

WORLD HERITAGE CONVENTION

World Heritage Committee

Draft Operational Guidelines

An Analysis of the Legal Issues

**Responding to the 2nd Draft Operational Guidelines and issues raised
during the Drafting Group of October 2001**

Presented by:

IUCN - The World Conservation Union

*With the assistance of the IUCN Programme on Protected Areas together with the
IUCN Environmental Law Programme*

14 May 2002

DRAFT OPERATIONAL GUIDELINES AN ANALYSIS OF THE LEGAL ISSUES

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BRIEF SUMMARY OF THE ISSUES PRESENTED

Based upon a thorough analysis of the World Heritage Convention, its *Operational Guidelines*, and the practice of the World Heritage Committee as developed over the past three decades, IUCN offers its advice to the World Heritage Committee in respect of four critical issues:

Issue 1: Role of the State Party consent in Reactive Monitoring

IUCN believes that State Party consent is not required before reporting is called for by the World Heritage Centre, other sectors of UNESCO or by the Advisory Bodies.

Issue 2: The role of State Party consent for inscription of a property on the List of World Heritage in Danger

IUCN believes that the Committee has the power to place properties on the List of World Heritage In Danger without State Party consent.

Issue 3: The capacity of the World Heritage Committee and the role of the State Party to consent to deletion of properties from the World Heritage List

IUCN believes that the Committee has the power to remove properties from the World Heritage List if they have deteriorated to the extent that they no longer exhibit the characteristics for which they were nominated. The consent of the affected State Party is not required for deletion of a property from the List.

Issue 4: Whether the protection of a World Heritage property refers to the conservation of all values or just the values identified as outstanding/World Heritage values

IUCN believes that the protection of a World Heritage property refers to the protection of the whole of the inscribed property.

Purpose and Scope of this Analysis

The Report of the Drafting Group of October 2001 identified a range of technical issues regarding the World Heritage Convention and its interpretation that required clarification, in order to assist members of the Drafting Group complete their important task. An Interim Analysis was prepared by IUCN for this purpose.

IUCN now submits an updated Legal Analysis to the World Heritage Committee, as the final arbiter of the interpretation of the Convention. This update is still based on the 2nd Draft Operational Guidelines and the Report of the Drafting Group of October 2001. Upon release of the final UNESCO Legal Advice and the 3rd Draft of the Operational Guidelines, IUCN may consider it important to provide further analysis for the benefit of the Committee.

Fundamental Concepts

The fundamental concepts of the World Heritage Convention can be summarised as follows:

1. The Convention is primarily directed to the *protection* of natural and cultural heritage of “outstanding universal value” i.e. World Heritage.¹
2. To this end, the Convention unites two critical issues – national sovereignty and international co-operation – through a carefully honed framework. It recognises the sovereignty of each State Party and places upon each of them the very serious obligation to ensure that its cultural and natural heritage is identified, protected, conserved, presented and transmitted to future generations.² At the same time, the Convention calls on each State to carry out this duty under a co-operative international management regime led by the World Heritage Committee and advised by international advisory bodies. Whilst the sovereignty of the States is fully respected, “States Parties recognise that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.”³
3. The Convention specifically authorises the World Heritage Committee to establish both the “World Heritage List” itself and the “List of World Heritage in Danger.”⁴
4. The overarching principle underlying the Convention is known as “intergenerational equity” and the need to ensure that the world’s cultural and natural heritage is identified, preserved and transmitted to future generations.
5. The importance of these objectives is reinforced throughout the Convention, as they have been through its implementation.⁵

¹ See Preamble to the Convention, particularly paragraph 9, which refers to the Convention “establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organised on a permanent basis and in accordance with modern scientific methods.”

² See Article 4 World Heritage Convention.

³ See Articles 5 and 6 World Heritage Convention.

⁴ See Article 11 paras. 2, 4 and 6 World Heritage Convention.

⁵ Given the need to apply the highest possible standards of protection to all properties on the World Heritage List.

The Context of the *Operational Guidelines*

The *Operational Guidelines* are designed to “operationalise” the World Heritage Convention. As such they must be consistent with both the letter and the spirit of the Convention. They must therefore reflect, and not extend, the legal meaning of the Convention in all of its aspects, and ensure that the basic scheme of the Convention is carried out to the highest standards.

The revision of any international conventions’ operational guidelines is significantly assisted by a thorough analysis of the Convention and the production of a Guide to the Convention, and IUCN is available to actively assist with this, in addition to helping as necessary with any subsequent review of the *Operational Guidelines*, or in providing any additional advice on the issues that are currently under consideration.

1. ROLE OF STATE PARTY CONSENT IN REACTIVE MONITORING

Reactive monitoring is intended to inform the Committee’s decisions on a variety of elements relative to the condition and management of listed properties, including the possibility of inscription on the List of World Heritage in Danger (the “In-Danger List”).⁶ Through this mechanism, the Committee receives a report on the state of specific World Heritage properties under threat, which partly informs the decision by the Committee to list a property as In-Danger, or to delete it from that List.⁷

The authority for the reactive-monitoring process is derived from Article 11 para. 4. It operates as a precursor to In-Danger listing, and the possibility of eventual deletion of properties that have irretrievably lost the characteristics for which they were listed.⁸ As an informational process, reactive monitoring is valuable primarily because it provides a dispassionate, scientific analysis. The impartiality of the information provided is both a central component and a justification of the process.

The *Operational Guidelines* foster such impartiality, by providing that reactive monitoring is undertaken by the World Heritage Centre, in partnership with the Advisory Bodies, IUCN, ICCROM, and ICOMOS (whose role within the Convention is intended to serve in just such an impartial capacity). These independently compiled reports are submitted directly to the Bureau and the Committee. If the State Party’s participation in, consent to, or approval of reactive monitoring were made mandatory, the impartiality and independence of reactive monitoring, and of the decisions based on its reports would be compromised.

While fully respecting national sovereignty and private property rights, it is the “duty” of the international community as a whole to co-operate⁹ and the co-operation of the State Party is quite properly expected (and may be required to obtain physical access to the property concerned). Where co-operation is not forthcoming, however, the Committee is both empowered, and obliged, to initiate the reactive monitoring process without the consent of the State Party.

The March 1999 *Operational Guidelines* correctly describe reactive monitoring. However, given the close similarity of purposes between reactive monitoring and periodic reporting, it may be more appropriate to describe reactive monitoring utilising the same approach as is

⁶ See Article 11 para. 4 World Heritage Convention.

⁷ See March 1999 *Operational Guidelines*, para. 68; and *December 2001 draft Annotated Revisions of the Operational Guidelines*, para. 105, in the square brackets.

⁸ As noted in paragraph 50(d) of the March 1999 *Operational Guidelines*.

⁹ See Article 6 para. 1 World Heritage Convention.

currently used in agreed paragraph 99 of the new draft (with regard to periodic reporting), viz:

Reactive monitoring is intended to serve four main purposes:

- (a) To provide a report regarding the application of the World Heritage Convention by the State Party;*
- (b) To provide a report as to whether the Outstanding Universal Value of the property is being maintained over time;*
- (c) To provide confirmed information about the World Heritage properties, to record changing circumstances and state of conservation of the properties in order to improve site management;*
- (d) To provide an input into regional co-operation and exchange of information and experiences between States Parties and for promotion of the Convention in various regions of the world.*

2. THE ROLE OF STATE PARTY CONSENT FOR INSCRIPTION OF A PROPERTY ON THE LIST OF WORLD HERITAGE IN DANGER

The first sentence of Article 11 para. 4 of the Convention is directed to the obligation of the Committee to establish and keep up to date a “List of World Heritage In Danger” (the “In-Danger List”). Unlike the World Heritage List, for which a procedure is stated regarding addition of sites, the Convention is not clear about exactly how sites can be added to the In-Danger List.

The present question centres on whether the Committee may place properties on the In-Danger List without the consent of the State Party on whose territory the property is situated. The relevant sentence of Article 11 para. 4 of the Convention states that:

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 for the conservation of which major operations are necessary and for which assistance has been requested under this Convention.

The March 1999 *Operational Guidelines* include the following pre-conditions for including a property in the List of World Heritage in Danger:

80. *In accordance with Article 11, paragraph 4, of the Convention, the Committee may include a property in the List of World Heritage in Danger when the following requirements are met:*

- (i) The property under consideration is on the World Heritage List;*
- (ii) The property is threatened by serious and specific danger;*
- (iii) Major operations are necessary for the conservation of the property;*
- (iv) Assistance under the Convention has been requested for the property; the Committee is of the view that its assistance in certain cases may most effectively be limited to messages of its concern, including the message sent by inclusion of a site on the List of World Heritage in Danger and that such assistance may be requested by any Committee member or the Secretariat.*

The Convention, its *Operational Guidelines*, and the past practice of the World Heritage Committee, as developed over the last three decades, confirm that the Committee has the

power to place properties on the In-Danger List without the State Party's consent. There are six separate bases for this conclusion:

(i) *International co-operation*

A primary basis for this conclusion can be found in the overall understanding of the Convention as part of the international process by which countries take collective action or reach collective agreement. The basic mutual agreement underlying operation of the entire Convention can be summarised as follows:

- (1) Following the voluntary nomination by a State Party, certain sites are agreed to constitute part of the World Heritage;
- (2) The State Parties collectively, as well as an international Committee, an international secretariat (the World Heritage Centre), and three international Advisory Bodies, dedicate time and effort towards protecting, publicising, monitoring and maintaining those sites;
- (3) State Parties are not required to list any site; however, once they have proposed a site and it has been added to the World Heritage List, they agree to protect these properties in accordance with the Convention, and thereby submit them to the ongoing attention of the Committee, the Centre, Advisory Bodies, etc.;
- (4) Governments, Intergovernmental Organisations and others commit money and effort to assist in the ongoing protection and maintenance of these sites, along with their restoration in cases of damage. This, in effect, is the nature of the international compact represented by the Convention.

State Parties must give their consent before a site may be added to the World Heritage List. However, listing is not determined by the Parties.¹⁰

Rather, the Convention requires that properties be independently evaluated and found to meet certain criteria before they can be listed. It is on the basis of this evaluation that the World Heritage Committee can agree that a property warrants inclusion on the List – *i.e.*, that the site has Outstanding Universal Value, making it worthy of world-wide attention. Nomination, assessment, inclusion on the list and ongoing protection involves a considerable investment of resources by UNESCO, the World Heritage Centre, the World Heritage Committee, the Conference of Parties to the World Heritage Convention, IUCN, ICOMOS and the Rome Centre, in addition to the work done by or within the State Party itself.

By agreeing to submit properties for inscription on the World Heritage List, and enjoying the international status this brings, State Parties agree to a regime of protection that involves the world community, including the possibility that one of the properties situated in their territory may require special attention, including being placed on the List of World Heritage in Danger.

(ii) *Consent requirements under the convention*

Whether or not consent from a State Party is required under the Convention is addressed in different ways. In some instances, such as nomination for listing, it is explicit, in other cases it is determined in the context of the Convention as a whole.

Two relevant instances of where consent of the State Party is required are:

- Before a property within the territory of a State may be included on the World Heritage List.¹¹

¹⁰ As it is for example under the Ramsar Convention.

- Where the only action contemplated is “research.”¹² Given the Convention uses specific language regarding approval of research activities, one would also reasonably expect such language to be used where it intends more important activities to require such consent.

It is also notable that Article 11 para. 6 states that the State Party must be consulted before the Committee decides to refuse to include a property on one of the Lists. This point is indeed so close to the issue of In-Danger listing that the Convention’s drafters could easily have specifically included State-Party approval for a positive decision on In-Danger listing, if they had wanted to do so.

It is not necessary to make an inference about whether State Party consent is required. Where the drafters intended consent to be required, they were specific about it. No express “consent” clause is included for In-Danger listing. Applying common sense and general principles of legal drafting, if the drafters had intended the State Party consent to be a prerequisite to In-Danger Listing, they would have clearly stated this.

The rational conclusion is that the Convention was always intended to vest the Committee with plenary power over the In-Danger listing process.

(iii) “Urgent need” and the In-Danger List

In cases of urgent need,¹³ the Committee is empowered to take immediate action to add a property to the In-Danger List. This power to take action between meetings further underscores the fact that In-Danger listing is a measure to be taken with the protection of the property in mind, on the basis of factual evidence. While the State Party involved may object to such a listing, such an objection would not bar the Committee from taking this step.¹⁴

(iv) Objectives of the listing process

Further support can be found in the objectives underlying the two listing processes. The Convention indicates that, although In-Danger listing is a determination that may be critical of the State Party; the Committee is not censuring the State Party, rather it is giving notice that this particular property is under threat. This relates to mobilising assistance and awareness – in keeping with the basic orientation of the Convention:

*that, in view of the magnitude and gravity of the new dangers threatening them, it is incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value, by the granting of collective assistance which, although not taking the place of action by the State concerned, will serve as an efficient complement thereto.*¹⁵

¹¹ See Article 11 para 3 World Heritage Convention. This has always been the practice of the World Heritage Committee, with the exception of “the Old City of Jerusalem and its Walls”. See Report of the Rapporteur of the First Extraordinary Session of the World Heritage Committee, Document CC-81/CONF. 008/2 Rev. (Paris, 30 September 1981).

¹² See Article 11 para. 7 World Heritage Convention.

¹³ See Article 11 para. 4 World Heritage Convention.

¹⁴ Note: For the reasons given in the body of this IUCN/ELC document, IUCN/ELC advises that the World Heritage Committee has an implied plenary power to inscribe a property on the World Heritage in Danger List, without State Party consent, in circumstances where a property is “...threatened by a serious and specific danger”. The inclusion of “urgent need” provision does not mean that a State Party’s consent is required in cases of non-urgent “need”.

¹⁵ See Preamble clause 7 World Heritage Convention.

A State Party need not consent to In-Danger-listing, but must be consulted if listing is denied. The refusal to add a site to the In-Danger List may have a potential negative impact on the State Party seeking assistance with the site, hence the rationale for this requirement.

(v) *Need for impartial evaluation of threats*

Further support is available in the Convention's description of the In-Danger listing process. Under Article 11 para. 4 of the Convention, the In-Danger List may only include World Heritage property that 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 unknown causes; abandonment for any reason whatsoever; the outbreak or the threat of an armed conflict; calamities and cataclysms; serious fires, earthquakes, landslides; volcanic eruptions; changes in water level, floods, and tidal waves.

The Convention intends the Committee to evaluate these issues impartially. A State Party on whose territory the threatened property exists cannot reasonably be expected to be dispassionate about such listing. As the custodian of the World Heritage under the Convention, such a State Party would lack the necessary separation from the cause of the danger to be seen as independent.

Article 11 recognises this issue by including public projects (activities which are “normally directed or financed by government”¹⁶) among the specific examples of threats to be considered. If a “public” project constitutes a “serious and specific danger”, that threat that may well be condoned or caused by the government that has the power to prevent the threat but, for whatever reason has neglected or failed to do so. Such a party cannot reasonably be expected to consent to In-Danger listing. In fact, if State Party consent were a prerequisite to In-Danger listing the inclusion of this example would be meaningless.

(vi) *Convention Practices*

Finally, a basic principle of international law holds that, over time, accepted practices pursuant to a convention can become established as norms and standards, to be taken into account in the interpretation and implementation of that convention.¹⁷ Since the Convention's earliest years, the World Heritage Committee and State Party members have accepted the Committee's power, and obligation, to safeguard World Heritage Listed properties through the In-Danger List. Application of this accepted principle of international law to the current question strongly supports the conclusion that State-Party consent is not required for In-Danger listing.

Moreover, international treaties are not static instruments but evolve over time, in line with acceptance of the interpretations of the Convention built up by practice through meetings of the Parties and of the World Heritage Committee. Hence, the large body of decisions and policy statements through the history of the Convention have created and fine-tuned a process that is recognised under international law.

¹⁶ This discussion is, of course, equally relevant to private works, and privately financed projects which are approved by government.

¹⁷ In interpreting a treaty “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation” is to be taken into account. See Article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996 at page 75.

In summary, the Convention does not require State-Party consent for In-Danger Listing. It is therefore appropriate to retain the provisions, as expressed in the March 1999 *Operational Guidelines*, and to delete the proposed amendments referring to the consent of the State Party in the December 2001 draft Revisions.

Additional Argument: In-Danger Listing and Requests for Assistance

In the currently ongoing process of revision of the *Operational Guidelines*, new arguments concerning the role of States Parties in the In-Danger listing process have arisen. It is appropriate to directly address these alternative arguments.

A treaty must be interpreted in accordance with international law regarding the interpretation of treaties, as codified by the 1969 Vienna Convention on the Law of Treaties. In this regard the International Court of Justice (ICJ) has recently stated that, in accordance with the Vienna Convention, treaties must be interpreted “in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the treaties objectives and purpose.”¹⁸

The main argument is based on Article 13 para. 1, relating to the relationship between the In-Danger listing process, and requests for assistance. It assumes that only the State Party can request assistance. The *Operational Guidelines*, however, have adopted the interpretation that a request for assistance may come from “any Committee member or the Secretariat.”¹⁹ Moreover, the Convention notes that such requests may be made either *before or after* the property is placed on the In Danger List, indicating that a site may be added to the In-Danger List without any request for assistance²⁰. Although clumsily drafted, the intent of this passage seems clear – a broad interpretation of the provisions for requests for assistance.

In other words, the final phrase of the first sentence of Article 11 para. 4 (“..and for which assistance has been requested under this Convention”) should not be interpreted as a mandatory link between In-Danger listing and requests for assistance,²¹ but merely as a listing of possible sources for commencement of the In-Danger process. Any other interpretation would conflict with the overall scheme and objectives of the Convention, as described in this paper.

This interpretation has been supported by the Convention since 1982, when Mr. Daniel Navid presented an analysis of Article 11 to the World Parks Congress. He noted that although it would be illogical to dispense completely with State Party involvement in the case of removal of a property from the World Heritage List, the Committee’s mandate includes the requisite oversight responsibility, and that the better view of the Convention would allow such a decision without the State Party’s consent. He noted that the In-Danger List serves as a “transitional category; before deleting a property from the World Heritage List, the property should be classified as being in danger.” He noted the illogic of allowing the Committee to remove a site from the World Heritage List without State Party consent, and not permitting In-Danger listing to occur on the same basis. For this reason, he recognised the innate reasonableness of the *Operational Guidelines*, which:

¹⁸ LaGrand Case (Germany v. USA) Judgement, ICJ Reports 2001, para 99. The Court has had to apply this rule on many occasions. See also *Territorial Dispute (Libya Arab Jamahiriya/Chad)*, ICJ Reports 1994 at pages 21-22.

¹⁹ See para. 80, March 1999 *Operational Guidelines*.

²⁰ See Article 13 para 1 and Article 22 World Heritage Convention.

²¹ This view is supported by the Legal Advice for the Permanent Representation of Belgium to UNESCO, 30 November 2001 at page 11.

authorize the Committee to enter such a property on an “endangered” list and develop recommendations as to conservation requirements, even in the absence of a request to so act by the state party concerned.

Navid went on to canvass specific procedures for inclusion of properties on the “In-Danger” List. In particular, he suggested:

The Committee may also at its own initiative decide to place a natural property,²² included on the World Heritage List, on the World Heritage List in Danger. In such cases, the Committee shall consult with the State Party concerned and may seek additional information from qualified experts on the matter.

This process, then, seeks to ensure that the State Party’s wishes and concerns are known, but “consultation” does not carry any requirement for State Party approval. The State Party’s views are relevant to the decision, but are not determinative.

Navid’s interpretation is further supported by a joint report from IUCN and ICOMOS, entitled “Developing Criteria for Inscription of Cultural and Natural Properties on the List of World Heritage in Danger”. Also issued in 1982, in response to a request from the World Heritage Bureau, the joint report similarly concludes that a State Party’s role is one of responding to consultation by the World Heritage Committee in relation to threats to the property and the manner in which those threats can be addressed, rather than being able to exercise a veto on the In-Danger listing.

3. THE CAPACITY OF THE WORLD HERITAGE COMMITTEE AND THE ROLE OF THE STATE PARTY’S CONSENT IN DELETION OF PROPERTIES FROM THE WORLD HERITAGE LIST

This section addresses two separate but related points – the authority of the World Heritage Committee to delete properties from the World Heritage List, and the role of the affected State Party in the deletion process.

Authority for the Deletion Process

The Convention does not specifically discuss deletion of properties from the World Heritage List. The power to do so is however a logical necessity to the operation of the Convention.²³ If the Committee has the power to accept or reject nominations for listing, the authority to identify the criteria to be applied to proposals to list properties, and the responsibility to list properties that are “in-danger,” it should also have the power to remove properties from the List if they have deteriorated to the extent that they no longer possess the Outstanding Universal Value on the basis of which they were listed. Without this power, the designation “World Heritage property” could easily become devalued or meaningless in the eyes of the world community, and the incentive for State Parties to take action when their listed properties are found to be “in danger” would be dramatically reduced.

The *Operational Guidelines* have provided for such a process since they were first adopted, in the first session of the World Heritage meeting.²⁴ They specifically provided that a listed

²² In his paper, Navid directed himself to the processes relating to natural properties, but by logical implication, the points he makes would be no different in relation to cultural properties or mixed cultural and natural properties.

²³ The World Heritage Committee may exercise those powers that are necessarily implied as being essential to achieving its objectives. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996 at page 79. See also the Legal Advice for the Permanent Representation of Belgium to UNESCO, 30 November 2001 at pages 7 and 15.

²⁴ Paris, 27 June – 1 July 1977.

property, which “has deteriorated to such an extent that it has lost those characteristics for which it was inscribed or... is not, in fact of outstanding universal value... shall be deleted from the list.”²⁵ Provisions to this effect have continued to appear in each succeeding version of the *Operational Guidelines*, appearing in the current (March 1999) *Operational Guidelines*.²⁶

Role of State Party Consent in the Deletion Decision

The State Party’s consent is a specific prerequisite to the inclusion of a property in the World Heritage List.²⁷ This fact has, predictably, lead to the question “Can a property be deleted from the List without the consent of the State Party?” In brief, the answer is yes. Since its first meeting, the Committee has clearly been assigned the role of the moving body in all matters relating to setting and evaluating the criteria for listing. If a State Party could dictate retention of a deteriorated property on the World Heritage List, the status and prestige of World Heritage listing would be seriously devalued.

As noted above, inscription on the In-Danger List does not require State Party consent. The logical corollary of this is that such consent is not required in the removal of a property from that List either. The current (March 1999) *Operational Guidelines* provide the Committee with an unfettered discretion with regard to the deletion of properties from either List. If the independence of the Committee is to be maintained, this approach should continue.

4. THE “VALUES” ISSUE IN THE MANAGEMENT OF WORLD HERITAGE PROPERTIES

In its meeting in Paris on 8-10 October 2001, the Drafting Group for the Revision of the *Operational Guidelines* suggested the need for consensus on a basic question – whether management of a World Heritage property should be based on evaluation and protection of that property as a whole, or should be limited to ensuring the protection of certain specifically identified “values” (*i.e.*, “attributes” or “characteristics”) of that property.²⁸

At the heart of this question is the concern that a State Party, when concentrating only on protection of specified “values” (“attributes”/“characteristics”) may be more easily able to justify major development within the boundaries of a listed World Heritage property, by claiming that these identified “values” (“attributes”/“characteristics”) themselves were not harmed. Protection, if focused only on specific attributes or characteristics of the property, ignores the State Party’s obligation as stated in the Convention – to protect each World Heritage *property* situated within its territory to the utmost of its own resources.²⁹

From their inception in 1977, the *Operational Guidelines* have recognised the need to define actions under the Convention according to the “property” involved.³⁰ The March 1999 *Operational Guidelines* continue to reflect this approach. It is enunciated more clearly in the December 2001 draft, particularly in the context of “integrity.”

²⁵ See para. 3.iv., of the first (1977) *Operational Guidelines*.

²⁶ As para. 46 of the first (1997) *Operational Guidelines* and the December 2001 draft, as paras. 124 – 134.

²⁷ See Article 11 para. 3 World Heritage Convention.

²⁸ “A consensus is required as to whether the protection of a World Heritage property refers to the conservation of all values or just the values identified as Outstanding Universal Value....” (“Report of the Drafting Group for the Revision of the Operational Guidelines,” Paris, 8-10 October 2001.)

²⁹ See Articles 2-4 World Heritage Convention.

³⁰ See, e.g., the original version of the *Operational Guidelines*, as adopted June-July, 1977, para. 5.

Outstanding Universal Value: A holistic concept

The determination of a property's Outstanding Universal Value is based on careful consideration of a combination of issues, conditions and factors. It is only as a result of this unique combination of factors that it can be found, overall, to have Outstanding Universal Value. It may be that many sites possess particular characteristics of note, but it is the combination of them, and the presence of factors relevant to site integrity, which mean that this particular property has Outstanding Universal Value. Thus, the entire property must be protected and managed, without singling out particular portions of it, or particular attributes or characteristics.

The listing decision requires an independent evaluation on whether the proposed property has Outstanding Universal Value. This Outstanding Universal Value decision is based on evaluation of the entire property, including all areas that must be included for purposes of integrity, to ensure that the site can be protected over time.³¹

One illustrative example of the importance of a "property" focus for protection of World Heritage properties can be found in the criteria for site "integrity" as a component of Outstanding Universal Value. As set forth in Paragraph 47 of the December 2001 draft *Operational Guidelines*, in addition to the criteria for determining Outstanding Universal Value, a property must also "meet the qualifying conditions of authenticity and/or integrity and must have an adequate legal/management protection regime to ensure its safeguarding".

Many of the conditions that determine site integrity refer to the need to include particular types of features in the nomination *in addition to* the features that are identified as being of Outstanding Universal Value.³² In some instances, the size of the property is specifically referred to as an important aspect of the integrity determination: "Properties... should have sufficient size and contain the necessary elements to demonstrate the key aspects of processes that are essential for the long-term conservation of the ecosystems and the biological diversity they contain."³³ If the property is not large enough to ensure protection of its Outstanding Universal Value, it will not meet the conditions of integrity. The *Operational Guidelines* offer numerous specific examples, which make it clear that the entire Outstanding Universal Value of a property may depend on whether it can meet and maintain conditions of site integrity.³⁴

Consequences of Narrowing the Focus to Specific Values

Recent proposals suggest altering the approach under the *Operational Guidelines*, to focus on the protection of specific "values" ("attributes"/"characteristics") identified for each property rather than on the property's "Outstanding Universal Value". Any approach under which management of listed properties would focus only on such characteristics would, in effect, tacitly approve the erosion of the overall property's integrity as it existed at the time that the

³¹ See generally, Articles 2, 3, 4, 5, 11 para 1, 11 paras 3-6, 12, 13, 19, 20 and 26; World Heritage Convention as well as the above-cited sections of the December 2001 draft *Operational Guidelines*.

³² See para. 48 (vii) - (x), *further elaborated in* paras. 55-59, December 2001 draft *Operational Guidelines*.

³³ See para. 58, December 2001 draft *Operational Guidelines*.

³⁴ See, e.g., December 2001 draft *Operational Guidelines*, paras. 56, 57, and 59.

property was added to the List. Over time this would diminish the value of World Heritage listing itself.³⁵

From a practical perspective, the development and evaluation of operational guidelines and management standards for World Heritage properties would become an unnecessarily daunting task. The definition of a variety of particular “values” (“attributes”/“characteristics”) and provision of guidance and standards for their management and evaluation would be extremely difficult to define and too nebulous to provide the basis for a management regime that complies with Articles 4 and 5.

Similarly, it is not practicable to fix the specific components of a property’s Outstanding Universal Value by documenting those values at some specific time (such as at the time of inscription on the World Heritage List). The listing of the attributes or “values” of the property can never be complete, nor can all of the possible interrelationships among property characteristics be sufficiently understood. One cannot know with certainty which attributes are essential to Outstanding Universal Value, and which are not. Protection and management that is based upon an incomplete list of attributes would be necessarily flawed.

A “values” approach would not sit comfortably with trans-boundary World Heritage properties, which could be forced to renegotiate their management arrangements to arrive at a mutually acceptable view of which “values” (“attributes”/“characteristics”) should be protected.

Past practice in the application of the Convention has resulted in many early nominations not describing the specific individual values in a way that would allow this approach to their management and evaluation.³⁶ These properties remain clearly within the basic requirements of the Convention – *i.e.*, they are of Outstanding Universal Value. If World Heritage properties were to convert to a system of management that focuses on “values” (“attributes”/“characteristics”) entire revision, re-submission, and re-evaluation of these records might well be required.³⁷

Issues also arise in relation to the effective domestic implementation of the Convention where “values” are unclear, which would in turn undermine the attainment of the objectives and purpose of the Convention itself. This is exacerbated by the fact that such a focus on values has not been the past practice in the application of the treaty.

In the worst case, the State Party could potentially redraw the property’s boundary, by management decisions authorising actions and development within the site. This would diminish the nomination and assessment process as well as the managerial role of the Committee. World Heritage management would run the risk of being fundamentally changed to a political process of the State Party rather than a process under international law that engages the objective, neutral, long-term management of the Committee as established in the Convention.

All of these scenarios would be possible, if the State Party were allowed to determine that protection only extends to a particular list of values or characteristics.

³⁵ Through such an approach, the State Parties could breach their duties under Article 4 – *i.e.* the “identification, protection, conservation, protection and transmission to future generations of the cultural and natural heritage” referred to in articles 1 and 2.

³⁶ See footnote 16.

³⁷ “The interpretation must be compatible with the objects and purposes of the Convention, which means that an interpretation must be adopted, as far as possible, which makes the Convention effective...”. Burnie and Boyle, *International Law and the Environment* (Oxford 1992) at page 14.

The *Operational Guidelines*, therefore, should reflect the Convention's requirement that State Parties to take all appropriate measures to protect all of the listed property, without limiting protection to particular areas, characteristics, "values" or elements.