

# **The Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979): Procedures of Application in Practice<sup>1</sup>**

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## **Abstract**

The Convention on the Conservation of European Wildlife and Natural Habitats was signed in Bern, Switzerland in 1979 and came into force on 1 June 1982. Over the past 20 years, various mechanisms have been developed to monitor the implementation of the Convention and to improve its effectiveness. The purpose of this article is to examine the application of these mechanisms and assess the effectiveness of the Convention as a tool for biodiversity conservation.

## **Keywords:**

The Convention on the Conservation of European Wildlife and Natural Habitats; Bern Convention.

## **1. The Bern Convention**

The Convention on the Conservation of European Wildlife and Natural Habitats<sup>3</sup>, commonly referred to as the Bern Convention ("Convention"), originated from a 1973 Recommendation of the Consultative Assembly of the Council of Europe that the Committee of Ministers "define a coherent policy for the protection of wildlife, with a view to establishing European regulations - if possible by means of convention - and involving severe restrictions on hunting, shooting, capture of animals needing protection, fishing and egg-collection, and the prohibition of bird netting."<sup>4</sup> This idea was revisited in 1976 at the Second European Ministerial Conference on the Environment, where a resolution was adopted directing the Committee of Ministers of the Council of Europe to

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<sup>1</sup> This article is based and expands upon a paper entitled *Assessing the effectiveness of the Bern Convention* delivered by the author in March 1999 at the 4th International Wildlife Law Conference, Washington, USA.

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<sup>3</sup> 1979, E. T. S. 104; IEL-MT 979: 70 [hereinafter Bern Convention].

<sup>4</sup> *Consultative Assembly of the Council of Europe, Recommendation 720 (1973) on the results of the European Ministerial Conference on the Environment (Vienna, 28-30 March 1973)*. All recommendations are available on the website of the Parliamentary Assembly of the Council of Europe at <[http://stars.coe.fr/search/Synopsis\\_search.htm](http://stars.coe.fr/search/Synopsis_search.htm)>.

establish an ad hoc Committee of Experts to draft a legal instrument on the conservation of wildlife.<sup>5</sup>

After negotiations, the Convention was opened for signature at the Third European Ministerial Conference on the Environment in Bern, Switzerland on 19 September 1979. The Convention came into force on 1 June 1982. At the first meeting of the Standing Committee in 1982, only nine States and the European Community were Contracting Parties (“Parties”) to the Convention. There has been widespread acceptance in the succeeding years, however, and currently there are forty-one Parties<sup>6</sup> including thirty-six Member States of the Council of Europe, the European Community, Monaco, Burkina Faso, Senegal, and Tunisia.<sup>7</sup> The Parties now represent the majority of states on the European continent.

## 1.1 Objectives and obligations

The aims of the Convention are to conserve wild flora and fauna species, especially those species and habitats whose conservation requires cooperation between several States.<sup>8</sup> Conservation of endangered and vulnerable species, including migratory species, receives particular emphasis under the Convention, as does habitat protection.

The Convention is comprised of a Preamble, nine chapters, and four appendices. In its Preamble, the Convention recognises that wild flora and fauna species constitute a “natural heritage,” with aesthetic, cultural, recreational, economic, biological, and intrinsic value. Additionally, the Preamble notes that many species are seriously depleted or face extinction and that national governments must should take the conservation of species into account in their national goals and programs, as well as cooperate to protect migratory species.

In the first Chapter, the Convention establishes a framework for Parties to “maintain the population of wild flora and fauna at . . . a level which corresponds in

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<sup>5</sup> For an historical perspective on the drafting of the Convention, see *Convention on the Conservation of European Wildlife and natural Habitats and explanatory report*, in TREATIES AND REPORTS, (Council of Europe Publishing, eds. 1996), see generally Maguelonne Déjeant-Pons, *European Biodiversity: the Bern Convention of 19 September 1979 on the Conservation of European Wildlife and Natural Habitats*, Essays in the Honour of Wang Tieya 211 (Martinus Nijhoff Publishers, eds.1993); Maguelonne Déjeant-Pons *Biodiversité européenne, la Convention de Berne du 19 septembre 1979 relative à la conservation de la vie sauvage et du milieu naturel de l'Europe*, Fasc. 6 Anno XII Rivista Giuridica dell'ambiente (1997).

<sup>6</sup> At the time of this article's publication, the Contracting Parties to the Bern Convention are: Albania, Austria, Belgium, Bulgaria, Burkina Faso, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Senegal, Slovakia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Tunisia, Turkey, Ukraine, United Kingdom, European Community. See Chart of signatures and ratifications available on the website of the Council of Europe at <<http://www.coe.fr/tablconv/104t.htm>>.

<sup>7</sup> The geographical coverage of the Bern Convention is not restricted to the European continent, given the fact that many species of fauna and flora of Europe are found outside Europe. In addition, special attention is paid in the Convention to migratory species, for which co-operation beyond the boundaries of Europe is necessary. Therefore, in application of article 20 of the Convention, African States have been invited to accede to the Convention.

<sup>8</sup> Bern Convention, *supra* note 3, at art. 1.

particular to ecological, scientific and cultural requirements . . .”<sup>9</sup> by providing a series of general binding obligations. These include calling upon the Parties to adopt national policies to conserve species and imperiled habitats, as well as to incorporate species conservation considerations into their pollution programs.<sup>10</sup>

Chapters II, III, and IV amplifies the general binding commitments in Chapter I by outlining specific legislative and administrative measures for the conservation of habitats and species. Chapter II focuses on habitat protection measures, and calls on the Parties, *inter alia*, to take appropriate legislative and administrative measures to protect the habitats of fauna and flora species, especially those specified in Appendices I & II of the Convention;<sup>11</sup> to ensure that planning and development policies do not damage critical habitats, and to accord special attention to the protection of areas of importance to migratory species specified in Appendices II & III.<sup>12</sup>

Chapter III focuses on special protection measures for the species listed in Appendices I-III. Article 5 calls on the Parties to take legislative and administrative measures to protect flora species in Appendix I, including the prohibition of deliberate picking, collecting, cutting or uprooting of such species. Article 6 specifies measures to protect wild fauna species in Appendix II, including prohibition of deliberate capture, taking and killing or deliberate damaging of breeding or resting sites of these species. Article 6 also prohibits possession or domestic trade in Appendix II species in cases where this would contribute to the effectiveness of Chapter III provisions.<sup>13</sup>

Chapter IV outlines special provisions for migratory species. Article 10 requires parties to co-ordinate their efforts to protect Appendix II & III species whose range extend into their territories. Also, it requires Parties to take measures to ensure that closed seasons and other procedures established under Article 7 are adequate for migratory species.

Chapter V specifies a number of supplementary provisions to further the Convention’s objectives. Beyond a general call for cooperation and research coordination, Article 11 encourages the reintroduction of native species where this would contribute to conservation of the species and requires the Parties to strictly control the introduction of non-native species. Article 12 sanctions the establishment of stricter domestic measures for the protection of species and their habitats.

Under Chapters IV, the Parties are obliged to meet different types of obligations which can be classified according to the type of provision, with some essentially general or political in nature, and others more specific. Provisions establishing general obligations bind the Parties only to the defined result, allowing each Party discretion to determine the appropriate means to achieve the result. For example, the majority of the obligations under Articles 1, 2, 3, 10 and 11 of the Convention are binding upon the

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<sup>9</sup> *Id.* at art. 2.

<sup>10</sup> *Id.* at art 3.

<sup>11</sup> Appendix I specifies strictly protected flora species and Appendix II, strictly protected fauna species.

<sup>12</sup> Appendix III contains a list of protected fauna species. Appendix IV of the Convention outlines prohibited means and methods for killing certain species. Updated Appendices are available at: <http://www.coe.fr/eng/legaltxt/104e.htm>.

<sup>13</sup> Article 9 of the Convention allows for exceptions to the mandates of Articles 4-8, including where this would result in the protection of flora and fauna species, to prevent serious damage to crops, livestock, forests, fisheries, water or other forms of property; in the interest of public safety, and for the purposes of research, education, or measures to replenish stocks, e.g. reintroduction, repopulation or breeding.

Parties as to the results to be attained while permitting the Party to choose the appropriate methods for achieving the stated goal. In contrast, Articles such as 4, 5, 6, 7 and 8 are more specific, requiring Parties to take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild flora and fauna species specified in the appendices and the conservation of their habitats.

The provisions of the specific articles are "non self-executing" and the Parties must integrate them into national legislation or administrative acts in order for them to take effect. This distinction should be borne in mind when assessing the effectiveness of the Convention. For the "non self-executing" provisions, the first step in the assessment process is to determine whether the Party has adopted suitable legislation, addressing the relevant provisions of these articles. This first step will be referred to as control "in abstracto." The second step, which is more ambitious, consists of the evaluation of the implementation of these provisions in relation to specific cases. This step will be referred to as control "in concreto." These two levels of evaluation are recognised by the Convention and are reflected in its control procedures.

## **1.2 The institutional framework and the individual actors involved**

The institutional framework of the Bern Convention is comprised of the Standing Committee and its Bureau, the Groups of Experts and the Secretariat. In addition, non-governmental organisations (NGOs) play a key role in monitoring the application of the Convention.

### **1.2.1 The Standing Committee**

The Standing Committee consists of representatives of the Parties, each of which is entitled to one vote. National and international non-governmental organisations and agencies can also be represented at the Standing Committee in an observer capacity under the conditions specified in Article 13 of the Convention.<sup>14</sup>

The Standing Committee has general responsibility for monitoring the application of the Convention,<sup>15</sup> and it may in particular:

- Keep under review the provisions of the Convention, including its appendices, and examine any modifications necessary;

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<sup>14</sup> Article 13 (3) paragraph 3 of the Bern Convention states that: "Any body or agency technically qualified in the protection, conservation or management of wild fauna and flora and their habitats, and belonging to one of the following categories:

- a. international agencies or bodies, either governmental or non-governmental, and national governmental agencies or bodies;
- b. national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located, may inform the Secretary General of the Council of Europe, at least three months before the meeting of the Committee, of its wish to be represented at that meeting by observers. They shall be admitted unless, at least one month before the meeting one-third of the Contracting Parties have informed the Secretary General of their objection."

<sup>15</sup> Bern Convention, *supra* note 3, at art. 14(1).

- Make recommendations to the Contracting Parties concerning measures to be taken for the purposes of the Convention;
- Recommend the appropriate measures to keep the public informed about the activities undertaken within the framework of the Convention;
- Make recommendations to the Committee of Ministers concerning non-member States of the Council of Europe to be invited to accede to the Convention;
- Make any proposals for improving the effectiveness of the Convention, including proposals for the conclusion, with the States that are not Contracting Parties to the Convention, of agreements that would enhance the effective conservation of species or groups of species.
- Arrange expert group meetings.<sup>16</sup>

Of particular interest in assessing the role of the Standing Committee is its authority to make recommendations to the Parties regarding implementation of the Convention and to make proposals for improving the effectiveness of the Convention. Acting under this authority, the Committee has adopted seventy-one recommendations, six resolutions, and three guidelines.<sup>17</sup> This body of materials provides interpretations of certain provisions of the Convention and instructions to help the States apply them in particular cases.

Most recommendations are adopted in accordance with the current work programme, as an outcome of expert groups meetings or seminars, or subsequent to the examination of the case files placed on the agenda of the Standing Committee meetings. A distinction has been made between general recommendations, which concern the interpretation and implementation of the Convention, and specific recommendations on topics such as species protection.<sup>18</sup> For instance, at its 18th meeting, in December 1998, the Standing Committee adopted recommendations for the conservation of *Maculinea* butterflies, the conservation status of nesting beaches for marine turtles in Turkey, and the conservation of heathlands in Dorset (United Kingdom). The Committee also adopted recommendations on the protection of the common hamster (*Cricetus cricetus*) in Alsace (France), and the Badger (*Meles meles*) in the United Kingdom, as well as recommended guidelines for the protection and management of habitats through private or voluntary systems.

Recommendations are transmitted to the Parties for further action and are of a public nature. The recommendations constitute an essential means of giving substance to the provisions of the Convention and may even constitute, in time, international

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<sup>16</sup> See *infra*.

<sup>17</sup> Texts adopted by the Standing Committee of the Bern Convention on the Conservation of European Wildlife and Natural Habitats (19 September 1979): 1982-96, in 75 NATURE & ENV'T (Council of Europe Publishing, eds. 1997).

<sup>18</sup> Veit Koester, *Pacta sunt Servanda*, 26 ENVTL. POL'Y & L. 78, 85 (1996).

customary law.<sup>19</sup> In any case, their definite political impact and high ethical value make them a critical component of the Convention's decision-making process. They also provide NGOs with a basis for further initiatives and actions. Once in the public domain such information places interests groups, NGOs and media in a better position to respond to the measures contained in the recommendation, as well as oversee their effective implementation.

In addition, since its inception the Standing Committee has adopted six Resolutions. Resolution N° 1 interprets Article 4, which relates to the protection of habitat. The Committee recognised that there was an absence of agreement on the interpretation of terms and provisions under the Convention and that this lack of clarity could lead to considerable differences in the legal interpretation of the Convention. Desiring to promote as much agreement as possible among Parties as to what is required for effective implementation of the Convention, the Committee decided that providing standard definitions and interpretations of some of its provisions would make it easier for the Parties to harmonise their approaches in achieving the aims of the Convention.<sup>20</sup> The Standing Committee continued its work of interpretation with Resolution N° 2 which concerns the scope of Article 8 and Article 9 of the Convention. Resolutions N° 3, 4, 5 and 6 concern the establishment of the network of areas of special conservation interest (Emerald Network).

The Standing Committee has also adopted a series of guidelines. Though more detailed than general recommendations, they are of comparable scope. To date, the Committee has adopted guidelines on the taking of the pearl mussel (*Margaritifera margaritifera*), the conservation of the wildcat (*Felis silvestris*) and recovery plans for species of amphibians and reptiles.

The Bern Convention, as a regional treaty, benefits from the fact that Member States form a relatively homogeneous group. This facilitates the reaching of consensus when making decisions, adopting recommendations, and monitoring the application of the Convention by the Standing Committee in a constructive way.<sup>21</sup> In addition, this corresponds with the philosophy of Article 18 paragraph 1 of the Convention, which provides that "the Standing Committee shall use its best endeavours to facilitate a friendly settlement of any difficulty to which the execution of this Convention may give rise." In this way, the Convention has provided a dynamic framework for international cooperation for the conservation of wildlife and natural habitats throughout Europe.

### 1.2.2. The Bureau

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<sup>19</sup> *Id.* at 79.

<sup>20</sup> Standing Committee, *Resolution N° 1 on the provisions relating to the conservation of habitats*, June 9, 1989, *supra* note 17, at 13.

<sup>21</sup> Koester, *supra* note 18, at 83. "The recommendations to the Parties are [...] explicitly shown as being an instrument in respect of the Article 14 imposed responsibility for the Committee to follow the application of the Convention. The starting point for the guidelines is the consideration that the Standing Committee is the forum in which the Parties assist each other in solving those problems encountered in the application of the Convention. [...] It was also agreed at the same meeting where the Guidelines were adopted that when the Committee is dealing with a concrete case, 'it must not turn itself into a tribunal in which the country concerned was put on trial: it must maintain tranquil or - to use the words of the Chairman of the Interim Committee - a 'club' atmosphere.'" Veit Koester was President of the Standing Committee, from December 1985 to December 1989.

Since its inception seventeen years ago, the institutional framework of the Convention has been progressively strengthened. In order to provide more cohesion, the Standing Committee established the Bureau in January 1991. The Bureau is responsible for making administrative and organisational decisions during the interim of Standing Committee meetings. The Bureau ordinarily meets twice a year and membership is comprised of a Chairman, Vice-Chairman, and the previous Chairman.

Starting with administrative and organisational competencies, the Bureau is making increasingly important decisions, particularly in advising the Secretariat in the procedure for the follow-up of case files.<sup>22</sup>

### **1.2.3 Groups of experts**

Article 14 provides that "in order to discharge its functions, the Standing Committee may, on its own initiative, arrange for meetings of group of experts." The composition of a group of experts will depend on the subject of discussion. Meetings are called on a regular or ad hoc basis, as appears necessary. The subjects of past meetings have included the conservation of plants, the protection of invertebrates, marine turtles, the protection of amphibians and reptiles, the conservation of birds, and the legal aspects of the introduction and reintroduction of wild species. With regard to habitat protection, a group of experts for the Emerald Network of areas of special conservation interest was set up in 1996.

Interested non-governmental organisations are invited to participate in the meetings. The meetings constitute important fora to discuss and monitor the application of the Convention and to raise specific and technical issues. Expert meetings facilitate the elaboration of specific recommendations on the conservation of certain species, which are then forwarded to the Standing Committee for adoption. This benefits the Group of Experts by providing an avenue to a more political forum as well as benefiting the Standing Committee by enriching the meeting with the scientific advice of its experts group. This aspect has been particularly important for the regular updating of the appendices of the Convention.

Expert assistance is also sought for the preparation of legal or scientific studies on specific subjects. Seminars and workshops on broader subjects are organised to bring together nature conservation specialists and policy makers and administrators. In 1999, workshops on the Convention and national case law and on the eradication of non-native species have been organised.

### **1.2.4 The Secretariat**

The Secretariat is provided by the Council of Europe. Though the Convention does not make any specific reference to its responsibilities, its role is essential for implementation. The Secretariat monitors the implementation of the Convention in accordance with the programme of activities drawn up by the Standing Committee. It is also instrumental in the conduct of all activities implemented under the Convention, in

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<sup>22</sup> See *infra*.

particular following up complaints by non-governmental organisations or citizens.<sup>23</sup>

### **1.2.5 Non-governmental organisations**

National and international non-governmental organisations attend meetings of the Standing Committee in an observer capacity, under Article 13 of the Convention.<sup>24</sup> The NGOs have proved to be a valuable source of information for the Secretariat and they often act as prime movers for specific protection or monitoring operations. They may also be invited to participate in groups of experts. This permanent institutional structure facilitates the establishment of strong relations between different bodies of the Convention and the NGOs, and contributes to continuity in the monitoring of the application of the Convention.

## **2. Assessing the Effectiveness of the Bern Convention**

Seventeen years after the Convention entered into force, an assessment of its achievements is a valuable exercise, providing us with useful lessons for operation and improvement of the Convention's implementation in the future, as well as informing the development of other regional regimes. The Convention is well equipped with the necessary tools for effectively monitoring its application, which can be divided into two categories. The first category, termed control "in abstracto," is the designated reporting system provided by the Convention. The second category, termed control "in concreto," consists of more specific monitoring on a case study basis. The degree of possible control will also vary, depending on the provisions being evaluated.

### **2.1 "In abstracto": the reporting system**

The Convention requires the production of reports only when dealing with an exception specified under Article 9. However, the actual reporting system is more comprehensive, consisting of both voluntary general reports and specific reports for following up the application of the recommendations or the work of the groups of experts.

#### **2.1.1 General reports**

Based on its competency to make proposals for improving the effectiveness of the Convention, the Standing Committee introduced a general reporting system at the 12th meeting in 1992.

The general reporting system consists of two types of reports: introductory reports, required to be submitted by new Parties; and annual reports by all Parties detailing the application of the Convention in the Party's territories. Guidelines on the requirements and content of these reports were adopted in 1993. The general reports contain information related both to the legal and scientific aspects of the application of

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<sup>23</sup> See *infra*.

<sup>24</sup> See *supra* note 10.

the Convention.

### **2.1.2 Special reports**

Article 9 of the Convention requires the Parties to submit bi-annual reports to the Standing Committee regarding exceptions made by the Parties under Articles 4, 5, 6, 7, and 8. These reports contain precise information on the implementation of the Convention and follow-up work per recommendations by working groups and include information on the population of species, the responsible authorities, and the controls applied in implementation.

With respect to evaluating treaty effectiveness, an important aspect of this reporting system, is the public access provided to the reports, in particular for the NGOs and local people concerned with nature conservation.<sup>25</sup>

## **2.2 "In concreto": "case-files" and on-the-spot appraisals**

The Standing Committee has two avenues by which it can review the practical implementation of the Convention: examination of case files and by organisation of "on-the-spot" appraisals.

### **2.2.1 Case files**

The Convention has given rise to a special kind of supervisory practice and procedure based on the examination of "case-files."<sup>26</sup> This practice was approved by the Standing Committee at its 3rd meeting in 1984. The procedure for this proposal was agreed upon and adopted provisionally at the 13th meeting of the Standing Committee in 1993.<sup>27</sup>

The procedure is based upon the examination of complaints received by NGOs or individuals. Complaints, in the form of grievances or allegations of the failure of a Party to comply with one or more provisions of the Convention, are received by the Standing Committee, its Chairman, or the Secretariat. The Secretariat, after examining the available facts, refers the complaint to the Party for information and further details. Parties are encouraged to answer to the Secretariat within a period of four months to allow the requisite investigations. In the light of the information thereby obtained, the Secretariat decides, subject to the approval of the Bureau, whether the case should be

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<sup>25</sup> In this regard, it is interesting to note that the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, IEL-MT 999:48 [hereinafter Aarhus convention], contains in its preamble references to "the importance of making use of the media and electronic or other, future forms of communication" and special provisions on collection and dissemination of environmental information, including international treaties, conventions and agreements on environmental issues and other significant international documents on environmental issues.

<sup>26</sup> Secretariat Memorandum, *Follow-up of the Lucerne Ministerial Conference "Environment for Europe" 28-30 April 1993, Procedures for the follow-up of the implementation of the Bern Convention*, Document T-PVS (94) 7.

<sup>27</sup> Secretariat Memorandum, *Opening and closing of files – and follow-up to recommendations*, Document T-PVS (99) 16.

placed on the agenda of the Standing Committee's next meeting.

After discussion, the Standing Committee decides whether there are grounds to open a case file. The Standing Committee has unfettered discretion regarding the procedure to be followed in cases where a file is opened, and may decide to close a case file. It may also decide to adopt a recommendation. A draft recommendation submitted by an observer must have the support of at least one delegation in order to be accepted for discussion.<sup>28</sup> However, the normal decision-making process is by consensus. This is of special significance, in that it reflects the unity of opinion through which problems arising in connection with the Convention are frequently solved.

In 1998, twenty-two cases were submitted to the Standing Committee, among which nine were for information, nine were possible new files, and four were case files followed up from previous years. Among the current case files are, for example, the conservation of Laganas Bay in Greece, which is the most important Mediterranean breeding area for the loggerhead turtle (*Caretta caretta*); the conservation of the White-headed duck (*Oxyura leucocephala*) a European endemic threatened by the non-native Ruddy-duck (*Oxyura jamaicensis*) with which it hybridises, or the conservation of the European hamster (*Cricetus cricetus*) in Alsace, France.

### **2.2.2 On-the-spot appraisal**

The Rules of Procedure of the Standing Committee provide that "if during discussions on one or more proposals, any doubts and/or difficulties arise regarding the measure to be taken for the implementation of the Convention with regard to a natural habitat essential to the conservation of species, and if it is necessary to obtain appropriate information, the Committee may, if the gravity of the situation so demands, decide that the natural habitat in question should be inspected by an expert instructed to make an on-the-spot appraisal and report back to the Standing Committee." However, this decision is subject to approval by the affected Party and the Standing Committee must draft and convey precise terms and conditions to the expert.

The expert is appointed by the Secretary General of the Council of Europe. The Party must agree to the appointment and the expert cannot be a person who represents or has represented a State on the Standing Committee, or is a national of the Party in whose territory the visit is to take place. At the request of the Standing Committee or its Chairman, the expert is to be accompanied during the visit by a member of the Secretariat and by a representative of the Party concerned. After completing the inspection, the expert submits a written report to the Standing Committee, and may present the report in person if the Committee requests. The travel and subsistence expenses pertaining to the visit and those arising out of the presentation to the Standing Committee are borne by the Council of Europe.

On the spot appraisals have been carried out to date, *inter alia*, at Laganas Bay (Greece) to assess the threat to this important Mediterranean nesting beach of the loggerhead turtle (*Carreta carreta*), at Castlegregory (Ireland) to assess the threats from the development of a golf club to the most important breeding site of the natterjack toad (*Bufo calamita*) in Ireland; in the Grünwald Forest (Luxembourg) to assess the impact of the construction of a road, and in Dorset (UK) to draft measures for the conservation of

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<sup>28</sup> Rules of procedures of the Standing Committee, Rule 9, available at: <<http://www.nature.coe.int>>.

heathland areas.

This scheme provides the Standing Committee with a relatively comprehensive set of tools to stay apprised of the application of the Convention, and to adopt decisions that enhance its effectiveness. However, in practice, as Veit Koester points out, it is difficult to assess the precise degree of influence of the Convention in the modification of a project or the adoption of new regulations, since in many cases, it will be the convergent action of NGOs, international pressure and/or a deep felt sense of duty to comply with international law that will influence the national authorities to introduce the measures requested.<sup>29</sup>

### **3. Looking to the future**

#### **3.1 An evolving international context**

The Convention has proved to be an important tool for the conservation of European wildlife, providing a dynamic framework for international cooperation, with the necessary flexibility to improve and adapt to new standards and concepts of wildlife protection. However, the Convention increasingly needs to be viewed within an evolving international context. As one of the pioneer treaties for wildlife protection, the Convention must not only fulfill its original role as a regional treaty, but also its new role of coordinating European implementation of many of the provisions contained in the Convention on Biological Diversity.<sup>30</sup> The methods of carrying out this new task will determine the extent of possible cooperation and synergies between the different international instruments.

In light of this, a Symposium entitled "the United Nations Conference on Environment and Development (UNCED), the Convention on Biological Diversity and the Bern Convention: the Next Steps" was held in Monaco in 1994.<sup>31</sup> It resulted in the adoption of the Monaco Declaration on the role of the Convention in the implementation of worldwide international instruments for the protection of biodiversity.<sup>32</sup> The Monaco Declaration recommends that the Standing Committee assure that the principles and

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<sup>29</sup> Koester, *supra* note 18, at 88.

<sup>30</sup> Convention on Biological Diversity, June, 5, 1992, IEL-MT 992:42, [hereinafter CBD].

<sup>31</sup> *Symposium on the United Nations Conference on Environment and Development (UNCED), the Convention on Biological Diversity and the Bern Convention: the next steps, Monaco, 26-28 September 1994*, in 22 ENVTL. ENCOUNTERS (Council of Europe Publishing, eds. 1995).

<sup>32</sup> See *supra* note 17, at 182. The Declaration acknowledges in particular that "Regional international organisations should act with a view to favouring the application of the worldwide international instruments for the protection of biodiversity – in particular, the Convention on Biological Diversity, the Declaration on Environment and Development, the Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forest, and Agenda 21; [...] The objectives of the Bern Convention are largely in line with the objectives set forth in Agenda 21 and the Convention on Biological Diversity. The scope of Article 14 of the Bern Convention is broad enough to deal with many aspects of the Convention on Biological Diversity related to biodiversity conservation, if the Standing Committee so wishes." In addition, the declaration contains a series of recommendations to the Standing Committee on the scientific and technical aspects, strategic aspects, and institutional and financial aspects. On 24 March 1995, the Standing Committee of the Bern Convention took note of the Monaco Declaration and decided to take due account of it in the future when examining its activity programmes. For comments, see Maguelonne Déjeant-Pons, *The Monaco Declaration*, 77 NATUROPA 21, 21 (1995).

obligations established in global international instruments for the protection of biodiversity are applied at the regional level.

Numerous regional conventions and agreements have been drafted in the last twenty years, complementing the legal framework for biodiversity conservation in Europe,<sup>33</sup> yet resulting in some duplication of activity by programmes. Governments have acknowledged the necessity of coordinating the work programmes of these different instruments and in 1995, in the framework of the Pan-European Biological and Landscape Diversity Strategy,<sup>34</sup> the Bern Convention was given the co-ordination role for the implementation of the European Action Programme for Threatened Species. In practice, this has involved the drafting of instruments of common interest such as action plans, "red lists" or common databases, and attending meetings organised for the specified conventions. In the future, this could also consist of consolidating the procedural aspects of the different conventions to eliminate duplication of effort, such as the development of common systems for reporting on the conservation status of flora, fauna, and their habitats.

### 3.2 From international cooperation to local implementation

In addition to the evolution of the international context, the repartition of competencies at national level in Europe has to be acknowledged.<sup>35</sup> As part of the process of decentralisation and regionalisation, local and regional authorities have assumed important mandates both in the field of environmental protection and planning and development policies. A significant number of cases raised at the Standing Committee concern policies at this level. However, in conforming to the principles of public international law, only States themselves are represented at the Standing Committee

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<sup>33</sup> In addition to the worldwide international conventions for wildlife protection, the following instruments operative for Europe are closely associated with the Bern Convention: Convention for the Protection of the Mediterranean Sea against Pollution, February 16, 1976, IEL-MT 976:13; Protocol concerning Mediterranean Specially Protected Areas, April 3, 1982, IEL-MT 982:26; Agreement on the Conservation of Seals in the Wadden Sea, October 16, 1990, IEL-MT 990:77; Agreement on the Conservation of Bats in Europe, December 4, 1991, IEL-MT 991:90; Agreement on the Conservation of Small Cetaceans of the Baltic and North Sea, March 17, 1992, IEL-MT 992:21; Protocol concerning specially protected areas and biological diversity in the Mediterranean, June 10, 1995, IEL-MT 976:13/F; Agreement on the Conservation of African-Eurasian Migratory Waterbirds, August 15, 1996, IEL-MT 995:45; Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Sea, November 24, 1996, IEL-MT 979:55/C.

<sup>34</sup> The Environment ministers of 55 European countries endorsed the Pan-European Biological and Landscape Diversity Strategy at the 3rd Ministerial Conference 'Environment for Europe' (Sofia, 23-25 October 1995). "This Strategy is a European response to support implementation of the Convention on Biological Diversity. The Strategy introduces a co-ordinating and unifying framework for strengthening and building on existing initiatives. It does not aim to introduce new legislation, but fill gaps where these initiatives are not implemented to their full potential or fail to achieve desired objectives. Further, the Strategy seeks to more effectively integrate ecological considerations into all relevant socio-economic sectors, and increase public participation in, and awareness and acceptance of, conservation interests. Actions for the 1996-2000 period are clustered in 11 Action Themes." Action Theme 11 concerns threatened Species. *The Pan-European Biological and Landscape Diversity Strategy*, in 74 NATURE & ENV'T 9 (1996).

<sup>35</sup> For a broader analysis of the evolution of international law and the emergence of new actors in international relations, see Edith Brown-Weiss, *The Changing Structure of International Law*, in MANKIND AND THE ENVIRONMENT EN HOMMAGE À ALEXANDRE KISS, 4 (Frison-Roche, eds. 1998).

meetings. This can result in an "implementation gap." While national authorities represent the State under the Convention, it is often the regional or local authorities that must take effective steps to implement the recommendations of the Standing Committee. In other words, the responsibilities of these local and regional authorities must be taken into account in the implementation process to ensure more effective implementation of the Convention.

In this respect, it is essential that NGOs, especially those with a strong local or regional presence, be better informed of the legislative and procedural means at their disposal for taking action.<sup>36</sup> This will help to alleviate the current gap between international standards and local implementation.

### **3.3 Applying new concepts for biodiversity conservation**

As well as taking into account the evolution of these external factors, the further development of the Convention relies upon its ability to take advantage of new concepts in biodiversity conservation. The Convention has achieved some significant results in compiling a comprehensive list of protected species within Europe and establishing quality standards for nature conservation.<sup>37</sup> To conform to the provisions set out in Articles 4, 5, 6, 7 and 8 of the Convention, Parties have extensively modified their national legislation. However, it is necessary to expand or elaborate on the current set of tools in order to implement certain provisions of the Convention. These include the goal of integrating conservation of wild flora and fauna into national planning and development policies, promoting education and disseminating general information on the need to conserve species of wild flora and fauna and their habitats<sup>38</sup> or strictly controlling the introduction of non-native species.<sup>39</sup> Concepts derived from the Convention on Biological Diversity<sup>40</sup> such as "potentially damaging process," "the sustainable use of components of biological diversity," or "impact assessment and the minimising of adverse effects" constitute tools for the further implementation of provisions regarded as more politically sensitive.<sup>41</sup>

The integration of nature protection issues into sectoral policies, such as agriculture, fishery, or forestry, remains a key challenge, which needs to be further addressed under the Convention.

## **4. Conclusion**

Over the past two decades, the Bern Convention has accommodated an increasing

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<sup>36</sup> Aarhus Convention, *see supra* note 25, at art 3.

<sup>37</sup> Eladio Fernandez-Galiano, *A personal view*, 77 NATUROPA 5, 5 (1995).

<sup>38</sup> Bern Convention, *supra* note 3 at art.3.

<sup>39</sup> *Id.*, at art. 11(2) b.

<sup>40</sup> CBD, *see supra* note 30.

<sup>41</sup> Cyrille de Klemm, *The Application of the Bern Convention and its Monitoring, and the Need to Take Account of the Processes which Undermine Biological Diversity*, in SYMPOSIUM ON THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, THE CONVENTION ON BIOLOGICAL DIVERSITY AND THE BERN CONVENTION: THE NEXT STEPS, MONACO, 26-28 September 1994, in 22 ENVTL. ENCOUNTERS 60 (1996).

number of Parties and developed the necessary framework and machinery to pursue its mission. The Convention is now part of an extensive network of international treaties and regional agreements. It is essential that the comprehensive work undertaken in this forum to conserve wildlife continues to evolve by adopting and responding to the new scientific, legal, and political developments in biodiversity conservation.