

Marine turtles and international law: An evaluation of conservation measures under international law, treaties and conventions

By Rhett Martin¹

Introduction

The problem for marine turtle conservation is their migratory nature that crosses state boundaries. Six of the seven species of marine turtles are listed as endangered or critically endangered. Current developments in marine turtle conservation includes the Marine Turtle Conservation Act by the United States Congress 2004 that is designed to safeguard and conserve marine turtles, particularly nesting sites, both in the United States and throughout the world. The Act focuses on funding for international programs and the education of local communities about conservation and to provide economic alternatives to egg and turtle harvesting as well as helping to enforce existing laws that are aimed at their protection. The legislation inputs into the North American Commission for Environmental Cooperation (CEC) established by Canada, Mexico and the United States under the North American Free Trade Agreement (NAFTA). It promotes cooperation between the three member countries in the implementation of the North American Agreement on Environmental Cooperation (NAAEC). Under an accord made under NAAEC there is a biodiversity resolution that recognises the need for cooperation between the members of CEC for biodiversity conservation including marine turtles. An important focus therefore is the combined political clout that the three countries can provide to international marine turtle conservation generally as well as specific conservation procedures underway by the member states. At issue therefore is how international environmental law and instruments can work to protect marine turtles.

The problem stated

A country's territorial waters will extend to 12 nautical miles from its coastline and the marine exclusive economic zone covers 200 nautical miles from this point. Thus there is an inherent problem in maintaining protection given that turtles transgress these boundaries and be present in areas that have no or inadequate conservation measures.

The international law provision "Permanent Sovereignty over Natural Resources" (1) recognises the sovereign states rights to use its natural resources which also mean species that come within its territory. Anything that falls outside of these zones by definition, are accessible to exploitation since these areas are considered *res nullius* which effectively means they belong to no state (2). However international law highlights that a sovereign state cannot use its territory in a way that harms another state (3). A sovereign state must seek to conserve living resources on the high seas and consistent with the interests of other states (4). The difficulty is implementing these laws and the apparent failure to properly coordinate multilateral coordination between all states that have a role to play in marine turtle conservation.

International law highlights that a sovereign state is considered the temporary host of a migratory species (5). If conservation requirements are needed then a state is required to take them to ensure a favourable outcome for the preservation of the species (6). Not all states have recognised the concept of a shared resource and fitting marine turtles within the boundaries of these broad principles is not easy. In terms of international treaties the most specific to cover marine turtles is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (7). However CITES seeks to regulate trade in relation to turtles and their by product and does not cover conservation programs such as over their nesting sites. International agreements such as CITES and the Convention on Biological Diversity (8) do not cover the broad threats arising from human intervention the turtle life cycle. Regional agreements such as CEC do allow for more specific conservation programs that can work in conjunction with legislation. International conventions are important such as the Convention of Migratory Species of Wild Animals (CMS) (9).

1 Rhett Martin is a lecturer in law at the Faculty of Business and Economics at Monash University. He has previously worked as a legal practitioner with Blake Dawson Waldron, and an honorary solicitor for the Australian Wildlife Protection Council. Rhett is a Committee member of the Australian Herpetological Society and active in the conservation movement for turtles and tortoise species worldwide.

From this convention two Memoranda of Understanding have been made one to protect species in South East Asia and for the west coast of Africa. An evaluation of these memoranda is made later which makes tentative conclusions that they represent an effective conservation tool.

The Protocol Concerning Specially Protected Areas and Wildlife (SPAW Protocol) (10) is designed to cover the wider Caribbean region to ensure protection of species but it does not specifically protect nesting sites. The Inter American Convention for the Protection and Conservation of Sea Turtles (11) does serve to prohibit international trade in sea turtles and their destruction.

The turtle life cycle conundrum; migratory problems and conventions

It is useful to consider the life cycle of the turtle as a means to discuss the relevant law applicable to them. They emerge from eggs buried in the coast line of various sovereign states. So they come under the law of that state but with some limited international protection under the principle that the subject state shall not interfere with the environment of another sovereign state. Small and vulnerable, the hatchling turtle makes its way to the water where again the state has control but with the only limitation in an international law sense being on harming the environment of another state. They will eventually move into the exclusive economic zone that has limited protection under the Law of the Sea Convention. Finally they move into the high seas which (as previously discussed) is beyond the control of a particular state and are not protected here. We can say here that principles of international law will disdain any action leading to their destruction and possible extinction but there are no conservation measures in this region of the high seas and the international law is only relevant if enforced.

It is clear that in the nesting phase, the sovereign state has complete control and a recognised right to use their resources in accordance with internal policies. This is still subject to the constraints required under the Biodiversity Convention that require states not to inflict harm on the environment of other states (12). The problem here is to prove that any transgression relates to a breach of international law. The only real protection is Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration which observes a general duty on the state not to harm their environment.

When turtle species enter the territorial waters and the exclusive economic zone of a sovereign state they are still covered by the doctrine of State responsibility but within the territorial waters they remain capable of being exploited, although the doctrine of State responsibility discussed earlier will require that the state not act in a way that damages the environment of other states. When the turtle is in the Exclusive Economic Zone the State still has limited sovereignty that allows for the use of natural resource, although still tempered by due regard to the rights of other states. It must also have due regard to the Law of the Sea Convention (13) that prohibits over exploitation of species and which ensures the state has maintained the species "above levels at which their reproduction may become seriously threatened" (14). Similarly the regulation of the Exclusive Economic Zone arguably requires states to maintain species levels to sustainable numbers and measures that will constrain fishing measures to incorporate protection of turtles caught in nets.

Once the turtle is on the high seas it is not covered by any specific jurisdiction. A state can fish on the high seas although with reasonable regard to the interests of others (15). This is subject to rulings from the International Court of Justice that have ruled on the requirement for states to take account of conservation measures in conducting fishing operations (16). Similarly under the Law of the Sea Convention states can allow fishing but subject to their treaty obligations that requires conservation measures to preserve exploited species through fishing at sustainable levels (17).

International Environmental Law

Where there are species in two or more coastal states the Law of the Sea Convention sets out rules for the states to cooperate on species management and the Straddling Stocks Agreement which sets out implementation measures and requirements for conservation and sustainable harvesting of the stocks (18). The latter particularly setting out certain trigger points for activating control measures. Of particular significance is the requirement that there is no sovereign right to the stock by a state when it is in two or more exclusive economic zones.

The concept of “shared resources” requires that they be used equitably and harmoniously (19) requiring general obligations of consultation and cooperation in the use of the shared resource. It is only the ASEAN agreement though, that has specifically alluded to the concept of shared resource to include migratory species. The concept of a shared resource has not otherwise been generally recognised.

Another relevant concept is that of “common heritage of humankind”. The concept of rights being vested in humankind is extremely broad but does gain recognition in the Laws of the Sea Convention at article 137 that states: “*all rights in the resources of the deep sea bed are vested in mankind as a whole.*” The concept implies that states must cooperate in sustainable management of resources and that equitable sharing of the “harvest” should be provided for. The difficulty as always in such matters is the lack of general acceptance of the concept.

Conventions and Agreements

The Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) seeks to regulate the international trade in threatened plants and animals. It does not, however, impose any protective requirements on species habitat and domestic trade. If a species is listed in Appendix 1 of the convention then all trade for primarily commercial purposes is prohibited. Significantly all seven species of marine turtle are listed in Appendix 1 of the convention. The restriction on trade to species listed in Appendix 1 of CITES provides a clear lead in successfully reducing trade in sea turtles and their by product. Its focus is, however, on international trade and certainly further controls are needed on the conservation of specific habitat with particular regard for nesting sites.

The Convention on Biological Diversity has application to marine turtles since it applies generally to conserve and ensure sustainable use of biological diversity. Whilst it does not refer to turtles specifically it does allow for protection of habitat that would include turtle nesting sites. The Convention specifically requires signatories to prepare national conservation plans for conservation and to then integrate them into policies for sustainable management of biodiversity. Also required is the use of environmental impact statements where there is significant activity potentially threatening biological diversity. The Convention also requires signatories “as far as possible and as appropriate” to protect ecosystems, habitat, and minimum viable populations of species in their natural surroundings (21). The main problem is the qualification based the reference to apply the planning and conservation policies “so far as possible and as appropriate” which is neither defined nor fully tested. Certainly the use of the convention does allow for:

- Identification and protection of coastal nesting sites,
- Restriction of over fishing and related activities that impact marine turtles,
- Development under the convention of integrated marine and coastal area management.

The Convention on Migratory Species of Wild Animals (the “Convention”) (22) is concerned exclusively with the conservation of migratory species and their habitat. This provides a forum for governments to communicate on issues relevant for coordinated conservation measures. It arguably has the most potential for use in coordinating a truly global program on turtle conservation and is evaluated in some depth in the last section in this paper.

Regional Agreements

In some respects regional agreements have the opportunity to provide a more specific targeted process for marine turtle protection although their ultimate success will partly depend on how they integrate with international treaties and conventions. The Convention has a specific focus on migratory animals and their conservation. It serves to create conservation obligations on signatories for species listed in Appendix 1 (23) It also provides for processes leading to agreements for the conservation of species. Its strength is to impose conservation requirements and a strict requirement to develop agreements for conservation of species listed in Appendix 1 and 11 and as a result there are two memoranda of understanding specifically on sea turtles. The aim of the memoranda of understanding are to “*restore the migratory species concerned to a favourable conservation status or to maintain it in such a status*” (24). Significantly these agreements cover the conservation and management of turtles at any stage in their life cycle both at sea and on land of coastal states falling under the agreement.

The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere⁽²⁵⁾ is a long established convention that requires signatories to actively protect wildlife and wilderness areas and to prevent exploitation of species. Its focus is on the development of national parks and preservation of wilderness areas. Thus marine national parks would be included and this would serve to limit or exclude fishing and its associated risks for turtles being caught in nets. The only real limitation is that signatories are not required to create these areas but to “explore at once the possibility of establishing” them. Once these protected regions are created signatories are required to actively protect species listed in the Annex to the agreements. The problem here is that only the United States has included a turtle species, being the Green Turtle. The protection required covers a prohibition on hunting, killing or taking these species without proper governmental approval which would only be granted in “special circumstances” (26). Importantly the parties agree to cooperate with each other to promote the objectives of the convention, for specific arrangements for the protection and conservation of migratory species. The operative difficulty is having a forum for the terms of the convention and agreements to be discussed and finalised and this has seen to have limited the degree of cooperative consultation.

The SPAW Protocol to the Cartagena Convention requires the signatories to implement national as well as cooperative measures for the protection of designated areas and listed species. The Protocol covers the regions around the Gulf of Mexico and the Caribbean and requires active protection of Sea Turtles in their marine environment, although there is no obligation to protect nesting areas unless designated as requiring protection. It represents a focused regional agreement that at least is specific in its application to marine turtles. A signatory has a recognised responsibility to protect and preserve threatened species within their jurisdiction and regulate activity that would have a detrimental effect on them. Signatories to the agreement must “where necessary” establish protected areas to protect natural resources including wildlife to ensure they are at a sustainable level in the ‘Wider Caribbean Region’ (27), although it is silent on when the need for the establishment of a protected area is considered necessary. Importantly though once a protected area is established there are significant provisions that require the parties to regulate human activity within the subject regions including the prevention of pollution in the protected areas and the protection of migration routes of the turtles. It also requires signatories to regulate and prohibit the commercial trade in protected species of animals listed in Appendix 1 of the Protocol. Also the SPAW Protocol requires the signatories to make joint decisions on protected areas and species protection.

The Inter American Sea Turtle Convention (28) is significant as the first real attempt to protect sea turtles in a binding multi lateral treaty. Its application covers all of the Americas and Mexico and also seeks to control vessels connected to member states on the high seas and thus is relevant for the regulation of fishing activity. It has specific application to habitat protection. Article 1V requires parties to protect, conserve and restore turtle habitat including nesting sites. There is a requirement to restrict human activity as far as practicable that could “seriously affect” marine turtles (29). The presence of a requirement as to practicability seems to water down its provisions but the reference to things that can seriously threaten marine turtles is a welcome degree of specificity that is absent from the other conventions and treaties. It also has provisions that prohibit “the intentional capture, retention or killing of, and domestic trade in sea turtles, their eggs, parts or products” (30). Finally the Convention does implement strict monitoring and compliance requirements and this is evidenced by the requirement of annual reports from the signatories and a periodic conference of the parties designed to allow for ensuring that the provisions of the Convention have been effectively implemented. One limitation of the Convention is the apparent failure to address processes for the development, implementation and monitoring of regional management plans which would appear to be necessary in order to more effectively put in place required standards of conservation programs.

United States Marine Turtle Conservation Act 2004

In light of the previous discussion on turtle conservation it is useful to consider the impact of the Marine Turtle Conservation Act. The purpose of the Act is to assist in the conservation of and the nesting habitats of marine turtles in foreign countries by supporting and providing financial assistance for projects to conserve the nesting habitats, conserve other habitats and address other survival threats as and when they arise. Conservation measures include the enforcement and implementation of CITES and laws of foreign countries that are relevant to turtle conservation. The Act allows for application of funding for conservation programs from any party in a relevant country pursuant to guidelines which means demonstrated expertise in turtle conservation. Obviously focus is on programs designed to ensure effective long term conservation of marine turtles and their nesting habitats. The Act is interesting in its attempt to enter and assist programs within another jurisdiction and to develop cooperative schemes that interrelate to local communities and parties within those jurisdictions.

Evaluation of international instruments on the protection of migratory species

Turtles are migratory and nesting sites are vulnerable and therein lies the problem for their conservation. It is clear that unilateral actions will only have limited success and cooperative arrangements are paramount. The principles of international law such as shared resources and common heritage of humankind are ambiguous and difficult to enforce. Thus we are forced back to an evaluation of international instruments to enable some conclusion on gaps in existing measures and what is required to bridge such gaps.

Of the international instruments considered the Convention on the Conservation of Migratory Species of Wild Animals (31) (hereafter referred to as the "Convention") is the only truly global treaty concerned with the protection of migratory species. This convention has 79 member states with flexibility for other states to become involved in its deliberations. Its relative strength lies in its proven capacity to become involved in collaborative exercises with such bodies as the World Conservation Union. It has provided a means to develop regional cooperative arrangements within its terms including the World Conservation Union Marine Turtle Specialist Group's Global Strategy for the Conservation of Marine Turtles (32). Its advantages lie in the capacity to develop global initiatives via agreements that may be regionally focused in conjunction with conservation bodies that have specialist understanding of marine turtles that provide for a coordinated response. It has already been instrumental in landmark multilateral agreements for the protection of migratory bird species (33). In addition the development of Memorandums of Understanding between member states and non government bodies in regional cooperative arrangements that allows for identification, implementation and monitoring of conservation measures that have elicited measurable results for endangered species. These arrangements have proven to be effective in bypassing costly and protracted bureaucratic processes normally associated with international agreements. A specific example is the Memorandum of Understanding for the Conservation of Marine Turtles of the Atlantic Coast of Africa adopted in May 1999 between member states that has seen the adoption of a regional conservation action plan (34). This was followed by the separate memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South East Asia which was concluded under the auspices of the Convention in 2001 which also adopted a comprehensive action plan for turtle conservation (35). Significantly the convention of the memoranda of Agreement that are formed under it provide for a process of formal meetings that allow for greater cooperative arrangements between the parties and the opportunity to meet and discuss operational issues. It is this last point that arguably highlights the single most important point for turtle conservation, being the creation of a forum that provides for regular meetings to monitor the implementation of protective programs. This could be within the auspices of the United Nations but whether it is or is not within its umbrella is largely irrelevant to the issue of providing the means for member states to meet and develop further cooperative arrangements.

The Convention has also seen the development of regional scientific/education programs that also address practical conservation measures such as the program in Sri Lanka to educate fishing interests in turtle conservation measures including measures to avoid by catch in the fishing industry (36).

The Convention is limited by the failure of significant states to become members (including China and the United States) and has yet to fully streamline a process of coordination of ministries within member states to truly coordinate a consistent response to conservation pressures. Until the membership is more truly global and an effective global forum is created the success of these local memoranda will be positive but not yet complete.

Taking this cooperative model under the Convention as a guide it allows for an evaluation of other international instruments outlined in the earlier part of this paper. Note that this will not repeat the basic features of these instruments discussed earlier but will seek to evaluate them from the perspective of international law and their prospects to achieve stated objectives.

The Convention of Biological Diversity (37) does allow for the parties to develop *inter alia* national strategies and programs for conservation of species but does not refer to turtles under a specific annexure as the Convention does. However it did adopt in 1998 a program for the management of integrating marine and coastal areas conservation and has also entered a cooperative arrangement with the Convention on a joint work program on migratory species conservation issues.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has stringent protective measures prohibiting international trade in endangered species and all marine turtles are listed, effectively prohibiting trade in turtles and turtle parts unless exempted. Of course, illegal trade is only one aspect of the conservation dilemma and it imposes no direct legally binding obligation in relation to the harvesting of wildlife within a country. This should be compared to the Convention which offers a means to address conservation programs comprehensively by dealing with problems of domestic consumption of migratory species and fostering international cooperation to achieve shared conservation objectives. The success in developing regional agreements and memoranda of understanding under the Convention has not been duplicated by CITES.

The Inter American Convention for the Protection and Conservation of Sea Turtles has specific reference to preserve marine turtles and their habitats and its effect can be illustrated by the requirement imposed on member states to introduce turtle excluder devices on shrimp trawl nets – a practical specific measure directly implemented. Its existence illustrates it is possible for countries to conclude freestanding instruments for marine turtle conservation without necessarily duplicating or being allied with the Convention. In other words, whilst it would be preferable for the Convention to be part of the process it at least highlights to non members, the convention can still effect regional agreements that are far reaching in their aims. It also highlights that the Convention must engage in interaction with these regional agreements preferably at forum level.

What then are the benefits and weaknesses of existing arrangements and what improvements can be made? Legally binding treaties, properly drafted, provide for binding commitments on member countries. Their effectiveness is dependant on equitable financing arrangements and an empowered and functional secretariat to ensure that agreements are kept. They are hampered by time constraints in their setting up and implementation and seem to work slower than regional non binding conservation arrangements designed for quick implementation. Obviously there is a need for arrangements to be in place for a legal structure that member states can use for more efficient implementation of treaty obligations. This could arguably take the form of an extension of the secretariat in member states to coordinate the response of ministries in the member states, a challenge both financially and organisationally. However it can also take the form of memoranda of understanding discussed in respect to the Convention. The precedent for these instruments under the Convention allows for more direct interaction to ministries of member states, interaction with wildlife departments and the establishment of more specific conservation programs. The memoranda consist of basic text outlining the framework for cooperation accompanied by a detailed conservation plan which is subject to regular review and updating. They can be concluded at ministerial level and do not require a formal ratification process and have the advantage of being a flexible approach to changing circumstances. The agreement relies on the cooperative nature of the parties to their terms and a willingness to contribute financially to its implementation. Such inherent difficulties are not any reason to shy away from their essential usefulness provided they are concluded under an overarching global treaty (such as the Convention) that allows for global coordination.

Arguably the Convention allows a blueprint for action on conservation at a global level. It has demonstrated an ability to coordinate disparate local and regional initiatives and provides for the establishment of formal agreements that require legally binding commitments and less formal memoranda of understanding which have clearly defined objectives. Its success however will only be truly achieved when it is able to coordinate activities on all major continents and regional hot spots (notably Asia and Africa) which present the greatest conservation dilemma and when a formal body allows for regular meetings or member states working on conjunction with the secretariat.

Endnotes

1. United Nations General Assembly, Resolution 1803 (XV11) (Dec. 14 1962)
2. See discussion in Cyril de Klemm, *Migratory Species and International Law*, 29 *Natural Resources Journal*, 935 (1989)
3. See Corfu Channel Case (U.K. V Albania) 1949 I.C.J. 24 Rio Declaration, at principle 2.
4. 1982 Law of the Sea Convention, at arts. 87 (2), 116 – 119,
5. Klemm, above n 2, at 949
6. *ibid.*
7. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar.3 1973, art. 111, 27 U.S.T. 1087 U. N.T.S. 243 [hereinafter "CITES"],
8. Secretariat, Convention on Biological diversity, World Trade Centre, Montreal,
9. Convention on the Conservation of Migratory Species of Wild Animals, June 3, 1979, [CMS].
10. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Jan.18 1990,
11. Inter American Convention for the Protection and Conservation of Sea Turtles, May 2 2001 [hereinafter Inter American Sea Turtle Convention].
12. Secretariat, Convention on Biological diversity, World Trade Centre, Montreal,
13. Law of the Sea Convention, above n 4, at arts. 56 and 61
14. *ibid*, arts. 61.
15. W.T. Burke, *Unregulated High Seas Fishing and Ocean Governance*, in *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony* 235.
16. Fisheries Jurisdiction Case (United Kingdom v. Iceland), 1974 I.C.J. 3, 31
17. 1982 Law of the Sea Convention, above n 4 art.116 and 119.
18. *ibid*, article 63.
19. ASEAN Agreement, art.1 and 19: Principles for Shared Natural Resources.
20. Charter for Economic Rights and Duties, U.N. General Assembly Resolution 3281, Chapter 11, art.3.
21. Secretariat, Convention on Biological diversity, World Trade Centre, Montreal,
22. Convention on the Conservation of Migratory Species of Wild Animals, June 3, 1979, [CMS].
23. *ibid*, art 11 and 111.
24. *ibid*, at art V (1)

25. The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct, 1940 161, U.N.T.S. 193 U.S.T. 981.
26. *ibid* at art. V111.
27. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Jan.18 1990,
28. Inter-American Sea Turtle Convention, above n, 11
29. *ibid* art. 1V (2) (c).
30. *ibid* art IV (2) (a)
31. Convention on the Conservation of Migratory Species of Wild Animals, June 3, 1979, [CMS].
32. IUCN (The World Conservation Union), A global Strategy for the Conservation of Marine Turtles, IUCN, Washington, D.C. 1 24 (1995),
33. See, for example, the Agreement on the Conservation of African – Eurasian Migratory Waterbirds and the Agreement on the Conservation of Albatrosses and Petrels,
34. Member states are Benin, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea Bissau, Mauritania, Nigeria and Togo,
35. The signatory states are Australia, Comoros, Islamic Republic of Iran, Myanmar, Philippines, Sri Lanka, United Republic of Tanzania, United States and Vietnam,
36. (Turtle Conservation Project), Marine Turtle By Catch in Sri Lanka, September 1999,
37. Secretariat, Convention on Biological diversity, World Trade Centre, Montreal,

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