

# International Environmental Governance and Protected Areas

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## I. INTRODUCTION

This article studies the internationalization of terrestrial nature protection and the associated international governance structures. The management of natural resources has traditionally been a prerogative of sovereign states, with little involvement of international institutions.<sup>1</sup> One long-standing and very significant modification to this starting point has been international cooperation regarding terrestrial protected areas. The present focus shall be on the evolving international regulatory and institutional frameworks for national protected area policy.

One key reason why countries undertake international commitments regarding protected areas flows from the perception that certain ecosystems are the ‘common heritage of mankind’ and of ‘common concern’ to a broad range of countries, for example, due to the uniqueness of their biodiversity or genetic resources. While mutual agreement on protecting such areas benefits the world community, it also provides host countries with benefits of international attention, for example, through tourism and research collaboration. Another common reason is the transboundary interest in the functioning of specific ecosystems, for example, due to the migration of species. There are also more systemic and long-term reasons, including to secure a high level of biodiversity, maintain resilience against common threats such as climate change, ensure that burdens and benefits

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<sup>1</sup> UNGA Resolution 1803(XVII) on Permanent Sovereignty over Natural Resources (14 December 1962). On the history and international environmental law context of the principle, see N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997) at 264–6.

associated with area protection are fairly distributed among countries and peoples, and harmonize national protection regimes to enable the comparison, monitoring, and prediction of future threats. Finally, international commitments are undertaken due to domestic political priorities—for example, to strengthen and make more permanent the protection of selected areas and to gain international assistance to develop representative and effective national protection regimes.

While a broad range of countries have undertaken a high number of general and specific international commitments regarding protected areas, there are still reasons for concern regarding the effectiveness of such commitments. So far, biodiversity-related conventions have been unable to halt the trend towards increasing loss of biodiversity.<sup>2</sup> While significant progress has been made with regard to the establishment of terrestrial protected areas,<sup>3</sup> this has not been sufficient to reverse the more general trends towards the loss of biodiversity and ecosystem functions.<sup>4</sup> Nevertheless, the establishment of protected areas remains a key instrument to protect biodiversity and ecosystems, as illustrated by the extent to which countries have made use of this category of land use. Already in 2008, Stuart Chape, Mark Spalding, and Martin Jenkins pointed out that ‘protected areas are now one of the most important land-use allocations on the planet.’<sup>5</sup> According to the World Database on Protected Areas, terrestrial protected area coverage has expanded by more than 12 percent since that statement (from 2008 to 2020).<sup>6</sup> Protected areas have become the land-use category where countries have undertaken the highest number of international legal and political commitments.

<sup>2</sup> See Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 1* (2001) at 117–18; *Global Biodiversity Outlook 2* (2006) at 5; *Global Biodiversity Outlook 3* (2010) at 17; *Global Biodiversity Outlook 4* (2014) at 10; *Global Biodiversity Outlook 5* (forthcoming) (these reports are hereinafter referred to as *GBO*).

<sup>3</sup> *GBO 2*, *supra* note 2 at 3; *GBO 3*, *supra* note 2 at 17; *GBO 4*, *supra* note 2 at 82–5; *GBO 5*, *supra* note 2.

<sup>4</sup> For an interesting illustration of the increasing, but inadequate, importance of protected areas, see H Job, S Becken and B Lane, ‘Protected Areas in a Neoliberal World and the Role of Tourism in Supporting Conservation and Sustainable Development: An Assessment of Strategic Planning, Zoning, Impact Monitoring, and Tourism Management at Natural World Heritage Sites’ (2017) 25(12) *Journal of Sustainable Tourism* 1699.

<sup>5</sup> Stuart Chape, Mark Spalding and Martin Jenkins, eds, *The World's Protected Areas* (2008) at 2.

<sup>6</sup> Terrestrial area (not covering coastal protected areas that include the marine environment) expanded from 22,570,400 square kilometres in 2008 to 25,741,681 square kilometres in April 2020 (12.3 percent expansion). If we include coastal protected areas, the expansion was higher, from 25,309,359 square kilometres in 2008 to 30,345,653 square kilometres in April 2020 (16.6 percent expansion). See *Protected Planet* <<https://www.protectedplanet.net/>>. According to figures from FAOSTAT, the land area of all countries amounts to 130,214,879 square kilometres. *FAOSTAT Land Area World* (2015), Sustainable Development Goal Indicator 15.1.1.

This development started in the early twentieth century.<sup>7</sup> The internationalization of protected areas is thus a prime example of the internationalization of administrative law in the field of environmental law. As we shall see, a factor that makes protected areas particularly interesting is the extension of internationalization beyond procedural issues to substantive administrative law. Internationalization is here used as a generic term,<sup>8</sup> covering one or more of the following: (1) treaty making at the international level and the extent to which states join such treaties; (2) subsequent norm creation through international institutions; (3) implementation coordinated through and guided by such institutions; (4) formal and informal enforcement mechanisms; (5) interstate cooperation mechanisms not based on treaties; and (6) long-term work programs within the various institutions.

It is clear that there is an important and untapped potential for protected areas to contribute more effectively to maintain and improve biodiversity and ecosystems. Reforms needed to concern the establishment, design, and management of protected areas, including that 'protected area networks remain ecologically unrepresentative and many critical sites for biodiversity are poorly conserved' and that '[i]nadequate management of protected areas remains widespread.'<sup>9</sup> One major global study published in 2010 based on the assessment of more than eight thousand protected areas found that management effectiveness was 0.53 on a scale from zero (no management) to one (management of the highest standard). The report concluded that 'protected area management leaves much to be desired,' '[a]bout 42% of the protected areas in the study sample have major deficiencies, ... and 13% show very inadequate management.'<sup>10</sup> Therefore, in

<sup>7</sup> Pieter van Heijnsbergen, *International Legal Protection of Wild Fauna and Flora* (1997) at 13 points out that the London Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa Which Are Useful to Man or Inoffensive (1900) 'was the first [multilateral convention] to make use at an international level of such techniques as the introduction of protected areas.' The convention never entered into force. The London Convention Relative to the Preservation of Fauna and Flora in Their Natural State (1933), which formally still is in force for some countries, sets out detailed rules regarding national parks and 'strict natural reserves.' Another early convention that mainly focuses on protected areas is the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (1940). On the historical background and development of international commitments regarding protected areas, see Alexander Gillespie, *Protected Areas and International Environmental Law* (2007) at 9–26. He concludes that '[a]lthough there are clear gaps in the system, the system is clearly evolving and collectively, the international community is well en-route to systematically covering many of the areas that need to be addressed.'

<sup>8</sup> See also Ornella Ferrajolo, 'State Obligations and Non-Compliance in the Ramsar System' (2011) 14(3–4) *J Intl Wildlife Law & Policy* 245, who uses the term in a different meaning.

<sup>9</sup> *GBO 4*, *supra* note 2 at 15.

<sup>10</sup> Fiona Leverington et al., 'A Global Analysis of Protected Area Management Effectiveness' (2010) 46 *Envtl Mgmt* 694. While a trend of improved management over time has been observed, questions remain regarding the environmental effects of such improvements, see Jonas Geldmann et al., 'Changes in Protected Area Management Effectiveness over Time: A Global Analysis' (2015) 191 *Biological Conservation* 692 at 695, who found 'no significant change in the score for biological outcomes' despite improved scores in management effectiveness in 722 protected areas from seventy-four countries.

addition to mapping the international regime for protected areas, this contribution shall also consider the interaction between the international regime and domestic protected area policies. In particular, attention will be paid to the potential tension that can occur between the internationalization of protected areas and calls for stronger grounding of protected area establishment, design, and management among local populations.

There is a broad range of international instruments—regional and global, hard law, and soft law—with protected area provisions.<sup>11</sup> We shall analyse a selection of these instruments.<sup>12</sup> First, Part II shall cover general rules within global treaties and other instruments based on the 1992 Convention on Biological Diversity (CBD) and taking into account relevant normative initiatives under the International Union for Conservation of Nature (IUCN).<sup>13</sup> Second, Part III shall consider rules applicable to individual protected areas through the listing of such areas with international institutions. The agreements to be analysed include the 1972 World Heritage Convention and the 1971 Ramsar Convention.<sup>14</sup> Finally, Part IV will reflect on cross-cutting issues. It will consider general trends in the development of the international regimes for protected areas and issues concerning implementation at the international and national levels. It will also consider why states accept such significant numbers of international commitments and follow-up procedures in relation to protected areas when other aspects of land planning are considered to be the core issues of national sovereignty.

## II. GENERAL COMMITMENTS IN THE CBD

### 1. Introduction

Instruments that contain general international commitments—legally binding or political—that are not linked to any specific protected area include, in particular, those undertaken in the CBD, the 1979 Convention on Migratory Species (CMS),<sup>15</sup> and, through these two conventions, the IUCN. In addition, many

<sup>11</sup> Already in 2008, Stuart Chape, Mark Spalding, and Martin Jenkins listed forty-seven international instruments. Chape, Spalding and Jenkins, *supra* note 5 at 20–3.

<sup>12</sup> Convention on Biological Diversity, 1992, 1760 UNTS 79 (CBD). Bilateral agreements concerning joint management of transboundary protected areas as well as instruments only applicable on a regional basis will not be considered.

<sup>13</sup> International Union for the Conservation of Nature (IUCN) <<https://www.iucn.org/>>.

<sup>14</sup> Convention for the Protection of the World Cultural and Natural Heritage, 1972, 1037 UNTS 151 (World Heritage Convention); Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971, 996 UNTS 245 (Ramsar Convention).

<sup>15</sup> Convention on Migratory Species of Wild Animals, 1979, 1651 UNTS 333, art III(4) (CMS); *The Role of Ecological Networks in the Conservation of Migratory Species*, Doc UNEP/CMS/Resolution 10.3 (2011); see also Gillespie, *supra* note 7 at 39, 61, 102.

countries have undertaken such commitments through regional instruments, in particular, in Africa,<sup>16</sup> Europe,<sup>17</sup> and Latin America.<sup>18</sup> These instruments encourage and establish common standards for countries when establishing and managing protected areas. In the following, we shall explore the extent to which the CBD creates duties to establish protected areas, procedures to follow when establishing protected areas, the harmonization of categories and the status of protected areas, standards to follow when managing protected areas, and procedures to follow (including the adoption of compensatory measures) when wholly or partly eliminating protected areas.

The CBD is among the most widely ratified treaties of the world with 196 parties—the United States being the essential exception. Commitments undertaken through the CBD therefore enjoy close to universal recognition. According to Article 8 of the CBD:

[e]ach Contracting Party shall, as far as possible and as appropriate:

- (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (b) Develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;

<sup>16</sup> The London Convention for the Preservation of Wild Animals, Birds, and Fish in Africa (1900) was signed by the United Kingdom, Congo, France, Germany, Italy, Portugal, and Spain. It was applied despite failing to enter into force. See *British & Foreign State Papers*, vol 94 (1900–1) at 715. It was followed by the Convention Relative to the Preservation of Fauna and Flora in Their Natural State (1933; entry into force 1936), which is still in force for some countries. The African Convention on the Conservation of Nature and Natural Resources (1968) and the revised African Convention on the Conservation of Nature and Natural Resources (2003; entry into force 2016) overlap extensively with the 1933 convention. The latter has been characterized as ‘the most modern and comprehensive of all agreements concerning natural resources.’ See IUCN, *An Introduction to the African Convention on the Conservation of Nature and Natural Resources*, IUCN Environmental Policy and Law Paper no 56 Rev (2006) at 1.

<sup>17</sup> Convention on the Conservation of European Wildlife and Natural Habitats, 1979, 1284 UNTS 209 (Bern Convention), which focuses on habitat protection; the European Landscape Convention, 2000, UNTS Online no I-40915, and European Union legislation regarding Natura 2000.

<sup>18</sup> See, in particular, Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere (1940), which defines four categories of protected areas and which has also been described as a ‘sleeping treaty’ that was adopted ‘ahead of its time.’ See Kathleen Rogers and James A Moore, ‘Revitalizing the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere: Might Awakening a Visionary but “Sleeping” Treaty Be the Key to Preserving Biodiversity and Threatened Natural Areas in the Americas?’ (1995) 36 *Harv Intl LJ* 470; Convention for the Conservation of the Biodiversity and the Protection of Wilderness Areas in Central America, 1992. The main treaties of interest in other regions include for Oceania: the Convention on Conservation of Nature in the South Pacific, 1976; for the Middle East: the Protocol Concerning the Conservation of Biological Diversity and the Establishment of Network of Protected Areas in the Red Sea and Gulf of Aden, 2005; for Asia: the ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985; and, for Antarctica: the Protocol on Environmental Protection to the Antarctic Treaty, 1991, UNTS Online no A-5778.

- (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;
- (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings;
- (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas.

The CBD defines a protected area as ‘a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.’ There has been no further elaboration of these commitments through legally binding instruments. As a starting point, states thus enjoy broad discretion when implementing the commitments, as indicated by the phrase ‘as far as possible and as appropriate.’ However, this phrase does not mean that the commitments are purely political. It merely indicates that the commitments are subject to countries’ ability to perform the duties and that states have broad discretion regarding how to achieve compliance.

These commitments must be interpreted in light of subsequent practice.<sup>19</sup> In the following discussion, we shall therefore examine the legal implications of the relevant practice. Relevant practice consists of: (1) the integration of protected area issues in the CBD’s general policy documents; (2) the Programme of Work on Protected Areas (PoWPA); (3) the endorsement of management approaches based on ‘ecosystem approaches’ and ‘ecosystem services’; and (4) the endorsement of the IUCN’s guidelines regarding protected areas.

## 2. General Policy Documents Adopted by the Conference of the Parties to the CBD

The prominent placement of protected areas in the first part of Article 8—the CBD’s core provision on *in situ* conservation—indicates that countries have regarded such areas as essential to achieve conservation of biodiversity. In 2002, ten years after adopting the convention, countries agreed on a key target to be achieved under the CBD: ‘to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth.’<sup>20</sup> The role of protected areas in achieving this target was emphasized when the next CBD’s Conference of the Parties (COP) adopted the PoWPA in 2004 and stated that the program’s objective was ‘the establishment and maintenance by 2010 for terrestrial . . . of comprehensive, effectively managed, and ecologically representative national and regional systems of protected areas that collectively, *inter alia* through a global network contribute to achieving the three objectives of the

<sup>19</sup> Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, arts 31, 32 (VCLT).

<sup>20</sup> See *Strategic Plan for the Convention on Biological Diversity (Annex)*, Doc UNEP/CBD/COP/DEC/VI/26 (19 April 2002) at para 11. The target was endorsed by the World Summit on Sustainable Development in Johannesburg in 2002.

Convention and the 2010 target to significantly reduce the current rate of biodiversity loss.<sup>21</sup>

When taking stock of the status in 2010, the opening sentence was blunt: ‘The target agreed by the world’s Governments in 2002, “to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on Earth”, has not been met.’<sup>22</sup> Similar conclusions were reached concerning the subsidiary targets that concerned protected areas.<sup>23</sup> When formulating new targets for the next decade—the Aichi Biodiversity Targets, adopted in 2010—the role of protected areas remained central and were set out in Target no. 11:

By 2020, at least 17 per cent of terrestrial and inland water areas, . . . especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes.<sup>24</sup>

We may question whether the CBD’s focus on protected areas as a key means to reduce biodiversity loss peaked in 2010 and, thereafter, became less central. Arguably, the first sign was already present in the COP’s decisions in 2010, as protected areas were relegated to Target no. 11 and were hardly mentioned elsewhere in the Strategic Plan for 2011–20 and its main preparatory document.<sup>25</sup> The failure to achieve the 2010 biodiversity targets, despite significant attention to protected areas as a major policy instrument both domestically and

<sup>21</sup> *Protected Areas (Articles 8 (a) to (e))*, Doc UNEP/CBD/COP/DEC/VII/28 (20 February 2004) at para 18.

<sup>22</sup> *GBO 3*, *supra* note 2 at 9.

<sup>23</sup> *Ibid* at 18. Target 1.1: ‘At least 10% of each of the world’s ecological regions effectively conserved. Not achieved globally, but more than half of terrestrial eco-regions meet the 10% target. However, management effectiveness is low for some protected areas.’ Target 1.2: ‘Areas of particular importance to biodiversity protected. Not achieved globally, but an increasing proportion of the sites of importance for conserving birds, and those holding the last remaining populations of threatened species, are being protected.’ Results are further elaborated in terms of more detailed indicators. Of particular interest is coverage of protected areas: ‘There has been a significant increase in coverage of protected areas, both terrestrial and marine, over the past decade. However, many ecological regions, particularly in marine ecosystems, remain underprotected, and the management effectiveness of protected areas remains variable’ and connectivity – fragmentation of ecosystems: ‘Most terrestrial and aquatic ecosystems are becoming increasingly fragmented, despite an increased recognition of the value of corridors and connections, especially in climate change adaptation’ (at 22).

<sup>24</sup> *Strategic Plan: Future Evaluation of Progress*, Doc UNEP/CBD/COP/DEC/VII/30 Annex (13 April 2004), Aichi Biodiversity Target 11. Among the twenty-one subsidiary targets, the first two were: ‘1.1 At least 10% of each of the world’s ecological regions effectively conserved’ and ‘1.2 Areas of particular importance to biodiversity protected.’ See also Stephen Woodley et al, ‘Meeting Aichi Target 11: What Does Success Look Like for Protected Area Systems?’ (2012) 18(1) *Parks* 23.

<sup>25</sup> See *Revised and Updated Strategic Plan: Technical Rationale and Suggested Milestones and Indicators*, Doc UNEP/CBD/COP/10/9 (18 July 2010).

internationally,<sup>26</sup> can explain why countries may have wanted to reconsider the role of protected areas.<sup>27</sup>

Traditionally, protected areas have been set aside for long-term conservation purposes. However, the COP's decision on the 2011–20 Strategic Plan states: 'While longer-term actions to reduce the underlying causes of biodiversity are taking effect, immediate action can help conserve biodiversity, including in critical ecosystems, by means of protected areas, habitat restoration, species recovery programmes and other targeted conservation interventions.'<sup>28</sup> Such a functionalist view on protected areas, which identifies protected areas as relevant in situations of urgency, can be seen as part of a trend in which the management of protected areas is considered increasingly as a specific management tool in the context of other management efforts. In addition, global warming exerts pressure in the direction of a dynamic approach to protected areas. The purpose for which protected areas were originally established may significantly change over relatively limited time periods.<sup>29</sup> A third factor that is also contributing to a more dynamic approach to protected areas is an increasing focus on sustainable use. This shift was signalled when the CBD adopted the Malawi Principles on the ecosystem approach in 2000.<sup>30</sup> The subsequent focus on ecosystem services, which was accepted as a key issue by the CBD in 2008, is a logical consequence of this shift.<sup>31</sup> Consequently, there has been increased emphasis on how protected areas

<sup>26</sup> See Chape, Spalding and Jenkins, *supra* note 5 at 4–5, 11: 'In 1962 there were almost 10,000 parks and reserves worldwide; 45 years later the World Database on Protected Areas, maintained by the UNEP World Conservation Monitoring Centre, holds information on more than 100 000 protected sites. . . . By the end of 2005, the WDPA had recorded over 114 000 sites. These protected areas covered more than 19 million km<sup>2</sup>, or 12.9 percent of the Earth's land surface.'

<sup>27</sup> Indeed, *GBO 3*, *supra* note 2 at 84 stated that '[o]ne of the main reasons for the failure to meet the 2010 Biodiversity Target at the global level is that actions tended to focus on measures that mainly responded to changes in the state of biodiversity, such as protected areas and programmes targeted at particular species, or which focused on the direct pressures of biodiversity loss, such as pollution control measures.'

<sup>28</sup> *Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets*, Doc UNEP/CBD/COP/DEC/X/2 (29 October 2010) at para 10(c); see also *Revised and Updated Strategic Plan*, *supra* note 25 at 6.

<sup>29</sup> Examples include changes to ecosystems within protected areas due to the direct impact of climate changes for the survival and distribution of species as well as more indirect effects—for example, by facilitating the establishment of invasive alien species. See *GBO 4*, *supra* note 2 at 72, 76–9, 83–5.

<sup>30</sup> See *Ecosystem Approach*, Doc UNEP/CBD/COP/DEC/V/6 (26 May 2000), Annex, Principle 10: 'The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity. Rationale: Biological diversity is critical both for its intrinsic value and because of the key role it plays in providing the ecosystem and other services upon which we all ultimately depend. There has been a tendency in the past to manage components of biological diversity either as protected or non-protected. There is a need for a shift to more flexible situations, where conservation and use are seen in context and the full range of measures is applied in a continuum from strictly protected to human-made ecosystems.' See also *Access and Benefit-Sharing as Related to Genetic Resources*, Doc UNEP/CBD/COP/DEC/V/24 (19 April 2002) on sustainable use as a cross-cutting issue.

<sup>31</sup> The ecosystem services initiative is based on the CBD, *supra* note 12, arts 11, 20, 21. See *Review of Implementation of Articles 20 and 21*, Doc UNEP/CBD/COP/DEC/IX/11 (30 May 2008).



can contribute such services.<sup>32</sup> These trends were also reflected in the CBD's 2010 decision on protected areas, which highlights sustainable finance, climate change, valuing protected area costs and benefits, and governance, participation, equity, and benefit sharing under its subheading 'issues that need greater attention.'<sup>33</sup>

Against this background, the distinction between protected area management and other categories of land use and natural resource management seems to become increasingly unclear. The trend towards a redefinition of the role of protected areas has implications for the interpretation of Article 8(a)–(e) of the CBD. It can be argued that the states' obligations under Article 8(a)–(e) are affected in the sense that they enjoy broad discretion when considering trade-offs between environmental and human interests in the context of protected area management. In order to further explore this process of redefinition and how far it has come, we need to consider the practice of countries and international institutions in more detail.

### 3. The Program of Work on Protected Areas

National and international practice regarding protected areas is closely linked to the 2004 PoWPA. This program is divided into four elements, sixteen goals, including more specific targets (seven to be reached by 2008, six by 2010, three by 2012, and one by 2015), and ninety-one suggested activities.<sup>34</sup> The distinction between the goals and suggested activities is—while countries enjoy broad discretion in regard to the suggested activities, the goals are expressed as 'a framework within which national and/or regional targets may be developed and activities prioritized.'<sup>35</sup> The 'goals' can thus be regarded as a framework for how states are expected to implement Article 8(a)–(e) of the CBD, while the 'suggested activities' are practical examples of implementation.

The wording of the COP decision and the PoWPA is recommendatory, and the documents are not explicitly linked to the wording of Article 8(a)–(e) of the CBD. Moreover, it is unlikely that the use of the term 'framework' was meant to have legal connotations—it should be interpreted instead as indicating a non-binding framework to assist countries when making policy decisions. Nevertheless, the PoWPA is likely to be important for the interpretation of Article 8(a)–(e) since the PoWPA and its implementation constitute relevant state practice in accordance with Article 31(3)(b) of the Vienna Convention on the

Subsequently, the ecosystem services approach has been based on reports on 'the economics of ecosystems and biodiversity' (TEEB), produced on an initiative by thirteen ministers of the environment in 2007. See *The Economics of Ecosystems and Biodiversity* <<http://www.teebweb.org/>>.

<sup>32</sup> See, eg, the multiple references to protected areas as a source of various goods and services in the 2004 Conference of the Parties (COP) decision establishing the Programme of Work on Protected Areas (PoWPA). *Protected Areas (Articles 8 (a) to (e))*, *supra* note 21.

<sup>33</sup> See *Protected Areas*, Doc UNEP/CBD/COP/DEC/X/31 (29 October 2010) at paras 9–36.

<sup>34</sup> *Ibid*, Annex.

<sup>35</sup> *Ibid* at paras 5 and 6 respectively.

Law of Treaties.<sup>36</sup> The impact of the PoWPA on state practice is enhanced by institutional and procedural arrangements to support and review implementation.<sup>37</sup> A closer scrutiny of the content of the PoWPA shows a main focus on the link between protected areas and biodiversity targets as well as on the effectiveness and representativeness of protected areas in relation to such targets.<sup>38</sup> The PoWPA hardly contains any reference to sustainable use as an objective of protected areas, but it does include multiple references to protected areas as a source of various goods and services.<sup>39</sup>

The CBD's decisions that review countries' implementation of the PoWPA provide a basis for assessing how countries have followed up on the PoWPA. The COP's decisions from 2006 and 2008<sup>40</sup> indicate that little progress was achieved and that the main concerns related to funding and other means of facilitating developing countries' implementation. These decisions also show an increasing focus on costs and benefits of protected areas. They contain hardly any references to biodiversity conservation. The decision on the PoWPA in 2010 was far more thorough on substantive issues and took stock of progress and challenges.<sup>41</sup> When comparing this decision to the original decision establishing the PoWPA, we can observe that the focus of countries seems to have shifted at least partly from biodiversity conservation to the values of ecosystem services, costs, and benefits of protected areas, and resilience to climate change.

Such a shift was confirmed by the next COP decision on protected areas in 2012.<sup>42</sup> However, this shift in attention does not seem to have been transferred to the reporting framework annexed to the decision. The reporting framework remains closely linked to the text of the PoWPA. Countries were asked to submit national action plans to implement the PoWPA in 2012. In his report to the COP in 2012, the executive secretary notes that 105 states (out of 193) had submitted action plans. The report indicates that most progress had been achieved in terms of the establishment, education, and capacity building regarding protected areas and that the highest priority of countries is to improve the management of protected areas.<sup>43</sup> The report also shows that there were important regional differences.<sup>44</sup> The assessment of projects funded through the Global Environment

<sup>36</sup> VCLT, *supra* note 19.

<sup>37</sup> *Ibid* at paras 25, 28–30.

<sup>38</sup> See, in particular, Goals 1.1, 1.4, and 4.3.

<sup>39</sup> References to sustainable use and benefits of protected areas are essentially limited to exposing such effects in order to generate support for protected areas.

<sup>40</sup> *Protected Areas*, Doc UNEP/CBD/COP/DEC/VIII/24 (15 June 2006) (*Protected Areas (VIII/24)*); *Protected Areas*, Doc UNEP/CBD/COP/DEC/IX/18 (9 October 2008) (*Protected Areas (IX/18)*).

<sup>41</sup> *Protected Areas*, *supra* note 33.

<sup>42</sup> See *Protected Areas*, Doc UNEP/CBD/COP/DEC/XI/24 (5 December 2012), in particular, the references to extended functions of protected areas in paras 1(d), (e), (f).

<sup>43</sup> *Protected Areas: Progress in the Implementation of the Programme of Work and Achievement of Aichi Biodiversity Target 11*, Doc UNEP/CBD/COP/11/26 (23 July 2012) at paras 10–11, 18, 21.

<sup>44</sup> *Ibid* at paras 12–14.

Facility demonstrates that the main emphasis had been to ensure effective management and sustainable funding of protected areas and that there was increasing focus on integrating protected areas into wider landscapes, seascapes, and sectors.<sup>45</sup>

After the 2012 decision and report on the PoWPA, there have been few decisions aimed at protected areas. The first such decision in 2014 placed 'private protected areas' up front by recognizing their contribution 'in the conservation of biodiversity.' Beyond this shift in focus, the decision was essentially symbolic by proposing to establish the 'World National Parks and Protected Areas Day.'<sup>46</sup> The next decision of some importance came in 2016 and served to update the indicators assessing progress towards the Aichi Biodiversity Targets by endorsing the elaboration of indexes on the representativeness and connectedness of protected areas as well as an index on species protection.<sup>47</sup> At the COP in 2018, countries adopted a more substantive decision on protected areas.<sup>48</sup> While the decision is mainly about 'other effective area-based conservation measures' than protected areas, it also sets out voluntary guidelines on protected area 'integration' and 'mainstreaming.'<sup>49</sup> These decisions confirm the trend towards conceptualizing protected areas as a dynamic tool, which needs to be integrated with, and cannot be clearly distinguished from, other area-based management tools. They also strengthen the emphasis on the goods and services that protected areas can provide to human beings.

In sum, countries seemed to abandon the PoWPA after 2012, even if not formally deciding to do so.<sup>50</sup> The COP's decisions associated with the PoWPA indicate a shift from perceiving protected areas as an instrument to protect biodiversity to a broader focus on the role of such areas in terms of sustainable use and ecosystem services. Most likely, this reflects a similar trend in the domestic protected area legislation and policies of countries. Hence, since the PoWPA can serve to clarify the commitments listed in Article 8(a)–(e), as the related state and institutional practice represents a long-term consensus-building exercise, it reinforces the view that countries have significant discretion as they prioritize human and environmental interest when designing and managing protected areas.

<sup>45</sup> *Ibid* at para 29.

<sup>46</sup> *Ecosystem Conservation and Restoration*, Doc UNEP/CBD/COP/DEC/XII/19 (17 October 2014) at para 2.

<sup>47</sup> *Indicators for the Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets*, Doc CBD/COP/DEC/XIII/28 (12 December 2016).

<sup>48</sup> *Protected Areas and Other Effective Area-based Conservation Measures*, Doc CBD/COP/DEC/14/8 (30 November 2018).

<sup>49</sup> *Ibid*, annex I.

<sup>50</sup> See *Protected Areas* <<https://www.cbd.int/protected/>>. It is symptomatic that only nine countries have submitted implementation reports related to the PoWPA (years indicate the year in which the survey was completed): Canada (2010), Colombia (2009), Costa Rica (1990), Croatia (2001), Egypt (2009), Estonia (2009), India (2009), Liberia (2009), and Micronesia (2009).

#### 4. The Ecosystem Approach and Ecosystem Services

Historically, there have been tensions between the ‘conservationist’ and the ‘sustainable use’ approach to protected areas.<sup>51</sup> While the former emphasizes the need to protect areas from human activities, the latter accepts and, in many cases, encourages human activities. Protected areas have traditionally been perceived as areas in which strict conservation measures shall apply. The ‘ecosystem approach’ combined with ‘ecosystem services,’ which have been promoted under the CBD, imply that protected area management can integrate human activities and focus on the provision of ecosystem services to local populations and humanity in general. The ecosystem approach was endorsed by the CBD in the 2000 Malawi Principles.<sup>52</sup> According to the decision:

[t]he ecosystem approach does not preclude other management and conservation approaches, such as biosphere reserves, protected areas, and single-species conservation programmes, as well as other approaches carried out under existing national policy and legislative frameworks, but could, rather, integrate all these approaches and other methodologies to deal with complex situations.<sup>53</sup>

Target no. 11 of the Aichi Biodiversity Targets emphasizes ecosystem approaches and ecosystem services in the context of protected areas. Moreover, the importance of ecosystem services in the context of protected areas was made clear in the COP’s decision on protected areas in 2010. The emphasis of the latter was essentially on promoting, assessing, providing information about, and generating funding through ecosystem services provided by protected areas.<sup>54</sup> These general developments indicate that Article 8(a)–(e) of the CBD should be interpreted as providing significant flexibility to countries. The increased focus on ecosystem services also implies that it may not be necessary for countries to draw

<sup>51</sup> It has been argued that a major shift in the view of protected areas can be dated back to the third World Parks Congress in 1982: ‘The old view of protected areas as “set aside” was replaced with a new idea: protected areas could be important components of sustainable development.’ See IUCN, *50 Years of Working for Protected Areas: A Brief History of IUCN World Commission on Protected Areas* (2010) at 6.

<sup>52</sup> *Ecosystem Approach*, *supra* note 30, Annex B.

<sup>53</sup> *Ibid.*, Annex A, para. 5; see also Principle 10: ‘The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity. Rationale: Biological diversity is critical both for its intrinsic value and because of the key role it plays in providing the ecosystem and other services upon which we all ultimately depend. There has been a tendency in the past to manage components of biological diversity either as protected or non-protected. There is a need for a shift to more flexible situations, where conservation and use are seen in context and the full range of measures is applied in a continuum from strictly protected to human-made ecosystems.’

<sup>54</sup> *Strategic Plan for Biodiversity 2011–2020*, *supra* note 28; *Protected Areas*, *supra* note 33, in particular, paras 27–9; see also the CBD Guidelines on Biodiversity and Tourism Development, *Biological Diversity and Tourism*, Doc UNEP/CBD/COP/DEC/VII/14 (13 April 2004); Economics of Ecosystems and Biodiversity for National and International Policy Makers, *Summary: Responding to the Value of Nature* (2009) at 20–2; B Bertzky et al., *Protected Planet Report 2012: Tracking Progress towards Global Targets for Protected Areas* (2012).

clear distinctions between protected areas and areas subject to general land use management regimes. When studying recent CBD documents, an emerging pattern is arguably that the distinction between protected areas and non-protected areas has been replaced with a distinction between ‘conservation,’ which includes sustainable use and ‘conversion,’ referring to the replacement of the natural ecosystem.<sup>55</sup> Such an interpretation could be in accordance with the definition of ‘protected areas’ in Article 2 of the CBD, which merely states that protected areas shall be ‘regulated and managed to achieve specific conservation objectives.’

## 5. The Role of the IUCN

Since its establishment as a ‘semi-governmental’ institution in 1948, the IUCN has played an essential role in the internationalization of protected areas.<sup>56</sup> It participated actively in the establishment and subsequent elaboration of the United Nations (UN) List of Protected Areas (1962–2003),<sup>57</sup> which was replaced by the World Database on Protected Areas in 2003. The IUCN established the International Commission on National Parks in 1960, which subsequently was renamed the World Commission on Protected Areas.<sup>58</sup> In 1962, the IUCN organized the first World Parks Congress jointly with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Food and Agriculture Organization (FAO) and established the Global Protected Areas Programme. Despite its status as a non-governmental organization (NGO),<sup>59</sup> the IUCN enjoys a special position in the intergovernmental cooperation regarding protected areas<sup>60</sup> and provides a forum for, and link between, governments, management

<sup>55</sup> See, in particular, *Protected Areas and Conservation Measures*, *supra* note 48.

<sup>56</sup> See Heijnsbergen, *supra* note 7 at 37–40, 177–9; Gillespie, *supra* note 7 at 281–8. According to the 1948 IUCN Statutes, ‘[t]he functions of the World Congress shall be *inter alia*: . . . (b) to make recommendations to governments and to national and international organizations in any matter related to the objectives of IUCN.’ IUCN, *Statutes, including Rules of Procedure of the World Conservation Congress, and Regulations* (2019) (IUCN, *Statutes*): This function is further elaborated in the regulations of the IUCN, *Statutes, ibid* at para 2(h)–(i). It is also further specified in relation to the functions of the IUCN Council. See Statute of the IUCN at para 46(a) and (b). *Council Handbook and Performance Tools* (August 2011), s 2.2.7.

<sup>57</sup> See ECOSOC Resolution 713(XXVII) (1959); ECOSOC Resolution 810(XXXI) (1961). At this time, the IUCN was also recognized as a key actor by the United Nations Educational, Scientific and Cultural Organization (UNESCO). See General Conference Resolution 2.213 (1962); UNGA Resolution 1831(XVII) (1962); see also Chape, Spalding and Jenkins, *supra* note 5 at 7–8.

<sup>58</sup> On the history of the Commission, see IUCN, *supra* note 51.

<sup>59</sup> For details on membership, see *IUCN Members* <<https://www.iucn.org/about/union/members>>.

<sup>60</sup> The IUCN has been identified as an official advisory body for the UNESCO World Heritage Committee (WHC). See World Heritage Convention, *supra* note 14, art 8(3); it hosts the Secretariat of the Ramsar Convention, *supra* note 14, art 8. The director general of the IUCN appoints the head of Secretariat for the Ramsar Convention; it provides significant input to the CMS, *supra* note 15, and its associated agreements. See, *inter alia*, Resolution 2.2 Guidelines for the Application of Certain Terms of the Convention and Article VII of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, 1996, UNTS Online no I-42632 at para 1(b). And it has special consultative status under the UNESCO Man and Biosphere Programme. See Statute of the International

authorities, scientists, NGOs, and other stakeholders at the international and national levels.

It was therefore to be expected that the IUCN would also enjoy a special relationship with the CBD. While the CBD—in contrast to the World Heritage and Ramsar Conventions—does not refer to the IUCN, there are frequent references to the IUCN in the CBD's COP decisions and other documents. The IUCN enjoys a particularly strong position in the field of protected areas, where it is a standard-setting institution enjoying significant recognition among countries and where the CBD's decisions refer to its role and endorse some of the results of its normative activities.<sup>61</sup> For the purpose of the issues discussed here, key steps were taken when the CBD recognized the 'value of a single international classification system' as the one developed by the IUCN, encouraged relevant stakeholders 'to assign protected-area management categories to their protected areas, providing information consistent with the refined IUCN categories for reporting purposes,'<sup>62</sup> and singled out the IUCN for collaboration in supporting the implementation of the PoWPA.<sup>63</sup> The elaboration of basic concepts and management approaches by the IUCN has thus affected state practice in ways that are relevant when interpreting Article 8(a)–(e) of the CBD.

The IUCN can exercise normative functions in relation to its members or in relation to third parties, such as international institutions. The Congress adopts 'resolutions' and 'recommendations.' The latter are 'directed to third parties, and may deal with any matter of importance to the objectives of IUCN.'<sup>64</sup> The practice of the Congress, however, is that both resolutions and recommendations can be addressed to members and non-members. The main distinction seems to be that recommendations do not explicitly instruct bodies of the IUCN. Decisions of the Congress include elements of both harmonization and guidance.

We may distinguish between two main normative functions of the IUCN: harmonization of national and international regimes for protected areas and guidance through 'principles,' 'guidelines,' or 'best practices.'<sup>65</sup> For the purpose of this discussion, 'harmonization' aims at coordinating approaches and does not

Co-ordinating Council of the Programme on Man and the Biosphere, Resolution 2.313 of UNESCO's General Conference (1970), arts IV.3, VII.3, VIII, IX.1, X.

<sup>61</sup> See *Protected Areas (Articles 8 (a) to (e))*, *supra* note 21 at paras 24, 31; *Protected Areas (VIII/24)*, *supra* note 40 at para 14; *Protected Areas (IX/18)*, *supra* note 40 at paras 9, 10, 14; *Protected Areas*, *supra* note 33 at paras 1(h), 3, 8, 27 and ss 1.1, 2.1 of the reporting framework in the Annex; *Protected Areas*, *supra* note 42 at paras 1(e), 6–8.

<sup>62</sup> *Protected Areas (Articles 8 (a) to (e))*, *supra* note 21 at para 31.

<sup>63</sup> *Protected Areas (VIII/24)*, *supra* note 40 at para 14. As an illustration, there were eleven references to the IUCN in the PoWPA, and only three references to the United Nations Environment Programme (UNEP).

<sup>64</sup> Rules of Procedure of the World Conservation Congress, IUCN, *Statutes*, *supra* note 56 at para 48.

<sup>65</sup> This distinction corresponds to the distinction made between 'descriptive policy' and 'prescriptive policy' in Nigel Dudley, ed, *Guidelines for Applying Protected Area Management Categories* (2008) at 48.

primarily aim at identifying approaches that shall or should be chosen. The normative function of harmonization is indirect in the sense that a preference for the harmonized approach can be established gradually if such approaches are applied by countries. Guidance, on the other hand, indicates directly which approaches should be taken.

As to the IUCN's guidance function, we can initially observe that many decisions of the World Conservation Congress include guidance to all relevant actors, including private enterprises, inter-governmental institutions, and governments. One relevant and controversial example is Recommendation 2.82: 'Protection and conservation of biological diversity of protected areas from the negative impacts of mining and exploration.' This recommendation calls on 'all IUCN's State members to prohibit by law, all exploration and extraction of mineral resources in protected areas corresponding to IUCN Protected Areas Management Categories I to IV.'<sup>66</sup> It is one of a long series of decisions related to the relationship between extractive industries and protected areas.<sup>67</sup>

Two groups of normative documents produced by the IUCN in the context of protected areas are 'guidelines' and 'best practices guidelines.' The statutory documents of the IUCN do not set out any procedures for adopting such documents, and despite the IUCN's commitment to transparency, it is not an easy task to determine the formal status of such documents within the IUCN. In some instances, the Congress requests institutions of the IUCN to produce or update such documents,<sup>68</sup> but this does not seem to be done on a systematic basis. Despite their special status, the IUCN's guidelines for protected area management categories<sup>69</sup> have not been explicitly adopted or endorsed by the Congress or by the IUCN's Council beyond ad hoc references to them in decisions.<sup>70</sup> The same is the case for the IUCN series published under the label 'best practice guidelines,'<sup>71</sup> which cover the establishment, management, funding, and value of protected areas, as well as issues related to Indigenous and local communities.<sup>72</sup> They are produced in close collaboration with academic institutions and are

<sup>66</sup> *Ibid.*

<sup>67</sup> See Recommendation 4.136 on Biodiversity, Protected Areas, Indigenous Peoples and Mining Activities (14 October 2008), which lists relevant decisions.

<sup>68</sup> Examples include Resolution 4.036 on Best Practice Protected Area Guideline for Ecological Restoration (14 October 2008); Resolution 3.048 on IUCN Guidelines for Protected Area Management Categories (25 November 2004).

<sup>69</sup> Dudley, *supra* note 65; see also Nigel Dudley, Peter Shadie and Sue Stolton, *Guidelines for Applying Protected Area Management Categories Including IUCN WCPA Best Practice Guidance on Recognising Protected Areas and Assigning Management Categories and Governance Types* (2013).

<sup>70</sup> See, eg, Resolution 4.050 on Recognition of Indigenous Conservation Territories' (14 October 2008) at para 2; Resolution 4.123 on Promotion of Category V and VI Protected Areas for Biodiversity Conservation (14 October 2008).

<sup>71</sup> See, eg, Resolution 4.038 on Recognition and Conservation of Sacred Natural Sites in Protected Areas (14 October 2008).

<sup>72</sup> See *IUCN WCPA Best Practice Guidelines for Protected Area Managers Series* <<https://www.iucn.org/theme/protected-areas/resources/best-practice-guidelines>>.

published in the names of editors and under the auspices of a series' editor. The guidelines are generally subject to extensive consultation processes before publication.

In general, the IUCN guidelines have not received initial formal endorsement by states. Nevertheless, they may subsequently receive some form of recognition through state practice and decisions of international institutions—in particular, bodies of the CBD and the IUCN. Moreover, the content of the guidelines vary from highly descriptive to prescriptive.<sup>73</sup> The normative status of the guidelines must thus be determined on a case-by-case basis in relation to their content, institutional endorsement, and subsequent state practice. Examples of widely used guidelines are those based on the assessment of protected area management effectiveness.<sup>74</sup>

With respect to the IUCN's functions with regard to harmonization, its work with the UN's List of Protected Areas produced definitions that initially focused on national parks but subsequently were extended to all categories of protected areas.<sup>75</sup> The current general definition of protected areas, which has received significant endorsement internationally, defines a protected area as '[a] clearly defined geographical space recognized, dedicated and managed, through legal and other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.'<sup>76</sup> This definition is more precise than the CBD's Article 2 definition with regard to the purpose for which a protected area is established and the framework for the management of the protected area. It has been argued, however, that there is 'tacit agreement between the CBD Secretariat and IUCN that the two definitions effectively mean the same thing.'<sup>77</sup>

The IUCN's classification of protected areas into main categories was introduced in 1978 and was subsequently updated in 1994 and 2008.<sup>78</sup> This classification system was formally endorsed by the CBD in 2004,<sup>79</sup> is currently widely,

<sup>73</sup> For an example of descriptive, see Svetlana L Kopylova and Natalia R Danilina, eds, *Protected Area Staff Training* (2011); and of prescriptive, see Robert Wild and Christopher McLeod, eds, *Sacred Natural Sites: Guidelines for Protected Area Managers* (2008).

<sup>74</sup> Marc Hockings et al, *Evaluating Effectiveness: A Framework for Assessing Management Effectiveness of Protected Areas* (2nd edn, 2006). According to Dudley, *supra* note 65 at 78, by 2008 '[m]ore than 90 percent of site assessments have been undertaken using systems compatible with' these guidelines.

<sup>75</sup> Chape, Spalding and Jenkins, *supra* note 5 at 7–8, 106–8.

<sup>76</sup> Dudley, *supra* note 65 at 8–9. This definition slightly revises the definition adopted at the fourth World Park Congress in 1992: 'An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means.'

<sup>77</sup> *Ibid* at 75.

<sup>78</sup> *Ibid* at 11–23.

<sup>79</sup> *Protected Areas (Articles 8 (a) to (e))*, *supra* note 21 at para 31; see also *Protected Areas (IX/18)*, *supra* note 40 at para 9.



but not universally, used in international and regional institutions,<sup>80</sup> and is increasingly used by national management authorities.<sup>81</sup> The categorization sets a framework for the assessment of protected area policies. As of April 2020, countries had chosen not to assign the IUCN criteria for only 4.3 percent of the terrestrial protected areas listed in the World Database on Protected Areas. In addition, countries did not report the IUCN categories for a further 24.5 percent of the protected areas, bringing the total share of areas without IUCN categorization in the database to 28.8 percent.<sup>82</sup> Only one country—South Africa—chose not to assign IUCN categories to any of its protected areas. Another two other countries—Croatia and Vanuatu—did not report any IUCN categories for their protected areas.<sup>83</sup> A relatively large number of countries seem to be in a position where they lack the ability or will to systematically apply IUCN categories to their protected areas. For example, forty-three countries provide IUCN categories for less than half of their protected areas, and a further eleven for less than two-thirds.<sup>84</sup> Of these fifty-four countries, three out of four of them were from Europe and Africa, indicating a remarkably low use of IUCN categorization in these regions.

<sup>80</sup> See, *inter alia*, Ramsar COP9 Resolution IX.22 (2005) at para 8; African Convention on the Conservation of Nature and Natural Resources (2003), Annex 2, which reproduces the IUCN categories; section II of the Monaco Declaration on the Role of the Bern Convention in the Implementation of Worldwide International Instruments for the Protection of Biodiversity (1994); Recommendation on Strategic Aspects and Article 3.1(a) of the Memorandum of Co-operation between the Council of Europe and the International Union for Conservation of Nature and Natural Resources (IUCN) (27 January 2010); Conservation of Arctic Flora and Fauna (CAFF) Circumpolar Protected Areas Network (CPAN) Strategy and Action Plan (1996); see also Gillespie, *supra* note 7 at 31–2, 46.

<sup>81</sup> Dudley, *supra* note 65 at 48–9.

<sup>82</sup> *World Database on Protected Areas* <<https://www.protectedplanet.net/>>; UNEP and World Conservation Monitoring Centre, *World Database on Protected Areas User Manual 1.5* (2017) <[http://wcmc.io/WDPA\\_Manual](http://wcmc.io/WDPA_Manual)>. Of a total of 239,795 protected areas (excluding purely marine areas, proposed areas and areas for which IUCN criteria are not applicable), IUCN criteria were not assigned to 10,383 areas and not reported for a further 58,697 areas. For the purpose of comparison, Gillespie, *supra* note 7 at 33, pointed out that in 2007 33 percent of 33,036 protected areas were not reported.

<sup>83</sup> *World Database on Protected Areas*, *supra* note 82. South Africa had 1,523 protected areas listed, for none of which it had chosen to apply IUCN categories. The following is a list of other countries that had a significant share of protected areas that were not assigned IUCN categories (of a total of 27 countries that followed similar practices): Serbia 22.3%; Spain 20.7%; Poland 15.8%; Finland 15.2%; Sweden 12.4%; Denmark 10.2%; Germany 2.8%; Canada 2.0%; Australia 1.5%.

<sup>84</sup> *Ibid.* Percentage of protected areas for which IUCN categories have been reported: South Africa; Croatia; Vanuatu (all 0%); Timor-Leste (2.4%); Guinea (2.5%); Nigeria (2.7%); Bolivia (3.2%); Papua New Guinea (4.2%); Morocco (4.5%); Uganda (4.8%); Ghana (5.0%); Côte d'Ivoire (6.4%); Malawi (9.1%); Benin (9.1%); Namibia (10.3%); Togo (11.0%); Zambia (11.1%); Tanzania (11.3%); Senegal (12.2%); Kenya (13.7%); United Arab Emirates (14.0%); Burkina Faso (14.1%), Bahamas (14.7%); Sierra Leone (17.9%); Ireland (19.8%); Italy (22.7%); Estonia (23.4%); Spain (25.4%); Panama (26.2%); Israel (27.4%); Zimbabwe (27.5%); Sweden (28.4%); Tunisia (29.5%); Malaysia (32.9%); Fiji (33.7%); Hungary (35.2%); Samoa (37.3%); Netherlands (39.3%); Lithuania (45.4%); Cyprus (45.8%); Palestine (47.1%); Mexico (48.2%); Denmark (49.2%); Poland (51.3%); Portugal (51.5%); Slovenia (52.7%); Belgium (54.4%); Slovakia (59.1%); Romania (60.5%); Latvia (61.4%); Greece (61.9%); Palau (65.4%); Serbia (66.5%); Luxembourg (66%).

Hence, while the IUCN classification system has had significant impact on some international institutions and the majority of countries,<sup>85</sup> the effort to harmonize national regimes for protected areas remains a long-term undertaking where much still remains to be achieved. Moreover, countries' practices regarding the designation and management of protected areas remains diverse despite the efforts by the IUCN and the CBD to promote harmonization. The lack of formalized procedures for the adoption of normative and harmonizing documents within the IUCN, as well as the limited role of countries in such processes, are likely the most significant factors that prevent such documents from playing a more important role in the interpretation and implementation of the CBD.

## 6. Concluding Remarks

There is little doubt that almost all countries of the world have undertaken legal commitments to operate a system of protected areas under the CBD. The core functions of protected areas are to ensure the conservation of threatened ecosystems and of habitats of threatened species. But protected areas increasingly fulfil other functions linked to ecosystem services and cultural values, such as flood protection, adaptation to climate change, recreation, and access to genetic resources. The standard clause used in the CBD to qualify most substantive provisions, including Article 8, 'as far as possible and as appropriate,' indicates that countries enjoy a broad discretion with regard to the extent to which they establish protected areas, depending on available resources and on how their system of protected areas interact with other measures to conserve biodiversity.

Article 8(a) of the CBD is relevant for countries' commitment to ensure that protected areas cover all or most threatened or 'red listed' ecosystems, nature types or species (frequently referred to as 'protected area representativeness')—the duty to establish protected areas 'where special measures need to be taken to conserve biological diversity.' For ecosystems, nature types, and species that are plentiful within the country, 'special measures' would presumably not be needed, and there would not be any obligation to establish protected areas. Beyond this starting point, considerations of whether a country fulfils its obligation of representativeness could be based on an overall assessment of the ability of the protected area system as a whole to prevent the extinction of species or the destruction of threatened ecosystems and nature types.

The IUCN has defined six main categories of protected areas. While these categories have objectives that are common to all of the categories,<sup>86</sup> there is a main distinction between Categories I–IV, which focus on strict conservation of biodiversity, and Categories V and VI, which focus more on ecosystem services and

<sup>85</sup> Dudley, *supra* note 65 at 70–5.

<sup>86</sup> *Ibid* at 12–13.

cultural values and which allow a broader range of human activities. Countries have no legal obligation to use the IUCN categories when determining the level of protection in protected areas. Countries enjoy broad freedom under the CBD when determining the level of protection within specific protected areas. Nevertheless, countries do have core obligations regarding the level of protection. A country that establishes protected areas, where the level of protection is insignificant (so-called ‘paper parks’) to such an extent that the effectiveness of its protected areas system as a means to conserve biodiversity can be seriously questioned, fails to honour its legal commitments provided that the lack of effectiveness cannot be attributed to the country’s lack of ability to establish an effective protected area regime.

There is increasing focus on the management of protected areas, as the values to be conserved need management initiatives in light of threats posed by, *inter alia*, invasive alien species, climate change, and changes in human activities. The general starting point is that the CBD focuses on obligations of result—the establishment of protected area systems within countries that effectively contribute to the conservation of threatened ecosystems and habitats of threatened species. Arguably, this starting point is somewhat modified through the elaboration of “soft law” and other policy-oriented documents in the context of the CBD and possibly also the IUCN. These documents provide a deeper understanding of the implications of the obligations of result undertaken in Article 8 of the CBD and arguably can affect the range of options available to countries when designing and managing their protected areas. One example is local—namely, the management of protected areas in light of the obligation to ‘respect . . . practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity’ (Article 8(j) of the CBD). It is clear that countries are free to delegate significant responsibilities regarding the design and management of protected areas to such peoples and their relevant administrative institutions. Another example is the distinction between protected areas and other area-based management tools.

While the CBD’s definition states that a protected area must be ‘designated or regulated and managed to achieve specific conservation objectives,’ it has become clear that protected areas can also serve other purposes—in particular, those related to ecosystem services. Arguably, the definition does not prevent countries from establishing protected areas with a primary aim of providing ecosystem services, as long as they also set out specific conservation objectives and are managed with a view to achieving them. A third example is the need to adapt the design and management of protected areas to changed circumstances. While it remains clear that protected areas serve long-term protection objectives, it is also clear that such objectives cannot be achieved unless they are designed and managed to offset adverse effects from changing circumstances, such as transboundary pollution, climate change, and populations of migrating species.

In light of subsequent practice, we may conclude that when countries designate protected areas, Article 8 of the CBD establishes that they undertake to make their best effort at managing such protected areas in a manner that effectively achieves the conservation objectives. Countries also undertake not to allow such areas to be converted in violation of the conservation objectives. Nevertheless, countries enjoy broad discretion when defining and subsequently redefining conservation objectives for protected areas.

### III. INTERNATIONAL COMMITMENTS REGARDING SPECIFIC PROTECTED AREAS

#### 1. Introduction

The thought of assigning international status to specific protected areas dates to at least the end of the Second World War. Pieter van Heijnsbergen indicates that the objective was to identify areas ‘containing wildlife species or geological or landscape formations which are not, or not to the same extent, represented elsewhere in the world, and therefore are of such importance that they need international protection.’<sup>87</sup> The first multilateral initiative in this direction was the 1962 publication of the first UN List of Protected Areas.<sup>88</sup> This list did not entail any legal commitments regarding the protected areas listed; it was essentially established for informational and research purposes. But the list has not been without importance from a normative perspective. It provided a basis for subsequent initiatives to harmonize national rules and procedures and to establish multilateral cooperative arrangements.<sup>89</sup>

Subsequently, the establishment of multilateral lists of protected areas has both been treaty based—the first being the 1971 Ramsar Convention—and non-binding.<sup>90</sup> The establishment of such lists and associated legal and political commitments mark a significant development of international law. The lists necessitate the establishment of international administrative systems and associated decision-making based on conditions and activities within national protected areas. To operate effectively, such systems need mechanisms for the objective and impartial establishment of facts, the subsequent application of rules and procedures to such facts, and consideration of the interests of private parties affected by the decisions. However, the extent to which such mechanisms are established within international regimes vary significantly.

Here, we shall discuss how the administrative systems have developed under two treaty-based regimes: the 1972 World Heritage Convention and the Ramsar

<sup>87</sup> Heijnsbergen, *supra* note 7 at 177. He traces the idea back to the Brunnen Conference in 1947.

<sup>88</sup> IUCN, *United Nations List of National Parks and Equivalent Reserves* (1962); see also ECOSOC Resolution 713(XXVII) (1959) and ECOSOC Resolution 810(XXXI) (1961).

<sup>89</sup> See S Chape et al, *2003 United Nations List of Protected Areas* (2003).

<sup>90</sup> J Harrison, ‘International Agreements and Programmes on Protected Areas’ (2002) 12(3) *Parks* 2, identifies thirteen global and regional instruments, of which six are not treaty based.

Convention. Together with the non-binding listing under UNESCO's Man and Biosphere Programme,<sup>91</sup> these treaties represent the global systems for protected area listings. While the treaty regimes are formally distinct, they are also closely inter-related. Hence, procedures and decisions in one regime are frequently related to, and coordinated with, decisions in the other regime. In the following discussion, we shall look closer at the following three issues under the two treaties:

- the obligation to seek international designation of sites (for example, because of a site's outstanding environmental qualities);
- the requirements regarding management of a listed area; and
- the rules regarding monitoring of listed areas and the potential loss of international status.

## 2. World Heritage Sites

A core purpose of the World Heritage Convention is, according to its preamble, to protect natural heritage of outstanding universal value. Countries' obligations relating to the listing of such heritage are set out in Article 11 of the convention, according to which countries shall submit inventories of potential sites as bases for the committee's subsequent decisions. Decisions to list sites cannot be made without the consent of the relevant countries (Article 11(3)).

The details of the World Heritage Convention's administrative system has been set out in its Rules of Procedure and Operational Guidelines, the latter being of primary interest in the following discussion.<sup>92</sup> In addition, a database—the World Heritage Policy Compendium—contains updated and systematic access to policies adopted by the World Heritage Committee and the General Assembly of States Parties in decisions, resolutions, and other strategic texts.<sup>93</sup> The systematization and publication of relevant normative materials, taken together with the extensive documentation of decisions regarding individual world heritage sites, provides an essential contribution to effective governance under the convention.

<sup>91</sup> The World Network of Biosphere Reserves, initiated in 1976 and formalized in 1995 by the UNESCO General Conference under the UNESCO Man and Biosphere Programme, which was established already in 1970, predating the two global treaties. See Resolution 2.4 of the UNESCO General Conference (1995) at para 4. See Malcolm Hadley, 'Forty Years of Field Laboratories in Sustainability' (2011) 9(4) *World of Science* 2.

<sup>92</sup> Both are adopted by the WHC. *Rules of Procedure of the General Assembly of States Parties to the Convention* (1978); UNESCO and WHC, *Basic Texts of the 1972 World Heritage Convention* (2016); *Operational Guidelines for the Implementation of the World Heritage Convention* (1977) <<http://whc.unesco.org/en/guidelines>>.

<sup>93</sup> See *World Heritage Policy Compendium* <<http://whc.unesco.org/en/compendium>>

Starting with the Global Strategy adopted in 1994<sup>94</sup> and followed up through the 2000 Cairns Decision and the 2002 Budapest Declaration on World Heritage,<sup>95</sup> a key objective of the past three decades has been to strengthen the representativeness, balance, and credibility of the World Heritage List.<sup>96</sup> While the World Heritage Convention and its administrative system apply equally to cultural and natural heritage, the World Heritage List remains biased in favour of cultural sites.<sup>97</sup> The Operational Guidelines encourages states whose sites are under-represented to enhance their efforts to prepare sites for listing, and such sites are to be prioritized in the subsequent procedures of the committee.<sup>98</sup> While states are strongly encouraged to submit such nominations, and recognition of a site as world heritage is likely to depend on the extent to which such sites are under-represented, nothing in the convention or decisions of the committee establishes any legal obligation to seek listing of under-represented sites.

To qualify as a world heritage site, an area must be of 'outstanding universal value' (Article 2). This criterion is extensively elaborated in the Operational Guidelines.<sup>99</sup> A natural site must fulfil one or more of five criteria relating to land use, aesthetics, the earth's history, ecological and biological processes, and biodiversity.<sup>100</sup> These criteria are elaborated in a number of policy decisions and other documents.<sup>101</sup> The threshold for designating an area as a natural world heritage site is very high, at least in theory. According to the Operational Guidelines, to be inscribed, a natural site must have a 'significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity.'<sup>102</sup> These requirements are supplemented by criteria concerning the former and future management of proposed sites; the integrity of the site and the existence of an adequate protection and management system to ensure its safeguarding. In this regard, the thresholds for establishing world heritage sites may be comparable to those applying to protected areas within national regimes. In many cases, it would therefore be sufficient that a nominated site is included in an existing protected area. However, as the level of

<sup>94</sup> *Global Strategy for a Representative, Balanced and Credible World Heritage List* <<http://whc.unesco.org/en/globalstrategy>>.

<sup>95</sup> *Cairns Decisions: Work of The World Heritage Reform Groups*, Decision CONF 204 VI (2 December 2000) <<http://whc.unesco.org/en/cairns/>>; *Budapest Declaration on World Heritage*, Decision CONF 202 9 (29 June 2002) <<http://whc.unesco.org/en/decisions/1217/>>.

<sup>96</sup> See Goal 2 of the *Strategic Action Plan for the Implementation of the World Heritage Convention 2012–2022*, Doc WHC-11/18.GA/11 (1 August 2011); *Operational Guidelines*, *supra* note 92 at paras 60–1.

<sup>97</sup> Despite repeated calls for increased focus among states on nominating natural sites (see, *inter alia*, *Operational Guidelines*, *supra* note 92 at paras 57, 59–61), cultural sites outperform natural sites by almost four to one (numbers as of April 2020: cultural 869; natural 213; mixed 39).

<sup>98</sup> *Ibid* at paras 60–1.

<sup>99</sup> *Ibid* at paras 49–53, 77–8, 87–95.

<sup>100</sup> *Ibid* at para 77(v), (vii), (viii), (ix), (x).

<sup>101</sup> See, in particular, *World Heritage Policy Compendium*, *supra* note 93, s 2, on the meaning of 'outstanding universal value.'

<sup>102</sup> *Operational Guidelines*, *supra* note 92 at para 49.

protection and the management of nationally protected areas vary significantly, there is no guarantee that such sites would fulfil the management-related criteria. The thresholds and requirements serve to ensure that the system does not get flooded by nominations and is able to follow up on specific cases. Moreover, they mean that such sites fall within the CBD's and IUCN's definitions of 'protected areas.'

The evaluation of whether a nomination fulfils the requirements is, in whole or in part, undertaken by the IUCN on the basis of a series of principles.<sup>103</sup> This evaluation will in most cases be the main basis for the World Heritage Committee's decision. The specifications in the Operational Guidelines of outstanding universal value and the additional criteria associated with management are in practice binding since they are applied by the World Heritage Committee and there is no possibility for states to challenge the decision on whether to recognize a site as world heritage. Practice shows that the chances that the nomination of a natural property will be successful are around 50 percent. Given the current situation of under-representation and increasing threats to biodiversity, we are likely to see increased pressure to list natural sites in upcoming years.

The World Heritage Convention establishes no explicit link between world heritage sites and protected areas. The starting point is an obligation of result; if countries ensure that sites under their jurisdiction retain their outstanding universal value, they will comply with their commitments under the convention. One important reservation, however, is the duty to protect sites against risks. Countries are under the obligation to 'endeavor, in so far as possible, and as appropriate . . . to take the appropriate legal, scientific, technical, administrative and financial measures necessary for the . . . protection [and] conservation' of sites (Article 5). According to the Operational Guidelines, '[a]ll properties inscribed on the World Heritage List must have adequate long-term legislative, regulatory, institutional and/or traditional protection and management to ensure their safeguarding.'<sup>104</sup> Hence, even if the Operational Guidelines hardly refer to 'protected areas' as a means to fulfil commitments under the convention,<sup>105</sup> the existence of protected areas within world heritage sites is very common and a key factor when considering countries' fulfilment of Article 5.<sup>106</sup>

<sup>103</sup> *Ibid* at para 148.

<sup>104</sup> *Ibid* at para 97.

<sup>105</sup> *Ibid* at para 102: 'The boundaries of the nominated property may coincide with one or more existing or proposed protected areas, such as national parks or nature reserves, biosphere reserves or . . . other areas and territories. While such established areas for protection may contain several management zones, only some of those zones may satisfy criteria for inscription.' In addition, para 180(b) states that listing of sites as 'in danger' can take place when '[t]he property is faced with major threats which could have deleterious effects on its inherent characteristics. Such threats are, for example: i) a modification of the legal protective status of the area.'

<sup>106</sup> The categorization of such areas according to IUCN protected areas categories is also very common. Of the 237 world heritage sites for which UNEP's World Conservation Monitoring Centre have World Heritage Datasheets as of April 2020 <<http://world-heritage-datasheets.unep-wcmc.org/data-sheet/output/index.html>>, 206 listed one or more IUCN protected area categories for the site, of

The general commitments of countries regarding the management of natural heritage sites are set out in Articles 4–6 of the World Heritage Convention. Here, we shall not focus on these general rules but, rather, on the specific management rules that apply to sites inscribed on the World Heritage List. The convention itself contains no explicit rules in this regard; relevant commitments follow from the decision to list the site and are directly related to a duty to safeguard the site's outstanding universal value. Since 2007, the World Heritage Committee has adopted a 'statement of outstanding universal value' in relation to each listed site, which defines the values to be safeguarded.<sup>107</sup> The Operational Guidelines set out the specific norms for management of sites on the World Heritage List. Countries are expected to have in place adequate long-term legislative, regulatory, institutional, or traditional protection and management to ensure the safeguarding of the sites.<sup>108</sup> Such protection should be followed up by appropriate management plans, comparable management systems, or action plans during the nomination process.<sup>109</sup> Some human activities may be allowed in listed sites provided that the use is 'ecologically sustainable.'<sup>110</sup> Article 5(a) of the convention sets out that countries shall endeavour to involve local people in the management of world heritage sites. While the wording of the provision is soft and unclear, it should be interpreted in light of subsequent decisions and policy documents under the convention<sup>111</sup> as well as the general trends towards the involvement of Indigenous peoples and local communities in the management of protected areas and sustainable use of such areas. In effect, countries have a broad margin of discretion when defining and implementing management regimes, provided that they effectively safeguard the outstanding universal value of the sites.

There are in essence two ways in which the World Heritage Committee monitors sites: 'periodic reporting' and 'reactive monitoring.'<sup>112</sup> The reporting cycles under the World Heritage Convention takes six years, plus two years of

which 57 listed nature reserves/wilderness (Category I), 140 listed national parks (Category II), 16 listed natural monuments (Category III), 37 listed habitat/species management area (Category IV), 21 listed protected landscapes/seascapes, and 18 listed protected area with sustainable use of natural resources (Category VI). Of the 206 sites, 53 stated that they apply more than one protected area category.

<sup>107</sup> *Operational Guidelines*, *supra* note 92 at paras 154–5. Such statements have subsequently been established for sites listed before 2007. See International Council on Monuments and Sites, International Centre for the Study of the Preservation and Restoration of Cultural Property, IUCN and UNESCO World Heritage Centre, *Guidance on the Preparation of Retrospective Statements of Outstanding Universal Value for World Heritage Properties* (July 2010).

<sup>108</sup> *Operational Guidelines*, *supra* note 92 at paras 97–8.

<sup>109</sup> *Ibid* at paras 108–18, 132.

<sup>110</sup> *Ibid* at paras 90, 119.

<sup>111</sup> See, in particular, *ibid* at para 111 and priority 3.1 of the *Strategic Action Plan (2012–22)*.

<sup>112</sup> Reporting is regulated in art 29 of the World Heritage Convention, *supra* note 14, and chapter V of the *Operational Guidelines*, *supra* note 92, and monitoring is dealt with in chapter IV of the *Operational Guidelines*.



subsequent reflection.<sup>113</sup> By 2020, only two reporting cycles had been completed. As the reporting is undertaken on a regional basis, there is limited focus on each individual country in the reports prepared by the World Heritage Centre.<sup>114</sup> Issues regarding specific world heritage sites are dealt with in subsequent decisions by the World Heritage Committee. ‘Reactive monitoring’ is defined as ‘the reporting by the Secretariat, other sectors of UNESCO and the Advisory Bodies to the Committee on the state of conservation of specific World Heritage properties that are under threat.’<sup>115</sup> In 2007, the committee established a separate version of this monitoring mechanism—the Reinforced Monitoring Mechanism—which is to be applied in exceptional and specific cases where there is a fear that the outstanding universal value could be lost in the short term.<sup>116</sup> While third parties may provide information on sites, they cannot trigger monitoring.<sup>117</sup> The IUCN is the main body through which monitoring missions are carried out for natural sites.<sup>118</sup> The results of monitoring are reports that comment on ‘threats or significant improvement in the conservation’ of the site, ‘follow-up to previous decisions of the World Heritage Committee,’ and ‘any threat or damage to or loss of Outstanding Universal Value, integrity and/or authenticity.’<sup>119</sup>

The most serious consequence of reactive monitoring would be the deletion of the site from the World Heritage List. Such loss of international status is not explicitly dealt with in the World Heritage Convention. The Operational Guidelines state that, ‘when there is evidence that the property has deteriorated to the point where it has irretrievably lost those characteristics which determined its inscription on the List, the Committee may decide to delete the property from the List.’<sup>120</sup> There has so far been only two cases of deletion of sites from the World Heritage List; one natural and one cultural site.<sup>121</sup> It is far more common that the

<sup>113</sup> So far, the WHC has decided to suspend the next cycles by two years in order to study and reflect on the cycle and develop strategic direction, clear objectives, and benchmarks for the next cycle. *Reflection on the Preparation of the Next Cycle of Periodic Reporting*, Decision 30 COM 11G (16 July 2006) at para 5; *General Reflection on Periodic Reporting*, Decision 39 COM 10B.5 (8 July 2015) at para 7.

<sup>114</sup> For an example, see *Final Report on the Results of the Second Cycle of the Periodic Reporting Exercise for the Europe Region and Action Plan*, Doc WHC-15/39.COM/10A (8 July 2015).

<sup>115</sup> *Operational Guidelines*, *supra* note 92 at para 169.

<sup>116</sup> *Reinforced Monitoring Mechanism Proposed by the Director-General*, Decision 31 COM 5.2 (2 July 2007); see also *Evaluation of the Reinforced Monitoring Mechanism and Decision 35 COM 7.2*, Doc WHC-11/35.COM/7.2 (6 May 2011); UNESCO Reactive Monitoring Review Team, *Strengthening the Effectiveness of the World Heritage Reactive Monitoring Process*, Final Report (31 August 2019) at 76–8.

<sup>117</sup> *Operational Guidelines*, *supra* note 92 at para 174.

<sup>118</sup> *Ibid* at para 37.

<sup>119</sup> *Ibid* at para 173.

<sup>120</sup> *Ibid* at para 176(d). A procedure for deleting sites is set out in paras 192–8.

<sup>121</sup> *Arabian Oryx Sanctuary – Oman*, Decision 31 COM 7B.11 (2 July 2007); *Dresden Elbe Valley – Germany*, Decision 33 COM 7A.26 (30 June 2009). In addition, in the decision to remove Georgia’s Gelati Monastery from the Oist of World Heritage in Danger, it was decided to establish new boundaries for the site and thus exclude the Bagrati Cathedral from the site. See *Bagrati Cathedral and Gelati Monastery (Georgia) (C 710)*, Decision 41 COM 7A.20 (12 July 2017).

monitoring results in the listing of sites as being ‘in danger.’ Since the first decision on such a listing of a site in 1979, the World Heritage Committee has made a total of ninety-three decisions, of which thirty-five concerned natural sites. During the first two decades, natural sites were far more frequently listed as being in danger than cultural sites, and, by the millennium, there were twice as many natural sites as there were cultural sites on the list.<sup>122</sup> Since then, there have been more decisions to delist natural sites than to list new ones, while the number of cultural sites on the list has increased significantly.<sup>123</sup> By 2020, natural sites remain overrepresented on the list but by a much lower margin.<sup>124</sup>

For the purpose of this article, a study has been carried out on the World Heritage Committee’s listing decisions regarding twenty-nine sites.<sup>125</sup> All of these sites contain protected areas. None of the cases mention changes in protected area status as being relevant for the decisions. Nevertheless, three of the cases are of some interest as they mention changes in the boundary or lack of clear boundaries of protected areas as important factors.<sup>126</sup> The cases indicate that the reasons why these sites are listed as being ‘in danger’ vary along a broad spectrum.<sup>127</sup> With two major exceptions, the reasons are mostly related to the management of the sites. Exceptions are situations of *force majeure*—in particular, war, civil unrest, influx of refugees, and hurricanes<sup>128</sup>—and activities outside sites that have direct adverse effects on the values of the sites.<sup>129</sup> The main reasons why the sites were listed were that countries allowed certain activities within

<sup>122</sup> Natural sites: 18; cultural sites: 9; mixed sites: 0. The distribution of sites at the start of 2000 was cultural sites: 76%; natural sites: 20%; mixed sites: 4%. Data extracted from <<http://whc.unesco.org/en/list/stat/#s7>>.

<sup>123</sup> *Ibid.* The WHC has adopted 40 decisions to delist sites, of which 18 concerned natural sites.

<sup>124</sup> *Ibid.* Natural sites: 17; cultural sites: 36; mixed sites: 0. The distribution of sites at the start of 2020 was cultural sites: 78%; natural sites: 19%; mixed sites: 3%.

<sup>125</sup> The study includes one case where a site was delisted from the World Heritage List and one case concerning a mixed site.

<sup>126</sup> The decision to delist Oman’s Arabian Oryx Sanctuary from the World Heritage List, see *Arabian Oryx Sanctuary – Oman*, *supra* note 121 at para 9; *World Heritage Committee Draft Summary Record*, Doc WHC-07/31.COM/INF.24 (20 December 2007) at paras 702–67, 791–806, 1235–40, 1836–7. For background documentation, see <<http://whc.unesco.org/en/list/654/documents/>>. For the decision to list the Mount Nimba Nature Reserve as in danger, see *SOC: Mt. Nimba Nature Reserve (Cote d’Ivoire/Guinea)*, Decision CONF 002 VIII (14 December 1992). For the decision to list the Belize Barrier Reef System as in danger, see *Belize Barrier Reef System (Belize) (N 764)*, Decision 33 COM 7B.33 (30 June 2009).

<sup>127</sup> Decisions by the WHC, starting with the twenty-sixth session of the WHC in 2002, increasingly set out in detail the justification for listing sites as ‘in danger’ and the conditions for removing sites from this list. For committee decisions before 2002, the assessment is based on the summary record contained in the report from the session.

<sup>128</sup> Main examples include cases regarding sites in Congo listed as ‘in danger’ as a consequence of the Rwandan genocide and ensuing unrest and refugee problems (Virunga National Park, Kahuzi-Biega National Park, Okapi Faunal Reserve and Garamba National Park), and the listing (twice) of the Everglades National Park in the United States triggered by hurricanes.

<sup>129</sup> Main examples include the construction of dams upstream or downstream from the sites, see Djoudj National Bird Sanctuary (Senegal); Srebarna Nature Reserve (Bulgaria); and Ichkeul National Park (Tunisia).

the sites or failed to take measures to stop unlawful activities.<sup>130</sup> There were a few cases where failure to take active measures to conserve or protect the values of the sites were a reason for listing the sites as being ‘in danger.’<sup>131</sup>

The adoption of management plans has in some cases been a main justification for removing sites from the list.<sup>132</sup> Only in rare cases does the World Heritage Committee refer to national rules and procedures regarding protected areas. The summary of the committee’s discussion of the Yellowstone National Park (United States) provides some insight into the dilemmas facing the committee in cases where the state is opposed to listing the site:

During the discussion it was noted that whether the State Party should grant a permit to the mining company or not is entirely a domestic decision of the State Party. It was further stated that there is no wording in the Convention or the Operational Guidelines which could lead to an interference in sovereignty. It was also noted that even if the State Party did not request action, the Committee still had an independent responsibility to take action based on the information it had gathered.<sup>133</sup>

These statements illustrate the tension between countries’ sovereignty regarding the management of protected areas and the World Heritage Committee’s responsibility, through administrative procedures, to ensure that the sites retain their outstanding universal values.

In sum, the World Heritage Convention’s administrative system related to natural sites has been extensively elaborated through the Operational Guidelines and associated documents. One essential feature of the system is its reliance on decisions by the World Heritage Committee, a body consisting of twenty-one states elected for six years (Article 8), although the current practice is that most countries voluntarily choose to limit their term to four years). The committee has adopted the general framework for establishment, management, and monitoring of sites, it has approved documents that further elaborate the Operational Guidelines, and it has decision-making authority for individual sites. Another characteristic of the system is its extensive reliance on the IUCN for fact-finding and elaboration of normative documents.

<sup>130</sup> Examples include extractive industries (Yellowstone National Park [United States]; Belize Barrier Reef Reserve System; Arabian Oryx Sanctuary [Oman]); road construction (Sangay National Park [Ecuador]; Yellowstone National Park [United States]; Simien National Park [Ethiopia]; Iguazu National Park [Brazil]; Tropical Rainforest Heritage [Sumatra]); poaching (Garamba National Park [Congo]; Salonga National Park [Congo]; Arabian Oryx Sanctuary [Oman]), activities related to tourism (Yellowstone National Park [United States]; Belize Barrier Reef Reserve System; Plitvice Lakes National Park [Croatia]); and agriculture including forestry (Río Plátano Biosphere Reserve [Honduras]; Rainforests of the Atsinanana [Madagascar]).

<sup>131</sup> The main example is the failure to deal with threats posed by alien species: Djoudj National Bird Sanctuary [Senegal]; Galápagos Islands [Ecuador].

<sup>132</sup> Srebarna Nature Reserve [Bulgaria]; Rwenzori Mountains National Park [Uganda]; Ichkeul National Park [Tunisia].

<sup>133</sup> World Heritage Committee, *Report from the Nineteenth Session, 4–9 December 1995*, Doc WHC-95/CONF.203/16 (31 January 1996) at 19–20.

The combination of the delegation of essential functions to institutions over which states have limited control and the lack of precise rules in the World Heritage Convention has paved the way for a dynamic administrative system that has developed an elaborate framework and extensive practice. However, the legal status of essential elements of the administrative system remains unclear. In particular, this is the case for the Operational Guidelines. In my view, it can be argued that the Operational Guidelines are binding on institutions of the convention but that they are not directly binding in the relationship between the institution and countries. Nevertheless, decisions on listing and delisting individual sites are legally binding for the states in question. As for the link between world heritage sites and protected areas, there seems to be a disconnect between the lack of focus on protected areas in the Operational Guidelines and the extensive focus on protected areas in the practice of the World Heritage Committee and countries.

### 3. Ramsar Sites

In contrast to the World Heritage Convention, the Ramsar Convention includes the commitment of a country to 'designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance' and to 'designate at least one wetland to be included in the List' when signing or joining the convention (Article 2.1 and 2.4). The listing of a site represents the recognition by the country in question that the site is of common concern to the parties to the Ramsar Convention.<sup>134</sup> Decisions to include or delete sites on the list are made by the countries and not by the convention's institutions (Article 2.5). This means not only that the duties of countries to list sites are much clearer under the Ramsar Convention than they are under the World Heritage Convention but also that the decision-making functions of Ramsar institutions are much more limited than those of the World Heritage institutions.

The annual number of designated sites under the Ramsar Convention peaked in 2004 and has since followed a markedly downward trend.<sup>135</sup> The total number of Ramsar sites reached 2,410 by 2020, more than ten times the number of world heritage sites. The Ramsar Convention restricts the countries' freedom to list sites by indicating that sites should be of 'international significance in terms of ecology, botany, zoology, limnology or hydrology,' with a main emphasis on their 'international importance to waterfowl' (Article 2.2). In 1987, the COP adopted nine alternative criteria for determining whether wetlands qualify as being of 'international importance.'<sup>136</sup> The criteria are fairly detailed, covering issues such as endemic species, wetland-dependent species, habitat and migration

<sup>134</sup> Ferrajolo, *supra* note 8.

<sup>135</sup> *Ramsar Sites Information Service Stats* <<https://rsis.ramsar.org/?pagetab=2>>.

<sup>136</sup> COP 3 Recommendation 3.1 on Criteria for Identifying Wetlands of International Importance and Guidelines for Their Use (1987).

functions, and vulnerability of species and nature types. The most used criteria are those related to representative, rare, or unique wetland types and biodiversity-oriented criteria based on species and ecological communities.<sup>137</sup>

There is no requirement that a wetland is regulated as a protected area when being listed, but Article 4(1) of the Ramsar Convention establishes that countries 'shall promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not.' The Secretariat has described countries' commitments in this regard as follows:

The Convention does not indicate ... what legal status should be attributed to listed wetlands. Parties are therefore free to choose how to provide long-term protection against processes or activities which would alter the wetland's character. Methods vary according to a country's legal system (including customary law) and patterns of wetland ownership. They include designation of wetlands as protected areas under conservation legislation, conferring protection under land-use planning rules and using incentive measures to promote voluntary conservation.<sup>138</sup>

While it is very common for Ramsar sites to contain protected areas, the Ramsar Sites Information Services does not provide information on the extent to which (parts of) the Ramsar sites enjoy national protected area status.<sup>139</sup> Only about 5 percent of the listings of Ramsar sites mention IUCN protected area categories, and less than 4 percent overlap with world heritage sites.<sup>140</sup>

The management commitments for sites under the Ramsar Convention are based on the obligations to 'formulate and implement ... planning so as to promote the conservation of the wetlands included in the List,' maintain the 'ecological character' of sites, 'provide adequately for their wardening,' and endeavour to 'increase waterfowl populations' (Articles 3(1), 3(2), 4(1) and 4(4)). The convention uses two key concepts in the context of management provisions: 'conservation' and 'wise use.' While 'conservation' appears to be the more central of the concepts according to the text of the convention, 'wise use' appears to have become an equally important element in documents elaborating how to

<sup>137</sup> As of May 2020, 70% of the sites were based on criteria 1–4. *Ramsar Sites Information Service Stats*, *supra* note 135.

<sup>138</sup> Ramsar Convention Secretariat, *Laws and Institutions: Reviewing Laws and Institutions to Promote the Conservation and Wise Use of Wetlands*, Ramsar Handbooks for the Wise Use of Wetlands (4th edn, 2010), vol 3 at 24–5, 43–5; see also Ramsar Convention Secretariat, *Designating Ramsar Sites: Strategic Framework and Guidelines for the Future Development of the List of Wetlands of International Importance*, Ramsar Handbooks for the Wise Use of Wetlands (4th edn, 2010), vol 17 at 22. The term 'nature reserves' should not be interpreted as referring to protected areas classified as IUCN category I, see Heijnsbergen, *supra* note 7 at 183.

<sup>139</sup> *Ramsar Sites Information Service Stats*, *supra* note 135. Interestingly, the database includes information on 'non-statutory designations,' including 'important bird area' and 'important plant area,' and such data is listed for 530 sites.

<sup>140</sup> *Ibid.* References to the IUCN was made for 128 Ramsar sites and 90 sites overlapped with world heritage sites as of May 2020. See Barbara Lausche, *Guidelines for Protected Areas Legislation* (2011) at 55.

implement the convention.<sup>141</sup> The management objectives of Ramsar sites thus follow the general trend of increased emphasis on sustainable use that we see elsewhere in international protected area regimes.

One fundamental condition for achieving effective management is information about the status of sites, including, in particular, the elements to be conserved.<sup>142</sup> Such information is submitted when countries designate sites according to the relevant criteria. In addition, countries submit information on ecosystem services provided by, and the threats against, almost all of the sites.<sup>143</sup> Collectively, this information represents a solid basis for planning the management of the Ramsar sites (Article 3(1)). There is no strict duty to carry out such planning in the form of management plans. As of May 2020, approximately half of the sites have management plans, and if we include those that are in preparation, more than two-thirds of the sites will be covered. However, countries have reported that management plans are applied to only 37 percent of the sites.<sup>144</sup> Hence, even if there is a solid basis for management, significant challenges remain regarding management effectiveness.<sup>145</sup>

One key mechanism for improving the management of Ramsar sites has been the Ramsar advisory missions, which were initiated in 1988.<sup>146</sup> Only a very limited number of sites have been subject to such missions—less than 4 percent—but such missions have been carried out in a broad range of contracting parties—almost one-third.<sup>147</sup> The procedure is non-confrontational, and its key objective is to assist countries in addressing negative changes in the ecological character of sites. A 2018 report assessing almost three decades of missions, observes that the procedure has ‘undoubtedly been instrumental in helping Contracting Parties in a positive way to address key instances of challenges affecting the conservation of

<sup>141</sup> This reflects the mandate of the Conference of the Contracting Parties, which combines the three concepts ‘conservation, management and wise use’ and is a key element of the Strategic Plan. *The Ramsar Strategic Plan 2016–2024*, Resolution XII.2 (2015), art 6, where it is one of three strategic goals.

<sup>142</sup> See *Additional Scientific and Technical Guidance for Implementing the Ramsar Wise Use Concept*, Resolution IX.1 (2005) Annex A para. 18: ‘Essential to wetland management is baseline data that establishes the range of natural variation in components, processes and services at each site within a given time frame, against which change can be assessed.’

<sup>143</sup> *Ramsar Sites Information Service Stats*, *supra* note 135. Information on ecosystem services is available for 2,317 sites and on threats for 2,200 sites.

<sup>144</sup> *Ibid.* Management plans were available for 1,162 sites, in preparation for another 476 sites, but were implemented for only 893 of 2,390 sites.

<sup>145</sup> The importance of effective and integrated management is emphasised in the strategic goals of the *Ramsar Strategic Plan 2016–2024*, *supra* note 141.

<sup>146</sup> The mechanism was originally initiated by the Standing Committee in 1988 and subsequently endorsed by *Mechanisms for Improved Application of the Ramsar Convention*, Recommendation IV.7 (1990). Originally, it was labelled a monitoring procedure, subsequently rebranded as the management guidance procedure (Resolution VI.14 (1996) at para 14) and was given its current name in Resolution VII.12 (1999) at para 39.

<sup>147</sup> As of April 2020, missions had been carried out for ninety-three Ramsar sites located within fifty different countries.

some of the world's most important wetlands.' However, the report concludes that:

the potential offered by the RAM [Ramsar advisory missions] is only being partially realised and that this could be rectified in large part through the provision of enhanced guidance to Parties, the Secretariat and other stakeholders in the form of a revision to Recommendation 4.7. In particular, a lack of consistency over time and between regions in the way in which missions have been prepared and conducted and RAM reports finalised, combined with very weak attention to follow-up, means that it is often difficult or impossible to assess the impact of a RAM or to ensure that experience and lessons learned are available for sharing within and beyond the Convention. Key opportunities for optimising Convention effectiveness are being missed.<sup>148</sup>

This report was followed up by the COP through the adoption of a resolution instructing the Secretariat to prioritize missions where results are expected to be relevant for a broad range of other sites and to prepare operational guidance for these missions.<sup>149</sup> The guidance document makes very clear that missions are not to be regarded as 'a compliance mechanism or in any sense a "negative" or disciplinary procedure.'<sup>150</sup> While the missions have some degree of independence in the sense that they are to be conducted by the Secretariat assisted by experts hired by the Secretariat, the final report will have to be approved by the administrative authority of the country in question.<sup>151</sup> A further element that might strengthen the independence of a mission is the possibility of organizing joint missions with other multilateral environmental agreements, such as the World Heritage Convention, the CMS, and the Bern Convention.<sup>152</sup> By May 2020, almost two years after the adoption of the resolution, there has been no significant change in the frequency of missions.<sup>153</sup>

In contrast to the World Heritage Convention, institutions of the Ramsar Convention do not have the power to strike sites from the Ramsar list. Even if significant changes have occurred in many sites, no country has so far chosen to delete any site from the list. As a parallel to the World Heritages List of Sites in Danger, the Ramsar contracting parties established the Montreux Record in 1990, with the purpose of listing sites whose ecological character is changing or is likely to change (Articles 3(2) and 6(2)(c)).<sup>154</sup> Decisions to list a site on the Montreux Record as well as to strike it from the record are made by the countries with jurisdiction over the sites. The Montreux Record currently lists only forty-

<sup>148</sup> T Jones and D Pritchard, *Comprehensive Review and Analysis of Ramsar Advisory Mission (RAM) Reports*, consultancy report (January 2018) at iii, iv–v.

<sup>149</sup> Resolution XIII.11: Ramsar Advisory Missions (2018) at paras 11, 15.

<sup>150</sup> *Operational Guidance for Ramsar Advisory Missions* (July 2019) at para 5.

<sup>151</sup> *Ibid* at paras 12, 25–9.

<sup>152</sup> *Ibid* at para 19. Bern Convention, *supra* note 17.

<sup>153</sup> Yearly average number of missions was 2.2 before 2018. There were three missions in 2018 and two in 2019.

<sup>154</sup> *Change in Ecological Character of Ramsar Sites*, Recommendation 4.8 (1990).

eight sites, of which the vast majority were listed in the 1970s. Only a sixth of these sites were added since 2000, and the most recent addition was made in 2010.<sup>155</sup>

It may seem like the Montreux Record has fallen into disuse since 2010. However, in 2018, the COP agreed to encourage countries to continue their use of the Montreux Record and linked it closely to the missions.<sup>156</sup> Most noteworthy, the guidance document states:

[W]hen a RAM covers a Site that is listed in the Record, the Mission report must spell out the conditions or recommended actions required to remove the Site from the Record. A wetland may be removed from the Record following a request of the Contracting Party using the format provided in Annex 1 of Resolution XIII.10, and after consideration of advice and/or comment from the Scientific and Technical Review Panel.<sup>157</sup>

It remains to be seen whether these initiatives will provide sufficient incentives for countries to increase the use of missions and the Montreux Record. Future use of these mechanisms is most likely dependent on the availability of economic and human resources as well as domestic political considerations. Arguably, the formalization of the Ramsar advisory missions following the 2018 recommendations strengthens the international regulatory framework in a manner that could complicate domestic political support for increased use of the missions and the Montreux Record.

#### IV. CONCLUSIONS

The three regimes have been in operation for several decades—the Ramsar and World Heritage Conventions for almost half a century and the CBD for almost three decades—and they can therefore all be characterized as ‘mature’ in the sense that decision-making structures, the relationship between treaty bodies and contracting parties, as well as the relationship between the treaty regimes and other treaty regimes have largely been settled. These regimes have been operational during a period in which the earth’s biodiversity and ecosystems have deteriorated at an alarming and accelerating rate. During the same period, countries have significantly expanded protected areas as a management category for land use. They have also altered their protected area policies from conservation by protection against human interference towards concentrating on sustainable use and ecosystem services. While they clearly have had some effect on

<sup>155</sup> The six most recently added sites were Ouse Washes in the United Kingdom (2000); Parc national des Mangroves in the Democratic Republic of the Congo (2000), Mokřady dolního Podyjí and Poodří in Czechia (both in 2005), Sistema de Humedales de la Bahía de Bluefields in Nicaragua (2007), and Hawizeh Marsh in Iraq (2010).

<sup>156</sup> *Status of Sites in the Ramsar List of Wetlands of International Importance*, Resolution XIII.10 (2018) at paras 19–22; Resolution XIII.11, *supra* note 149 at paras 19, 21.

<sup>157</sup> *Operational Guidance for Ramsar Advisory Missions*, *supra* note 150 at para 9; see also para 40.



countries' protected area policies, this article has not aimed to determine the extent to, or the direction in which, the three regimes have influenced countries. It remains clear, however, that they have not succeeded in preventing the escalating deterioration of biodiversity and ecosystems.

This article has studied the practice of what has previously been labelled the 'autonomous institutional arrangements' of the three regimes.<sup>158</sup> As has been pointed out, such arrangements 'have a wide range of both explicit and implied powers,' which can include powers to 'develop substantive obligations through various forms of lawmaking and treaty interpretation; powers to supervise the implementation of and compliance with those obligations . . .; and powers on the external plane to enter into arrangements with states, international organizations, and the institutions of other MEAs.'<sup>159</sup> All three multilateral environmental agreements involved in international governance of protected areas include elements of these three power categories. As is made clear by the structure of this article, the main distinguishing feature among the three regimes is their respective scope of application; the CBD being broad in scope (originally referred to as an 'umbrella treaty' in the field of biodiversity),<sup>160</sup> while the World Heritage Convention and the Ramsar Convention establish frameworks for conservation of specific categories of biodiversity and ecosystems.

The powers of their respective institutions, as defined in the treaty texts, differ significantly. The World Heritage Convention sets out the powers of the World Heritage Committee in significant detail. The committee is composed of representatives of only twenty-one of the 193 contracting parties, and its extensive powers means that it is the main decision-making institution of the convention. In stark contrast, the Ramsar Convention relies heavily on the COP for its decision-making, and the powers are mostly formulated in general and non-coercive terms. The CBD is situated somewhere between these two extremes by establishing a more elaborate institutional structure and defining the powers of respective institutions in some detail. These important differences in institutional design are not reflected in the characteristics of the treaties' substantive obligations. If we look beyond the differences in the scope of the treaties, the substantive provisions are similar in the sense that they signal that countries shall enjoy significant discretion when determining how to implement and comply with their commitments. All three treaties emphasize obligations of result, while differing somewhat in degree of discretion.

The three regimes have responded somewhat differently to the underlying general shift in protected area policy from conservation towards sustainable use. The

<sup>158</sup> Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 AJIL 623.

<sup>159</sup> *Ibid* at 658–9.

<sup>160</sup> Françoise Burhenne-Guilmin and Susan Casey-Lefkowitz, 'The Convention on Biological Diversity: A Hard Won Global Achievement' (1993) 3 YIEL 43 at 43–5.

CBD has tacitly abandoned significant attempts at guiding and supervising countries' protected area policies and also seems to have abandoned initial attempts at distinguishing clearly between protected area management and other modes of land-use management. While still working towards targets regarding protected area coverage and representativeness, countries' performance in this regard has become increasingly hard to measure as the criteria for determining what constitutes a 'protected area' have become less clear.

The World Heritage Convention represents a contrast to the development within the CBD by gradually strengthening the international regime for natural world heritage sites. The improvement of natural world heritage sites in danger over time is an important achievement in this regard. However, these achievements do not seem to come without costs. Initiatives to increase the share of natural, as compared to cultural, world heritage sites have had only limited success. Moreover, many natural world heritage sites are vulnerable external threats—in particular, climate change. Hence, the contribution of this treaty regime to the long-term and comprehensive conservation of biodiversity and ecosystems is in essence insignificant.

The Ramsar Convention has in many ways followed a pattern that is similar to the CBD by deferring broad discretion to countries and accepting increased human use of Ramsar sites. This is not surprising given its weak institutional structure and the importance of decision-making by the COPs. Nevertheless, major achievements include the high number of designated Ramsar sites, the extensive gathering of information regarding the status of, threats against, and ecosystem services provided by Ramsar sites, as well as the high number of contracting parties that have engaged in the Ramsar advisory missions. It seems that these achievements have been relatively effective in terms of preventing deterioration and facilitating restoration of wetlands in many member states.

The IUCN has been essential in supporting the formation and implementation of the multilateral treaty regimes for protected areas. However, its definition and classification of protected areas have not had the increasing normative importance that one could have expected. The treaty regimes and many countries have only made use of the IUCN definition and classification to a limited degree, and recent developments seem to indicate reduced reliance on the IUCN in this regard.

Countries face many dilemmas when designing protected area policies. The balance between conservation and sustainable use is context dependent and varies according to protected area management categories and over time. Moreover, it has increasingly been recognized that a 'subsidiarity principle'—the principle that decisions should be taken at the lowest possible level or closest to where they will have their effect—needs to be applied also in the context of protected areas. However, this principle must often be weighed against the need to base protected area management decisions on regional, national, and

international priorities regarding the conservation of biodiversity and ecosystems. Finally, while many argue that local 'ownership' of, and benefits from, protected areas is essential to achieve long-term conservation, and therefore conclude that decision-making over protected areas should be delegated to local politicians and officials, others warn that such decision-making would not be sufficiently based on scientific knowledge about the status of, and threats to, protected areas.

Against this background, it is not easy to point to any specific way forward for the multilateral treaties on protected areas. What is fairly clear, however, is that the management of protected areas needs to be based on scientific knowledge about their status and threats. With increasing external threats, such as climate change, invasive alien species, and changes in water flows, ensuring sufficient knowledge is becoming increasingly resource demanding. These factors indicate that the international regimes should proceed with caution when faced with calls for increased focus on sustainable use and ecosystem services in the context of the design and management of protected areas.