Charter. According to article I para. 1 of the UNESCO Constitution of 16 November 1945, its purpose is “to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of the law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world.” To achieve this purpose, UNESCO can assure the conservation and protection of the world’s inheritance of books, works of art and monuments of history and science, and recommend to the nations concerned the necessary international conventions (article I para. 2 (c) UNESCO Constitution).

One of these international conventions to foster conservation and protection of world heritage is the previously mentioned World Heritage Convention¹⁴¹ which was adopted by the General Conference of UNESCO in 1972.¹⁴² The Convention aims at the protection of immovable and tangible cultural heritage (monuments, groups of buildings, and sites) and natural heritage (natural features, geological and physiographical formations, and natural sites) of “outstanding universal value” (Preamble, arts 1 and 2 of the Convention). The provisions of

¹⁴¹ UNTS Vol. 1037 No. 15511; *ILM* 11 (1972), 1358.

¹⁴² Further on the genesis of that Convention, e.g., T. Fitschen, “Internationaler Schutz des kulturellen Erbes in der Welt”, in: W. Fiedler (ed.), *Internationaler Kulturgüterschutz und deutsche Frage*, 1991, 183, 185 et seq.; B. Genius-Devime, *Bedeutung und Grenzen des Erbes der Menschheit im völkerrechtlichen Kulturgüterschutz*, 1996, 140 et seq.; R.L. Meyer, “Travaux Préparatoires for the UNESCO World Heritage Convention”, *Earth Law Journal* 2 (1976), 45 et seq.; M.P. Wyss, *Kultur als eine Dimension der Völkerrechtsordnung. Vom Kulturgüterschutz zur internationalen kulturellen Kooperation*, 1992, 125 et seq.

the Convention are rightly described in literature as an example of “a delicate balance between national sovereignty and international intervention.”¹⁴³

1. The Duties of the States Parties under the World Heritage Convention

At first, the Convention in its article 4 sentence 1 addresses the individual State Party as being responsible for implementing the obligations towards its own heritage in the national legal system. 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 ... belongs primarily to that state.” Article 4 sentence 2 of the Convention continues that the state will do “all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and cooperation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.” Although these provisions are formulated quite softly in acknowledging the States Parties’ sovereignty, it is clear that the states are *obliged* to attend to the protection and conservation of the cultural and natural heritage in their territories.¹⁴⁴ Therefore, to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated in a State Party’s territory, article 5 of the Convention in addition to the two sentences of article 4 provides that each State Party to the Convention shall endeavour, so far as possible, and as appropriate for each country:

- a) to adopt a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate the protection of that heritage into comprehensive (French: *générale*) planning programmes;

¹⁴³ C. Cameron, “The Strengths and Weaknesses of the World Heritage Convention”, *Nature and Resources* 28 (1992), 18 et seq.

¹⁴⁴ Cf. S. von Schorlemer, *Internationaler Kulturgüterschutz. Ansätze zur Prävention im Frieden sowie im bewaffneten Konflikt*, 1992, 131 et seq.; P. Strasser, “‘Putting Reform into Action’ – Thirty Years of the World Heritage Convention: How to Reform a Convention without Changing Its Regulations”, *International Journal of Cultural Property* 11 (2002), 215 et seq. (216 et seq.) who speaks about an “obligation” of the states.

- b) to set up within its territories, where such services do not exist, one or more services for the protection, conservation and presentation of the cultural and natural heritage with an appropriate staff and possessing the means to discharge their functions;
- c) to develop scientific and technical studies and research and to work out such operating methods as will make the state capable of counteracting the dangers that threaten its cultural or natural heritage;
- d) to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage; and
- e) to foster the establishment or development of national or regional centres for training in the protection, conservation and presentation of the cultural and natural heritage and to encourage scientific research in this field.

The points mentioned in arts 4 and 5 are the primary obligations of the States Parties under the World Heritage Convention. Thereby, the provision of article 4 sentence 1 of the Convention can be qualified as an extensive, general clause to make the protection of the cultural and natural heritage a State Party's duty, whereas the rules in article 5 of the Convention can be regarded as action-related concretizations of that general duty.

2. The Competences of the World Heritage Committee

Moreover, on the other hand, the Convention stipulates the duty of the international community as a whole to cooperate (article 6 para. 1), which should be achieved through the establishment of a system of international cooperation and assistance designed to support States Parties of the Convention in their efforts to conserve and identify that heritage (article 7). This is an expression of the thought that the world heritage belongs to the whole mankind (cf. the Preamble).¹⁴⁵ One

¹⁴⁵ See in this context M.E.E. Castelli, *Protección Jurídica del Patrimonio Cultural de la Humanidad*, 1987, 17 et seq.; Genius-Devime, see note 142, 20 et seq. and passim; Fitschen, see note 142, 183, 206 et seq.; M. Müller, "Kulturgüterschutz: Mittel nationaler Repräsentation oder Wahrung des Gemeinsamen Erbes der Menschheit", in: F. Fechner/ T. Oppermann/ L.V. Prott (eds), *Prinzipien des Kulturgüterschutzes. Ansätze im deutschen, europäischen und internationalen Recht*, 1996, 257 et seq., 266 et seq.; E. Rou-

means of cooperation and assistance is the Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value called the World Heritage Committee which is established on the basis of article 8 para. 1 of the Convention. The Committee which consists of 15 members elected by the General Assembly of the States Parties is the final decision-making body. Its responsibilities include, in particular, the establishing, keeping up to date, and publishing of the World Heritage List (article 11 para. 2) and the List of World Heritage in Danger (article 11 para. 4).

a. The Inscription of Properties in the World Heritage List

The World Heritage List (currently comprising some 812 properties) is a list of properties forming part of the cultural and natural heritage which the World Heritage Committee “considers as having outstanding universal value in terms of such criteria as it shall have established” (article 11 para. 2 sentence 1 of the World Heritage Convention). Since 1978, the Committee has added new sites to the List at each session, in 2005, for instance, the Historic Monuments of Macao in China, the Architectural, Residential and Cultural Complex of the Radziwill Family at Nesvizd in Belarus, the Biblical Tels and Ancient Water Systems of Megiddo, Hazor and Beer Sheba in Israel, the Syracuse and the Rocky Necropolis of Pantalica in Italy, and the Old City of Mostar in Bosnia and Herzegovina.¹⁴⁶ The material precondition for a property to be included on the List is, as indicated by the wording of article 11 para. 2 of the Convention, that it can be identified as cultural heritage in accordance with article 1 of the Convention or natural heritage in accordance with article 2 of the Convention and having “outstanding universal value.” This crucial term was introduced in the Convention to limit its application to the protection of the most important places of cultural and natural heritage in the world.¹⁴⁷ But the notion itself is left deliber-

counas, “International Regulations and Internal Measures of Protection of the Archaeological Heritage”, in: G. Kassimatis (ed.), *Archaeological Heritage: Current Trends in Its Legal Protection*, 1995, 117 et seq., 120 et seq.; about the beneficiary of archaeological heritage T. Antoniou, “Is There Any Discord Between Constitutional and International Protection of the Archaeological Heritage?”, *ibid.*, 87, 89 et seq.

¹⁴⁶ See under <<http://www.whc.unesco.org/en/list>>.

¹⁴⁷ S.M. Titchen, “On the Construction of ‘Outstanding Universal Value’”. Some Comments on the Implementation of the 1972 UNESCO World

ately¹⁴⁸ undefined in the Convention.¹⁴⁹ Rather, as is laid down in article 11 para. 2 of the Convention, the criteria shall be defined in detail by the World Heritage Committee.

The World Heritage Committee has, thus, the competence and, at the same time, a scope for the assessment whether an item of cultural or natural heritage should be put on the List. However, this competence or scope should be limited by the requirement to determine the decisive criteria *ex ante*. Accordingly, the Committee created these criteria at its first session in 1977 by the Operational Guidelines for the Implementation of the World Heritage Convention which were based on a working paper prepared by the Committee's secretariat (since 1992 called the World Heritage Centre) in cooperation with the Advisory Bodies.¹⁵⁰ The Operational Guidelines are considered to play an essential role in the implementation of the World Heritage Convention, as stated in a note in the 1977 version saying that "these guidelines, which will need adjusting or expanding to reflect later decisions of the 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".¹⁵¹ The Guidelines primarily have the status of internal law of an international organization but might, to a certain extent, be compared with administrative regulations in the sense of the German understanding.¹⁵² Although they are not addressed to inferior authorities, they serve, not least, a uniform administrative practice of the States Par-

Heritage Convention", *Conservation and Management of Archaeological Sites* 1 (1996), 235 et seq. (236).

¹⁴⁸ See Strasser, see note 144, 217.

¹⁴⁹ Cf. M.M. Boguslavsky, "Der Begriff des Kulturguts und seine rechtliche Relevanz", in: R. Dolzer/ E. Jayme/ R. Mußgnug (eds), *Rechtsfragen des internationalen Kulturgüterschutzes. Symposium vom 22./23. Juni 1990 im Internationalen Wirtschaftsforum Heidelberg*, 1994, 3, 7.

¹⁵⁰ See the Final Report of the Committee, First Session, Doc. CC-77/CONF.001/9 of 17 October 1977, 56, available at: <<http://whc.unesco.org/archive/repcom77.htm>>.

¹⁵¹ Note 1 sentence 2 subpara. 3 of the Operational Guidelines 1977, Doc. CC-77/CONF.001/8 Rev. of 20 October 1977 available at: <<http://whc.unesco.org/archive/out/opgu77.htm>>.

¹⁵² Cf., with regard to a dispute about the legal significance of the Operational Guidelines during the 1996 session, World Heritage Committee, Report, 20th Sess., Doc. WHC-96/CONF.201/21 of 10 March 1997, XVII.7 and Annex IX.1, available at: <<http://whc.unesco.org/archive/repcom96.htm>>; Strasser, see note 144, 215, 246.

ties, in particular with regard to the application for including a property in the List (cf. arts 3 and 11 para. 1 of the Convention). In sum, more transparent, foreseeable, and calculable decisions shall be guaranteed. The Committee has bound itself with the Guidelines. Nevertheless, it can amend and modify them at any time. In fact, since the first version was drafted, the Operational Guidelines have been revised approximately fifteen times¹⁵³ and their content has been extended from 27 paragraphs in 1977 to 290 paragraphs, including 9 annexes, in February 2005.¹⁵⁴ According to para. 77 of the Operational Guidelines 2005, the Committee considers a property as having outstanding universal value if the property meets one or more of the listed criteria in para. 77. To be deemed of outstanding universal value a property must also meet the conditions of integrity and/or authenticity and must have an adequate protection and management system to ensure its safeguarding, according to paras 78 and 79.¹⁵⁵

The new criteria no longer formally distinguish between cultural and natural heritage; there is now a uniform set of criteria for both kinds of property. Among the criteria are that the property represents a masterpiece of human creative genius (i), exhibits an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design (ii), bears a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared (iii), or is an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history (iv); to name but a few. The Cologne Cathedral in 1996 was classified under the criteria (i), (ii), and (iv) of the Operational Guidelines which were valid at that time.¹⁵⁶ Although the text of all criteria has changed since 1986, their material contents remained in broad terms with regard to the aspects that had been of relevance for the classification of Cologne Cathedral.

¹⁵³ Cf. already Strasser, see note 144, 247.

¹⁵⁴ The new Operational Guidelines are available as Doc. WHC.05/2 of 2 February 2005 available at: <<http://whc.unesco.org/archive/opguide05-en.pdf>>.

¹⁵⁵ Also on this prerequisite, e.g., H. Caspary, "Weltkulturerbe", in: D.J. Martin/ M. Krautzberger (eds), *Handbuch Denkmalschutz und Denkmalpflege*, 2004, Part A, 138.

¹⁵⁶ Cf. above in the text, at note 8.

As stated in article 11 para. 2 of the World Heritage Convention in conjunction with para. 24 (a) of the Operational Guidelines 2005, the World Heritage Committee has 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. The decision of the World Heritage Committee to inscribe a property on the List which is, as in the case of Cologne Cathedral, based on the criteria mentioned in the Operational Guidelines for a property having outstanding universal value can be understood as a concretization of the States Parties' duties laid down in arts 4 and 5 of the Convention with regard to the object of protection and conservation. In other words: if a historic monument is inscribed on the List it is determined to be a cultural or natural heritage in the sense of the Convention; thus, the questions of interpretation or evaluation are decided. The general duties of the States Parties, which exist according to the wording of the Convention, are made actual and definite by the concretization of the object. As a consequence, a State Party having in its territory a monument enshrined in the List is now obliged to take care of the protection and conservation of that concrete monument according to article 4 of the Convention in conjunction with the decision of the World Heritage Committee; in particular, it is obliged, according to article 5 (a) of the Convention in conjunction with the Committee's decision, to work towards the protection of the concrete item of world heritage being integrated into comprehensive planning programmes.

This can be done, above all, by legislative measures but also by administrative measures. For instance, a state supervisory authority could instruct or force an inferior administrative authority by the ordinary means of supervision ruled in the law not to act contrary to the duties of the state laid down in the World Heritage Convention or rather not to thwart their fulfilment. Incidentally, the identification of cultural and natural properties of outstanding universal value and their inscription in the List do not take place without the agreement of the State Party in whose territory the property is located according to article 11 para. 3 of the Convention.¹⁵⁷

The identification process is laid down in paras 120 et seq. of the Operational Guidelines 2005. Several requirements have to be fulfilled according to paras 132 et seq. Reviews of nominated property are undertaken by the Advisory Bodies to the World Heritage Committee,

¹⁵⁷ Cf. K. Odendahl, *Kulturgüterschutz. Entwicklung, Struktur und Dogmatik eines ebenenübergreifenden Normensystems*, 2005, 234, 520 and 634.

the previously mentioned ICOMOS as has happened in the case of Cologne Cathedral, the World Conservation Union (IUCN), or both¹⁵⁸ (cf. paras 35 and 36 of the Operational Guidelines 2005).¹⁵⁹ Following a positive evaluation, the Advisory Bodies prepare the justification for inscription on the List. The Bureau of the Committee which coordinates the work of, and passes the Advisory Bodies' evaluation to the Committee might recommend the inscription as well as the texts. In most cases, the Committee follows the Bureau's recommendations and approves the texts in connection with the inscription of the property; changes in the texts made by the Committee are rare. After all, the definition and formulation of what is considered to be of outstanding universal value is proposed, and the process initiated by the States Parties, and transferred from a political body, the Committee, to a level of technical experts, as represented by the Advisory Bodies.¹⁶⁰ The composition of the World Heritage List is, thus, the result of input from three different participants in the process of recognizing a property as cultural heritage: the State Party that nominates the property; the Advisory Bodies that evaluate the property and eventually propose its inscription; and the Committee that decides formally on the inclusion in the List.¹⁶¹

A hearing or the involvement of authorities below the level of the State Party or of the owner of the property is not provided for by the World Heritage Convention; therefore, the World Heritage Committee is not obliged to give local authorities or private persons the possibility to participate in the process of inscription. However, para. 123 of the Operational Guidelines 2005 reads that "participation of local people in the nomination process is essential to enable them to have a shared responsibility with the State Party in the maintenance of the property. States Parties are encouraged to prepare nominations with the participation of a wider variety of stakeholders, including site managers, local

¹⁵⁸ See about these advisory bodies M.C. Ciciriello, "L'ICCROM, l'ICOMOS e l'IUCN e la salvaguardia del patrimonio mondiale culturale e naturale", in: id. (ed.), *La protezione del patrimonio mondiale culturale e naturale a venticinque anni della Convenzione dell'UNESCO del 1972*, 1997, 109 et seq.

¹⁵⁹ For an overview about the evaluation procedure see, e.g., H. Stovel, "The Evaluation of Cultural Property for the World Heritage List", *Nature and Resources* 28 (1992), 30 et seq.

¹⁶⁰ Cf. L. Pressouyre, *The World Heritage Convention – Twenty Years Later*, 1996, 46.

¹⁶¹ Strasser, see note 144, 215, 218.

and regional governments, local communities, non-governmental organizations and other interested parties.” According to that regulation which recognizes that broad acceptance is a mechanism to achieve compliance, as worked out by the interactional theory of law,¹⁶² it is the responsibility of the State Party, when preparing a nomination, to hear and involve persons whose interests could be touched by the inscription. Neither the World Heritage Convention nor the Operational Guidelines, oblige the state to work together with other authorities or private persons; the regulation in para. 123 of the Operational Guidelines 2005 is a mere recommendation that can be disregarded by the state. However, the non-conformity of the state procedure with that rule can be taken into account by the World Heritage Committee when comprehensively evaluating the status of a historic monument which is proposed to be inscribed on the List. It is a factor that can be of relevance in the context of the requirements concerning the national protection system, which are laid down in paras 79 et seq. of the Operational Guidelines 2005.¹⁶³

b. The Inscription of Properties on the List of World Heritage in Danger

The legal basis for inscribing properties recognized as World Heritage on the List of World Heritage in Danger (known as the “Red List”, currently comprising 34 sites) is the previously mentioned article 11 para. 4 of the World Heritage Convention. As laid down there the Committee shall establish, keep up to date and publish, whenever circumstances shall so require, under the title of List of World Heritage in Danger, a list of the property appearing in the World Heritage List. With regard to the material preconditions of the inscription of property in the List of World Heritage in Danger, the provision stipulates that only such properties forming part of the cultural and natural heritage may be included in the List for which major work is necessary and for which assistance has been requested under the Convention. The List may include property being cultural or natural heritage which is threatened by serious and specific dangers, such as the threat of disappearance caused by accelerated deterioration, large-scale public or private projects or rapid urban or tourist development projects; destruction caused by changes in the use or ownership of the land; major alterations due to

¹⁶² See above in the text, at note 114.

¹⁶³ See in this context above, after note 154.

unknown causes; abandonment for any reason whatsoever; outbreak or threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, or landslides; changes in water level, floods, and tidal waves (article 11 para. 4). These threats may exclusively refer to the loss or, at least, the modification of the property's substance, which is, in fact, claimed by some voices in literature.¹⁶⁴ Thus, it may be doubted whether the World Heritage Committee is entitled to inscribe such property appearing in the World Heritage List on the List of World Heritage in Danger if it does not run the risk of being substantially damaged or destroyed but might only lose its dominant function in a city's skyline or become restricted in its visibility from far-away distances, as it is the case of Cologne Cathedral.

By means of a wide interpretation, the phraseology "threat of disappearance caused by [...] large-scale public or private projects or rapid urban or tourist development projects" of article 11 para. 4 could be understood in the way that the property cannot be seen any more either because of destruction or because of blocking the view.¹⁶⁵ Therefore, it seems to be tenable to hold that the Committee has the competence to put properties on the List of World Heritage in Danger when they are threatened by measures that will hinder people to look at them and, thus, to have the chance to admire their outstanding character.

This view may find confirmation in the examples of danger in the sense of article 11 para. 4 of the Convention, mentioned in para. 179 of the Operational Guidelines 2005. They do not only speak about a deterioration of materials, structure or ornamental features but also about "serious deterioration of architectural or town-planning coherence", "serious deterioration of urban or rural space", and "important loss of cultural significance". As mere potential dangers are listed, *inter alia*, the "threatening effects of regional planning projects [...] and] of town planning." These examples indicate that a realization of a threat for cultural heritage needs not always be accompanied by a deterioration or loss of historic building stock.

Another question occurring in this context is what restrictions as to the view of a world heritage monument reach such severity that they justify an inscription in the List of World Heritage in Danger. The background for this question is the insight that the World Heritage Convention cannot ensure an unobstructed line of vision on a historic

¹⁶⁴ Cf. A. Hipp, *Schutz von Kulturgütern in Deutschland*, 2000, 142.

¹⁶⁵ Cf. F. Fechner, "Prinzipien des Kulturgüterschutzes", in: Fechner/ Oppermann/ Prött, see note 145, 11, 27 et seq.

monument from everywhere and from any distance. There must be limits which go beyond the natural curvature of the earth's surface. Otherwise, the development of certain areas with world heritage monuments would necessarily have to come to an end.

At first glance and quite generally, one could say that the World Heritage Committee must find a reasonable balance between the interests of effective world heritage protection on the one hand, and those of a beneficial development of the area or town on the other hand, when deciding about the inscription of a property on the List of World Heritage in Danger. That balance can only be found in the concrete case, not abstractly. If a monument, like Cologne Cathedral, is famous for its superlative dimensions, it would be tenable to demand that a new building exceeding these dimensions should not be erected in its direct neighbourhood. There must be a buffer zone so that the imposing structure of the property can be perceived as the reason for acknowledging it as world heritage. Thereby, the size of the buffer zone is not the urgent result of a mathematical equation including the monument's length, width, and height. Instead, the World Heritage Committee has discretion as to its evaluation.¹⁶⁶ By making use of that discretion in the Cologne case, the Committee could take into account that the high-rise buildings opposite the Cathedral should not reach its height and that there is a free space between the skyscrapers and the Church saved by the so-called Cathedral Slab, which is a raised place surrounding the Cathedral, and by the river. But height and the distance are not the only aspects of importance for the view of a monument; angle of vision and perspective are decisive, too. The skyscrapers of Cologne which will form a semicircle can, in that respect, give the illusion of a massive wall opposite the Cathedral and, thus, appear to be a challenging competitor to the Sacred House. After all, it seems to be justifiable in the Cologne case to come to the conclusion that the city planning concerning the right bank of the Rhine is a threat to the Cathedral in the sense of article 11 para. 4 of the World Heritage Convention; accordingly, the Committee did not obviously overstep the boundaries of its scope for evaluation when inscribing the Cathedral on the List of World Heritage in Danger.

However, a more thorough analysis of the legal situation is appropriate, not least in the Cologne case. This analysis must take into consideration the function of the List of World Heritage in Danger in the

¹⁶⁶ Concerning the possibility of the World Heritage Committee to determine buffer zones, cf. von Schorlemer, see note 144, 136.

system of world heritage protection under the Convention and the specific duties of the State Party which are actualized and concretized by the initial inscription of the property in the World Heritage List. Only if these aspects are clear, can the provisions on the protection of world cultural and natural heritage be applied correctly.

The first indicator for determining the function of the List of World Heritage in Danger is the wording of article 11 para. 4 of the World Heritage Convention. The article reads that only such property shall be inscribed on the List for the conservation of which major operations are necessary and for which assistance has been requested under the Convention. Thus, the inscription in the List signals that further action must be taken to maintain the item of world heritage for future generations. It is designed to inform the international community of conditions which threaten the very characteristics for which a property was inscribed on the World Heritage List, and to encourage corrective action. Inscribing a site on the List of World Heritage in Danger allows the World Heritage Committee to allocate immediate assistance from the World Heritage Fund to the endangered property.

It is, however, not a necessary prerequisite for getting international assistance because assistance can already be granted if a property forming part of the cultural or natural heritage is potentially suitable for inclusion either in the World Heritage List or in the List of World Heritage in Danger (see article 13 sentence 1 of the Convention). There are also no clues in the Convention that properties enshrined in the List of World Heritage in Danger gain priority over other properties with regard to assistance. Rather, the World Heritage Committee determines an order of priorities with regard to all properties in question, thereby considering “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, the urgency of the work to be done, the resources available to the States on whose territory the threatened property is situated and in particular the extent to which they are able to safeguard such property by their own means” (article 13 para. 4 of the Convention). Thus, the inscription in the List can be interpreted as a measure of “reputation enforcement”¹⁶⁷ which is an effective mechanism to enhance compliance in cases where other kinds of enforcement strategies either are not provided or seem to be inappropriate; the State Party that is able but not

¹⁶⁷ Majone, see note 34, 319, 337.

willing to take the necessary measures for the conservation of the world heritage in its territory shall be shown up in face of the world community of states in order to make it comply.¹⁶⁸ This compliance mechanism takes into account that reputation and the standing in the community of states are factors playing an important role in achieving compliance, and it is, thus, in line in particular with the managerial model of compliance.¹⁶⁹ Hence, an inscription in the List of World Heritage in Danger can be considered, above all, if a state violates its duties as a State Party of the World Heritage Convention.

Accordingly, in the Cologne case, it is, above all, relevant that a buffer zone was explicitly, and with the consent of the German authorities, made a precondition for the Cologne Cathedral being inscribed on the World Heritage List.¹⁷⁰ The City of Cologne obviously neglected that buffer zone, which constitutes a violation of the duties of the Federal Republic under the World Heritage Convention because the acts of the City in international contexts are attributed to the state.¹⁷¹ Moreover, article 4 of the Convention obliges the State Party to ensure, *inter alia*, the presentation of the cultural heritage which means that the state must guarantee that the property having the status of world heritage can be looked at,¹⁷² which is not possible any more if it is narrowly surrounded by high-rise buildings. If the reduction of the free view onto the Cathedral is considerable, this can be rightly regarded as a violation of the Federal Republic's duties under the Convention. Finally, a violation of Conventional duties must also be assumed if a state deliberately does not take possible measures to avert a danger for the property of world cultural or natural heritage that will lead to the disappearance of at least one criterion that had been decisive for the positive decision of the World Heritage Committee.

Concerning Cologne Cathedral, the Committee based its decision, *inter alia*, on the assessment that the sacred building is a powerful testimony to the strength and persistence of Christian belief in medieval

¹⁶⁸ Cf. Caspary, see note 155, Part A, 140, speaking about the inscription on the List of World Heritage in Danger and about delisting as final "means of exerting pressure."

¹⁶⁹ See above in the text, at note 73.

¹⁷⁰ Cf. above in the text, at note 10.

¹⁷¹ Cf., e.g., article 4 ILC-Draft; M. Herdegen, *Völkerrecht*, 4th edition, 2005, § 58, 5 et seq.; G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, Vol. I/3, 2nd edition, 2002, 890 et seq.

¹⁷² Cf. Fitschen, see note 142, 183, 194.

and modern Europe.¹⁷³ This aspect has to do with the impression the Cathedral gives to its observers, its visual effects. If the Cathedral is no longer visible because of surrounding skyscrapers, this criterion must be dropped for the future assessment of the value of Cologne Cathedral. Thus, there is also insofar a violation of the Federal Republic's duties under the World Heritage Convention.

Next to the substantive aspects there might be formal prerequisites for inscribing a property on the List of World Heritage in Danger. In fact, there are provisions referring to a cooperative approach of the World Heritage Convention with regard to the inclusion of property in the List of World Heritage in Danger. Although a formal nomination by the State Party is not required, article 11 para. 6 of the Convention, for instance, reads that before refusing a request for inclusion in one of the two lists, the Committee shall consult the State Party in whose territory the property in question is situated. Furthermore, article 11 para. 7 of the Convention stipulates that "the Committee shall, with the agreement of the States concerned, coordinate and encourage the studies and research needed for drawing up of the lists." Thus, there shall be a consultation of, and cooperation with, the State Party even in cases leading to an inscription on the List of World Heritage in Danger.

Until 1992, the World Heritage Committee interpreted these provisions in the way that an inclusion in the List of World Heritage in Danger could only be undertaken after a "request" by the concerned State Party.¹⁷⁴ The "regular" procedure, the state had to act in order to initiate the process aiming at the inscription of a property on the List. Later, inclusions were made as long as the State Party did not oppose the inscription on the List of World Heritage in Danger.¹⁷⁵

This practice led to a fierce controversy during the 24th session of the World Heritage Committee in 2000 with regard to the case of the Kathmandu Valley which was threatened by uncontrolled urban development. In that case, the Committee had deferred the inscription of the property in the List of World Heritage in Danger numerous times but the Nepalese authorities steadily refused their consent. Hence, the Committee underlined the need to ensure the credibility of the World Heritage Convention, of its own role and of the World Heritage List, while effectively implementing the mechanisms provided under the Convention and appropriately assisting States Parties in safeguarding

¹⁷³ See above in the text, at note 8.

¹⁷⁴ Cf. Cameron, see note 143, 20.

¹⁷⁵ Cf. Strasser, see note 144, 215, 252 and 254.

the World Heritage properties; thus, it seemed to be adequate to change the current policy. Most members agreed that it would be desirable to define procedures for examining cases such as Kathmandu Valley, where certain values or components justifying World Heritage inscription have been, or are going to be, irreversibly lost. Nevertheless, some delegates and the Observer of Nepal felt that the Committee was not empowered to inscribe a property on the List of World Heritage in Danger without the consent of the concerned State Party and without request for assistance by the State Party. In contrast to that position, other members of the Committee and Observers stressed that article 11 para. 4 of the Convention allowed the Committee to inscribe a property on the List of World Heritage in Danger without the consent of the State Party concerned, although it was preferable to have the State Party's consent in advance. Since the dispute could not be solved in the session, the World Heritage Committee, finally decided to consider the issue of the inscription of properties in the List of World Heritage in Danger in the context of the planned revision of the Operational Guidelines, in order to develop appropriate criteria and a procedure to handle situations such as Kathmandu Valley.¹⁷⁶

Not surprisingly, the question of whether or not consent by a State Party is necessary for inscribing on the List of World Heritage in Danger was answered by the Operational Guidelines 2005 in favour of strengthening the position of the Committee. Para. 183 of the Operational Guidelines 2005 provides that the Committee, when considering the inscription of a property on the List of World Heritage in Danger, shall develop, and adopt, as far as possible, in consultation with the State Party concerned, a programme for corrective measures. Para. 184 adds that, in order to develop the programme of corrective measures, the Committee shall request the Secretariat to ascertain, as far as possible in cooperation with the State Party concerned, the present condition of the property, the dangers to the property, and the feasibility of undertaking corrective measures. Thus, the new Operational Guidelines make clear that there need not be cooperation or even agreement with the State Party concerned; the State Party's consent for the inclusion in

¹⁷⁶ See World Heritage Committee, Report, 24th Sess. Doc. WHC-2000/CONF.204/21 of 16 February 2001, 27 et seq., VIII.32, available at: <<http://www.natural-resources.org/minerals/CD/docs/other/whc-00-conf-204-21e.pdf>>.

the List is desirable but not obligatory.¹⁷⁷ There shall be a consultation “as far as possible” but the Committee is not forced to remain inactive if the State Party, for whatever reason, refuses cooperation. With that solution, the Committee followed a proposal of the Advisory Bodies reading that “the Committee must retain the ultimate authority to put sites on the Danger List, even against the wish of the State Party, if judged essential to help protect and preserve the [...] site.”¹⁷⁸ In principle and under ordinary circumstances, the Committee should make efforts to get the State Party’s agreement; but if the state does not consent, the Committee can and must come to its own decision. This change in reading the norms of the Convention takes into account the function of the List of World Heritage in Danger which had been explained above. If putting a property on the “Red List” is an enforcement measure to make the state comply with international law, it is obvious that its consent or approval of the measure may, in the end, not be decisive. After all, for inscribing a property on the List of World Heritage in Danger, the procedural demands with regard to the participation of the State Party are lower than in the case of inscribing a property on the World Heritage List.

In the Cologne Cathedral case, the impetus for initiating the procedure to inscribe the Church on the List of World Heritage in Danger probably came from some private organizations aimed at the protection of historic monuments, and the press does not mention whether the Federal Republic of Germany later agreed with the inscription or not. However, even if it refused its consent, the World Heritage Committee had the competence to inscribe the Cathedral on the “Red List”. Para. 187 of the Operational Guidelines 2005 in such cases only stipulates that the State Party concerned shall be informed of the Committee’s decision.

A last problem is the participation of local authorities and private persons whose interests may be affected by the inscription. In cases

¹⁷⁷ Cf. already World Heritage Committee, Report, 26th Sess., Doc. WHC-02/CONF.202/8 of 24 May 2002, 18 et seq., available at: <<http://whc.unesco.org/archive/2003/whc03-6extcom-inf4re.pdf>>.

¹⁷⁸ IUCN Statement from 6 September 2001, 2, quoted by Strasser, see note 144, 215, 254; see also IUCN, *An Analysis of the Legal Issues Responding to the 2nd Draft Operational Guidelines and Issues Raised During the Drafting Group of October 2001*, available at: Doc. WHC-02/CONF.202/INF.12 of 14 May 2002 at <<http://whc.unesco.org/archive/2002/whc-02-conf202-inf12e.pdf>>.

where the State Party requires inscribing a property on the List of World Heritage in Danger, the provision of para. 123 of the Operational Guidelines 2005 should find application analogously: the state is encouraged to prepare the nomination with a participation of the public or private persons who are potentially affected by the inscription. But if it is not the State Party initiating the process or if the state even opposes the inscription in the “Red List”, the whole procedure is in the hand of the World Heritage Committee which is not obliged to involve entities other than the State Party. Thus, in the case of Cologne Cathedral, it is not a procedural error or defect that the Committee did not hear the City of Cologne or the Chapter of the Metropolitan before deciding in favour of an inscription.

c. The Deletion of Properties from the World Heritage List

The deletion of property from the World Heritage List is not explicitly mentioned in the World Heritage Convention. However, article 11 para. 2 of the Convention refers to the Committee’s task to “establish, keep up to date and publish” the World Heritage List. “Keeping [the List] up to date” includes both inscribing a new property on the List and deleting a property from the List in cases where the preconditions for inscription no longer exist. Accordingly, the Operational Guidelines contain further information about the deletion of a property from the List. For instance, para. 191 (c) of the Operational Guidelines 2005 reads that the Committee shall decide, in consultation with the State Party concerned, whether to consider the deletion of the property from both the List of World Heritage in Danger and the World Heritage List if the property has deteriorated to the extent that it has lost those characteristics which determined its inscription on the World Heritage List, in accordance with the procedure set out in paras 192 to 198. One important provision within these paragraphs is that the Committee shall not decide to delete any property unless the State Party has been consulted on the question (para. 196 sentence 3 of the Operational Guidelines 2005). Thus, the consent of the State Party concerned is not required; only its consultation shall be achieved, which reveals that there is a gradual reduction of procedural requirements from the inscription on the World Heritage List over the inscription on the List of World Heritage in Danger to the deletion from the World Heritage List.

On the basis of the interpretation of article 11 para. 2 of the World Heritage Convention undertaken by the Operational Guidelines, the World Heritage Committee is entitled to delete a property from the

World Heritage List if characteristics of that property which had been made the basis for the initial positive decision to inscribe it on the List have, meanwhile, got lost so that a different evaluation is necessary or, at least, justified; thus, the delisting is no more and no less than the *actus contrarius* to the inscription on the List, reserved for cases where the conditions for inscription exist no longer. As mentioned, Cologne Cathedral in 1996 was inscribed in the World Heritage List because it was considered that “the monument is of outstanding universal value being an exceptional work of human creative genius, constructed over more than six centuries and a powerful testimony to the strength and persistence of Christian belief in medieval and modern Europe.”¹⁷⁹ Hence, we must examine whether one or more of these aspects have become extinct as a result of the buildings opposite Cologne Cathedral. The first element “exceptional work of human creative genius” refers to the architecture, the building stock; it is not going to disappear and it is not even touched when faced with the skyscrapers. Rather, it is an aspect strictly connected with the substance of the building. The second element is the duration of continued existence and, thus, an aspect of time. It is, by no means, going to be lost with regard to the construction project on the right bank of the Rhine. Therefore, the focus is on the third element “powerful testimony” which is, as seen above,¹⁸⁰ directly linked with the impression the Cathedral’s outer appearance makes on its observers and, thus, with its visibility. The Cathedral’s visibility is best guaranteed if there are no other buildings in its surroundings that obstruct the free sight on it, and it becomes smaller if the view of the building is restricted by the skyscrapers. Therefore, one criterion which had been decisive for the inscription of Cologne Cathedral on the World Heritage List is disturbed by the high-rise buildings. Against this background, one could argue that the loss of a single element is not decisive if it can be compensated by other elements, for para. 77 of the Operational Guidelines 2005 reads that the Committee considers a property as having outstanding universal value if it meets one or more criteria. If one criterion had been sufficient, Cologne Cathedral would have continued to be inscribed on the List because, in its case, two out of the three elements, which played a role in the assessment that the building was of “outstanding universal value”, still remain. However, this view is too restricted. The World Heritage Committee makes its decision on the basis of a comprehensive assessment and evaluation of

¹⁷⁹ See above in the text, at note 10.

¹⁸⁰ See in the text, after footnote 173.

those criteria that play a role. Thereby, it does not necessarily consider all criteria as equal; single elements might have a different weight and rank. Accordingly, it cannot be overlooked that in the case of Cologne Cathedral its visibility, even from distant places, was the decisive factor for putting it on the List. Furthermore, a property fulfilling one of the criteria does not automatically qualify for inscription; it may be that only the sum of various criteria leads the World Heritage Committee to its positive decision in a particular case with the consequence that, if a certain criterion had not existed, the Committee would not have made its decision. Hence, it cannot be concluded in the Cologne case that the World Heritage Committee would overstep its responsibilities if it decided to delete the Cathedral from the World Heritage List.

Moreover, although leading to the same result, there is a second possible way to interpret the provisions of the World Heritage Convention with regard to a deletion of properties from the List: this approach, again, considers the function of the deletion from the World Heritage List in the regime of world heritage protection. For the World Heritage Convention does not provide any traditional means of enforcement, in particular sanctions such as imposing a fine or excluding the state from certain possibilities of participation, the delisting can be qualified as an ultimate compliance mechanism with the inscription on the List of World Heritage in Danger as preparatory procedure; this would also explain why the State Party's consent or agreement is not necessary for such a requirement would be counter-productive. This interpretation does not contradict the general opinion often stressed with regard to the inscription of property on the List of World Heritage in Danger that the Committee is not allowed to use the instruments laid down in the World Heritage Convention as a punishment of, or sanction against, a State Party.¹⁸¹ Instead, the deletion of properties from the World Heritage List is an *informal means of coercion* to conserve a historic monument or site, based on the assumption that the state still wishes its property to be listed on the World Heritage List¹⁸² and will possibly react in favour of compliance with its Conventional duties in order to avoid the delisting or rather to regain the inscription. Accordingly, the World Heritage Committee could use the deletion of a property from the World Heritage List as a measure to enhance compliance of last re-

¹⁸¹ Cf., e.g., UNESCO, *World Heritage in Danger*, available at: <<http://whc.unesco.org/pg.cfm?cid=158>>.

¹⁸² Cf. E. Brown Weiss, "Rethinking compliance with international law", in: Benvenisti/ Hirsch, see note 79, 134, 148.

sort in cases where a State Party of the World Heritage Convention either totally neglects or does not carefully fulfil its duties under the Convention. Although the Committee has, until now, never implemented the provisions about the deletion of properties from the World Heritage List; so that so far no property has ever been taken from the List,¹⁸³ at least the possibility is an effective threat as the Cologne case finally indicated. Hence, the Committee could break with its tradition and set an example by delisting Cologne Cathedral in order to make the Federal Republic of Germany comply with its duties according to arts 4 and 5 of the World Heritage Convention.

A third approach could possibly rely on a breach of an international agreement. It could be argued that under the international regime of the UNESCO's world heritage protection there exists not only the World Heritage Convention as multilateral agreement; rather, the Convention is concretized by a series of bilateral agreements which are concluded by, on the one hand, the application of the State Party to inscribe a property on the World Heritage List and, on the other hand, the acceptance of that application by the World Heritage Committee in form of a decision to inscribe the property on the List. As a consequence, the Committee could be allowed to terminate such a bilateral agreement in cases of its breach by the State Party according to article 60 para. 1 of the Vienna Convention on the Law of Treaties;¹⁸⁴ conversely, the State Party could have the chance to terminate such an agreement by reason of a fundamental change of circumstances according to article 62 para. 1 of the Vienna Convention. However, this model seems to be too fabricated and unrealistic. The State Party's application is a mere procedural requirement; it is not directed to the conclusion of an additional international agreement. The Committee's decision, on the other hand, is a mere administrative measure; it does not aim at founding new international obligations of the State Party but only concretizes duties that already exist under the World Heritage Convention. Thus, the better arguments speak against identifying the procedure of inscribing a property in the World Heritage List as an additional international agreement; therefore, the delisting of a single property cannot be justified by a breach of such an additional agreement. But it is possible that UNESCO, by a decision of its General Assembly, terminates the Conventional relationship towards a State Party breaching the Convention according to the rules of the Vienna Convention. A State Party wanting

¹⁸³ Cf. Strasser, see note 144, 215, 219 and 254.

¹⁸⁴ See note 113.

to end its duties under the World Heritage Convention may denounce it according to article 35 of the Convention.

To sum up, arts 4 and 5 of the World Heritage Convention stipulate the general or rather action-related duties of the States Parties of the Convention. These duties are concretized with regard to a certain item of the cultural or natural heritage by the decisions of the World Heritage Committee to inscribe a property on the World Heritage List. The inscription of a property on the List of World Heritage in Danger and the deletion of a property from the World Heritage List can be understood as mechanisms to enhance compliance in the form of the so-called reputation enforcement in cases where States Parties do not fulfil their duties under the Convention. In the Cologne case, the World Heritage Committee could choose these measures to force the German authorities to comply, for they did not sufficiently take care of the protection or rather the view of Cologne Cathedral, which are part of Germany's duties, as enshrined in arts 4 and 5 of the Convention by the decision of the World Heritage Committee of December 1996.

After explanations with regard to the international regime, I will show in the next section how and to what extent the provisions of the World Heritage Convention should be considered by the German state and local authorities according to the rules of national law.

IV. The Failed Implementation of the World Heritage Convention in the German Legal Sphere and Its Consequences

According to general international law, a state must fulfil its duties resulting from treaties, agreements, and conventions but it is, in principle, free as to how to achieve this.¹⁸⁵ In a state in which the rule of law prevails, like in the Federal Republic of Germany, international duties such as those under arts 4 and 5 of the World Heritage Convention can only

¹⁸⁵ Cf. C. Tomuschat, "Die staatsrechtliche Entscheidung für die internationale Offenheit", in: J. Isensee/ P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. 7, 1992, § 172, 21; M. Niedobitek, *Das Recht der grenzüberschreitenden Verträge*, 2001, 151; P. Kunig, "Völkerrecht und staatliches Recht", in: W. Graf Vitzthum (ed.), *Völkerrecht*, 3rd edition, 2004, Part 2, 33; M. Zuleeg, "Abschluß und Rechtswirkung völkerrechtlicher Verträge in der Bundesrepublik Deutschland", *JA* 15 (1983), 1 et seq. (6).

be fulfilled if they are introduced in the domestic legal sphere where they can bind concrete parts of the state organization. In the Federal Republic of Germany, the common opinion holds that the relationship between international and domestic law is that of moderate dualism which means that both form separate legal systems.¹⁸⁶ The validity of international law in the German legal sphere is either exceptionally based on a constitutional order to apply it, namely article 25 of the German Constitution, the Basic Law (*Grundgesetz*), or on a special act of state, in particular a treaty law according to article 59 para. 2 sentence 1 of the Basic Law or an ordinance in the cases of article 59 para. 2 sentence 2 of the Basic Law.

Thereby, it is a matter of debate whether the provision of article 25 of the Basic Law or the legal act according to article 59 para. 2 of the Basic Law either transform the international norm into German law, which is stated by the older transformation theory, or rather issue a legal order to apply the norm, which is claimed by the enforcement theory.¹⁸⁷ The dispute may gain significance when a norm of international law is repealed or amended after it has been implemented in domestic law but this is not decisive in the Cologne Cathedral case.

It is now demonstrated that the World Heritage Convention had been implemented in German domestic law neither by article 25 nor by article 59 para. 2 of the Basic Law; the result may be surprising.

¹⁸⁶ Cf., e.g., K. Doehring, *Völkerrecht*, 2nd edition, 2004, 696 et seq.; S. Hobe/O. Kimminich, *Einführung in das Völkerrecht*, 8th edition, 2004, 224 et seq.; G. Dahm/J. Delbrück/R. Wolfrum, *Völkerrecht*, Vol. I/1, 2nd edition, 1989, 98 et seq.

¹⁸⁷ Concerning this dispute see, e.g., C. Amrhein-Hofmann, *Monismus und Dualismus in den Völkerrechtslehren*, 2003, 298 et seq.; C. Koenig, article 25, in: H. von Mangoldt/F. Klein/C. Starck (eds), *Grundgesetz. Kommentar*, Vol. 2, 5th edition, 2005, 36 et seq.; B. Kempen, article 59, *ibid.*, 88 et seq.; Niedobitek, see note 185, 157 et seq.; O. Rojahn, article 59, in: I. von Münch/P. Kunig (eds), *Grundgesetz-Kommentar*, Vol. 2, 5th edition, 2003, 33a; the enforcement theory should be preferred, cf. H. Steinberger, "Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen", *ZaöRV* 48 (1988), 1 et seq. (3 et seq., 14), referring to BVerfGE 46, 342, 363.

1. No Implementation by Article 25 of the Basic Law

Article 25 of the Basic Law reads that the general rules of public international law form part of the Federal law; they take precedence over the (national) laws and directly create rights and duties for the inhabitants of the Federal territory. The notion “general rules of international law” means customary law¹⁸⁸ and general principles of international law, in particular *jus cogens*.¹⁸⁹ The duties of the States Parties laid down in arts 4 and 5 of the World Heritage Convention do not fall under that notion.

2. No Implementation by Article 59 Para. 2 Sentence 1 of the Basic Law

Article 59 para. 2 sentence 1 of the Basic Law is a special rule for the implementation of international duties which are based on treaties. The provision states that treaties which regulate the political relations of the Federation (*Bund*) or relate to matters of federal legislation require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation. Thus, the implementation of an international treaty such as the World Heritage Convention in the German legal sphere takes place by the competent legislative organs of the Federation passing a so-called consensual or treaty act relating to the international treaty (the Convention) and the President of the Federal Republic publishing it in the Federal Law Gazette.¹⁹⁰

The World Heritage Convention had not been implemented in the German legal sphere by a treaty act according to article 59 para. 2 sentence 1 of the Basic Law. The Federal Republic of Germany which is a

¹⁸⁸ Concerning international customary law concerning the protection of cultural heritage, which includes the prohibition to disturb or take away foreign cultural assets in case of military conflict, see Odendahl, see note 157, 124 et seq.

¹⁸⁹ Cf., e.g., R. Streinz, article 25, in: M. Sachs (ed.), *Grundgesetz. Kommentar*, 3rd edition, 2003, 32 et seq.; I. Pernice, article 25, in: H. Dreier (ed.), *Grundgesetz. Kommentar*, Vol. 2, 1998, 15 et seq. (25).

¹⁹⁰ Cf., e.g., C. Engel, *Völkerrecht als Tatbestandsmerkmal deutscher Normen*, 1989, 30.

member of UNESCO¹⁹¹ ratified the World Heritage Convention on 23 August 1976 and published that in the Federal Law Gazette¹⁹² but a treaty act, contrary to the current unanimous basic assumption in legal literature,¹⁹³ does not exist. Recent enquiries made by the Foreign Secretary revealed that the ratification of the Convention in 1976 was based on a cabinet decision of the Federal Government which had previously consulted the Federal states according to the so-called Agreement of Lindau – Agreement Between the Federal Government and the Federal States’ Chancelleries About the Federation’s Right to Conclude International Treaties of 14 November 1957¹⁹⁴ that governs the participation of the Federal states in cases where the Federal Republic is going to ratify an international treaty relating to matters in which the Federal states have legislative competences.¹⁹⁵ That procedure had been chosen because the then members of the Federal Government and of the Federal states’ governments held that the legal situation at that time already corresponded with the requirements of the Convention so that there was no need for further legislative measures.¹⁹⁶ As a consequence, the World Heritage Convention has not become part of the objective legal system of the Federal Republic of Germany according to article 59 para. 2 sentence 1 of the Basic Law.

¹⁹¹ See at: <http://portal.unesco.org/geography/en/ev.php-URL_ID=3329&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

¹⁹² See *Bekanntmachung des Übereinkommens zum Schutz des Kultur- und Naturerbes der Welt* of 2 February 1977, BGBl. 1977 II, 215.

¹⁹³ Cf., e.g., Caspary, see note 155, Part A, 132 et seq.; F. Fechner, *Rechtlicher Schutz archäologischen Kulturguts. Regelungen im innerstaatlichen Recht, im Europa- und Völkerrecht sowie Möglichkeiten zu ihrer Verbesserung*, 1991, 97 et seq.; F. Hammer, *Die geschichtliche Entwicklung des Denkmalrechts in Deutschland*, 1994, 347 et seq.; Hotz, see note 35, 163 et seq.; Odendahl, see note 157, 244 and passim.

¹⁹⁴ Available, e.g., at: <<http://www.lexexakt.de/glossar/lindauerabkommentxt.php?PHPSESSID=b24713d801c721596424b4feb6e72992>>.

¹⁹⁵ See in detail H.J. Papier, “Abschluß völkerrechtlicher Verträge und Föderalismus”, *DÖV* 56 (2003), 265 et seq.

¹⁹⁶ So the telephone information given by the Foreign Secretary on 20-21 April 2006.

3. The Status of the Convention under Article 59 Para. 2 Sentence 2 of the Basic Law

For the World Heritage Convention to be a binding treaty of the Federal Republic of Germany under international law which is not covered by article 59 para. 2 sentence 1 of the Basic Law, it must be an administrative agreement in the sense of article 59 para. 2 sentence 2 of the Basic Law. That provision which must be seen in connection with article 59 para. 2 sentence 1 of the Basic Law reads that for administrative agreements the provisions concerning the Federal administration apply *mutatis mutandis*. This means that any other international treaties than those subsumed under article 59 para. 2 sentence 1 of the Basic Law are concluded and executed according to the provisions about the Federal administration.¹⁹⁷ That the Federal Government, in fact, intended to conclude an administrative agreement is indicated by a reservation that was made when the instrument of ratification was deposited at UNESCO. At that time, the Federal Government declared that the Federal Republic of Germany should not be bound to the provisions of article 16 para. 1 of the Convention. This article rules the payment of regular contributions to the World Heritage Fund. To fulfil the financial obligations under that article, it would have been necessary according to German domestic law to write a new clause in the budget which has the legal form of a formal act; thus, a legislative measure would have been needed.¹⁹⁸

If the World Heritage Convention is to be qualified as an administrative agreement in the sense of article 59 para. 2 sentence 2 of the Basic Law, the question arises what is the status of its provisions in the domestic legal sphere. There does not seem to exist any explicit jurisdiction with regard to that point. The predominant view in legal literature is that administrative agreements do not automatically achieve domestic validity; rather, it is always required that there is a legal act of the executive.¹⁹⁹ As far as the provisions of international law shall have the

¹⁹⁷ See E. Härle, "Die völkerrechtlichen Verwaltungsabkommen der Bundesrepublik. Ein Beitrag zu Art. 59 Abs. 2 Satz 2 des GG", *JIR* 12 (1965), 63 et seq. (95).

¹⁹⁸ Cf. J. Kokott, "Art. 59 Abs. 2 GG und einseitige völkerrechtliche Akte", in: K. Hailbronner/ G. Ress/ T. Stein (eds), *Staat und Völkerrechtsordnung. Festschrift für Karl Doehring*, 1989, 503 et seq. (517).

¹⁹⁹ R. Geiger, *Grundgesetz und Völkerrecht*, 3rd edition, 2002, 177; Niedobitek, see note 185, 154 et seq.; F.J. Jasper, *Die Behandlung von Verwal-*

same effect in the domestic sphere as has objective Federal law, they must, thus, be given validity by an ordinance which has the status of substantive law subordinated to adjective legislative acts; the ordinance is the legal order to apply the norm or rather the transformation act. However, as yet no ordinance concerning the World Heritage Convention has been passed, so that the Convention, thus, has not reached the status of objective law in the German domestic sphere.

Moreover, it is held that administrative agreements containing provisions that could be ruled domestically by administrative regulations are “ordered” for application by an official instruction or administrative regulation issued by the competent organs or authorities. Even administrative agreements that should have internal validity for the organ or authority itself and should not have direct legal effects in relation to citizens need such an act, for they only generate treaty obligations of the Federal Republic of Germany on the international level but not obligations of the particular organs and authorities which act domestically for the Federal Republic.²⁰⁰ The principle of dualism speaks in favour of this solution.

Hence, the legal nature of the introducing state act determines the administrative agreement’s legal quality in the domestic sphere.²⁰¹ The World Heritage Convention has been adopted by a cabinet decision of the Federal Government, which has the legal quality of internal law, and, thus, shares this quality. After all, the Convention does not have the validity of formal Federal law. Accordingly, the Convention as such cannot bind the Federal states or the municipalities.

This does not preclude that the duties of the Federal Republic of Germany under international law have certain relevance in domestic adjudicative or administrative procedures to that extent that they must be observed by the courts and administrative authorities as “law” in the sense of article 20 para. 3 of the Basic Law. This provision reads in its second part that the executive and the judiciary are bound by the law. In jurisdiction, there does not yet exist a clear statement with regard to that aspect. However, the relevance of Germany’s international duties in the domestic sphere is a result of the principle of the Basic Law’s friendly attitude towards international law: as the Federal Constitutional Court has rightly pointed out several times, the Basic Law takes

tungsabkommen im innerstaatlichen Recht (Art. 59 Abs. 2 S. 2 GG), 1980, 165.

²⁰⁰ Rojahn, see note 187, article 59, 56.

²⁰¹ Kempen, see note 187, article 59, 107.

as a basis that the state, which is constituted by it, is integrated in the international legal system.²⁰² Thus, the Basic Law obliges all kinds of state authorities to friendly behaviour towards international law, even those outside the general rules of international law which are covered by article 25 of the Basic Law, in particular international treaty law binding for Germany.²⁰³ An interpretation of domestic law which friendly or positively takes into consideration the provisions of international law is, to that extent required.²⁰⁴ The state authorities have to interpret the proper domestic law in the light of the international obligations of the Federal Republic.²⁰⁵ Furthermore, the principle of friendly behaviour towards international law, according to the view of the Federal Constitutional Court, obliges all state organs “to obey the norms of international law which are binding for the Federal Republic of Germany and to omit, as far as possible, violations.”²⁰⁶ The state and

²⁰² BVerfGE 75, 1, 17; 108, 129, 137; 111, 307, 318; see in this context already the analyses of: C. Tomuschat, “Der Verfassungsstaat im Geflecht der internationalen Beziehungen”, *VVDStRL* 36 (1978), 7 et seq. (16 et seq.); K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, 1964, 35 et seq.

²⁰³ Cf. BVerfGE 18, 112, 121; 31, 58, 75 et seq.; 63, 343, 370; 71, 1, 17; from literature, e.g., A. Bleckmann, “Der Grundsatz der Völkerrechtsfreundlichkeit der deutschen Rechtsordnung”, *DÖV* 49 (1996), 137 et seq.; C. Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts*, 2005, 130, 220; Streinz, see note 189, article 59, 9; M. Zuleeg, article 25, in: E. Denninger/ W. Hoffmann-Riem/ H.P. Schneider/ E. Stein (eds), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (Alternativkommentar)*, 3rd edition, 2001, 33 et seq. (loose-leaf book; state: August 2005).

²⁰⁴ BVerfGE 63, 1, 20; A. Bleckmann, “Die Völkerrechtsfreundlichkeit der deutschen Rechtsordnung”, *DÖV* 32 (1979), 309 et seq. (312 et seq.); S. Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz*, 1998, 140; R. Hofmann, article 25, in: D.C. Umbach/ T. Clemens (eds), *Grundgesetz (Mitarbeiterkommentar)*, Vol. 1, 2002, 20; Rojahn, article 25, see note 187, 24; Tomuschat, § 172, see note 185, 27; see also BVerfGE 59, 63, 89.

²⁰⁵ Cf. in this context O. Rojahn, “Die Auslegung völkerrechtlicher Verträge in der Entscheidungspraxis des Bundesverwaltungsgerichts”, in: R. Geiger (ed.), *Völkerrechtlicher Vertrag und staatliches Recht vor dem Hintergrund zunehmender Verdichtung der internationalen Beziehungen*, 2000, 123, 138 et seq.

²⁰⁶ Federal Constitutional Court, *NVwZ* 24 (2005), 561 et seq. (562); see also H.D. Jarass, in: H. D. Jarass/ B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, 8th edition, 2006, article 59, 4.

also the municipal authorities are, thus, obliged to avoid everything that contravenes the international duties of the Federal Republic. Thus, the duties of the Federal Republic under arts 4 and 5 of the World Heritage Convention must be observed by the German domestic authorities when interpreting statutory law in the context of judicial or administrative procedures.

Finally, the question may arise whether the provisions of the Convention are not exceptionally irrelevant for the domestic sphere due to an infringement of the Constitution, i.e. of article 59 para. 2 sentence 1 of the Basic Law. The conclusion of an international treaty covered by article 59 para. 2 sentence 1 of the Basic Law is, under the perspective of constitutional law, only admissible on the basis of a treaty act. It is, thus, decisive how the definitional elements “relate to matters of Federal legislation,” which assign a treaty to the constitutional requirement of implementation by a treaty act, are to be understood. According to the common opinion in literature and the jurisdiction of the Federal Constitutional Court, a relation to matters of Federal legislation is only given if “in the concrete case an executive act requiring the participation of the legislative bodies will be necessary.”²⁰⁷ Thus, the rule in article 59 para. 2 sentence 1 of the Basic Law protects the legislator against being forced to take action with regard to the execution of international treaty law without his previous consent.²⁰⁸

When Germany ratified the World Heritage Convention, the Federation and the Federal states, as the Foreign Secretary investigated, had been in agreement that their legal situation was in accordance with the provisions of the Convention, so that actually no legislative activity need take place. If this assumption was correct, which we must suppose because there are no clues to the opposite, the World Heritage Convention does not have a sufficient relation to matters of Federal legislation according to the understanding of common opinion. As a consequence, when following that view, article 59 para. 2 sentence 1 of the Basic Law was not pertinent and the conclusion of the Convention had been possible, without the consent of the Parliament in form of a Federal act, as an administrative agreement according to article 59 para. 2 sentence 2 of the Basic Law. Thus, the World Heritage Convention was not ratified

²⁰⁷ BVerfGE 1, 372, 388.

²⁰⁸ See BVerfGE 1, 372, 388 et seq.; Jarass, see note 206, article 59, 13; Jasper, see note 199, 88; Rojahn, see note 187, article 59, 23; M. Schweitzer, *Staatsrecht*, Vol. 3, 8th edition, 2004, 167; Streinz, see note 189, article 59, 31; W. Rudolf, *Völkerrecht und deutsches Recht*, 1967, 193.

by infringing the constitutional provision of article 59 para. 2 sentence 1 of the Basic Law. After all, the statement still stands that the duties under the Convention are to be considered by the state and municipal authorities within the framework and the bounds of the wording of the relevant Federal law or Federal state law provisions.

4. No Exclusion of the Duty to Consider the Convention by Article 34 (b) of the Convention

However, against a duty of the German Federal states and municipalities in general and the Federal State of North Rhine-Westphalia and the City of Cologne in particular to consider the obligations of the Federal Republic under arts 4 and 5 of the World Heritage Convention could be posited article 34 (b) of the Convention. This article stipulates with regard to federal constitutional systems that “with regard to the provisions of this Convention, the implementation of which comes under the legal jurisdiction of individual constituent States, countries, provinces or cantons that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States, countries, provinces or cantons of the said provisions, with its recommendation for their adoption.” As we will see below, according to the domestic system of competences, the implementation or execution of arts 4 and 5 of the Convention is also a task of the German Federal states which have competences especially in the field of the protection of the substance of historic monuments.²⁰⁹ Thus, it is decisive whether the Federal states are obliged by the constitutional system of the Federation to take legislative measures. The common opinion rightly holds that there is such an obligation of the Federal states in Germany. That obligation is one aspect of the general principle of federal loyalty²¹⁰ which is a guarantor of

²⁰⁹ Cf. A. Jaeger, *Internationaler Kulturgüterschutz*, 1993, 25; Odendahl, see note 157, 259 et seq., 635.

²¹⁰ See, e.g., H. Bauer, *Die Bundestreue*, 1992, 358 et seq.; K. Göhner, “Wann sind Regelungen internationaler Übereinkommen bei der Anwendung nationalen Rechts zu beachten?”, *Denkmalschutz-Information* 29 (2005), 65 et seq. (66); Kunig, see note 185, part 2, 63; H.W. Bayer, *Die Bundestreue*, 1961, 37 et seq.; H. Mosler, “Kulturabkommen des Bundesstaats. Zur Frage der Beschränkung der Bundesgewalt in auswärtigen Angelegenheiten”, *ZaöRV* 16 (1955/56), 1 et seq. (33 et seq.); in this direction also the decision BVerwGE 104, 29.

the cohesion of the federal system. Consequently, article 34 (b) of the World Heritage Convention does not allow the German authorities to ignore the Convention when interpreting domestic law. The Federal State of North Rhine Westphalia and the City of Cologne had to consider the concerns of world heritage protection in their decisions relating to the city planning measures *vis-à-vis* Cologne Cathedral.

Since the World Heritage Convention is suffering from a lack of implementation in the German legal system and must, thus, only be considered within the framework and the bounds of the relevant Federal or Federal state law, we will examine in the following what progress the Federation and the Federal states have made with regard to the protection of cultural world heritage and where are possible starting points or rather links in domestic law for the provisions of the Convention.

V. The Execution of Competences with regard to World Heritage Protection on the Level of the Federal Republic of Germany

For the activities of the Federation and of the Federal states that are connected with, and based on, their prevailing legislative and administrative competences, it is necessary to give an overview of the division of competences in the field of cultural heritage protection in Germany. That division is laid down in the Basic Law. Unlike the Weimar Constitution of the year 1919,²¹¹ the Basic Law does not explicitly provide a Federal legislative competence in the field of the preservation of historic monuments. But there is a series of special titles for Federal legislation that can be linked to the protection of cultural heritage.

²¹¹ Cf., e.g., A. Hense, "Reform des Denkmalrechts? Eine Problemskizze zu Notwendigkeit und Entwicklungsperspektiven vor dem Hintergrund aktueller staats- und verwaltungsrechtswissenschaftlicher Reformdiskussionen", in: A. Hense (ed.), *Denkmalrecht unter Denkmalschutz? Aktuelle rechtspolitische, verfassungs- und verwaltungsrechtliche Probleme von Denkmalschutz und Denkmalpflege*, 2003, 79, 85.

1. Legislative Competences and their Execution in the Field of World Heritage Protection

First, the Federation is competent in protecting German cultural treasures against removal abroad. Originally, that title was construed as a concurrent power and ruled in article 74 para. 1 No. 5 of the Basic Law; later, as a consequence of the Amendment of the Basic Law of 27 October 1994,²¹² it was transferred into the catalogue of the Federation's powers to pass framework legislation (see article 75 para. 1 No. 6 of the Basic Law). That reduction of Federal power aimed at strengthening the cultural sovereignty of the Federal states.²¹³ A second important competence of the Federation is the exclusive power to legislate on foreign affairs and defence, including the protection of the civilian population (article 73 No. 1 of the Basic Law). The Federation is, furthermore, competent in all matters of private law (article 74 para. 1 No. 1 of the Basic Law) which entitles it to regulate the ownership of cultural assets. Other relevant Federal competences are the concurrent powers in the fields of war graves (article 74 para. 1 No. 10a of the Basic Law) and land law (article 74 para. 1 No. 18 of the Basic Law). The land law includes the general law on town planning²¹⁴ and the law on historic monument protection in urban planning processes.²¹⁵ Additionally, there exist some indirectly relevant competences concerning environmental law and the law on the care for the countryside (article 74 para. 1 No. 24 and article 75 para. 1 No. 3 and 4 of the Basic Law).²¹⁶ Apart from these explicit powers, there are two implicit powers: bringing cul-

²¹² BGBl. 1994 I, 3146.

²¹³ Cf. Printed Documentation of the Federal Parliament (*Bundestags-Drucksache*) 12/6000, 34; M.D. Müller, *Auswirkungen der Grundgesetzrevision von 1994 auf die Verteilung der Gesetzgebungskompetenzen zwischen Bund und Ländern*, 1996, 126.

²¹⁴ BVerfGE 3, 407, 424; 65, 283, 288; 77, 288, 299.

²¹⁵ Federal Constitutional Court (Chamber), *NVwZ* 6 (1987), 879; Odendahl, see note 157, 292; C. Degenhart, article 74, in: Sachs, see note 189, 67; P. Kunig, article 74, in: I. von Münch/ P. Kunig (eds), *Grundgesetz-Kommentar*, Vol. 3, 5th edition, 2003, 82; B. Pieroth, article 74, in: H.D. Jarass/ B. Pieroth, see note 206, 38; W. Hoppe/ C. Bönker, "Das Verhältnis von örtlicher Landschaftsplanung und Bauleitplanung. Unter dem Blickwinkel der Gesetzgebungszuständigkeit von Bund und Ländern", *DVBl.* 99 (1996), 585 et seq. (586).

²¹⁶ See in this context Fechner, see note 193, 21; W. Bülow, *Rechtsfragen flächen- und bodenbezogenen Denkmalschutzes*, 1986, 74, 96 et seq.

tural assets back to Germany, which had been removed abroad in times of war, falls into the Federation's competence by virtue of the nature of the subject.²¹⁷ The same goes for the power to finance culture, especially to support cultural treasures of national importance.²¹⁸

In all other fields of direct and indirect protection of cultural heritage it is not the Federation but the Federal states which are competent (cf. article 70 para. 1 of the Basic Law stating that the Federal states have the power to legislate insofar as the Basic Law does not confer legislative powers on the Federation). This is of particular concern for the protection of movable and immovable cultural treasures against modification or deterioration, and the continuing care of them. As already mentioned, the protection of historic substance as such falls into the competence of the Federal states.²¹⁹ Since the World Heritage Convention mainly has the purpose of protecting world cultural heritage in its substance, the Federal states' competence was touched when the Federal Republic of Germany became State Party to the Convention. That is the reason why the Federal Government consulted the Federal states before ratifying the World Heritage Convention (cf. para. 3 of the Agreement of Lindau). The Federal states, furthermore, prepare, for instance, the national lists for the nomination of properties and present them to the Federation.²²⁰ If the Convention had been implemented

²¹⁷ Cf. E.G. Mahrenholz, "Die Kultur und der Bund. Kompetenzrechtliche Erwägungen anlässlich der Gründung der Bundeskulturstiftung im März 2002", *DVBl.* 105 (2002), 857 et seq. (859).

²¹⁸ Cf. Fechner, see note 193, 22; W. Maihofer, "Kulturelle Aufgaben des modernen Staates", in: E. Benda/ W. Maihofer/ K. Vogel (eds), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, 2nd edition, 1995, 1201, 1256; Mahrenholz, see note 217, 864 et seq.; dissenting: T. Köstlin, *Die Kulturhoheit des Bundes. Eine Untersuchung zum Kompetenz- und Organisationsrecht des Grundgesetzes unter Berücksichtigung der Staatspraxis in der Bundesrepublik Deutschland*, 1989, 98 et seq.; E.R. Hönes, "Über die Kompetenz der Länder zur Feststellung der besonderen nationalen kulturellen Bedeutung von Kulturdenkmälern bei Subventionen", *BayVBl.* 49 (2000), 169 et seq. (173 et seq.); id., "Zur Förderung national bedeutsamer Denkmäler durch den Bund", *NuR* 22 (2000), 426 et seq. (429 et seq.) In detail about the Federation's competences in the field of cultural heritage protection, e.g., Odendahl, see note 157, 258 et seq.; B. Küster, *Die verfassungsrechtliche Problematik der gesamtdeutschen Kunst- und Kulturpflege in der Bundesrepublik Deutschland*, 1990, 295 et seq.

²¹⁹ See above in the text, at footnote 209.

²²⁰ Cf. *Vorläufige Liste der Kultur- und Naturgüter, die in den Jahren 2000-2010 von der Bundesrepublik Deutschland zur Aufnahme in die UNES-*

adequately in the German legal sphere, the Federal states would, thus, play internally, within the federal structure of Germany, an important role with regard to transformation and execution of the international obligations and standards that result from the World Heritage Convention;²²¹ but even without the implementation they were not at all idle, as we will see below.

Moreover, the Federal legislator fulfils the Federal Republic of Germany's obligations in particular under article 5 of the World Heritage Convention by a series of legal acts which enforce the concerns of world heritage protection announced by the Convention. For example, the Federal Parliament decided to pass the Act on Considering the Protection of Historical Monuments in Federal Law of 1 June 1980²²² which did not have an independent area of application but amended or rather expanded Federal regulations relevant to public security and planning.²²³ In most cases, the protection of historic sites was, thereby, explicitly declared a public concern that must be taken into consideration in the planning process, where competing concerns must be weighted and balanced against each other. While the reform, largely, did not change the substantial legal situation, it led, at least, to a clarification.²²⁴ Furthermore, it had procedural consequences, for the authorities that are primarily competent in the protection of historic monuments, since then, had to be involved and heard in many land-related planning procedures. Moreover it was important that the reform had the function of a signal that historic monuments are of public interest and should play a role in planning processes which principally focus on the future and not on the past.²²⁵ Meanwhile, some acts have been replaced, for instance, the Federal Railway Act in 1993 by the General Act on Railways²²⁶ and the Telegraphic Ways Act in 1996 by the Tele-

CO-Liste des Kultur- und Naturerbes der Welt angemeldet werden sollen. Decision of the Conference of the Ministers for Cultural Affairs (*Kultusministerkonferenz*) of 23 October 1998, available at: <http://www.kmk.org/doc/beschl/VORLISTENAT_2000.pdf>.

²²¹ Cf. Odendahl, see note 157, 260; Schweitzer, see note 208, 451 et seq.; R. Streinz, *Internationaler Schutz von Museumsgut*, 1998, 65.

²²² BGBl. 1980 I, 649.

²²³ Cf. M. Backhaus, *Denkmalrecht in Niedersachsen*, 1988, 26 et seq.

²²⁴ Cf. Fechner, see note 193, 22.

²²⁵ Odendahl, see note 157, 291.

²²⁶ BGBl. 1993 I, 2378.

communication Act.²²⁷ The succeeding norms, nevertheless, still call for taking account of historic monument protection concerns during the planning process, though only as *one* aspect of “public concerns” (sec. 18 para. 1 sentence 1 General Act on Railways) or “urban development concerns” (sec. 68 para. 3 sentence 2 Telecommunication Act) which is a very general phraseology.²²⁸ Hence, one could say that the norms of the World Heritage Convention are, to a certain extent, expressed indirectly by the provisions of planning law.

However, the great act on municipal development planning, the Federal Building Act, since the middle of the eighties the Town and Country Planning Code or rather Building Code, was not amended during the reform of the year 1980. The reason was that, not least against the background of the international negotiations about the protection of world heritage and the approaching ratification of the World Heritage Convention, in 1976 the protection of historic monuments had already been integrated into the law on development plans for local real estate.²²⁹ That measure, essentially, also had a merely affirming nature because jurisdiction had acknowledged even before that time that the protection of historic sites is a public concern which cities and towns have to consider when making plans about the future use of grounds and the development of urban areas.²³⁰ Later, the rules about the protection of historic monuments were transferred from the Federal Building Act into the Building Code of 1986²³¹ and partially expanded.²³² The most important provision of the actual²³³ Building Code is section 1 para. 6 No. 5 reading that in the preparation of land-use plans attention is to be paid to the requirements relating to building culture, protection and preservation of historic monuments, to parts of a village or town, streets and public places of historic, artistic or archi-

²²⁷ BGBl. 1996 I, 1120 (see now BGBl. 2004 I, 1190).

²²⁸ Cf. Odendahl, see note 157, 291.

²²⁹ *Gesetz zur Änderung des Bundesbaugesetzes* of 18 August 1976, BGBl. 1976 I, 2221; see in detail about that reform Hammer, see note 193, 341 et seq.

²³⁰ Cf. Higher Administrative Court of Baden-Württemberg, *Entscheidungssammlung des VGH* 23 (1974), 188 et seq. (193).

²³¹ *Gesetz über das Baugesetzbuch* of 8 December 1986 (BGBl. 1986 I, 2191).

²³² See the rules concerning the protection of historical monuments in the initial version of the Building Code W. Kleiber, “Baugesetzbuch und Denkmalschutz”, *Die alte Stadt (DAS)* 13 (1986), 305 et seq.

²³³ BGBl. 2004 I, 2414.

tectural importance which warrant conservation.²³⁴ Furthermore, section 1 para. 5 of the Building Code rules that the development plans shall contribute to preserve, under aspects of building culture, the urban character of sites and the appearance of the locality or the landscape. Finally, section 35 paras 2 and 3 No. 5 of the Building Code stipulate that in undesignated outlying areas, for which a land-use plan does not exist, non-privileged development projects may be permitted as exceptional cases provided that their execution and use do not conflict with any public interests; such a conflict exists in particular where the development project is in conflict with the concerns of the protection of sites of historic interest or mars the overall appearance of the locality or of the landscape.²³⁵ These provisions enable the municipal planning authorities, so to say in a “well-known legal terrain”, to consider extensively the concerns of the World Heritage Convention in their planning processes when the Federal Republic’s obligations under arts 4 and 5 of the Convention are read into the norms of planning law concerning the weighing and balancing of interests. By the way, even without the protection of historic monuments being explicitly mentioned in the norms of planning law, Germany’s international obligations must be considered at least as a public concern or interest according to section 1 para. 7 of the Building Code because of the Constitution’s principle of friendly behaviour towards international law²³⁶ (see also sec. 1 para. 6 of the Building Code saying that the explicitly mentioned concerns must be considered: “in particular” which shows that the enumeration is not closed). Section 1 para. 7 of the Building Code contains the general rule that in preparing land-use plans, (all relevant) public and private interests are to be duly weighed.

Apart from planning law, many Federal provisions regulating the prerequisites for granting special permits read that permission is not allowed to be granted if the project for which it is applied will endanger

²³⁴ Concerning public interest in the conservation of historic monuments see J. von Faber du Faur, *Der Begriff des öffentlichen Erhaltungsinteresses im Denkmalschutzrecht*, 2004, 7 et seq.

²³⁵ In detail about the norms of the Building Code relating to the protection of historic monuments A. Nöth, *Staatliche Förderung denkmalgeschützter Gebäude*, 1999, 47 et seq.; W. Ollenik/ J.A.E. Heimeshoff, *Denkmalschutz und Denkmalpflege in der kommunalen Praxis*, 2005, 28 et seq.; K.O. Schmittat, *Denkmalschutz und gemeindliche Selbstverwaltung*, 1988, 124 et seq.

²³⁶ See above in the text at footnote 202.

public welfare or important public concerns.²³⁷ Accordingly, permissions could or rather should be refused if the project will violate or harshly contravene obligations of the Federal Republic of Germany under international treaty law.²³⁸

2. Administrative Competences in the Field of World Heritage Protection

Irrespective the Federation's power to legislate the protection of historic monuments with regard to the specific requirements of town, city or other kind of planning, the exercise of governmental powers and the discharge of governmental functions are incumbent on the Federal states insofar as the Basic Law does not otherwise prescribe or permit (see article 30 of the Basic Law). This means that the administrative activities including both the execution of laws and other forms of administration²³⁹ are, in principle, a matter and concern of the Federal states and not of the Federation. That is also true for the field of heritage protection, regardless of whether the execution of national or international norms is concerned;²⁴⁰ administrative and legislative competences are, insofar, not congruent.

According to the general rule of article 83 of the Basic Law, the Federal states execute Federal laws as matters of their own concern insofar as the Basic Law does not otherwise provide or permit. Town and city planning in general, that is ruled in the Building Code, and the protection of cultural world heritage within the context of that planning in particular, are not subject to an exemption provision. As a consequence,

²³⁷ See in this context the overview by W. Durner, *Konflikte räumlicher Planungen. Verfassungs-, verwaltungs- und gemeinschaftsrechtliche Regeln für das Zusammentreffen konkurrierender planerischer Raumansprüche*, 2005, 270 et seq. Examples are, i.e., the permission to use a stretch of water according to section 6 para. 1 of the Law on Water Resources Management which may be relevant in cases where industrial buildings will be erected next to a river or a lake, or to build an airport according to section 6 para. 2 of the Air Traffic Act.

²³⁸ Cf. with regard to the permission according to water law, e.g., G.M. Knopp, in: F. Siedler/ H. Zeitler/ H. Dahme (eds), *Wasserhaushaltsgesetz und Abwasserabgabengesetz* (loose-leaf book; state: July 2005), § 6 WHG, 7 et seq., 9a.

²³⁹ Cf., e.g., H. Maurer, *Staatsrecht*, Vol. 1, 3rd edition, 2003, § 18, 3 et seq.

²⁴⁰ Cf. Odendahl, see note 157, 261.

with regard to administration, the Federal states exercise the rules in the Building Code and of other Federal acts concerning the protection of world heritage as a matter of their own concern.

However, the Federal states are not totally free to do what they want. Instead, the Federation has certain rights to supervise and influence the Federal states to ensure that they execute the Federal laws in the right way. These rights or rather competences are laid down in article 84 of the Basic Law. Preventive means to guide the Federal states are general administrative rules which contain abstract regulations with regard to a multitude of cases²⁴¹ (cf. article 84 para. 2 of the Basic Law) and individual instructions which are binding orders on how to act in a particular case²⁴² (cf. article 84 para. 5 of the Basic Law). Individual instructions are, though, only admissible as a special exception, for they are a serious infringement of the Federal states' self-responsibility to execute the Federal laws.²⁴³ There must be an explicit authorization of the Federal Government in a Federal law requiring the consent of the Federal Council to issue individual instructions (article 84 para. 5 sentence 1 of the Basic Law). Furthermore, the individual instructions must be addressed to the highest authorities of the Federal state (which are the Federal state's ministers) unless the Federal Government considers the matter urgent (article 84 para. 5 sentence 2 of the Basic Law). That requirement reveals the remaining respect towards the organizational power of the Federal states.²⁴⁴ Hence, the Federation is, in principle, not allowed to manipulate the local authorities. In any case, legal authorizations to issue individual instructions are rare in practice. There are some in the law on military service and in migration law, but not in the law on town and city planning.²⁴⁵ Therefore, the Federation is not empowered to issue directly to a city administration, as a means of preventive supervision, individual instructions concerning city planning measures which (could) endanger world heritage monuments.

²⁴¹ Cf., e.g., A. von Bogdandy, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik*, 2000, 449 et seq.

²⁴² Cf., e.g., T. Groß, article 84, in: K.H. Friauf/ W. Höfling (eds), *Berliner Kommentar zum Grundgesetz*, Vol. 2 (loose-leaf book; state: December 2005), 35.

²⁴³ Cf. Groß, see note 242, article 84, 35 with further references.

²⁴⁴ A. Dittmann, article 84, in: Sachs, see note 189, 24.

²⁴⁵ Cf. Maurer, see note 239, § 18, 13; Dittmann, see note 244, article 84, 25 with footnote 99.

As means of repressive supervision the Constitution names the sending of commissioners (article 84 para. 3 sentence 2) and the formal reprimand (article 84 para. 4). Both procedures require that there are clues for concrete violations of Federal law.²⁴⁶ The execution of Federal law by the Federal state or local authorities must be in non-accordance with the applicable Federal rules; the Federal Government is, thus, restricted to a pure control of legality. It is not entitled to examine whether the measures or activities of the Federal state or of the local authority are suitable with regard to the purposes of the Federal norm or whether they are appropriate.²⁴⁷ Furthermore, the scopes for evaluation and discretion that are given by the norm have to be respected.²⁴⁸ Commissioners may be sent by the Federal Government to the highest authorities of the Federal state and, with their consent or, if this consent is refused, with the consent of the Federal Council, also to subordinate state and municipal authorities. The commissioners who have the position of help organs of the Federal Government²⁴⁹ can make examinations by inspecting files, questioning public servants, or other means of gathering information, but they are not entitled to give instructions; their job is merely investigative to clarify the facts.²⁵⁰

If the Federal Government finds shortcomings in the execution of Federal law in the Federal state, it may formally reprimand the state for having violated the law. If the Federal state, thereafter, corrects the insufficient legal situation, the procedure of Federal supervision ends. But if the Federal state holds that the formal reprimand was not well-founded and does not make any corrections, both parties can apply at the Federal Council to decide formally whether the Federal state has acted unlawfully (article 84 para. 4 sentence 1 of the Basic Law). If the Federal Council does not see any fault in the execution of Federal law or does not follow the application of the Federal Government in all points, the Federal Government can, on the one hand, refer the so-

²⁴⁶ Cf. Dittmann, see note 244, article 84, 42; G. Hermes, article 84, in: H. Dreier (ed.), *Grundgesetz. Kommentar*, Vol. 3, 2000, 76.

²⁴⁷ Cf. S. Broß, article 84, in: von Münch/ Kunig, see note 215, 31; Hermes, see note 246, article 84, 75; Maurer, see note 239, § 18, 13.

²⁴⁸ Cf. Maurer, see note 239, § 18, 13.

²⁴⁹ Dittmann, see note 244, article 84, 28.

²⁵⁰ Cf. Hermes, see note 246, article 84, 80; P. Lerche, article 84, in: T. Maunz/ G. Dürig (eds), *Kommentar zum Grundgesetz* (loose-leaf book; state: February 2005), 165; H.H. Trute, article 84, in: H. von Mangoldt/ F. Klein/ C. Starck (eds), *Das Bonner Grundgesetz. Kommentar*, Vol. 3, 5th edition, 2005, 50.

called Federation-Federal states-dispute to the Federal Constitutional Court according to article 84 para. 2 of the Basic Law in conjunction with sections 13 No. 7, 68 et seq. of the Federal Constitutional Court Act. That litigation, in case of success and continuing refusal of the Federal state, would clear the path to the execution of Federal coercion according to article 37 of the Basic Law.²⁵¹ On the other hand, the Federal Government may take the view of the Federal Council and drop the affair. In that case the procedure is also brought to an end. Otherwise, if the Federal Council confirms the shortcomings claimed by the Federal Government, there are three possibilities:²⁵² first, the Federal state can correct the fault completely; then the procedure ends. Second, the Federal state can apply at the Federal Constitutional Court (cf. article 84 para. 4 sentence 2 of the Basic Law; sections 13 No. 17, 68 et seq. of the Federal Constitutional Court Act). Third, if the Federal state does not make any corrections and also fails to apply at the Federal Constitutional Court within the period of one month according to section 70 of the Federal Constitutional Court Act, the Federal Government can exercise Federal coercion according to article 37 of the Basic Law. That provision reads that if a Federal state fails to comply with its obligations of a Federal character imposed by the Basic Law or another Federal law, the Federal Government may, with the consent of the Federal Council, take the necessary measures to enforce such compliance by the Federal state by way of Federal compulsion. To carry out such Federal compulsion the Federal Government or its commissioner has the right to give instructions to all Federal states and their authorities. Besides, the Federal Government, for its part, can apply to the Federal Constitutional Court according to article 93 para. 1 No. 3 of the Basic Law in conjunction with sections 13 No. 7, 68 et seq. of the Federal Constitutional Court Act and, thereby, clarify the legal situation with regard to the Federation-Federal state-dispute.²⁵³ Since the procedure of the formal reprimand is complicated and the Federal government as well as the Federal states usually at first try to find an informal, mutual solution for their disputes, the supervision model according to article 84 para. 4 of the Basic Law is not used very often in practice. Moreover,

²⁵¹ Cf. Dittmann, see note 244, article 84, 29 et seq.; C. Pestalozza, *Verfassungssprozeßrecht*, 3rd edition, 1991, § 9, 16 et seq.

²⁵² Cf. Hermes, see note 246, article 84, 83; Pieroth, see note 215, article 84, 14.

²⁵³ Cf. Dittmann, see note 244, article 84, 29 et seq.; Hermes, see note 246, article 84, 83; Lerche, see note 250, article 84, 174; Pieroth, see note 215, article 84, 14; Groß, see note 242, article 84, 44; D. Zacharias, *Staatsorganisationsrecht*, 2nd edition, 2001, 130 et seq.

the addressee of the measures of the Federal Government is always and exclusively the Federal state. This applies even if a town or city has violated Federal law. The shortcomings of the local authority are attributed to the Federal state, for in the relationship between Federation and Federal states the local level is seen as a part of the organizational structure of the Federal state.²⁵⁴ The Federation has no immediate competence to supervise the local authorities and to force them to act in a certain way. It is, thus, not allowed to direct legally binding measures against a city or town.

After all, in the Cologne Cathedral case, the Federation, because of a lack of competence, was not entitled to request the City of Cologne to change its plans concerning the high-rise buildings on the right bank of the Rhine. Rather, it had to direct all measures against the Federal State of North Rhine-Westphalia which had to transform them into its own measures of state supervision over the municipalities. Hence, even the informal letter of the Foreign Office of the Federal Republic to the Mayor of the City of Cologne could be regarded as problematic under aspects of responsibility, because it ignored both the position of the Federal state and the stipulated sequence in which an official contact, whether having legally binding effect or not, must take place. However, this view seems to be too formalistic. The letter was not an instrument of the arsenal of formal instruments of state supervision; it was a mere appeal without legally binding consequences, revealing that the matter is of importance for the Federation. The Federal Government is entitled to make such a statement in relation to a municipality.

It is, though, surprising that the Federation or rather the Federal Government obviously did not take any supervisory steps against the Federal State of North Rhine-Westphalia. The Federal Government had the competence to force the state, to whom the unlawful actions of the City of Cologne are attributed, to comply with Federal law. Moreover, it is the task of the Federal states to supervise the local authorities. As the Federal Constitutional Court had already stated in an early decision, the Federal states must ensure, also and not least in relation to the Federation, by the means of their state supervision, that the municipal administrations execute the Federal laws lawfully.²⁵⁵ It may be doubted whether this also applies for the international treaties concluded by the

²⁵⁴ Cf. H.P. Bull, article 84, in: Denninger/ Hoffmann-Riem/ Schneider/ Stein, see note 203, article 84, 54; Trute, see note 250, article 84, 53.

²⁵⁵ See BVerfGE 8, 122, 137; in literature, e.g., Hermes, see note 246, article 84, 78; Lerche, see note 250, article 84, 161; Trute, see note 250, article 84, 53.

Federation. Thus far no court has explicitly addressed the issue of treaty norms not yet implemented in the domestic legal order. But the elaborations on the principle of friendly behaviour towards international law suggest that the supervisory instruments find application. It would be bizarre if the Federation had no means to exhort the Federal states to comply with international obligations that had been made by the Federal Republic in accordance with the law.²⁵⁶

VI. The Execution of Competences with regard to World Heritage Protection on the Level of the Federal State of North Rhine-Westphalia

Many of the legal aspects constituting the legislative and administrative competences of the Federal states in the field of world heritage protection have already been mentioned in order to separate the Federation's competences from those of the Federal states. Therefore, it is simply necessary to explain how the Federal states have activated, and made use of, their competences, in particular, in relation to the local level. At first, many Federal states took up the protection of historic monuments in their constitutions.²⁵⁷ So did the Federal State of North Rhine-Westphalia. Article 18 para. 2 of the Constitution of North Rhine-Westphalia²⁵⁸ reads that the memorials of art, of history, and of culture, the landscape, and the natural monuments are under the protection of the state, the municipalities and the districts. Thus, the protection of historic monuments is declared to be an objective of the state and municipal activities.

1. Legislative Measures to secure the Protection of Historic Monuments

Moreover, all Federal states passed acts on the protection of historic monuments.²⁵⁹ These acts contain very important provisions for immovable cultural assets. The Protection of Historical Monuments Act

²⁵⁶ In that direction Dittmann, see note 244, article 84, 27.

²⁵⁷ Cf. E.R. Hönes, *Denkmalrecht und Dorferneuerung. Eine praxisbezogene Abhandlung zur Erhaltung des ländlichen Raumes*, 1988, 7 et seq.

²⁵⁸ GV NRW 1950, 127.

²⁵⁹ Cf. Odendahl, see note 157, 297 et seq.

of North Rhine-Westphalia of 11 March 1980,²⁶⁰ for instance, rules in its section 1 that historic monuments shall be protected, looked after, used sensibly, and investigated scientifically. They shall be made accessible for the public as far as possible and reasonable (para. 1). It added that the concerns for the protection of, and care for, historic monuments shall be taken into consideration in public planning processes. The authorities competent for the protection and care of historic monuments shall be involved in these processes in due time and shall also be involved in the balancing, in a way that the conservation and use of historic monuments and parts of monuments and the appropriate arrangement of their surroundings are possible. On the other hand, the authorities for their part shall work towards both the inclusion of the historic monuments in regional development planning and state planning, urban development and landscape conservation, and the devotion of these monuments to an appropriate use (para. 3). The Act defines in section 2 para. 1 sentence 1 historic monuments very broadly as such properties, greater parts of properties, or parts of properties which have to be preserved and used by reason of public interest. A public interest exists if the properties are important for the history of man, for towns and settlements or for the development of working places and production facilities and if there are artistic, scientific, folkloric or urban reasons justifying their conservation and use (sec. 2 para. 1 sentence 2 of the Protection of Historical Monuments Act).

With regard to the administrative competences section 1 para. 2 of the Protection of Historical Monuments Act stipulates that the protection of, and care for, historic monuments is a task of the state, of the municipalities and of the districts according to the detailed principles laid down in that Act. Section 11 of the Act rules that the municipalities, the districts and the authorities for the reallocation of agricultural land are obliged to guarantee that the immovable historic monuments gain protection in urban development planning, landscape planning and making of plans concerning the reallocation of agricultural land. According to section 20 para. 1 of the Act, the supreme authority in matters of the protection of historic monuments is the Minister who is competent for the preservation of historic monuments; the intermediate authority is the county government (cf. sec. 8 of the State Organization Act of North Rhine-Westphalia²⁶¹), with regard to the cities (which

²⁶⁰ GV NRW 1980, 226; see about this act, e.g., J. Berndt, *Internationaler Kulturgüterschutz*, 1998, 93 et seq.

²⁶¹ GV NRW 1962, 421.

themselves form a district); otherwise the intermediate authority is the (municipal) districts; the low authorities are the municipalities. Furthermore, para. 3 of section 20 provides that the authorities for the protection of historic monuments are special regulatory authorities; their tasks are regarded as such to avert dangers. Thus, it is clear that the tasks of the authorities competent for the protection of historic monuments fall into the category of the so-called obligatory tasks to be fulfilled according to state instruction, (see sec. 3 para. 1 of the Public Security Authorities Act of North Rhine-Westphalia²⁶²), which is important for the scale and the means of state supervision of the municipalities (cf. sec. 9 et seq. of the Public Security Authorities Act). Section 9 of the Protection of Historical Monuments Act rules, *inter alia*, that permission of the lower authority is required if a person wants to erect, change or dispose buildings in the direct vicinity of a historic monument and if thereby the appearance of the monument will be disturbed. Thus, the Act recognizes that a historic monument can also suffer harm if it is not changed in its substance but if the view is obstructed. Finally, section 38 of the Protection of Historical Monuments Act points out the necessity of cooperation with the Churches and (other) religious communities in cases concerning a monument that serves religious purposes. The provision reads that cooperation with the Churches and religious communities with regard to the protection of, and care for, their historic monuments shall continue; the state and municipal authorities shall recognize the issue of religious service that has been claimed by the churches and religious communities, when deciding about these monuments.

Apart from the law on the protection of historic monuments, the construction police law of the Federal states plays an important role for the protection of immovable cultural assets. The construction law of the states mainly has the purpose of averting dangers. Furthermore, it traditionally contains the requirements for construction design and, in recent times, also provisions of social and environmental law.²⁶³ The norms about construction design can be useful for the protection of valuable building stock.²⁶⁴ All acts of the Federal states about construction police law contain general clauses saying that buildings shall not have disfiguring effects. In North Rhine-Westphalia this is ruled in sec-

²⁶² GV NRW 1980, 528.

²⁶³ See the overview given by W. Brohm, *Öffentliches Baurecht*, 3rd edition, 2002, 41 et seq.

²⁶⁴ Cf. Odendahl, see note 157, 300.

tion 12 para. 1 of the Construction Police Act.²⁶⁵ Buildings must be in harmony with their surroundings so that they do not disfigure neighbouring buildings or the view of a street, the townscape, or the natural scenery (sec. 12 para. 2 sentence 1 of the Construction Police Act). Thereby, the characteristics of the surroundings, which are worthy for preservation, must be taken into consideration (sec. 12 para. 2 sentence 2 of the Construction Police Act). This means for the Cologne Cathedral case that the competent authority for granting building permits had to consider the question of harm to the Church that would be caused by the skyscrapers on the right bank of the Rhine obstructing the view of the monument. The competent authority for granting building permits is, by the way, the city, large or middle sized town or the district which functions as the local authority charged with averting dangers (cf. sec. 60 para. 1 No. 3 and para. 2, 61, 62 and 75 of the Construction Police Act). Here it was the City of Cologne as the local authority in which the Church is situated (cf. sec. 60 para. 1 of the Construction Police Act in conjunction with section 4 para. 1 of the Public Security Authorities Act). The organizational structures and hierarchies are, thus, compatible with those of the authorities ruled in the Protection of Historical Monuments Act.

As on the Federal level, next to the norms explicitly ruling the protection of historic monuments, there are other provisions which can, nevertheless, be made effective starting points for the fulfilment of the Federal Republic's duties under the World Heritage Convention. In particular, section 75 para. 1 sentence 1 of the Construction Police Act obliges the competent authority to grant a building permit only in such cases where the construction project does not contravene any provisions of public law. An important provision of public law in that context is the rule of weighing and balancing in planning processes which is laid down in section 1 para. 7 of the Federal Building Code, by which the concerns of world heritage protection are introduced into the procedure of planning and which should be interpreted according to the principle of friendly behaviour towards the international norms of the World Heritage Convention. This has recently, at least indirectly, also been acknowledged by the Administrative Court in Meiningen in a decision concerning the permissibility of a wind energy plant that a private investor wanted to erect on a mountain opposite the famous castle Wartburg in Thuringia which has the status of world heritage under the World Heritage Convention. The Court pointed out that the Wartburg

²⁶⁵ GV NRW 2000, 255.

“being cultural world heritage of the UNESCO is, to an outstanding extent, worthy for protection, regardless of the question whether there is a reason to fear that this status will be deprived because of the wind energy plant.”²⁶⁶ Besides, the Court mentioned the importance of tourism as a factor for balancing in the context of planning processes, which may be also relevant for the case of Cologne Cathedral.²⁶⁷ After all, the law of the state of North Rhine-Westphalia contains rules that ensure that the concerns of world heritage protection and, thus, the provisions of the World Heritage Convention are considered by the state authorities and also by the cities, towns and districts in North Rhine-Westphalia. Accordingly, regardless of the failed direct implementation of the World Heritage Convention in the German legal sphere, there is, to a certain extent, a legal progression from the level of the UNESCO over the Federal Republic of Germany and the Federal State of North Rhine-Westphalia to the local authorities. This line does not only have a legislative aspect; moreover, it is replenished by an administrative aspect, for there are sufficient possibilities of state supervision of the municipalities that can be used as instruments to ensure that a town, city, or district does not act against the Federal Republic’s obligations under arts 4 and 5 of the World Heritage Convention.

2. State Supervision of the Municipalities

The Federal states will regularly transform a formal reprimand of the Federal Government into their own supervisory measures towards the municipalities, unless they hold that the reprimand is, from the very beginning, not well-founded. Furthermore, the Federal states will, under normal circumstances, react to an informal advice about an unlawful behaviour of a municipality which may be given by a Federal authority. Finally, the Federal states are not only entitled, but also obliged to intervene *ex officio* and without the necessity of a previous request by the Federation if there is a town or a district seriously violating Federal law.

²⁶⁶ Administrative Court in Meiningen, Decision of 25 January 2006, reference number 5 E 386/05 Me, sub II 3 c bb.

²⁶⁷ See in this context, e.g., D. Bogner, “Tourismus und Denkmalpflege”, in: G. Reichelt (ed.), *Internationaler Kulturgüterschutz*, 1992, 119 et seq.

This obligation can be derived from the principle of Federal loyalty that is recognized in Constitutional law.²⁶⁸

However, a still open question is how it can be guaranteed in detail that the local authorities really behave in accordance with Federal law and Federal state law. The answer which has to do with the executive competences of the Federal state of North Rhine-Westphalia is given by the provisions concerning the state supervision of the municipalities. These provisions distinguish between three types of supervision: general supervision in the field of self-governmental tasks, special supervision in the field of the obligatory tasks to be fulfilled according to state instruction, and, finally, qualified supervision in the field of tasks that have to be fulfilled by order of the state (cf. sec. 13 of the State Organization Act)²⁶⁹ that is not relevant in the Cologne Cathedral case. Thus, the kind and scale of state supervision of the municipalities depend on the qualification or category of the prevailing task.

As a consequence, to consider measures of state supervision it must, first, be clear what kind of task is affected; only afterwards can a statement be made about the available means of supervision. In the Cologne Cathedral case, the protection of historic monuments according to the provisions of the Protection of Historical Monuments Act falls, as we have seen, into the category of the obligatory tasks to be fulfilled according to state instruction. So do the activities based on the Construction Police Act, as they are qualified as tasks to avert dangers (such

²⁶⁸ As the administrative jurisdiction rightly pointed out in the context of the declarations of countless cities and towns in the eighties and early nineties about being “nuclear-free zones”, which was a problem because the municipalities do not have any competences in the field of defence polity. Cf. Federal Administrative Court, *NVwZ* 10 (1991), 682 et seq. (684 and 685) with further references; in literature, e.g., F. Schoch, “Erklärungen des Gemeindegebiets zur ‘atomwaffenfreien Zone’”, *JuS* 31 (1991), 728 et seq.; H. Heberlein, “‘Kommunale Außenpolitik’ und ‘atomwaffenfreie Zonen’: Die Maßstäbe des Bundesverwaltungsgerichts”, *DÖV* 44 (1991), 916 et seq.; already W. Graf Vitzthum, “‘Atomwaffenfreie Zonen’ auf Gemeindeebene”, *JA* 15 (1983), 557 et seq.; S. Süß, “Beschlüsse der Gemeinden zu verteidigungspolitischen Fragen”, *BayVBl.* 32 (1983), 513 et seq.; A. Theis, “Die Gemeinden als ‘atomwaffenfreie’ Zonen”, *JuS* 24 (1984), 422 et seq.; M. Uechtritz, “Die Erklärung des Gemeindegebiets zur atomwaffenfreien Zone”, *NVwZ* 2 (1983), 334 et seq.

²⁶⁹ Cf. H.U. Erichsen, *Kommunalrecht des Landes Nordrhein-Westfalen*, 2nd edition, 1997, 350 et seq.; D. Zacharias, *Nordrhein-Westfälisches Kommunalrecht*, 2004, 288 et seq.

dangers caused by the non-professional construction of a building which could collapse and, by doing so, hurt or even kill people). Hence, granting a building permit for the skyscrapers on the right bank of the Rhine by the City of Cologne, which is ruled in section 75 of the Construction Police Act, stands under special state supervision.

The situation is different with regard to the preparation or rather drawing and writing of land-use plans according to the provisions of the Federal Building Code. Section 1 para. 3 of the Federal Building Code reads that the municipalities have to prepare land-use plans as soon as and to the extent that these are required for urban development and regional policy planning. Additionally, section 2 para. 1 sentence 1 of the Building Code rules that the municipalities adopt land-use plans by virtue of their own responsibility. This reveals that preparing and adopting land-use plans is (under certain conditions) an obligatory task in the field of self-government. That result corresponds with the planning autonomy as part of the municipal autonomy granted to the cities, towns and districts by article 28 para. 2 of the Basic Law.²⁷⁰ Hence, when a municipality, for instance the City of Cologne, is preparing land-use plans, it only falls under general state supervision.

According to section 119 para. 1 of the Municipality Act of the State of North Rhine-Westphalia,²⁷¹ the general supervision of the municipalities in the field of self-governmental tasks empowers the state to check whether the municipalities are administered in accordance with the law. Thus, the general supervision is a mere control of legality; an examination whether the municipal activities are reasonable or appropriate does not take place²⁷² (see article 78 para. 4 sentence 1 of the

²⁷⁰ Cf., e.g., J. Oebbecke, "Die verfassungsrechtliche Planungshoheit der Gemeinden", in: W. Erbguth/ J. Oebbecke/ H.W. Rengeling/ M. Schulte (eds), *Planung. Festschrift für Werner Hoppe*, 2000, 239 et seq.; P. Lerche, "Grenzen der Wehrfähigkeit kommunaler Planungshoheit", in: T. Maunz (ed.), *Verwaltung und Rechtsbindung. Festschrift zum hundertjährigen Bestehen des Bayerischen Verwaltungsgerichtshofes*, 1979, 223 et seq.; F. Schoch, "Der verfassungsrechtliche Schutz der kommunalen Planungshoheit", *Jura* 23 (2001), 121 et seq. (132 et seq.); B. Widera, *Zur Verfassungsrechtlichen Gewährleistung gemeindlicher Planungshoheit*, 1985.

²⁷¹ GV NRW 1994, 666.

²⁷² Cf. Higher Administrative Court of North Rhine-Westphalia, *NVwZ* 9 (1990), 689 et seq. with comment by J. Müller, "Prüfungsmaßstab bei der Genehmigung der Kreisumlage", *NVwZ* 9 (1990), 640 et seq.; L. Schrapper, "Zweckmäßigkeitkontrolle in der Kommunalaufsicht?", *NVwZ* 9 (1990), 931 et seq.

Constitution of North Rhine-Westphalia). The state authority has to respect scopes for municipal evaluation and discretion.²⁷³ The state authority, thus, must apply, in principle, the same standards for control as the administrative courts.²⁷⁴ It is, however, also recognized that the state supervision of the municipalities shall be handled generously,²⁷⁵ as far as possible, it should be exercised in such a way that the municipalities' ability to reach decisions and to take responsibility will not be undermined²⁷⁶ (so-called principle of friendly behaviour towards the municipalities²⁷⁷). This principle, in particular, plays a role with regard to the decision about the adequate means for intervention.

The competent state authority of first instance for executing general supervision of municipalities, which is in the case of districts and cities, like the City of Cologne, the county government, in all other cases the district authority (cf. sec. 120 paras 1 and 2 of the Municipality Act), has several repressive means at its disposal. These means may be applied gradually, according to the principle of the priority of the less intensive infringement. First, the state authority can demand that the municipality presents the files, gives an oral or written report, or sends protocols of town or city council decisions (cf. sec. 121 of the Municipality Act). Second, the authority can request the mayor of the city or town to complain to the city or town council that it has made an unlawful decision, or complain itself to the city or town council that the

²⁷³ Cf. Higher Administrative Court of Bavaria, *DVBl.* 92 (1989), 212 et seq.; A. Gern, *Kommunalrecht Baden-Württemberg*, 8th edition, 2001, 437.

²⁷⁴ Cf. U. Becker, "Kommunalrecht", in: U. Becker/ D. Heckmann/ B. Kempen/ G. Manssen, *Öffentliches Recht in Bayern*, 3rd edition, 2005, part D, 574; K. Waechter, *Kommunalrecht*, 3rd edition, 1997, 212.

²⁷⁵ Cf. J. Ipsen, *Niedersächsisches Kommunalrecht*, 2nd edition, 1999, 824; see also R. Bracker, "Theorie und Praxis der Kommunalaufsicht", in: A. von Mutius (ed.), *Selbstverwaltung im Staat der Industriegesellschaft. Festgabe zum 70. Geburtstag von Georg-Christoph von Unruh*, 1983, 459 et seq. (464 et seq.); F.L. Knemeyer, "Staatsaufsicht über Kommunen", *JuS* 40 (2000), 521 et seq. (522); id., "Gewährleistung des notwendigen Handlungs- und Entscheidungsspielraums der Kommunalverwaltung", *NJW* 33 (1980), 1140 et seq.

²⁷⁶ Cf. the numerous references in the municipality law of other Federal states than North Rhine-Westphalia at Zacharias, see note 269, 289 footnote 2018.

²⁷⁷ Cf. M. Nierhaus, in: Sachs, see note 189, article 28, 60; K. Stern, *Staatsrecht*, Vol. 1, 2nd edition, 1984, 418 et seq.; M. Burgi/ B. Ruhland, *Regionale Selbstverwaltung durch die Landschaftsverbände in Nordrhein-Westfalen im Spiegel von Rechtsprechung und Rechtsliteratur*, 2003, 174 et seq.

mayor acted unlawfully (cf. sec. 122 para. 1 sentence 1 and para. 2 sentence 1 of the Municipality Act). That complaint shall give the affected municipal organ the chance to correct its shortcomings by itself. The state authority can, furthermore, order that measures, which had been omitted contrary to a duty, must be taken by the competent municipal organ (cf. sec. 123 para. 1 of the Municipality Act). Third, the authority can cancel the unlawful measures (cf. sec. 122 para. 1 sentence 2 and para. 2 sentence 4 of the Municipality Act) and, in case of omission, carry out the obligatory measures in place of the municipality (cf. section 123 para. 2 of the Municipality Act). Fourth and finally, the authority can appoint a representative who may attend certain or even all tasks of the municipality (cf. sec. 124 of the Municipality Act), or the authority can dissolve the municipal council (cf. sec. 125 of the Municipality Act).²⁷⁸ Thus, the state authority competent in the general supervision of the municipalities, which in the Cologne Cathedral case is the County Government of Cologne, has various possibilities to react if a municipality violates Federal or Federal state law. The County Government of Cologne, for instance, could have complained to the Mayor of the City of Cologne that the City Council did not consider sufficiently either the concerns of historic monument protection mentioned in section 1 para. 6 No. 5 of the Federal Building Code nor the Federal Republic's duties under arts 4 and 5 of the World Heritage Convention which form a public concern in the sense of section 1 para. 7 of the Building Code when preparing the land-use plan for the right bank of the Rhine. By doing so, it would have prevented the land-use plan which was passed in the form of a local statute (cf. sec. 10 para. 1 of the Federal Building Code) from coming into force (cf. sec. 122 para. 1 in conjunction with sec. 54 para. 2 sentence 2 of the Municipality Act) with the effect that, later, no building permit for the skyscrapers could have been based on it.

Regardless, according to the wording of the norms enabling state supervision, the state authority is not in any case obliged to exercise its repressive powers concerning the supervision of the municipalities. The state supervisory authority may take measures. This means that all measures of supervision are, in principle, in the authority's discretion. The supervising authority can react if a city, town, or district violated the law but it is not forced to intervene; furthermore, it has discretion

²⁷⁸ Cf. Knemeyer, see note 275, JuS 40 (2000), 521 et seq. (523); id., *Bayerisches Kommunalrecht*, 10th edition, 2000, 413 et seq.; Zacharias, see note 269, 290 et seq.

with regard to the choice of an appropriate measure in case of intervention.²⁷⁹ These two aspects are an expression of the so-called opportunity principle which, according to the common opinion, moulds the rules concerning state supervision of the municipalities.²⁸⁰ By making use of its discretion, the state authority has to find a proportionate balance between the constitutionally granted autonomy of the municipality and the conflicting interest of the public in disposing the violation of the law (see also sec. 11 of the Municipality Act). Whether there is any public interest in a state intervention in a single case and to what extent a local self-government remains healthy despite the violation of the law cannot be answered abstractly. The state authority has to consider the general behaviour of the municipality, type, scale and effects of the violation, the affected public interests, and the factual and legal possibilities to recreate lawful conditions.²⁸¹

However, the opportunity principle may be reduced in the case of a violation of the international duties of the Federal Republic because this would affect the fulfilment of legal obligations that have been undertaken towards the international community. Moreover, a national or rather domestic authority cannot ignore such obligations. Furthermore, one could argue that a violation of Federal law must lead to supervisory measures of the Federal state authority, at least if the municipality made a glaring error by executing the law, which has enormous negative effects.²⁸² The reason is that a violation of Federal law always touches the Federal interests, and the Federation is dependent on the Federal states persecuting such a violation, for it does not have the instruments at hand to supervise the municipalities. The Federal states are obliged to exercise the Federation's concerns and interests in that respect, which is also an aspect of the previously mentioned principle of Federal loyalty.²⁸³

²⁷⁹ Cf. Federal Constitutional Court, *DÖV* 11 (1958), 748 et seq.; BVerfGE 8, 122; Ipsen, see note 275, 827; M. Nierhaus, *Kommunalrecht für Brandenburg*, 2003, 260; R. Stober, *Kommunalrecht in der Bundesrepublik Deutschland*, 3rd edition, 1996, 154; M. Wehr, "Das Ermessen der Rechtsaufsicht über Kommunen", *BayVBl.* 50 (2001), 705 et seq. (706 et seq.).

²⁸⁰ Cf. Zacharias, see note 269, 296 et seq. with further references also to the dissenting opinion.

²⁸¹ See Zacharias, see note 269, 297.

²⁸² Cf. Nierhaus, see note 279, 263.

²⁸³ See above in the text, at footnote 210.

Against this background and given that the City of Cologne violated Federal law, i.e. the provisions of the Building Code, when preparing the land-use plan concerning the right bank of the Rhine, and, thereby, acted in breach of the Federal Republic's obligations under arts 4 and 5 of the World Heritage Convention, the County Government of Cologne's discretion with regard to the decision whether to intervene or not was reduced to zero; the County Government had to take measures against the City of Cologne. It was only free with regard to the choice of an appropriate instrument for supervision. But even if the County Government of Cologne had (some) discretion, it could only exercise it rightly by coming to the conclusion that it should intervene. Of course, the Cathedral is not affected in substance; it can still be visited by people from all over the world and it can also be seen from other directions of the city except for the right bank of the Rhine. The blocking of the view is only partial. Moreover, at least one of the skyscrapers had already been built; it would be a problem to force the owner to tear it down or remove some floors, irrespective of the potential claims for damages. Besides, there are already some other old skyscrapers on the right bank of the Rhine that obstruct the view on the Cathedral; the new skyscrapers are, thus, only an additional element to a skyline of high-rise buildings opposite Cologne Cathedral, a new spot added to a "threatening scenery." Nevertheless, even such an additional element, if followed by others, can lead to a "death by a thousand cuts", which means that if the incremental development is allowed to go on, it will destroy the (visual) integrity of the listed building in the long run. Furthermore, national interests must be taken into account, in particular that Germany could suffer a loss of reputation towards the international community if the land-use plan breaching the Federal Republic's obligations under the World Heritage Convention remains in force and is going to be extensively achieved. These aspects must lead the County Government of Cologne to a positive decision in favour of an intervention. Therefore, the County Government did not duly exercise its discretion when, and if, deciding to omit any intervention – a fact which, of course, cannot be confirmed on the basis of the sparse information in the press.

Besides, the state authority has greater possibilities to influence the municipalities than merely in the field of the explained general supervision, as far as the obligatory tasks to be fulfilled according to instruction are concerned, in particular, in the case of granting a building per-

mit.²⁸⁴ The qualified supervision of the execution of these tasks is governed in special provisions (cf. article 78 para. 4 sentence 2 of the Constitution of North Rhine-Westphalia, section 3 para. 2 and section 119 para. 2 of the Municipality Act). With regard to the tasks that relate to the averting of dangers, the prevailing provisions are laid down centrally in sections 8 et seq. of the Public Security Authorities Act. According to section 9 para. 1 of the Public Security Authorities Act, the state authority supervises the legality and, according to section 9 para. 2 of the Public Security Authorities Act, also the suitability of the measures of the local security authorities. It can, thereby, issue general instructions (cf. sec. 9 para. 2 (a) of the Public Security Authorities Act), but also individual instructions if the behaviour of the local authority either does not appear to be appropriate or can endanger superior public interests (cf. sec. 9 para. 2 (b) of the Public Security Authorities Act). Moreover, section 11 of the Public Security Authorities Act makes clear that state authorities with competence in general supervision that have the power of qualified supervision can also use the instruments for municipal control in sections 121 et seq. of the Municipality Act. This means that it can make use of the whole arsenal of supervisory measures; it is not limited to giving instructions.

Hence, the County Government of Cologne which is both the general and the qualified supervising authority had a very wide range of instruments at hand to intervene when the City of Cologne acted unlawfully by granting the building permit for the skyscrapers opposite the Cathedral. It could even replace a municipal discretion with its own considerations. However, the granting of a building permit is a so-called bound decision which means that there is no discretion; the building permit has to be granted if there are no provisions of public law that speak against it (sec. 75 para. 1 sentence 1 of the Construction Police Act). Thus, the permit can only be refused if the building is contrary to provisions of public law. Such provisions are, initially, planning law and construction security law. It must be assumed that the skyscrapers opposite Cologne Cathedral correspond with the requirements of the City's land-use plan for the right bank of the Rhine so that there is, at first glance, no violation of planning law, although the plan itself may violate the requirement in section 1 para. 7 of the Federal Building Code.²⁸⁵ Section 30 para. 1 of the Building Code essentially reads that a building to be erected in the area of application of a land-use plan is

²⁸⁴ Cf. above in the text, after footnote 268.

²⁸⁵ See above in the text, after footnote 265.

admissible if it does not contradict the determinations of that plan. Whether the skyscrapers are, furthermore, in accordance with the construction rules for this kind of building cannot be judged here.

The planned buildings must, additionally, comply with other legal rules, like those of water law, waste law, street law, and even the law on the protection of historic monuments.²⁸⁶ There could be a problem with regard to sections 1 para. 1 and 11 of the Historical Monuments Protection Act ruling that historic monuments shall receive protection in urban development planning. Initially, if the concerns of historic monuments are not sufficiently recognized in planning processes, which is also important in the context of section 1 para. 6 No. 5 of the Federal Building Code, this touches directly only the legality of the final plan, not the legality of the building permit granted on the basis of the plan. The same is true with regard to an insufficient consideration of the Federal Republic's duties under the World Heritage Convention as a public concern in the sense of section 1 para. 7 of the Building Code. However, the illegality of a plan can have an indirect effect on the legality of a building permission based on that plan. Since the land-use plan is passed in the form of a local statute, formal or material defects, in principle, lead to its ineffectiveness; such a plan is null and void.²⁸⁷ A building permit that is based on such a plan has, therefore, no effective legal authorization which it must have according to the Constitutional principle of the provision of legality.²⁸⁸ Consequently, the building permit itself is not lawful in these circumstances.

The Federal Building Code and the Municipality Act, rule various possibilities to "cure" local statutes suffering from formal or substantial flaws. For instance, section 7 para. 6 sentence 1 of the Municipality Act stipulates that, by reason of legal security, a violation of provisions of the Municipality Act concerning procedure or form cannot be asserted

²⁸⁶ Cf. S. Muckel, *Öffentliches Baurecht*, 3rd edition, 2002, 123 with further references.

²⁸⁷ Cf. F. Ossenbühl, "Eine Fehlerlehre für untergesetzliche Normen", *NJW* 39 (1986), 2805 et seq.; Zacharias, see note 269, 219 et seq. with further references.

²⁸⁸ Cf. BVerfGE 40, 237, 248; 49, 89, 126; in detail about that principle, e.g., M. Wehr, "Grundfälle zu Vorrang und Vorbehalt des Gesetzes", *JuS* 37 (1997), 419 et seq.; J. Pietzcker, "Vorrang und Vorbehalt des Gesetzes", *JuS* 19 (1979), 710 et seq.; F. Ossenbühl, "Vorrang und Vorbehalt des Gesetzes", in: J. Isensee/ P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. 3, 2nd edition, 1996, § 62, 7 et seq.; R. Herzog, article 20 VI, in: Maunz/ Dürig, see note 250, 55 et seq.

later than one year after the statute's proclamation, unless a required state permission is missing, the statute had not been made public in the right way, the mayor had complained of the city council's decision, or the defect had been reprimanded towards the municipality by mentioning both the violated provision and the facts bearing the legal violation. Sections 214 and 215 of the Building Code declare a long list of flaws which could not be considered for the validity of a plan either right from the very beginning or after they had not been reprimanded towards the municipality within a certain period of time. Section 214 para. 1 sentence 1 No. 1 of the Building Code makes clear that a violation of the law cannot be simply put aside in a case where any concerns affected by the planning that had or should have been known to the municipality, were either not considered or not assessed correctly, and if the defect was obvious and would influence the outcome of the planning process. Moreover, section 214 para. 3 sentence 2 of the Building Code restricts the significance of defects of the planning process when it reads that flaws of procedure in the course of consideration are regarded as serious and, thus, not insignificant, when they have had an obvious influence on the outcome of the consideration. Hence, if there is a concern that had not sufficiently been considered in the planning process and if that shortcoming is both obvious and found its expression in the plan as the product of the planning process, the plan is, initially, not valid.²⁸⁹ However, section 215 para. 1 Nos 1 and 3 of the Building Code provide that a crucial violation of procedural and formal requirements according to section 214 para. 1 sentence 1 No. 1 of the Building Code and crucial flaws in the course of consideration according to section 214 para. 3 sentence 2 of the Building Code become insignificant if no written claim has been asserted with the municipality

²⁸⁹ Cf. H.K. Schmaltz, in: H. Schrödter (ed.), *Baugesetzbuch. Kommentar*, 6th edition, 1998, sec. 214, 13 et seq.; about the revision of the planning law in 2004, which cannot be explained here, in detail, e.g., W. Erbguth, "Rechtsschutzfragen und Fragen der §§ 214 und 215 BauGB im neuen Städtebaurecht", *DVBl.* 107 (2004), 802 et seq.; W. Hoppe, "Die Abwägung im EAG Bau nach Maßgabe des § 1 Abs. 7 BauGB 2004", *NVwZ* 23 (2004), 903 et seq.; M. Quas/A. Kuk, "Neustrukturierung der Planerhaltungsbestimmungen in §§ 214 ff. BauGB", *BauR* 35 (2004), 1541 et seq.; U. Stelkens, "Planerhaltung bei Abwägungsmängeln nach dem EAG Bau. Zugleich Versuch einer Abgrenzung zwischen § 1 Abs. 7 und § 2 Abs. 3 BauGB", *UPR* 25 (2005), 81 et seq.; M. Uechtritz, "Die Änderung im Bereich der Fehlerfolgen und der Planerhaltung nach §§ 214 ff. BauGB", *ZfBR* 28 (2005), 11 et seq.

within a period of two years to commence on publication of the preparatory land-use plan or the statute; the grounds for alleging violation or the existence of flaws shall be stated in detail. Thus, a land-use plan suffering from crucial flaws loses its uncertain status and becomes valid if the two years have passed. A building permit based on such a plan would have, then, a valid authorization.

As a consequence for the Cologne Cathedral case, an insufficient recognition of the concerns of historic monument protection by preparing the land-use plan for the right bank of the Rhine would cause the initial invalidity of that plan if the defect was obvious and had found expression in the plan. The state authority would have a time period of two years within which it could act against the plan and, thus, hinder it becoming valid and its effects legitimating a building permit for the skyscrapers. However, if the period has already come to an end, so that the plan became valid in the meantime, there is no further possibility to claim successfully a violation of the requirement to consider the concerns of heritage protection in the Building Code.²⁹⁰

Nevertheless, if the time period has not come to an end, the supervising state authority has again, in principle, discretion with regard to the decision whether it should intervene against the building permit based on an invalid plan. It must, thereby, in addition to the aspects which have already been mentioned,²⁹¹ take into consideration that the building permit perpetuates an illegal situation and enables the owner of the property on the right bank of the Rhine to create a situation which cannot be reversed that easily. Thus, the discretion, if there is any, can only be exercised duly in a way that the County Government of Cologne must take supervisory measures in time against the City of Cologne and force it to reconsider the decision concerning the granted building permit in favour of the skyscrapers. After all, the authorities of the Federal State of North Rhine-Westphalia had various possibilities to make the City of Cologne comply with the Federal Republic's obligations under arts 4 and 5 of the World Heritage Convention. It is incomprehensible why it did not use them.

²⁹⁰ Critical with regard to the constitutionality of that rule Schmalz, see note 289, sec. 215, 7 et seq.

²⁹¹ Cf. above in the text, after footnote 283.

VII. The Execution of Competences on the Level of the City of Cologne

In the previous sections most aspects of the competences of the local authority have been explained. A further question is whether the City of Cologne really did not act in accordance with the provisions of the Federal Building Code and the Protection of Historical Monuments Act of the Federal State of North Rhine-Westphalia when preparing the land-use plan for the left bank of the Rhine and granting the building permit for the skyscrapers. The standards for assessment are mainly laid down in section 1 paras 5, 6 and 7 of the Federal Building Code in conjunction with sections 1 para. 3 and 11 of the Protection of Historical Monuments Act. According to section 1 para. 5 of the Building Code, the land-use plans shall guarantee a sustainable urban development that harmonizes the social, economic and environmental requirements even with responsibility towards future generations and a use of grounds that is reconcilable with the welfare of the state. Furthermore, they shall contribute to secure a human environment, to protect and develop the natural resources for life, even with responsibility towards the general protection of the climate, and to preserve under the aspects of building culture, and protect, the urban character, the view of the town, and the natural scenery. Examples for special concerns that have to be considered in the planning process are, then, listed in section 1 para. 6 of the Building Code, in particular the protection and preservation of historic monuments in No. 6, which is also mentioned in the provisions of the Protection of Historical Monuments Act. The historic monument protection is one concern among others. Competing concerns can in a single case be, for instance, the residential needs of the population (No. 2), the social and cultural needs of the population and the concerns of the educational system, of sports, leisure activities, and recreation (No. 3), the concerns of the economy (No. 8 (a)), the concerns with regard to the maintenance, securing and creation of workplaces (No. 8 (c)), the concerns of passenger transport and transport of goods and the general mobility of the population (No. 9), or even the results of an urban development concept adopted by the municipality (No. 11). The protection of historic monuments has, insofar, no priority over other concerns.²⁹² Instead, section 1 para. 7 of the Building Code reads that in preparing land-use plans, public and private interests are to be duly

²⁹² Cf. W. Schrödter, in: H. Schrödter, see note 289, sec. 1, 92; Schmittat, see note 235, 130 et seq.

weighed. This means that the municipality has to decide what weight it wants to give to each of the competing concerns that play a role in consideration, and, thereafter, it must find a proportionate balance between the concerns, which might lead to a compromise (cf. also Sec. 2 para. 3 of the Building Code). The Federal Republic's duties under the World Heritage Convention which need not be completely covered by the special provisions concerning the protection of historic monuments, therefore, do not enjoy a different, privileged position. The protection of world heritage must be taken into account when a balancing has to take place in planning processes but it does not automatically assert itself against competing interests; the competent authority still must balance comprehensively. The World Heritage Convention in its article 5 (a) only stipulates that the protection of world heritage must be "integrate[d]" into the planning programmes which could be understood, according to the doctrine of flaws concerning balancing that had been developed in the context of the German planning law,²⁹³ that it must be introduced in the balancing with an appropriate weight, with regard to an isolated view as well as in relation to other concerns. The internationally recognized concerns, do not have urgent priority over interests that are only protected by domestic law; instead, in the context of decisions of balancing, they may step back behind national concerns. However, this must not be done carelessly, for the Constitution is based on the principle of friendly behaviour towards international law.²⁹⁴

Therefore, as far as the protection of historic monuments is concerned, the municipality should in general, by appropriate determinations, control the use of grounds in the surroundings of a monument in such a way that its urban quality and function will remain. This can, of course, be done by determinations that save an open area in the neighbourhood of the monument and, thus, guarantee the view of it;²⁹⁵ furthermore, the municipality can limit the height of new buildings in

²⁹³ Cf., e.g., Federal Administrative Court, BVerwGE 34, 301, 309; M. Bertams, "Die verwaltungsgerichtliche Kontrolle der Planung", in: Erbguth/Oebbecke/ Rengeling/ Schulte, see note 270, 975, 987 et seq.; B. Stüer, *Der Bebauungsplan. Städtebaurecht in der Praxis*, 2nd edition, 2001, 547 et seq.; H.J. Koch/ R. Hendler, *Baurecht, Raumordnungs- und Landesplanungsrecht*, 4th edition, 2004, § 17, 14 et seq.

²⁹⁴ See above, at footnote 202.

²⁹⁵ Cf. Higher Administrative Court of Bavaria, *BRS* 38 (1982), No. 39; Administrative Court in Koblenz, *NVwZ* 5 (1986), 244 et seq.; Higher Administrative Court of Baden-Württemberg, *BRS* 35 (1979), No. 8.

the surroundings.²⁹⁶ But the process of weighing and balancing does not demand measures which can be named and determined in detail abstractly and *ex ante*. The process of consideration in a concrete case can reveal that certain concerns must step back behind others which have a superior weight. Besides, the municipality, because of its constitutionally granted planning autonomy, has a prerogative with regard to giving value to single concerns and assessing their position both isolated and in relation to other concerns. This is indicated by section 2 para. 1 sentence 1 of the Building Code saying that the municipality has to prepare the land-use plans “in its own responsibility.” The municipality may decide whether concerns of the economy or of the creation of workplaces must have a superior weight in a certain planning process in relation to the concerns of historic monument protection. Furthermore, the municipality has a scope for consideration when choosing the appropriate form of compromise. For example, it may exercise a certain freedom in determining the size of an open space, the distance between the monument and other buildings to be construed in the future, that goes beyond the legal provisions concerning distances that are necessary for public security and fire protection (cf. sec. 6 of the Construction Police Act), or the admissible height of future buildings in the neighbourhood. Only if the municipality oversteps the limits of its scopes, there is a violation of the law which can lead to the invalidity of a plan. In that context, the jurisdiction recognizes four relevant defects:²⁹⁷ first, where there is no proper consideration at all; the municipality does not see that it must weigh and balance competing concerns. Second, where the municipality does not introduce all concerns into the consideration that had to be considered; it simply ignores certain concerns. Third, where the municipality misjudges the importance of individual concerns. Fourth, where the municipality puts the concerns affected by the planning into a relation (of priority and subordination) to each other that does not correspond with the weight of the individual concerns. The density of control is, though, restricted with regard to the last two groups of defects. The courts as well as the state supervising authority cannot replace the municipality’s considerations with their own ideas.²⁹⁸ Thus, they do not have to ask whether the result of a consid-

²⁹⁶ Cf. Schrödter, see note 292, sec. 1, 116.

²⁹⁷ See the references in footnote 293.

²⁹⁸ Cf. Bertrams, see note 293, 975, 991; H. Schulze-Fielitz, “Verwaltungsgerichtliche Kontrolle der Planung im Wandel: Eröffnung, Maßstäbe, Kontrolldichte”, in: Erbguth/ Oebbecke/ Rengeling/ Schulte, see note 270, 997, 1003 et seq.

eration deserves applause or even is optimal. Instead, the control is limited to an examination of whether the consideration misjudges the objective weight of an individual concern²⁹⁹ or rather whether there is a clear misevaluation of concerns in relation to each other.³⁰⁰

Against this background, one could argue that the scarce information in the press does not deliver enough material for the assumption that the City of Cologne has violated the law by preparing the land-use plan for the right bank of the Rhine and perpetuated that situation by granting building permits on the basis of that plan. Quite in contrast, there are indications that the city had taken the concerns of historic monument protection into consideration but came to the conclusion either that they should be put behind the public interests of encouraging new industry, to create workplaces, and to build an appropriate, modern part of the new fair, or that there would be sufficient free space between the skyscrapers and the Cathedral. If it is true, as the Mayor said, and we do not have any other evidence, there was a heated discussion in the City Council of Cologne with regard to the buildings opposite the Cathedral. Furthermore, experts were heard, and it must be assumed that their opinions were considered in the planning procedure. These aspects, in fact, suggest that the City of Cologne did not violate the relevant provisions in the Federal Building Code and the Protection of Historical Monuments Act. However, this view would be too superficial, because it ignores the fact that the Federal Republic of Germany and the UNESCO had agreed to a buffer zone. Insofar, as they addressed, and anticipated, a part of the balancing of future planning programmes they, thereby, bound the City of Cologne. As a consequence, the City must respect this decision on the international level. It is not allowed to act against it. Therefore, the City, by neglecting the provisions about the buffer zone, overstepped the bounds of its scope for evaluation; its development plan concerning the right bank of the Rhine opposite Cologne Cathedral and the building permits granted on the basis of that plan are, thus, not in accordance with the law.

²⁹⁹ Cf. Federal Administrative Court, BVerwGE 45, 309, 315; 56, 283, 289 et seq.

³⁰⁰ For more details see Brohm, see note 263, § 13, 23.

VIII. The Position of the Cathedral and of the Chapter of the Metropolitan

The last point to be answered is the legal position of Cologne Cathedral, in particular, whether there is a possibility to seek juridical protection against the measures of the city of Cologne or rather against the omission of the state supervising authority, namely the County Government of Cologne, with the procedural aim to clarify whether these acts or non-acts are in accordance with the law.³⁰¹ The first problem in this context is the legal status of the Cathedral. At first glance, Cologne Cathedral is only a building, though used as a place of religious worship, and, thus, an object but not a subject of legal positions. But this view is not correct. Cologne Cathedral or rather the “High Cathedralic Church of Cologne”³⁰² has the status of a juridical person under public law,³⁰³ although it does not have any personal substance. Today, it is only possible for a mere conglomerate of assets to reach such a status with effect for the secular sphere if it is a public foundation. But article 137 para. 5 sentence 1 of the Weimar Constitution³⁰⁴ which is incorporated in the Basic Law by article 140 rules that the status of a juridical person under public law shall remain if it was owned in the time before the Weimar Constitution came into force. The special status of Cologne Cathedral must be such an old legal position. Additionally, article 13 of the Concordat between the former German Empire and the Holy See³⁰⁵ provides that the Catholic parishes, associations of parishes, and associations of dioceses, the Episcopal chairs, bishoprics, and chapters, the orders, and religious cooperative societies, and the institutes, foundations, and financial properties of the Catholic Church which are administered by ecclesiastical organs shall either keep or receive legal capacity in relation to the state according to the general provisions of state law. They shall remain corporations under public law if they had this status before; others can be granted the same rights in accordance with the

³⁰¹ See concerning the protection of ecclesiastical historic monuments according to the provisions of Canon Law, e.g., M. Weber, *Unveräußerliches Kulturgut im nationalen und internationalen Rechtsverkehr*, 2002, 198 et seq.

³⁰² See above in the text, at footnote 22.

³⁰³ Cf. Heritage List, see note 2, 24; also the article “Kölner Dom” in the online-encyclopedia Wikipedia, see note 3.

³⁰⁴ RGBl. 1919 I, 1383.

³⁰⁵ RGBl. 1933 II, 679.

law. That is also a recognition and affirmation of old, pre-Constitutional rights with consequences for the secular sphere.

Since the Cathedral cannot act by itself and also does not have any representative organs, there must be someone else to claim its rights and fulfil its obligations. That function is in the Cologne Cathedral case undertaken by the Chapter of the Metropolitan (cf. canon 118 of the Statute Book for the Roman-Catholic Church – *Codex Iuris Canonici* 1983). The Chapter of the Metropolitan is a group of priests established by the Apostolic Chair and under the supervision of the Archbishop (cf. canon 435 of the *Codex Iuris Canonici* 1983). That group celebrates the services in the Cathedral and fulfils all other tasks transferred on it by the ecclesiastical law or by the Archbishop (cf. canon 503 of the *Codex Iuris Canonici* 1983), and, thus, in Cologne also represents the Cathedral. At the present time, the Chapter of the Metropolitan of Cologne consists of 16 priests or canons with a provost and a dean at the top³⁰⁶ (cf. canon 507 para. 1 of the *Codex Iuris Canonici* 1983). Thus, Cologne Cathedral can take part in clarifying its rights; it can sue and be sued as any other juridical person of public or private law, though represented by the Chapter of the Metropolitan.

Cologne Cathedral could, at first, have the possibility to sue against the land-use plan of the City of Cologne. According to section 47 para. 1 No. 1 of the Federal Administrative Court Procedure Act,³⁰⁷ the Higher Administrative Court decides on the validity of local statutes that have been passed according to the provisions of the Federal Building Code. Thus, a land-use plan that is a local statute (cf. sec. 10 para. 1 of the Building Code) can be made the object of judicial review by the Higher Administrative Court.³⁰⁸ That is, according to the common opinion, a procedure to protect subjective rights as well as an objective complaint procedure.³⁰⁹ This means that the Higher Administrative

³⁰⁶ See the article “Kölner Dom” in the online-encyclopedia Wikipedia, see note 3.

³⁰⁷ BGBI. 1991 I, 686.

³⁰⁸ Cf. U. Battis, *Öffentliches Baurecht und Raumordnungsrecht*, 4th edition, 1999, 244 et seq.

³⁰⁹ Cf. Federal Administrative Court, *NVwZ* 11 (1992), 567 et seq. (568); Schulze-Fielitz, see note 298, 997, 999; W. Schmitz-Rode, “Das Normenkontrollverfahren (§ 47 VwGO) nach der 6. VwGO-Novelle”, *NJW* 51 (1998), 415 et seq.; critical: H. Sendler, “Grundsatz der Planerhaltung im Aufwind?”, *NJW* 52 (1999), 1834 et seq.; M. Ronellenfitsch, “Rechtsfolgen fehlerhafter Planung”, *NVwZ* 18 (1999), 583 et seq. (588).

Court has to review the land-use plan extensively; it is not restricted to the examination whether the applicant has violated his rights. However, the applicant, for being able to sue at the Higher Administrative Court, must claim to be violated now or in near future in one of his rights by either the statute or its application (cf. sec. 47 para. 2 of the Administrative Court Procedure Act). Thereby, the mere possibility of a violation is sufficient.³¹⁰

The Cathedral or rather the Chapter of the Metropolitan, though, cannot base its suit on a violation of provisions of the World Heritage Convention even if they had been duly implemented in the German legal sphere. This is because the provisions do not provide private natural or juristic persons with a legal basis for a cause of action, since their content is not directly applicable.³¹¹ Thus, the Cathedral or its executive organ cannot claim that the state or municipal authorities should act in accordance with international law. Furthermore, the domestic provisions concerning the protection of historic monuments are not regarded as aiming, at least to a certain extent, at the protection of private persons;³¹² hence their violation would also not be suitable for the Cathedral to base its claim on. After all, the only possibility is that the Cathedral could claim a violation of its property rights that is guaranteed in article 14 para. 1 of the Basic Law or, ultimately, of the right to flawless balancing which is, though, heavily disputed.³¹³ But the property right does not protect against the construction of high-rise buildings in the neighbourhood if certain minimum distances which ensure the inflow of light and air are respected; moreover, the free view onto its own building is not protected. Besides, with regard to the right to flawless balancing, the Cathedral could only claim the violation of the concerns

³¹⁰ Cf. BVerwGE 107, 215, 217; Federal Administrative Court, *NJW* 52 (1999), 592 et seq.; *DÖV* 52 (1999), 733 et seq. and *NVwZ* 19 (2000), 1296 et seq.

³¹¹ See concerning the preconditions of a direct applicability, e.g., BVerwGE 88, 254, 257; Streinz, see note 189, article 59, 68; P.E. Holzer, *Die Ermittlung der innerstaatlichen Anwendbarkeit völkerrechtlicher Vertragsbestimmungen*, 1998, 83 et seq.; H. Keller, *Rezeption des Völkerrechts*, 2003, 13 et seq.

³¹² Cf., e.g., H. Strobl, § 2, in: H. Strobl/ U. Majocco/ H. Sieche, *Denkmalschutzgesetz für Baden-Württemberg*, 2nd edition, 2001, 24; see also H. Melchinger, *Die Eigentumsdogmatik des Grundgesetzes und das Recht des Denkmalschutzes*, 1994, 222 et seq.; R. Körner, *Denkmalschutz und Eigentumsschutz*, 1992, 128 et seq.

³¹³ Cf. M. Löhnig, "Rechtsschutz gegen Bauleitpläne nach § 47 VwGO n. F.," *JuS* 38 (1998), 315 et seq. (316 et seq.); Brohm, see note 263, § 16, 2.

of historic monument protection and of the international duties of the Federal Republic under the World Heritage Convention. Therefore, the Cathedral or the Chapter of the Metropolitan are not able to make the development plan of the City of Cologne an object of a judicial review by the Higher Administrative Court.

Cologne Cathedral could seek an indirect judicial review by instituting a proceeding against the City of Cologne to withdraw the building permit granted with regard to the skyscrapers. It must, therefore, choose the so-called neighbour's suit according to section 42 para. 1 of the Administrative Court Procedure Act.³¹⁴ For that suit it must claim that it was violated in its own rights by the building permit, which leads to the same problems as previously mentioned in the context of the direct suit against the land-use plan. Finally, Cologne Cathedral could consider taking legal steps against the omission of the County Government of Cologne. But according to the common opinion in adjudication and literature, the provisions concerning the state supervision of municipalities do not protect any citizens; they exclusively serve public interests.³¹⁵ Therefore, citizens and also the Cathedral cannot claim that the competent state authority intervenes if a municipality violates the law.³¹⁶ The Cathedral only has the possibility to turn informally to the County Government of Cologne and, in this respect, to propose that it should examine the legality of the municipal measures.³¹⁷

³¹⁴ Cf. concerning the protection of neighbours in construction law, e.g., F. Schoch, "Nachbarschutz im öffentlichen Baurecht", *Jura* 26 (2004), 317 et seq.; S. König, *Drittschutz. Der Rechtsschutz des Drittbetroffenen gegen Bau- und Anlageneinigungen im öffentlichen Baurecht, Immissionsschutzrecht und Atomrecht*, 1993, 53 et seq.; D. Mampel, *Nachbarschutz im öffentlichen Baurecht*, 1994.

³¹⁵ Cf. Gern, see note 273, 435; Knemeyer, *Kommunalrecht*, see note 278, 417; Nierhaus, see note 279, 264; Stober, see note 279, 151; H. Borchert, "Legalitätsprinzip oder Opportunitätsgrundsatz für die Kommunalaufsicht?", *DÖV* 31 (1978), 721 et seq.

³¹⁶ Cf. Federal Administrative Court, *DÖV* 25 (1972), 723 et seq. with reference to BVerwGE 31, 33, 40; Erichsen, see note 269, 349; J. Oebbecke, "Die örtliche Begrenzung kommunaler Wirtschaftstätigkeit", *ZHR* 164 (2000), 375 et seq. (389); P.J. Tettinger, *Besonderes Verwaltungsrecht*, Vol. 1, 7th edition, 2004, 371; Waechter, see note 274, 201.

³¹⁷ Cf. Knemeyer, see note 315, 427; Becker, see note 274, 559; G. Lissack, *Bayerisches Kommunalrecht*, 2nd edition, 2001, § 8, 4.

IX. Conclusion

Finally, it is quite clear why the dispute between UNESCO and the German authorities concerning Cologne Cathedral raised its dimensions but also how it could have been avoided or at least toned down in time. The World Heritage Convention creates obligations of the State Parties and, thus, also of the Federal Republic of Germany, which are concretized by the positive decision of the World Heritage Committee to inscribe a property on the World Heritage List. The State Party must fulfil its obligations under the Convention by domestic measures. However, the Federal Republic did not implement the World Heritage Convention in the German legal sphere so that its provisions can only play an indirect role towards the national authorities which have to consider the Conventional provisions in the framework and the bounds of domestic law that is related to the protection of historic monuments. Thus, the World Heritage Convention as such has no direct influence on the German administrative authorities when making planning programmes for the future use of land. Nevertheless, there are strict legal regulations from the level of the Federation over the Federal states to the local authorities to guarantee that the protection of historic monuments is considered in all kinds of planning processes. Moreover, there are provisions that entitle the prevailing higher state instance to supervise and control whether the lower level acted in accordance with the law. Thus, there are legislative as well as administrative links between the various levels in the federal structure that could ensure that local authorities do not act in a way that contravenes the Federal Republic's duties under arts 4 and 5 of the World Heritage Convention.

Accordingly, the Federal Government could have forced the Federal State of North Rhine-Westphalia, to which the actions of the city of Cologne concerning the land-use plan for the right bank of the Rhine opposite Cologne Cathedral are attributed domestically, to comply with Germany's obligations under international law. The Federal State in its turn could have transformed the Federal measures into Federal state supervisory measures which are directed against the City of Cologne. If this had been exercised consistently, the City of Cologne would have had no possibility in the long run to continue violating the concretized provisions of the World Heritage Convention in particular with regard to the buffer zone; it would have been forced to amend its plan and to withdraw the granted building permits for the skyscrapers. But the Federal and Federal state authorities obviously did not take "hard" measures to make the city comply with the requirements of the

World Heritage Committee; they preferred putting political pressure on the City of Cologne which was not that effective, for it led the City to the assumption that there were no legal means to push through the concerns of world heritage protection and, even worse, that it did not act unlawfully but behaved in the right way concerning the request of the World Heritage Committee.

In the end, as mentioned in the introduction, the city of Cologne which meanwhile lost an important investor for the high-rise buildings opposite Cologne Cathedral “capitulated” and offered a (very) small compromise to reveal its willingness in principal to work with UNESCO. It is not clear whether UNESCO’s World Heritage Committee will accept that compromise. Rather, it has the possibility to delete the Cathedral from the World Heritage List by reason of an insufficient cooperation of the German authorities as a means to enhance compliance; such a measure would be, at least, comprehensible. Moreover, UNESCO has another option: as it did in the case of the Yellowstone National Park, it could send a fleet of black helicopters flying over the protected area to compel the national authorities to fulfil their obligations under arts 4 and 5 of the World Heritage Convention.³¹⁸ Probably, this would very quickly change the City of Cologne’s attitude.

³¹⁸ Cf. concerning this event J. Rabkin, *Why Sovereignty Matters*, 1998, 46 et seq.