



Marine World Heritage Sites

David Haigh

Senior Lecturer in Law

Department of Law, James Cook University of North Queensland, Townsville, Australia

Abstract

Despite efforts at international regulation the concept of pristine oceans of wilderness seas is unattainable without major changes in the principles and law that background the regimes which manage the oceans. This article argues that the 1972 Convention for the Protection of the World Cultural and Natural Heritage provides a means to achieve a better outcome through international law. It highlights the conflicts inherent in the present ocean management regime established by the law of the sea and that applicable to marine World Heritage areas. An analysis is undertaken of the World Heritage Convention and its application to the Great Barrier Reef (Australia), Tubbataha Reef (Philippines), and Belize Barrier Reef (Belize).

Key Words

Marine Environment, World Heritage, International Law, Australia, Philippines, Belize.

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Now we know enough – we are at a point where any mistake could become a disaster for humankind. So why tempt the devil? Let us be serious.

Jacques Cousteau

Introduction

Oceans dominate two thirds of the surface of our planet.¹ Their enormous size creates the impression they are indestructible. Nothing could be further from the truth. Similarly to the earth's terrestrial surface they face the omnipresent threats of increasing human population, excessive exploitation and ecological change. These threats have lead to the conclusion that:

unperturbed coastal – marine systems are a rarity over the world and the few pristine areas that may be left are small in scale and highly subject to alteration by regional processes.²

The public pressure to protect these few pristine areas continues to grow. There is now an urgency to reverse these losses. However the existent tools to do so seem ill equipped to achieve this end. Society needs to recognise that future generations will demand their heritage of pristine oceans and wilderness seas. Our failure will be if such a concept becomes an illusion.³

The global society has recognised the threats to our oceans. International treaties designed to this end are numerous. Most notable have been the United Nations Convention on the Law of the Sea (UNCLOS),⁴ Baltic Convention,⁵ the Oslo and Paris Conventions on the North Sea,⁶ the Barcelona Convention on the Mediterranean,⁷ and various regional agreements. In the Pacific region states have adopted the Convention on the Protection of the Natural Resources and Environment of the South Pacific Region.⁸ However despite these efforts at

- 1 Danny Elder, IUCN *The Oceans: Our Lifeblood Threatened* (Harper Rae Publishing Ltd, Sydney: 1992) 300.
- 2 Robin Warner "Environmental Concerns: Their Impact on Activities at Sea" in Martin Tsamenyi and Max Herriman (eds) *Rights and Responsibilities in the Maritime Environment: National and International Dilemmas* (Wollongong Paper on Maritime Policy No 5, Centre for Maritime Policy, University of Wollongong, Wollongong: 1996) 51.
- 3 Warner, *ibid*, considers that "wilderness" seas are an illusory concept.
- 4 United Nations Convention on the Law of the Sea (UNCLOS), done at Montego Bay, Jamaica, 10 December 1982, UN Doc A/CONF.62/122; (1982) 21 ILM 261.
- 5 Convention for the Protection of the Marine Environment of the Baltic Sea (Baltic Convention) done at Helsinki 12 March 1974, 13 ILM 546.
- 6 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft done at Oslo 15 February 1972, 11 ILM 262; Convention for the Protection of Marine Pollution from Land Based Sources done at Paris 4 June 1974, 13 ILM 352.
- 7 Convention for the Protection of the Mediterranean Sea Against Pollution done at Barcelona 16 February 1976, 15 ILM 290.
- 8 (1987) 26 ILM 38.

international regulation, the concept of pristine oceans or wilderness seas is a receding dream. It is unattainable without major changes in the principles and laws that background the regimes by which mankind manages the oceans.

This article will explore a means to achieve this outcome through international law. It will proffer the view that perhaps the most potent tool in the armoury is the 1972 Convention for Protection of the World Cultural and Natural Heritage (World Heritage Convention).⁹ The article will highlight the conflicts inherent in the present ocean management regime established by the law of the sea and that applicable to the present and prospective marine World Heritage areas. In particular an analysis will be made of the application of the World Heritage Convention to the Great Barrier Reef in Australia, the Tubbataha Reef in the Philippines and the Belize Barrier Reef in South America. It will be obvious from this analysis that changes need to be urgently made in our international legal regimes if pristine ocean, wilderness seas, and reefs are to be inherited by future generations.

World Heritage Convention

Background

The World Heritage Convention has a quite different background to the law of the sea. The concept of World Heritage had a two pronged genesis. This is because World Heritage cloaks singularly or together cultural and natural heritage.

Its cultural arm developed immediately after the conflagration in Europe caused by World War II. The establishment of UNESCO in the immediate post war period, lead to numerous Conventions and international agreements protecting the great cultural structures of Europe and elsewhere.¹⁰ The pivotal events were the threats in the 1950s–1960s to such international icons as Abu Simbel in Egypt, the temples of Borobudur in Indonesia, the City of Venice in Italy. After successful restoration efforts the international community recognised the need for an international agreement to halt the further loss of culture which constituted the irreplaceable heritage of all humankind. At the same time there developed in

9 Adopted by the General Assembly of UNESCO at its Seventeenth Session, Paris, 16 November 1972; 1037 UNTS 151.

10 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict done at the Hague, 249 UNTS 240; 1964 International Charter for the Conservation and Restoration of Monuments and Sites done at Venice; 1956 Recommendation on International Principles applicable to Archaeological Excavations done at Delhi; 1962 Recommendation concerning the Safeguarding of the Beauty and Character of Landscapes and Sites done at Paris.

the United States a movement to internationalise the national park concept to protect and conserve for future generations those outstanding natural places on our globe. These two movements coalesced in the World Heritage Convention. The preamble to the Convention notes that:

the cultural ... and natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction

It recognises that:

parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole

The underlying premise for the Convention is that irreplaceable and outstanding heritage must be given the highest possible level of protection so that present and future generations are able to benefit from its continued existence for time immemorial. In the World Heritage Convention positive protection is dominant, limiting and possibly excluding anthropocentric activity. It is a basis for the strongest protection not orderly exploitation. This is why World Heritage is called the "Nobel Prize of protected areas".¹¹

The Scheme of World Heritage Protection

The Convention operates on two levels: national and international. The international level does not initiate World Heritage protection but rather provides central administrative support, funding and expertise.¹²

At the national level, states nominate cultural and/or natural heritage on their territory that has "outstanding universal value"¹³ which accords with the criteria for consideration by the World Heritage Committee.¹⁴ If it is accepted the heritage is entered on the World Heritage List.¹⁵ The ascension of a nation's heritage to the List places upon the nominee state a duty to ensure it is accorded the highest level of protection commensurate with the objects of the Convention. What is the "highest level of protection" is the subject of considerable debate. The resolution of this issue is critical to the survival of the concept of World Heritage and determinative of its relationship to the law of the sea.

11 J. Thorsell quoted in N. Thongtham "World Heritage Guardian" *Bangkok Post*, 12 November 1993 at 3.

12 World Heritage Convention, Part III, IV and V.

13 World Heritage Convention, Arts. 2 and 3.

14 World Heritage Convention, Art. 11.

15 *Ibid.*

To do or not to do

It is trite logic that no management scheme can succeed if there is uncertainty in the principles underlying it. Management cannot know whether “to do or not to do” without certainty. Yet uncertainty exists within the management of World Heritage. The problem stems from the controversy over what is the test that establishes the duty under the Convention.¹⁶ This controversy is mainly located in Australia.¹⁷

Australia leads the world in the development of World Heritage law. Its High Court has three times been called upon to expound on domestic World Heritage legislation¹⁸ and the meaning of the Convention’s terms.¹⁹ At present another case *Friends of Hinchinbrook Society v. Minister for the Environment and Others*²⁰ is proceeding through the courts and can be expected to further develop the law and have international repercussions.

The critical issue in this controversy is to determine what are the obligations to World Heritage incumbent upon the nominee states? The resolution requires the settlement of two issues: the area requiring protection and the level of protection to be accorded the appropriate area. These two critical issues are presently addressed by two differing tests: the “Values” test and the “Duty” test.²¹

- 16 D. Haigh *World Heritage – Law and Practice* (Unpublished paper, 1993) (on file); D. Haigh written submission to the Inquiry into World Heritage Areas published in Vol 1 Submission 16, *Submissions to the Inquiry into World Heritage Areas* (House of Representatives Standing Committee on Environment, Recreation and the Arts, Commonwealth of Australia, Canberra: May 1995) 128; D. Haigh transcript of an oral submission to the Inquiry into World Heritage Areas held in Brisbane, reported in the *Official Hansard Report of the House of Representatives Standing Committee on Environment, Recreation and the Arts (Reference: World Heritage Areas)* 15 November 1995 (House of Representatives Standing Committee on Environment, Recreation and the Arts, Canberra: 1995) 225–238.
- 17 A suggested reason for controversy in Australia is that Australian World Heritage areas are not located only in national parks but include many commercial and private interests. See P. Valentine “World Heritage: Values and Management Implications” *Negotiating the Environmental Web: Proceedings of Queensland Environmental Law Association Conference* (QELA, Brisbane: 1997) 73 at 74.
- 18 World Heritage Properties Conservation Act 1983 (Australia); Nature Conservation Act 1992 (Queensland).
- 19 *Commonwealth of Australia v. Tasmania* (1983) 158 CLR (Commonwealth Law Reports) 1 (Australia); *Richardson v. Forestry Commission* (1988) 164 CLR 261 (Australia); *Queensland v. Commonwealth* (1988) 62 ALJR (Australian Law Journal Reports) 143 (Australia).
- 20 (1997) 93 LGERA (Local Government and Environment Reports of Australia) 249 (Australia); Appeal decision: *Friends of Hinchinbrook Society v. Minister for the Environment and Others* (Federal Court of Australia, Northrup, Hill, Burchitt JJ, No NG 164/97, 6 August 1997, unreported, Australia). An appeal to the High Court of Australia is being considered by the Appellant.
- 21 D. Haigh “Hinchinbrook – In Defence of World Heritage” *Proceedings of Defending the Environment Conference* (Australian Centre for Environmental Law and Adelaide University Law School, Adelaide: 1994); Valentine, note 17 at 78; B. W. Boer and R. Fowler *Management of World Heritage Properties in Australia*, Report to the Department of the Environment, Sports and Territories Part II, 1996.

The “Values” Test

The “Values” test addresses only threats to World Heritage values. “Values” are those components within the World Heritage area specified in the nomination documents as being “outstanding” in accordance with the criteria in Articles 2 and 3. Examples in the marine environment may be seagrasses, dugongs or specific corals. They may include the aesthetics or beauty of a cay or an underwater reef.

It is difficult to accept that a state is only duty bound to protect those values contained in a nomination document compiled in years past and not subject since to the developments of modern science. Equally, reliance on values assessed in the present takes no account of the continuing future development of scientific knowledge. The achievement of a clear and certain knowledge of the ecology of the terrestrial environment continues to be a real challenge. In the marine environment it is even more so given the large spatial areas subjected to the wax, wane and flow of winds and currents carrying the fish, animals, vegetation and food of ocean life.²² As well the “values” approach, in practice, fails to consider or gives scant regard to the overall “integrity”²³ of the World Heritage, its “aesthetics”,²⁴ and the need to include a “buffer zone”²⁵ around its core.

It follows from these deficiencies that the “Values” test accords a low level of protection to World Heritage in contravention of the Convention. The level of protection to be ascribed to a particular value is determined by taking a holistic view of the words “protection”, “conservation”, and “presentation” in Articles 4 and 5 of the Convention. The proponents do not accept any dominant role for “protection”. A decision-maker is required to seek “balance” in all the circumstances of the particular case and reach a conclusion that satisfies the needs of the duty which may include consideration of political, economic and social factors. Clearly this test is writ large in its considerations giving minimal certainty under the cloak of considerable discretion. It is a recipe for the loss of World Heritage by rapid development or “death by 1,000 cuts”.

These considerations expose the “values” approach to management as more concerned with the realism of day to day national politics than the duty to provide future generations with World Heritage. The application of this view has seen the permitting of large-scale tourism developments in or adjacent to World Heritage sites, which have clearly changed their character.²⁶ The Convention warns in

22 Valentine, note 17.

23 “Integrity” is implied in the Convention. It is referred to specifically in the *Operational Guidelines of the World Heritage Convention* WHC/2/Revised February 1996, *Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, UNESCO Paris* <http://www.unesco.org/whc/> (1 August 1997).

24 World Heritage Convention, Art. 3.

25 “Buffer Zone” is not used in the Convention. It is referred to in the *Operational Guidelines*, note 23.

26 An example of this approach is the Hamilton Island resort in the Whitsunday’s Islands of the Great Barrier Reef World Heritage Area. It includes high rise buildings, an international airport and marina in a World

Article 11 that such developments including large-scale public and private works may constitute a basis for inclusion on the World Heritage in Danger List.

“Values” Test and Ecological Sustainable Development

The popular conception of ecological sustainable development (ESD) as achieving a balance between environmental protection and economic and social considerations provides a rationale for proponents of the “Values” test. It seeks the same objective. However the critical issue is whether ESD is an objective of the World Heritage Convention?

Proponents of the “Values” test use the statement in Article 5(a) of the Convention, that the World Heritage is to be given “a function in the life of the community” as support for ESD. These words do not go so far as to undermine the duty to ensure “protection”. They do not require a wilderness to be threatened or damaged by anthropocentric concerns such as the assumed need of a large resort inside or adjacent to the World Heritage.

World Heritage is primarily concerned with the survival for future generations for time immemorial of the World’s outstanding cultural and natural assets. It is a singular objective that accommodates a limited consideration of economic and social factors within the concepts of “protection” and “presentation”. These factors however always give way to the dominant obligation to protect the World Heritage essentially in the condition it was in at the time of ascension to the List.

The notion of ESD is about lifting and balancing the standard of environmental protection. World Heritage is concerned with maintaining the highest standard of protection. ESD is therefore superseded by the high standards applicable to World Heritage management. The “Values” test in this context seeks through the application of ESD to weaken these standards.

“Duty” Test

The alternative test is the so-called “Duty” test. It applies to the entire area delineated as World Heritage. It maintains that the component “values” are important to the assessment of the nomination but merge after listing with all the factors that give the site its integrity as World Heritage.²⁷ This test recognises that

Heritage area nominated for its natural values. Another example is the Port Hinchinbrook development at Cardwell, Queensland which proposes 1,500 beds and a 237 boat marina adjacent to and in the Hinchinbrook Channel.

²⁷ Valentine, note 17 at 78.

there are substantial responsibilities attaching to the whole World Heritage area. A Party has the “duty” of:

ensuring the ... protection, conservation and presentation and transmission to future generations ... (of) the cultural and natural heritage... “and to do” all it can to this end, to the utmost of its own resources.²⁸

As well, Parties “... shall endeavour, in so far as possible, and as appropriate for each country... to take ... effective and active measures...” to implement the duty.²⁹

The test accepts that for a Party to comply with the duty it must do “all it can” to the “utmost” of its resources to achieve the high standard of protection appropriate to World Heritage. “Resources” includes financial, scientific, legal and administrative means. If a Party does not have the resources then it can seek assistance under the Convention from the international community.³⁰

The words “protection”, “conservation”, “presentation” and “rehabilitation” are critical to the “Duty” test. They are given their individual meanings within the context of the Convention. It is accepted that the dominant duty is positive “protection”.³¹ The test requires the decision-maker to determine permissible activities impacting on World Heritage by asking if it is for its “protection”, “conservation” and “presentation”.

The most difficult term is “presentation”. The term derives its meaning from the cultural context where buildings or monuments were presented in their setting based upon the time of their construction. Hence “presentation” is an adjunct of “protection”.³² It does not detract from “protection” and the duty to provide future generations with the same benefits as the present from the World Heritage. “Presentation” ensures the World Heritage has a “life in the community”³³ through visitation and education and allows for limited economic and social considerations.

The term “rehabilitation” is further evidence that World Heritage “protection” is a positive obligation. “Rehabilitation” engenders restoration or returning damaged or degraded parts to the standard appropriate to the whole World Heritage. It is further evidence that the measure of World Heritage “protection” is from the time of listing.

²⁸ World Heritage Convention, Art. 4.

²⁹ World Heritage Convention, Art. 5.

³⁰ World Heritage Convention, Art. 13.

³¹ The dominance of “protection” was accepted by the High Court of Australia in *Commonwealth of Australia v. Tasmania* (1983) 158 CLR 1 (Australia); Mason J at 138, Murphy J at 177, Brennan J at 227.

³² See Brennan J, *Commonwealth of Australia v. Tasmania* (1983) 158 CLR 1 (Australia) at 224.

³³ World Heritage Convention, Art. 5(a).

Summary

The debate over which test is appropriate is critical to World Heritage. At its heart is the need of certainty in World Heritage management. The “Duty” test provides a simpler test that accords with the objectives of the Convention. The “Values” test does not satisfy these objectives. It is more the servant of short-term anthropocentric politics, economics and social considerations. If the dominant issue is perceived as being to achieve the goals of the Convention then the debate would surely resolve in favour of the “Duty” test applying to the whole World Heritage.

This struggle is effectively highlighted by the application of the World Heritage Convention to the marine environment of the oceans, reefs, islands and the coastal zone. It is critical to the avoidance of conflict under the law of the sea.

Marine World Heritage

World Heritage in the marine environment may cover three differing environments:

- the coastal zone;
- reefs; and
- ocean areas.

At present there are 506 World Heritage sites which includes 107 natural sites of which some 31 have a marine or coastal component.³⁴ Eleven of these marine and coastal sites have coral reefs but only three, the Great Barrier Reef (GBR) in Australia, Tubbataha Reef Marine Park in the Philippines, and the Belize Barrier Reef Reserve System (Belize Reefs) are listed primarily for their coral reef values.³⁵ There are no ocean sites.

Ocean World Heritage

The concept of ocean World Heritage would seem to be academic fantasy to the present generation. Our oceans are regarded as marine “deserts”. However, for the same reasons that the coastal and reef environments attract World Heritage so

34 UNESCO *World Heritage Centre* <http://www.unesco.org/whc/> (1 August 1997); World Heritage Nomination – IUCN summary Belize Barrier Reef Reserve System (Belize) in “Documentation on World Heritage Properties (Natural)” prepared by IUCN for World Heritage Committee, Twentieth Session, Merida, Mexico, 27 December 1996 at 15.

35 Belize Reef, *ibid.*

will future generations seek to preserve unique ocean environments. The address by Dr Sylvia Earle³⁶ to the 1996 World Conservation Congress in Montreal³⁷ illustrated in graphic form that the deep oceans are the world's last frontier. They contain mountain ranges higher than the Himalayas and deep valleys and plains of presently largely unknown aesthetic and scientific significance. They are also of cultural significance containing a treasure-trove of marine archaeology in ancient and recent shipwrecks such as the *Titanic* recently located in mid Atlantic.

The deep ocean unless within a state's exclusive economic zone (EEZ), extending some 200 kilometres from a coastline, is in the international domain of the high seas. It is therefore excluded from the World Heritage Convention, which provides only for nominations for heritage within sovereign territory. This restriction limits marine World Heritage to the territorial sea where sovereignty equates with the terrestrial domain.

Clearly, if ocean World Heritage is to be a possibility, substantial amendments would be required to the World Heritage Convention to allow international bodies such as UNESCO, IUCN or ICOMOS to submit nominations. As well, the ensuing management of it would need international cooperation under the direction of international bodies such as the International Maritime Organization (IMO), IUCN or ICOMOS.

Coastal and Reef World Heritage

The problems of applying World Heritage status to marine environments are well illustrated by a comparison of the management and legal regimes that append to the GBR, Tubbahata and the Belize Reefs. These three reef systems were listed as World Heritage in 1981, 1993 and 1996 respectively.

The Great Barrier Reef

The Great Barrier Reef World Heritage area (GBR) was entered on the World Heritage list in 1981. It was the first large-scale marine World Heritage area. It also has the largest area of any World Heritage site being about 1.5 times the size of the United Kingdom.³⁸

The GBR was originally protected in response to proposals to exploit its resources, in particular its perceived oil resources. In 1975 the Australian

36 Dr Earle, internationally respected oceanographer, was Director of the National Oceanographic and Atmosphere Administration (NOAA) of the USA.

37 World Conservation Congress is a triennial general meeting of the IUCN.

38 P. Valentine *et al* "The Great Barrier Reef: Multiple Use Marine Park and World Heritage site" in *Proceedings of the Great Barrier Reef: Science and Management Conference* Vol 1 (CRC Reef and GBRMPA, Townsville) 382.

Government enacted the Great Barrier Reef Marine Park Act 1975 establishing a marine park over a vast area to be managed by the Great Barrier Reef Marine Park Authority. The Act provided a multiple use planning framework that provides for a spectrum of uses from commercial exploitation such as tourism and fishing to strict conservation allowing only scientific research.³⁹

It was never the intention of the legislation to provide a regime commensurate to a national park where the objective was ecological protection and limited anthropocentric access. Indeed the strong emphasis on “multiple use” reflects the political intent to ensure the public did not think the resources of the GBR were being closed to exploitation such as tourism and fishing.⁴⁰

This intent underlines how Australian authorities perceived the World Heritage Convention. When the GBR was listed as World Heritage in 1981 it was made without any changes in the Great Barrier Reef Marine Park Act or the management regime. It must be noted however that the World Heritage Committee and their adviser’s, IUCN, at the time flagged their concerns about the lack of legal protection and the “development pressures”.⁴¹ The Act made no references to World Heritage status or its obligations. Indeed it was not until the 1993 Whitehouse Report⁴² recommended amendments to the Act to reflect World Heritage responsibilities, and the recent public outcry over huge tourism development at Oyster Point in the Hinchinbrook component of the GBR, that finally in 1995, the Act was amended to specifically refer to “World Heritage” and the “Precautionary Principle” as considerations in the preparation of management plans.⁴³ This amendment however is a far cry from providing World Heritage protection in the GBR.

In 1994 the Great Barrier Reef Marine Park Authority produced a 25-year Strategic Plan which seeks to provide a framework for the future of the World Heritage area. The substantive basis of the Plan is an ecologically sustainable management regime that continues to allow multiple use including fishing and exploitative industry. This Plan fails to provide for the future of the GBR as a World Heritage area.

The management of the GBR reflects closely the Australian Government view that World Heritage accommodates exploitative uses such as fishing, large-scale tourism and in some terrestrial sites, mining. This view is accommodated by the application of the “Values” test. Hence emphasis is placed upon so-called “reactive management” allowing large-scale development under the guise of “best available knowledge” and of monitoring supported by a political regime allegedly

39 Valentine, note 17 at 75.

40 Ibid.

41 Ibid at 76.

42 J. F. Whitehouse *Managing Multiple-use in the Coastal Zone: A Review of the Great Barrier Reef Marine Park Authority* (AGPS, Canberra: 1993) Recommendation 1.2.

43 Great Barrier Reef Marine Park Act 1975 (Australia) s. 39YA: “The Authority in preparing management plans must have regard to: (a) the protection of the World Heritage values of the Marine Park.”

able to act to prevent damage. The overall integrity of the World Heritage requiring consideration of the aesthetic value of the area and the cumulative impacts are given minimal consideration.

The end result of this approach is increasing exploitation particularly through additional large-scale tourist projects in sensitive areas. The Hamilton Island development set in the Whitsunday Islands region, replete with high rise buildings, an international airport and a marina, was permitted in the 1980s despite the scar it places upon the integrity, scientific and aesthetic values of the region. In the 1990s the mistakes of the past continue with the Hinchinbrook and Trinity Bay developments and a proposal for a similar large-scale tourist resort at Keswick Island off Mackay.⁴⁴ Commercial and recreational fishing continues unabated to exploit the fishery resources. Perhaps a recent example of the inherent deficiencies of the current GBR management model is the failure to prevent a 50-80 per cent loss in the endangered dugong population of the GBR. Only now are measures being taken to react to these failures.

It is difficult to imagine what the GBR under present management will be like for future generations in time immemorial. It is a reasonable prognosis that it will be vastly different to that heritage listed in 1981. The question must be asked whether that outcome is contemplated by the World Heritage Convention or is it time to change the principles of management?

A change taking account of basic World Heritage principles would give greater recognition to the "Duty" test applied to the total area. If the basic principles were implemented there would be far more restrictions on the exploitation of the reef. The fishing industry would be phased out and large-scale tourist development relocated to sites where they were unlikely to impact on the aesthetics and the ecology of the reef and surrounding waters. As well, substantially greater emphasis would be placed upon the GBR buffer zone requiring more stringent coastal zone management. The current discharge of large-scale pollution from coastal rural industries would be prevented and rivers restored to their important role of "feeding" the coastal waters rather than providing a lethal soup of fertiliser and heavy metals.

However, the political reality is that these proposed changes are only politically possible when the community is accepting of them. It is highly unlikely that the community is ready for such urgent measures. One option is to continue to avoid the responsibilities of the World Heritage Convention and thus undermine its basic philosophy. Another option is to recognise that presently only parts of the GBR in those zones limiting exploitation are being managed as World Heritage. This being the case there are cogent arguments for redefining the boundaries of the GBR World Heritage area to better reflect the Convention. If this is the case then a smaller World Heritage area may be more appropriate.

44 There are some 250 tourism resort proposals in the GBR region.

Tubbataha Reef

The Tubbataha Reef Marine Park is located in the middle of the Central Sulu Sea in the Philippines. It is the most biologically diverse coral reef system in south-east Asia.⁴⁵ The Reef is of great importance in sustaining the region's fisheries and as a habitat for some 46 bird species.⁴⁶

It comprises the only two atolls in the Philippine Archipelago, North and South Reef. North Reef, the largest, comprises a reef platform some 16 kilometres long and 4.5 kilometres wide. South Reef is only some 12 kilometres wide. Each platform is bordered by spectacular 100 metre perpendicular walls, an almost undisturbed reef crest and reef edge which encloses a sandy lagoon with seagrass and coral beds. A small cay exists on each reef, which are nesting sites for the birds and turtles.⁴⁷ The surrounding waters contain some 379 fish species.⁴⁸

Threats to the integrity of the area are relatively few compared to the GBR. Tubbataha has remained relatively pristine due to its inaccessibility, which is secured by its exposure to rough seas for much of the year created by the south-west and north-east monsoons. It is also isolated from coastal population centres. There is no permanent human habitation on the reefs other than temporary visits during the fishing season and an occasional lighthouse keeper and temporary Coast Guard personnel. Fisherpersons conduct a wide range of fishing activities in the waters surrounding the Park.⁴⁹

Until 1991 the area was threatened by disturbances such as blast fishing, large-scale collection of sea bird and marine turtle eggs, sea resources such as giant clams, and spear fishing. In 1992 a Proclamation declared these activities illegal.⁵⁰ Tourism through scuba diving is the most prolific anthropocentric use of the reefs. Some 1,500 divers visit the area generating more than US\$1 million per year.⁵¹

Unlike the large area in the GBR the Tabbataha's small size and isolation lent itself easily to a "spatial" World Heritage nomination. However the IUCN at the time of the Reef's nomination was critical of the boundaries failing to encompass all nearby islets and reefs.⁵² The small size of the Tubbataha has meant a

45 IUCN *Paradise on Earth – The Natural World Heritage List – A Journey through the World's Most Outstanding Natural Places* (JIDD Publishers, Patonga, New South Wales: 1995) 188; World Heritage Nomination – IUCN Technical Evaluation 653 Tubbataha Reef National Marine Park (Philippines) in "Documentation on World Heritage Properties (Natural)" prepared by IUCN for World Heritage Committee, Seventeenth Ordinary Session, Cartagena, 5–11 December 1993 at 43.

46 World Conservation Monitoring Centre *Tubbataha Reef Marine Park World Heritage Data Sheet* February 1993 at 2. Available at *World Conservation Monitoring Centre* http://www.wcmc.org.uk/protected_areas/data/wh/index.html.

47 Ibid at 1.

48 Ibid at 2.

49 Ibid at 3.

50 Ibid at 4; Presidential Proclamation No. 306 (Philippines).

51 Ibid at 3.

52 World Heritage Nomination – IUCN Technical Evaluation 653, note 45 at 44. Bastera and Jessie Beazly Reefs are not included.

consistent management regime over the whole area without the perceived need for the zonal regime of the larger GBR. To this extent the Tubbataha's integrity as a World Heritage area is managed without the distortions inherent in the GBR management process. The surrounding area is managed as a part of the Palawan Biosphere Reserve established in 1990.

The Tubbataha Reef is clearly a simpler World Heritage management issue than the comparatively huge area of the GBR with its complex human interactions.⁵³ The essential point however is that the Tubbataha Reef World Heritage listing and its management regime sustains the World Heritage Convention and its basic principles.⁵⁴ The GBR World Heritage area fails to achieve this end. A completely different comparative nomination and listing is that of the Belize Reef.

Belize Reef

The Belize Reef lies off the Caribbean coast of the nation of Belize. It is the world's second largest reef system after the GBR and the largest reef system in the Caribbean-Atlantic region.⁵⁵ It is a 250 kilometres long complex consisting of reefs, sand and mangrove cays which are the habitat of many threatened marine species, birds, terrestrial and marine life. In 1842 Charles Darwin referred to it as "most remarkable reef in the West Indies".⁵⁶ It is distinctive for being in remarkably pristine condition.⁵⁷

Its integrity is less threatened by population pressure than the GBR however the over exploitation of its resources is a problem. Fish stocks, manatee and turtle numbers have suffered severe depletion. The coastal zone is impacting through sediment and effluent's flowing from urban settlements and agriculture. There is also active interest in oil exploration and a small amount of shipping.

However, despite the long-standing precedent of the GBR and its model of including all reefs in a large spatial area with zonal management, the Belize Government opted for a serial nomination of a number of small areas selected as World Heritage. This approach involved identifying those areas containing the outstanding natural values and excluding large areas without them.

53 Barrier Reef is 348,700 km², IUCN Technical Review GBR Nomination (1981) at 1. See World Heritage nomination documents UNESCO <http://www.unesco.org/whc/>; Tubbataha Reef is 33,200 hectares, WCMC note 42 at 1.

54 It should be pointed out that the day to day management regime of the Tubbataha Reef has been criticised as inadequately implemented, supported and funded. See IUCN Tubbataha Data Sheet, note 46 at 4 and World Heritage Nomination – IUCN Technical Evaluation 653, note 45 at 44.

55 Belize Reef, note 34 at 2.

56 Ibid.

57 Ibid at 16.

The major problem with this approach is whether it ensures the protection of the integrity of the World Heritage. It needs to be assessed whether the individual sites have an overall management framework that ensures their integration into the whole.⁵⁸ The World Heritage site's integrity must not be compromised by the use and management of the surrounding area. While these concerns apply to any serial nomination they particularly apply to one in the marine environment where uncontrolled unwise development on a nearby reef, or land-based nutrient inputs into a moving water mass, can affect scientifically and aesthetically a wide area of the marine environment.

This concern should be addressed by a management plan set in a strong specialist legislative context ensuring protection of the core World Heritage and the surrounding waters, reefs and coastal zone. Any legislation because of the particular needs of World Heritage would have to have provisions that deal specifically with that topic.

In the Belize Reef, there is a holistic coastal zone and reef legal and administrative regime. A Coastal Zone Management Authority is to be established to coordinate the roles of the Fisheries and Agriculture Ministries and various other government departments or agencies with responsibilities for the coastal zone.⁵⁹

Serial verses Spatial World Heritage

It is obvious that the smaller the World Heritage site whether "serial" or "spatial", the easier it is to maintain high standards over the whole area. However these gains are illusory if their application stops at the core World Heritage boundary and do not extend to the waters, reefs and coasts of the buffer zone.

In the GBR the zonal management regime in effect places a "serial" World Heritage concept into the "spatial" one. As the management of the GBR shows, the non World Heritage component creates an illusion of overall World Heritage management. The effect is managerial uncertainty and degradation of the concept of World Heritage. It promotes the community confrontation for which the GBR World Heritage area is legend.⁶⁰ This is the antithesis of ensuring that World Heritage is a positive concept that brings its management into "the life of the community".⁶¹

A further concern is that in a large "spatial" World Heritage with various zones, those zonal areas that do achieve a World Heritage standard are subverted by the pressures on the surrounding zones with lesser standards. This problem arises

58 Ibid at 17.

59 Ibid at 18.

60 Disputes are ongoing over such issues as large resorts and marina developments on islands and adjacent coast, commercial and recreational fishing, mangrove clearing, river catchment land clearing and pollution, dugong, turtles and fish species loss, scientific methods.

61 World Heritage Convention, Art. 5(a).

when the World Heritage standard of management is localised to the core without consideration of the buffer zone. The overall Coastal Zone Management regime of the Belize Reef and the Palawan Biosphere Reserve encompassing the Tubbataha Reef, are intended to overcome this problem.

The large “spatial” model is contained in a pincer between those who wish to see it as a complete World Heritage area with a management regime achieving the appropriate high standards and those who wish to reduce it to a “serial” nomination because of the failures of the “spatial” approach. In marine World Heritage this division is between those who regard the “spatial” model as a necessity due to the connectivity of the marine areas and those who wish stronger more appropriate World Heritage management. It is a debate that needs to focus more on the need for certainty in the basic principles of the World Heritage Convention and their inculcation into improved management regimes.

It is clear from the IUCN and the World Heritage Committee’s acceptance of the Belize Reef nomination that “serial” nominations are preferred to large “spatial” marine World Heritage areas open to diverse threats requiring complex management regimes. If the GBR were nominated today based upon a “spatial” model, it would most likely be an unacceptable nomination.

This conclusion must bring substantial disquiet to those persons who are responsible for management of the GBR. If the present management is to continue then it is a reasonable conclusion that the GBR is being driven towards the World Heritage in Danger list. It is interesting that this conclusion is based not upon management failing to apply the current legislative prescription but because the present scheme of management is wrong in principle and will lead to inevitable degradation of the GBR as a World Heritage site. These debates are even more exacerbated by the application of the law of the sea.

Law of the Sea

The underlying theme of the law of the sea is quite different to that of the World Heritage Convention. The law of the sea has had a genesis dating from the 16th century when international relations developed between independent States.⁶² It was at this time that Hugo Grotius through his work *Mare Liberum* (1609) established the concept of the seas as “Common Property”.⁶³

The development of international law since this time culminated in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This Convention is intended to resolve all issues in the ocean commons relating to the law of the sea. It declares in its preamble that:

⁶² R. Churchill and A. V. Lowe *The Law of the Sea* (Oxford University Press, London: 1983) 3.

⁶³ *Ibid.*

[T]he area of the sea-bed and the ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the *common heritage* of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole.

Thus UNCLOS provides for differing responsibilities extending from a state's territorial sea, its EEZ to the high seas. In the territorial sea the state must grant a right of innocent passage to all ships provided the passage is not prejudicial to the "peace, order and good government of the coastal State".⁶⁴ In the EEZ the coastal state has the right to explore, exploit, conserve and manage the natural resources of the subsoil, sea-bed and superjacent seas.⁶⁵ However if a coastal state does not fully exploit the EEZ fishery then another state can request the allocation of any excess.⁶⁶

Thus UNCLOS provides for the orderly exploitation of the common seas subject to an "...obligation to protect and preserve the marine environment".⁶⁷ It retains for states:

the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.⁶⁸

The sovereign right of a state to legislate for environmental protection does not extend to alter the law of the sea. Hence domestic laws can concern maritime disasters, safety and vessel discharges but they cannot hamper the right of innocent passage through the territorial sea⁶⁹ or the right of transit through an archipelagic state's waters.⁷⁰ In the EEZ the coastal state may only impose domestic laws which reflect accepted international rules although they may legislate particular laws for a specific delineated area and in ice covered areas.⁷¹

The spate of maritime oil pollution disasters in the 1970s–1980s, spawned international calls for changes to these regimes. The 1992 United Nations Conference on Environment and Development (UNCED) and subsequent meetings of the Commission for Sustainable Development and the IUCN have called for coastal states to establish marine protected areas and for changes to international laws to allow their establishment past national jurisdiction.⁷² The international community has responded to these calls in constructive ways.⁷³

64 UNCLOS, Art. 19.1.

65 UNCLOS, Art. 56.

66 UNCLOS, Art. 62.

67 UNCLOS, Art. 192.

68 UNCLOS, Art. 193.

69 UNCLOS, Art. 21.

70 UNCLOS, Art. 42(1)(b).

71 UNCLOS, Arts. 56, 211(5) & (6), 234.

72 Warner, note 2 at 423.

73 See Warner, *ibid* at 39; Robert Beckman "Legal Implications of Entry into Force of UNCLOS for Coastal and Maritime Zone Planning and Management – the South East Asian Perspective" in Martin Tsamenyi, Sam Bateman and Jon Delaney (eds) *Coastal and Maritime Zone Planning and Management – Transnational and Legal Considerations* (Wollongong Papers on Maritime Policy No 2, Centre for Maritime Policy, University of

The regime for prevention of marine oil pollution established by the International Convention for the Prevention of Pollution from Ships (MARPOL) and its Protocols⁷⁴ provides for “special areas” in which specific characteristics demand special rules to prevent pollution.⁷⁵ The outer boundary of the GBR creates a “special area” where there is a prohibition on most discharges from vessels. As well the International Maritime Organization (IMO) has, through the International Convention for the Safety of Life at Sea (SOLAS), the task of identifying “Areas to be Avoided” because of their navigational hazards and likely environmental damage from any accident.⁷⁶ These areas require only a voluntary response.

The IMO has recently established another designation, that of “Particularly Sensitive Sea Areas” (PSSA) which may straddle various maritime zones such as the territorial sea, EEZ and high seas.⁷⁷ The world’s first PSSA is the GBR. It provides for compulsory pilotage in the reef area except for vessels that have sovereign immunity such as warships.⁷⁸

All these measures within the umbrella of the law of sea provide for the orderly management and exploitation of the marine environment. They do not provide for the total exclusion of maritime activity in favour of the dominant theme of protection. They are therefore at odds with “Common Heritage” principles of marine World Heritage areas.

World Heritage and the Law of the Sea – Peace or War?

The conflict between World Heritage, the law of the sea and economic development is well illustrated by a list of the activities that are likely to be present in marine World Heritage areas. These include:

- tourism
- fishing
- shipping
- mining.

Wollongong, Wollongong) 55; Ian Lambert “Environmental Protection Implications” in Martin Tsamenyi, Sam Bateman and Jon Delaney (eds) *United Nations Convention on the Law of the Sea: What it means to Australia and Australia’s Marine Industries* (Wollongong Papers on Maritime Policy No. 3, Centre for Maritime Policy, University of Wollongong, Wollongong:) 115.

74 (1973) 12 ILM 1319; (1978) 17 ILM 546.

75 MARPOL Annexures I, II, IV, V.

76 Warner, note 2 at 43.

77 Ibid.

78 Great Barrier Reef Marine Park Act 1975 (Australia), Part VIIA, s. 59A.

In the GBR all these activities are permitted except mining.⁷⁹ They are limited only by the particular characteristics of the zones. Clearly for the GBR to attain World Heritage standard across its whole area would require major changes in its supporting legislation and relevant Queensland laws such as the Coastal Protection and Management Act 1995. As well, the passage of large scale shipping would need to be diverted to the Coral Sea outside the Reef boundary. This action would be the most challenging exclusion as it would not be possible without ramifications for UNCLOS and associated international agreements.

In the Tubbataha and Belize Reef World Heritage areas management limits tourism and fishing. The more compact boundaries of these reefs means movement by international shipping is unlikely to be an issue. However permits have been given for oil exploration on one of the listed Belize Reefs.⁸⁰ Their nomination was only accepted after the IUCN sought and was given by the Belize Government undertakings concerning the nature, extent and controls applying to oil exploration.⁸¹ This activity degrades the World Heritage and arguably should not be permitted in it.

The Tubbataha and Belize Reefs due to their much smaller core World Heritage areas rely heavily upon adequate protection in the buffer zone of the surrounding seas and coastal zone to maintain their integrity. In the GBR, the large area within the delineated boundary but outside the core World Heritage, acts, in effect, as a buffer zone. It is an advantage that this area and the core areas are under the same management authority. The Belize Reef has the same advantage with its single Coastal Zone Management Authority having jurisdiction over the core World Heritage areas, their buffer zones and the coastal zone.

Conclusion

The differing management regimes in marine World Heritage areas highlighted by the examples of the GBR, Tubbataha and Belize Reefs points to the urgent need for World Heritage management authorities to shift their focus from the problems of management to the principles of World Heritage. The past emphasis on the problems of management and the short term political, economic and social considerations did not allow the development of management regimes that are firmly based upon the principles of the World Heritage Convention. The uncertain nature of World Heritage management and its political rather than principled basis

79 Great Barrier Reef Marine Park Act 1975 (Australia), s. 38.

80 Belize Reef, note 34 at 15. On Glover Reef.

81 Belize Reef, *ibid* at 19.

is highlighted by the debate of the “Values” test and “Duty” test. An objective observer seeking the best outcome for World Heritage would reject the “Values” test in favour of the “Duty” test. This debate, if left unresolved, will ensure that future generations are deprived of the world’s most outstanding marine nature areas.

However management authorities cannot achieve a lasting outcome if action is not taken to remove the impediments created by international and national laws. The law of the sea must be changed to specifically provide for World Heritage areas as specific exclusion zones to international shipping and resource exploitation. These reforms must also provide for Ocean World Heritage areas that are proposed not only by states but also by the international authorities and NGOs such as UNESCO or the IUCN.

There can be no greater duty on this generation than to provide for those in the future, to time immemorial, the outstanding natural and cultural assets of this world. The use of World Heritage over marine areas is one small step to accept that responsibility. If World Heritage is not to “tempt the devil” it is time for serious action.