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Wildlife law and the empowerment of the poor



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103

by

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for the

Development Law Service

FAO Legal Office

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PREFACE

There is a wide variety of interests to be balanced in wildlife management. These interests range from the conservation of biodiversity and specific endangered species and their habitats, to valuable opportunities in eco-tourism or hunting tourism, to the needs and traditions of the local population relating to hunting and collection of animals or their product for cultural/religious practices. Although revenues from the wildlife sector may be considered irrelevant as a contribution to the national gross domestic product, wildlife's influence on local economies can be significant. Some rural communities see wildlife as a source of food. Some see wildlife habitat as potential timber or farmland. And some see wildlife hunting or eco-tourism as a source of cash.

Good laws can provide a framework for good wildlife management. An appropriate legal framework can conserve wildlife while reducing poverty and increasing food security. Enacting effective legal reforms, though, remains challenging.

In 2007–2008, FAO and the International Council for Game and Wildlife Conservation (CIC) reviewed legislation on wildlife management in Western and Central Asia. This review launched a regional dialogue on international obligations and standards on wildlife management, based on current challenges at national and regional levels.

This regional initiative led to a set of design principles on how to develop effective national legislation on sustainable wildlife management (available at www.fao.org/legal). These principles sought to provide tools for the analysis of existing legal frameworks, as well as provide guidance for developing new legislation based on international standards and best practices. In addition, the principles aim to help decision-makers, legal drafters and resource managers to understand wildlife legislation, engage in participatory and interdisciplinary legislative drafting, and use legislation to support sustainable wildlife management for the empowerment of the poor and environmental sustainability.

In 2009, FAO undertook to further refine these principles, taking into account the challenges faced and lessons learnt by wildlife legislators in other regions of the world. To this end, a series of regional studies examined the legislation of selected countries in Africa, Latin America, South-east Asia and Oceania.¹ These studies analysed laws concerning wildlife tenure (ownership and use rights and obligations, links with land and forest tenure), public participation in wildlife decision-making and planning, and community-based wildlife management. The purpose was to identify legal tools that allow disadvantaged people to directly benefit from wildlife management, thereby improving food security, alleviating poverty, enhancing rural livelihoods and ultimately contributing to the legal empowerment of the poor.² The studies also considered the strengths and weaknesses of current legal frameworks in promoting environmental sustainability and socio-economic development.

The present study synthesizes and analyses the findings of the above-mentioned regional legal reviews, identifies current trends and shortcomings, and singles out innovative legal solutions. On this basis, it also refines the design principles to develop effective national legislation on sustainable wildlife management, emphasizing the legal tools that empower the poor, particularly local and indigenous communities.

Several experts have contributed in the past two years to this project: Maria Teresa Cirelli, James Wingard, Alessandro Fodella, Elsa Tsioumani and Soledad Aguilar (FAO international legal consultants); Jacqueline Alastra and Ileana Papadopoulou (FAO legal interns); Victor Mosoti (former Attaché du Cabinet, FAO); Ali Mekouar (Director of FAO Conference, Council and Protocol Affairs Division, former Chief of the FAO Development Law Service); René Czudek (FAO Sub-Regional Forestry Officer for Southern Africa); Edgar Kaeslin (FAO Wildlife and Protected Area Management Officer); Kai-Uwe Wollscheid (Director General, International Council for Game and Wildlife Conservation); Michel Laverdiere (FAO Sub-Regional Forestry Officer for Eastern Africa); Fernando Salinas (Sub-Regional Forestry Officer for Western Africa); Patrick Durst (FAO Senior Forestry Officer, Asia and Pacific); Tracy McCracken (FAO Deputy Wildlife

¹ All studies are available at www.fao.org/legal and are listed in the bibliography.

² This concept has been developed by the Commission on Legal Empowerment of the Poor, established under the aegis of the United Nations between 2005 and 2008. The commission completed its mandate in 2008. See www.undp.org/legalempowerment. At its sixty-third session on 11 December 2008, the UN General Assembly, in a brief resolution (63/142), took note of the final report of the commission, stressing the importance of sharing best national practices in the area of legal empowerment of the poor.

Coordinator, Infectious Disease Group); Margret Vidar and Patrice Talla (FAO Legal Officers). Editorial assistance was kindly provided by Jesse Bellam and Lin Hu (FAO legal interns) and by Riccardo Beltrame.

The present study was authored by Elisa Morgera (former FAO Legal Officer), with substantive inputs and editorial assistance from Ken Rosenbaum (FAO International Legal Consultant), as a joint project of the FAO Development Law Service and the Land Tenure and Management Unit.

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PART I - OVERVIEW

INTRODUCTION

Wildlife¹ management is the process of keeping wildlife populations, including endangered species, at desirable levels using scientific, technical and traditional knowledge. **Sustainable** wildlife management adds the aim of balancing the economic, ecological and social values of wildlife, to protect the interests of present and future generations. Thus, this concept looks beyond hunting and protection of individual species and focuses holistically on wildlife as a renewable resource.

Law is a key tool to achieve sustainable wildlife management. It sets the parameters for protection and use of wild animals.

Over time, both the approach and the aims of law have broadened. Approaches have grown from simple property notions (who owns the animals or holds the rights to hunt them) to include more detailed regulatory, procedural and economic provisions. Aims have shifted from single-species management to more comprehensive goals including sustainable use of biodiversity. A number of ideas have informed these trends, among them, first the recognition of the interdependence among different species and the direct and indirect threats to wildlife, and second the broad appeal of a people-centred approach to wildlife management – meaning, the participation of concerned individuals in wildlife-related decision-making, the involvement of indigenous and local communities in wildlife management and the sharing of its benefits.

Legislation may allow all members of society and particularly, disadvantaged people, to directly benefit from wildlife management, improving food security, alleviating poverty, enhancing rural livelihoods and ultimately contributing to the legal empowerment of the poor. This concept has been developed by the Commission on Legal Empowerment of the Poor, established under the aegis of the United Nations between 2005 and 2008. According to the commission,² four pillars sustain the concept of legal empowerment of the poor: access to justice and the rule of law; property rights; labour rights; and business rights. Adequate wildlife management

¹ In the present study, wildlife is referred to as including terrestrial and avian wild animal species.

² The commission completed its mandate in 2008. See www.undp.org/legalempowerment. At its sixty-third session on 11 December 2008, the UN General Assembly, in a brief resolution (63/142), took note of the final report of the commission, stressing the importance of sharing best national practices in the area of legal empowerment of the poor.

legislation may contribute to the implementation of at least three of these pillars. For the first pillar, it may set out measures to promote equality under the law, clarity of rights and obligations, and access to justice. For the second pillar, it may allocate property rights, or related use rights over wildlife and its products, so that benefits are equitably shared, taking into account subsistence requirements, traditional titles and practices and disadvantages faced. For the fourth pillar, it may regulate contracts and other arrangements for wildlife use so that income-generating opportunities are available for all. This study identifies ownership of wildlife resources and other management rights and their tenure security as particularly critical for the empowerment of the poor.

Good wildlife law supports and is supported by good governance. Good administration of the recognition, allocation and possible revocation of wildlife rights provides legal certainty, which is essential to convince wildlife users and managers to operate responsibly with a long-term perspective. Public participation in decision-making and in planning, as well as access to justice, contribute to transparency, accountability, and balancing of the diverse interests of society – in particular of the poor, other disadvantaged groups and indigenous communities. Fair sharing of benefits, along with supportive business and lending frameworks, creates incentives for wildlife management. All these – good administration, public participation and fair benefit sharing – in turn lead to greater public respect for the law.

This study is a guide for those looking to improve national wildlife laws with a view to ensuring environmental sustainability and strengthening the role of disadvantaged people and increasing their participation in the sharing of benefits. In doing so, this study concentrates on legal tools for the empowerment of local and indigenous communities, as mandated by the Convention on Biological Diversity in recognition of their traditional knowledge, innovation and practices that contribute to the conservation and sustainable use of biological diversity. This also reflects the findings of the first State of the World's Indigenous Peoples' Report, released in 2010 by the UN Forum on Indigenous Issues,³ which underscored that the 370 million indigenous peoples worldwide comprise one-third of the world's extremely poor rural people.

³ The full text of the report is available at www.un.org/esa.

The study singles out trends, challenges and innovative legal solutions from national legislation in different regions of the world. It identifies both strengths and weaknesses of legal frameworks. It often highlights a menu of legal options, rather than just one solution, to allow each country to identify the ones most appropriate to local circumstances, policies and needs. It is a synthesis and further elaboration of the following regional studies:

- Morgera, E., Wingard, J. and Fodella A. 2009. "Developing Sustainable Wildlife Legislation in Central and Western Asia" FAO/CIC;
- Cirelli, M.T. and Morgera, E., 2009. "Wildlife law and the legal empowerment of the poor in Sub-Saharan Africa" FAO Legal Paper Online No. 77;
- Cirelli, M.T. and Morgera, E., 2009. "Wildlife law and the legal empowerment of the poor in Sub-Saharan Africa: additional case studies" FAO Legal Paper Online No. 79;
- Aguilar, S. and Morgera, E. 2009. "Wildlife law and the legal empowerment of the poor in Latin America" FAO Legal Paper Online No. 80; and
- Tsioumani, E. and Morgera E., 2010. "Wildlife law and the legal empowerment of the poor in South-East Asia and Oceania" FAO Legal Paper Online No. 83.⁴

Chapter 1 starts by describing the international legal framework related to biodiversity and environmental protection, as well as the key decisions and guidelines adopted by the parties to these agreements. In addition, it analyses guidance from the International Union for the Conservation of Nature, discusses wildlife-related legislation adopted by the European Union, and illustrates regional instruments in Europe, Africa, Asia, Oceania and Latin America.

The remaining chapters analyse trends in national wildlife management around the globe, singling out innovative legal solutions as well as common challenges to ensure environmental sustainability and the empowerment of the poor. They distil general recommendations and set out specific legal options for the improvement of national legislation on wildlife management. Chapter 2 addresses concerns about good legal drafting that are applicable to laws on renewable natural resources in general, with a view to providing

⁴ FAO Legal Papers Online are all available at www.fao.org/legal.

methodological guidance to wildlife law drafters. Chapter 3 then focuses on creating an effective institutional set-up for wildlife management – allowing coordination, public participation, as well as public access to information and justice – clarifying wildlife tenure and its legal consequences, and addressing gender and food security considerations. Chapter 4 discusses wildlife management planning as an overarching mechanism for wildlife conservation and sustainable use, investigating its legal implications. It pays specific attention to information gathering, planning processes, stakeholder involvement in planning and multinational planning. Chapter 5 discusses conservation issues: looking into species-based and area-based approaches in turn, protecting wildlife through environmental impact assessments and stakeholder participation in conservation – focusing specifically on participatory approaches to decision-making and community-based wildlife conservation initiatives. It also addresses questions related to human-wildlife conflicts. Chapter 6 is devoted to sustainable use, exploring different legal options for different uses (namely, hunting, eco-tourism, trade, ranching and breeding). It pays specific attention to the empowerment of the poor in relation to wildlife use, by analysing the regulation of traditional use, as well as legal tools for benefit-sharing, community-based wildlife use and communities' participation in wildlife management by the private sector. Chapter 7 turns to legal tools that facilitate implementation and enforcement, addressing specifically incentives, financial resources, enforcement powers and monitoring through the lenses of public participation. Each of these chapters draws attention to underlying international obligations and standards described in Chapter 1. The conclusions summarize the most significant recommendations for national decision-makers and legal drafters aiming to strengthen wildlife management legal frameworks to empower the poor and ensure environmental sustainability.

1. INTERNATIONAL FRAMEWORK

International law has long addressed wildlife management. Initially its focus was on the protection of certain species or habitats. More recently, its focus has shifted to more comprehensive approaches, epitomised by the innovative features of the Convention on Biological Diversity.

Two kinds of international legally binding agreements are primarily important for the review and drafting of effective national legislation on sustainable wildlife management. The first are agreements focusing on wildlife, which may either pose limits to national sovereignty or demand application of specific principles, methods and processes in national legislation. The second are agreements that address cross-cutting environmental issues, which implicitly cover wildlife management and may also require states to adopt certain provisions in their national wildlife laws. This is the case, for instance, of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters.

Other international and regional conventions and initiatives may provide useful reference for national legal drafters. This chapter will in particular address relevant international instruments on human rights, guidance from the International Union for the Conservation of Nature (IUCN), as well as regional wildlife-related initiatives in Europe, Africa, Asia, Oceania and Latin America.

Many of these international instruments and initiatives not only address environmental matters but also legal empowerment of the poor, in particular with reference to community-based management and benefit-sharing. Accordingly, sustainable wildlife management can contribute to reaching not only **Millennium Development Goal** (MDG) 7 – ensuring environmental sustainability – but also MDG-1 – eradicating extreme poverty and hunger.⁵

1.1 Species-based international agreements

Endangered species legislation involves a specialized legal approach to wildlife management. It focuses exclusively on the identification and restoration of species that have reached critically low population levels, on

⁵ See www.un.org/millenniumgoals.

the basis of defined criteria and procedures for **listing** these species and at least two general mechanisms designed to ensure recovery of individual species. Listing criteria and procedures use science-based definitions of "threatened" and/or "endangered," both of which imply an assessment of the status of the species and the threats to their continued survival. The primary mechanism for recovery is the requirement that government agencies and private developers consider listed species in designing and constructing projects and include adequate protection measures to minimize or mitigate project impacts and ensure the species long-term survival or recovery. The second mechanism is the prohibition of direct and/or incidental "take" of the species in question. "Take" includes the killing of such species by whatever means (not just hunting), as well as any actions that remove a species from its habitat, destroy critical habitat, or otherwise harm, harass, or injure the species (see the definition provided by the Convention on Migratory Species in Box 1-2).

Two major international wildlife agreements are species-based and focus on the immediate protection of certain species by the adoption of lists, differentiating among listed species according to the degree of threat. These lists take the form of appendices to the convention, some of which cover the most endangered species for which the use is prohibited (albeit with certain exceptions), while others cover less endangered species, the use of which is allowed but should be controlled. The parties to the conventions regularly update these appendices in periodic meetings (usually those of Conferences of the Parties or COPs). International listings are usually combined with a permit system, thus requiring the enactment of national legislation to this effect (Birnie and Boyle, 2002).

1.1.1 The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)

CITES (Washington, 1973)⁶ aims to ensure that international trade in wild animals and plants does not threaten their survival. CITES therefore restricts their trade through export permit systems. For species threatened with extinction that are or may be affected by trade (listed in Appendix I to the convention), parties may grant export permits for non-commercial purposes only in exceptional circumstances and subject to strict requirements. The importation of these species also requires a permit, while trade for primarily

⁶ For the full text of the convention and information about its implementation, see www.cites.org.

commercial purposes is banned. For species that may become endangered if their trade is not subject to strict regulation (listed in Appendix II), parties may grant export permits (including for commercial trade) if export is not detrimental to the survival of that species and if other requirements are met. A third list concerns species subject to national regulation and needing international cooperation for trade control (listed in Appendix III): in this case, parties may grant export permits for specimens obtained in accordance with national regulations. The COP adds or deletes species from the appendices according to established criteria. It should be also noted that CITES specifically enables parties to adopt stricter domestic measures (article 14).

The convention requires states to adopt legislation that:

- (i) designates at least one management authority and one scientific authority;
- (ii) prohibits trade in specimens in violation of the convention;
- (iii) penalizes such trade;
- (iv) calls for the confiscation of specimens illegally traded or possessed.

Before an authority can grant an export permit covering an Appendix II species, the authority must find that such export "will not be detrimental" to the survival of that species. CITES therefore requires countries to undertake **non-detriment finding procedures** to allow the commercial export of Appendix II species. To make such a finding, a party needs to have information about a species' status, needs, threats and management. In effect, this entails the development of national management plans for commercially relevant endangered species.

Box 1-1: CITES listing criteria

In 1994, the COP adopted updated criteria for listing species, repealing those long in force. The new criteria encompass general principles such as the **precautionary principle**, which implies that in case of uncertainty either as regards the status of a species or the impact of trade on the conservation of a species, parties should act in the best interest of the conservation of the species concerned and adopt measures that are proportionate to the anticipated risks to the species (CITES Conf. 9.24 (Rev. COP14)).

Accordingly, a species **"is or may be affected by trade"**

(relevant for Appendix I species) if:

- (i) it is known to be in trade (using the definition of 'trade' in Article I of the convention), and that trade has or may have a detrimental impact on the status of the species; or
- (ii) it is suspected to be in trade, or there is demonstrable potential international demand for the species, that may be detrimental to its survival in the wild.

In addition, a species is considered to be **"threatened with extinction"** (relevant for Appendix I species) if it meets, or is likely to meet, at least one of the following criteria:

A. The wild population is small, and is characterized by at least one of the following:

- (i) an observed, inferred or projected decline in the number of individuals or the area and quality of habitat; or
- (ii) each subpopulation is very small; or
- (iii) a majority of individuals are concentrated geographically during one or more life-history phases; or
- (iv) large short-term fluctuations in population size; or
- (v) a high vulnerability to either intrinsic or extrinsic factors.

B. The wild population has a restricted area of distribution and is characterized by at least one of the following:

- (i) fragmentation or occurrence at very few locations; or
- (ii) large fluctuations in the area of distribution or the number of subpopulations; or
- (iii) a high vulnerability to either intrinsic or extrinsic factors; or
- (iv) an observed, inferred or projected decrease in any one of the following:
 - the area of distribution; or
 - the area of habitat; or
 - the number of subpopulations; or
 - the number of individuals; or
 - the quality of habitat; or
 - the recruitment.

C. A marked decline in the population size in the wild, which has been either:

- (i) observed as ongoing or as having occurred in the past (but with a potential to resume); or
- (ii) inferred or projected on the basis of any one of the following:
 - a decrease in area of habitat; or
 - a decrease in quality of habitat; or
 - levels or patterns of exploitation; or
 - a high vulnerability to either intrinsic or extrinsic factors; or
 - a decreasing recruitment.

Source: CITES Resolution Conf. 9.24 (Rev. COP14).

In the last decade, the CITES COP has adopted several resolutions on enforcement and compliance, recommending confiscation of specimens exported illegally; on disposal of confiscated specimens or their parts or derivatives; and on greater coordination between competent authorities, and outlining measures to promote enforcement, such as creating appropriate incentives for local and rural communities. The COP has also adopted resolutions on trade in specified species, and on ranching and breeding of protected species. The importance of compliance and the adequacy of legislation has recently been underlined in the CITES Strategic Vision 2008–2013 (CITES Resolution Conf. 14.2). Parties are called to comply with their obligations under the convention through appropriate policies and legislation, by establishing transparent, practical, coherent and user-friendly administrative procedures, and reducing unnecessary administrative burdens. The Strategic Vision stresses that implementation of the convention at the national level must be consistent with COP decisions. National drafters, law enforcement officers and wildlife managers should, therefore, keep abreast of the outcomes of the periodic decision-making by the COP.

In the framework of CITES, **breeding** concerns animal specimens born or otherwise produced in a controlled environment,⁷ and CITES relaxes some

⁷ i.e. an environment that is manipulated for the purpose of producing animals of a particular species, that has boundaries designed to prevent animals, eggs or gametes of the species from entering or leaving the controlled environment, and the general characteristics of which may include but are not limited to: artificial housing; waste removal; health care; protection from predators; and artificially supplied food.

of the controls on captive bred specimens. CITES treats Appendix I species that have bred in captivity for commercial purposes as Appendix II species (article 7(4)). CITES therefore requires an export permit or re-export certificate but no import permit; the housing of live specimens is not subject to conditions and the specimens can be imported for primarily commercial purposes. Appendix I animals bred in captivity for non-commercial purposes and Appendix II and III animals bred in captivity for either commercial or non-commercial purposes only need a certificate that the animal was bred in captivity (which replaces import and export permits and re-export certificates) (article 7(5)). In addition, species of which all specimens in trade have been bred in captivity should not be included in appendices, if there is negligible probability of trade taking place in specimens of wild origin (Wijnstekers, undated).

The COP expressed the concern that, in spite of the adoption of several resolutions, much trade in specimens declared as bred in captivity remains contrary to the convention and may be detrimental to the survival of wild populations (Resolution Conf. 10.16 (Rev.)). The COP therefore refined the criteria for the applicability of provisions on captive breeding. It declared that the captive breeding exemptions of Article 7 apply only if:

- the parents mated or gametes were otherwise transferred in a controlled environment, if reproduction is sexual, or the parents were in a controlled environment when development of the offspring began, if reproduction is asexual; and
- the breeding stock, to the satisfaction of the competent government authorities of the exporting country:
 - was established in accordance with the provisions of CITES and relevant national laws and in a manner not detrimental to the survival of the species in the wild;
 - is maintained without the introduction of specimens from the wild, except for the occasional addition of animals, eggs or gametes, in accordance with the provisions of CITES and relevant national laws and in a manner not detrimental to the survival of the species in the wild as advised by the Scientific Authority:
 1. to prevent or alleviate deleterious inbreeding, with the magnitude of such addition determined by the need for new genetic material;
 2. to dispose of confiscated animals; or
 3. exceptionally, for use as breeding stock; and
 - has produced offspring of second generation or subsequent generation in a controlled environment; or is managed in a manner

that has been demonstrated to be capable of reliably producing second-generation offspring in a controlled environment.

These requirements seem particularly significant for national legal drafters wishing to discipline the matter at the domestic level. In addition, captive-breeding operations involving Appendix I species for commercial purposes, with the exception of those, including private persons, who occasionally bred specimens (zoos, hobbyists, etc.), must be **registered** (CITES Resolution Conf. 4.15).

Although the text of CITES does not include the word "**ranching**", the COP created provisions for the establishment of ranching operations and trade in their products under the convention. Ranching is the rearing in a controlled environment of specimens taken from the wild. No captive breeding need be involved. If a nation wants to allow ranching of an Appendix I species, it can ask the COP to transfer its national population or a sub-population to Appendix II. The COP will consider the request if the party and its ranching operations meet several requirements.

To be approved, the ranching programme must contribute to the conservation of the species. Under the COP recommendations, the programme must:

- be primarily beneficial to the conservation of the local population (i.e., where applicable, contribute to its increase in the wild or promote protection of habitat while maintaining a stable population);
- ensure the adequate identification and documentation of all products (including live specimens) of each operation, to ensure that they can be readily distinguished from products of Appendix-I populations (COP requires that products bear marks under a uniform marking system that include country and year of origin and a unique identification number);
- have in place appropriate inventories, harvest-level controls and mechanisms to monitor the wild populations; and
- have established sufficient safeguards to ensure that adequate numbers of animals are returned to the wild if necessary and where appropriate.

In addition, the programme must contain:

- evidence that the taking from the wild will have no significant detrimental impact on wild populations;
- an assessment of the likelihood of the biological and economic success of each ranching operation;
- assurance that the operation will be carried out at all stages in a humane (non-cruel) manner; and
- documented evidence to demonstrate that the program is beneficial to the wild population through reintroduction or in other ways (CITES Resolution Conf. 11.16 (Rev. COP14); Wijnstekers, undated).

If a nation wants to support ranching of protected species, it may need legislation addressing some of these points, such as creation of the uniform marking system and requirements for monitoring and documenting ranching activities.

The COP further adopted a specific resolution on **bushmeat**, given that poaching and illicit trade in bushmeat constitute the greatest threat to the survival of some wildlife species, such as gorillas, chimpanzees, elephants and crocodiles, and that illicit trade increases poverty and the food deficit among rural communities. Unregulated trade in and consumption of bushmeat may also bring risks to human health. To address these issues, the COP advised all parties:

- to prohibit the taking of Appendix-I species for consumption as food and to encourage sustainable levels of taking for species in Appendix II and III of the convention;
- to improve the domestic management of CITES-listed species harvested, traded and consumed as bushmeat through a review and, if needed, strengthening of relevant informative, legislative, *in situ* conservation, monitoring, enforcement and social or economic incentives;
- to define clearly the administrative responsibilities of the government agencies that may be involved in, or can contribute to, the domestic regulation of trade in bushmeat and the import, export, re-export and transit or transshipment of bushmeat;
- to clarify or establish property rights regarding CITES-listed species harvested, traded and consumed as bushmeat and to involve local communities in the monitoring of harvest, trade and consumption;

- to review and, if needed, revise logging and other natural resource concessions to ensure that they contribute to the legal, non-detrimental harvesting of trade in and consumption of bushmeat;
- to encourage the adoption of codes of conduct by the timber, fishing and other natural resource extraction industries, that discourage illegal or unsustainable harvesting, consumption and trade in bushmeat; and
- to identify alternative sources of protein and take other measures to reduce the demand for bushmeat and particularly the consumption of specimens of Appendix-I species (CITES Resolution Conf. 13.11).

Some of these steps clearly need supporting legislation at the national level.

1.1.2 The Convention on the Conservation of Migratory Species of Wild Animals (CMS)

CMS (Bonn, 1979)⁸ aims to conserve terrestrial, marine and avian migratory species throughout their range, thus requiring cooperation among "range" states host to species regularly crossing international boundaries. With regard to species considered as endangered (listed in Appendix I), states must conserve and restore their habitats; prevent, remove or minimize impediments to their migration; prevent, reduce and control factors endangering them; and prohibit their taking. With regard to other species that have an unfavourable conservation status (listed in Appendix II), range states undertake to conclude global or regional agreements to maintain or restore concerned species in a favourable conservation status. These agreements may range from legally binding treaties (called agreements) to less formal instruments, such as Memoranda of Understanding (MoU), and can be adapted to the requirements of particular regions. All these instruments set out cooperation mechanisms, including the development of action plans, as well as regular meetings and information-sharing requirements to improve the conservation of migratory wildlife species.

Like CITES, the CMS explicitly allows parties to adopt stricter domestic conservation measures (article 12).

⁸ For the full text of the convention and information about its implementation, see www.cms.int.

Box 1-2: Relevant definitions from CMS Article 1

"Migratory species" means the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries.

"Conservation status of a migratory species" means the sum of the influences acting on the migratory species that may affect its long-term distribution and abundance.

"Conservation status" will be taken as **"favourable"** when:

(1) population dynamics data indicate that the migratory species is maintaining itself on a long-term basis as a viable component of its ecosystems;

(2) the range of the migratory species is neither currently being reduced, nor is likely to be reduced, on a long-term basis;

(3) there is, and will be in the foreseeable future sufficient habitat to maintain the population of the migratory species on a long-term basis; and

(4) the distribution and abundance of the migratory species approach, historic coverage and levels to the extent that potentially suitable ecosystems exist and to the extent consistent with wise wildlife management.

"Endangered" in relation to a particular migratory species means that the migratory species is in danger of extinction throughout all or a significant portion of its range.

"Range" means all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route.

"Habitat" means any area in the range of a migratory species which contains suitable living conditions for that species.

"Range State" in relation to a particular migratory species means any state ... that exercises jurisdiction over any part of the range of that migratory species

"Taking" means hunting, fishing capturing, harassing, deliberate killing, or attempting to engage in any such conduct.

Source: www.cms.int

1.2 Area-based international agreements

Although species-based treaties often include habitat protection, some agreements focus primarily on conserving habitat (migration routes, feeding or breeding grounds, etc.), once again through a listing system. The main area-based treaties are the Convention on Wetlands of International Importance (Ramsar Convention, Ramsar, 1971), and the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention, Paris, 1972). Area-based international obligations are usually implemented at the national level through the creation of protected areas (national parks, nature reserves, etc.) and supporting legislation.

According to the **Ramsar Convention**,⁹ parties must designate wetlands in their territory for inclusion in a List of Wetlands of International Importance, and promote their conservation and wise use, for example by establishing nature reserves. "**Wetlands**" are defined as "areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres" (article 1). The concept of "**wise use**" does not forbid or regulate the taking of species for any purpose, but at least such use must not affect the ecological characteristics of wetlands (Birnie and Boyle, 2002). Wise use refers to the "sustainable utilization for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem" (Rec. C.3.3 rev.). Selection for the Ramsar List should be based on the wetland's significance in terms of ecology, botany, zoology, limnology or hydrology. Parties are also to promote site conservation, including, where appropriate, their wise use; and have also a general obligation to include wetland conservation considerations in their national land-use planning.

The Ramsar Convention has undergone a significant evolution: it was originally named "Convention on Wetlands of International Importance especially as Waterfowl Habitat", in line with its original emphasis on the conservation and wise use of wetlands primarily to provide habitat for waterbirds. Parties now recognize that the convention is applicable to all aspects of wetland conservation and wise use, recognizing wetlands as

⁹ For the full text of the convention and information about its implementation, see www.ramsar.org.

ecosystems that are extremely important for biodiversity conservation in general and for the wellbeing of human communities.

The **World Heritage Convention**¹⁰ provides for the conservation of outstanding natural and cultural sites, which are included in the World Heritage List. Natural areas may include the habitat of threatened species of animals of outstanding universal value from the point of view of science or conservation (article 2). The site has to fulfil conditions of integrity, so it has to be large enough to comprehend the essential components of the support system it represents and be sustainable (Birnie and Boyle, 2002). While responsibility for conservation is primarily vested in the state where the site is located, the convention also provides for international assistance funded by the World Heritage Fund. Parties to the convention must ensure the identification, protection and transmission of natural heritage to future generations. They must adopt protective policies, put in place management services for conservation and take appropriate measures to remove threats (articles 4–5).

1.3 Convention on Biological Diversity (CBD)

As opposed to the sectoral approach of the species- or area-based international treaties, the CBD (Rio de Janeiro, 1992)¹¹ reflects the increased global awareness of the interdependence among species. The convention is not limited to particular species or habitats, but provides for the conservation and sustainable use of biodiversity, defined as "the variability among living organisms", including "diversity within species, between species and of ecosystems" (article 2). Although successive to the other wildlife-related international agreements described above, the CBD has become the "umbrella" for the overall biodiversity-related international regime and has significantly contributed to the evolution of pre-existing treaties and to coordination of their activities. Further, the convention provides guiding principles that drafters should take into account in developing national policy and laws (Birnie and Boyle, 2002).

The CBD has three objectives, which include not only the conservation, but also the **sustainable use** of biodiversity components (thereby including

¹⁰ For the full text of the convention and information about its implementation, see whc.unesco.org.

¹¹ For the full text of the convention and information about its implementation, see www.cbd.int.

wildlife), as well as the equitable sharing of the benefits arising out of the utilization of genetic resources (article 1). Sustainable use is defined as using biodiversity components in a way and at a rate that does not lead to the long-term decline of biological diversity, thus meeting the needs and aspirations of present and future generations (article 2). This concept is particularly relevant for the sustainable management of wildlife as it entails, at a minimum, that countries monitor use, manage resources on a flexible basis, adopt a holistic approach, and base measures on scientific research (Birnie and Boyle, 2002). Interestingly, the CBD does not define "conservation", although it draws a distinction between "in situ" and "ex situ" conservation (see Box 1-3 below). In all events, the legal distinction made by the convention between conservation and sustainable use may be more difficult to apply in practice, as sustainable use may often be part and parcel of conservation efforts (Scholtz, 2005).

Box 1-3: Relevant definitions from the CBD Article 2

"Biological diversity" means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

"Biological resources" includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.

"Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

"Ex-situ conservation" means the conservation of components of biological diversity outside their natural habitats.

"Habitat" means the place or type of site where an organism or population naturally occurs.

"In-situ conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.

"Protected area" means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.

"Sustainable use" means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

Source: www.cbd.int

Parties must pursue biodiversity conservation and sustainable use by adopting specific strategies, plans and programmes and by incorporating relevant concerns into any plans, programmes and policies (article 6). Sustainable use of biodiversity must also be a consideration in national decision-making (article 10(a)). Parties must establish a system of protected areas, rehabilitate and restore degraded ecosystems and promote recovery of threatened species. To this effect, the convention emphasizes the role of national legislation (article 8). The threats to biodiversity are not limited to deliberate killing (e.g., hunting): parties are required to identify and control all potential sources of adverse impacts on biodiversity, and to carry out environmental impact assessments of projects likely to have "significant adverse effects" on biological diversity (article 14). The convention further calls attention to conservation of animals outside their natural habitats ("ex-situ conservation", such as in zoos, parks, etc.), with a view to facilitating recovery and rehabilitation of threatened species and for their reintroduction into their natural habitats under appropriate conditions, while avoiding harm to ecosystems and in-situ populations of species (article 9).

Another salient feature of the CBD is the importance attached to **people**, in particular local and indigenous communities and their relationship with biodiversity (including wildlife). Particularly with reference to sustainable use, the convention calls for cooperation between national authorities and indigenous communities and the private sector. In addition, parties are to protect and encourage the customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. They must also support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced (article 10). Finally, the convention has a pivotal role in promoting the respect, preservation and maintenance of traditional knowledge and practices relevant for the conservation and sustainable use of biological diversity (article 8(j)). It calls

upon national governments to ensure communities' prior informed consent¹² and involvement when such knowledge is applied, as well as the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

As can be gleaned from the previous paragraph, the CBD is mostly expressed as overall goals, rather than precisely defined obligations, thus allowing a variety of flexible approaches at the national and local level, so long as the goals are achieved. Nonetheless, the innovative features of the convention often require a major reconsideration of the role of national law on wildlife management. Another specific instance in this regard is the CBD requirement for resources conservation to be built around the interests of the individuals, communities and governments concerned in the specific circumstances of the country, as well as the importance of building incentives into conservation and sustainable use objectives (article 11).

1.3.1 Relevant COP Decisions

As is the case of the other international agreements relevant to wildlife, decisions from CBD's COP¹³ have further defined the convention's provisions. The CBD COP adopted Decisions V/6 (2000) and VII/11 (2004), calling on parties to apply an **ecosystem approach**, while not precluding other conservation approaches, be they area-based or species-based. "Ecosystem" in this context is defined as "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit", without determining the spatial scale of that unit. The ecosystem approach is the preferred framework for action under the convention because it can balance the three objectives of the CBD. It integrates management of land, water and living resources, and it promotes conservation and sustainable use in an equitable way. Furthermore, the ecosystem approach entails a social process: different interested communities must be involved through the development of efficient and effective structures and processes for decision-making and management. The CBD COP formulated guiding principles in this regard, including decentralization, consideration of adjacent and other ecosystems, long-term objectives and integration of use and conservation. These should

¹² This is based on Article 8(j), but explicitly referred to in CBD Decision V/16, Annex on the work programme on the implementation of Article 8(j), general principle 5.

¹³ All COP decisions can be found at www.cbd.int.

be reflected in modern wildlife legislation and could support specific measures for the empowerment of the poor and environmental sustainability.

The CBD **Programme of Work on Protected Areas** adopted by COP 7 (Decision VII/28, 2004) includes a section on "Governance, Participation, Equity and Benefit Sharing" with a view to supporting the adoption of mechanisms to promote equity and benefit-sharing through protected areas management. Parties are encouraged to adopt appropriate governance structures to promote the full participation of local and indigenous communities and share benefits generated by protected areas. The decision suggests establishing policies and institutional mechanisms with full participation of indigenous and local communities, carrying out participatory national reviews, adopting specific legislation and plans to involve communities in the decision-making and management process, ensuring full consultation before any resettlement activity of a community, and engaging communities and relevant stakeholders in participatory planning and governance in full respect of their rights and recognition of their responsibilities. Provisions to improve governance and ensure benefit-sharing can also be effectively incorporated in national legislation on wildlife management.

The CBD COP also adopted **voluntary guidelines on biodiversity-inclusive impact assessment** (Decision VIII/28, 2006). The guidelines aim at incorporating biodiversity considerations into the environmental impact assessment (EIA) procedure, as this may not necessarily result from the general requirement to take environmental issues into account before a project is implemented. Governments need to consider biodiversity criteria when screening projects for EIA, and should make sure that screening guidelines identify the categories of activities that may specifically affect biological diversity. If there is a risk of significant harm to biodiversity, they should apply the precautionary approach. The COP guidelines are also relevant for strategic environmental assessments before policies and programmes are adopted. Activities directly or indirectly affecting legally protected species, threatened species or species protected in respect of migration, breeding or commercial trading, fall under mandatory EIA. Moreover, activities taking place in legally protected areas or their vicinity may also fall under mandatory EIA. An activity that does not fall under mandatory EIA but which may significantly impact biodiversity should also be assessed: this is the case of the introduction of invasive alien species, activities that directly or indirectly affect species not yet legally protected but

threatened or sensitive, extractive species activities (including hunting) and activities leading to reproductive isolation of species or in biologically important areas. For current purposes, this may imply that national environmental legislation should be reviewed to ensure that wildlife management concerns are fully taken into account in EIAs, or to insert relevant provisions to this end in wildlife legislation.

The CBD COP also adopted **Guidelines on Biodiversity and Tourism Development** (Decision VII/14, 2004), which may be relevant in regulating eco-tourism and wildlife-watching. The guidelines target governments and decision-makers in creating a framework for tourism management by ensuring the sustainable use of biodiversity and wide stakeholder involvement in planning and implementation of both existing and new tourism operations. To ensure effective public participation, information gathering and dissemination are crucial and should include economic, social, cultural and environmental conditions or past damages at national and local level, trends within the tourism sector, biodiversity issues, benefit-sharing conditions as well as current national and local development plans and policies. Governments are encouraged to adopt and continuously review national strategies or master plans for sustainable tourism development, thus allowing for adaptive management based on environmental impact assessment, impact management and the precautionary approach. Monitoring also receives particular attention, especially in the long-term, to detect any effects on the ecosystem and areas beyond the immediate project site. The guidelines devote a specific section (paras. 30–33) to the role of legislation, suggesting the development of legal measures for effective law enforcement with the participation of all stakeholders; approval and licensing processes for tourism development and activities; controlling the planning, siting, design and construction of tourism facilities and infrastructure; management of tourism in relation to ecosystems, including vulnerable areas; environmental assessment, including assessment of cumulative impacts and effects on biodiversity, to all proposed tourism developments, and as a tool to develop policies and measure their impacts; integrated land-use management; application of economic instruments; creating incentives for sustainable tourism development; supporting private sector voluntary initiatives consistent with the guidelines; avoiding tourism development or activities outside areas where conservation actions are to take place; and monitoring collection and trade of biological and related cultural resources within tourism sites.

1.3.2 Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity

In the framework of the ecosystem approach, the parties to the CBD have further adopted specific principles and operational guidelines on sustainable use (Decision VII/14: the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity, 2004), which provide guidance to ensure that the use of the components of biodiversity will not lead to the long-term decline of biological diversity. The Addis Ababa Principles and Guidelines aim to generate incentives for conservation because of the social, cultural and economic benefits that people derive from it, and apply to both consumptive and non-consumptive use of biodiversity. Although not legally binding, these guidelines comprise several elements that may inspire national legislators. Applying these elements will require a flexible legal and policy framework – one that can adjust to local realities and specific ecosystems. Indeed, Principle 1 stresses the important role of legislation in ensuring sustainable use. Furthermore, the principles call for the consideration of local customs and traditions when drafting new legislation and regulations, and the development of new supportive incentives measures. Moreover, they underline the need to resolve any overlaps, omissions and contradictions in existing laws and policies, and they highlight the benefits of creating cooperative and supportive linkages between all levels of governance to avoid duplication or inconsistency. The following chapters on design principles for sustainable wildlife management legislation discuss some of the Addis Ababa Principles and their operational guidelines in more detail.

Box 1-4: Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity: an overview of practical principles

Practical principle 1: Supportive policies, laws, and institutions are in place at all levels of governance and there are effective linkages between these levels.

Practical principle 2: Recognizing the need for a governing framework consistent with international and national laws, local users of biodiversity components should be sufficiently empowered and supported by rights to be responsible and accountable for use of the resources concerned.

Practical principle 3: International, national policies, laws and regulations that distort markets which contribute to habitat degradation or otherwise generate perverse incentives that undermine conservation and sustainable use of biodiversity, should be identified and removed or mitigated.

Practical principle 4: Adaptive management should be practiced, based on:

1. Science and traditional and local knowledge;
2. Iterative, timely and transparent feedback derived from monitoring the use, environmental, socio-economic impacts, and the status of the resource being used; and
3. Adjusting management based on timely feedback from the monitoring procedures.

Practical principle 5: Sustainable use management goals and practices should avoid or minimize adverse impacts on ecosystem services, structure and functions as well as other components of ecosystems.

Practical principle 6: Interdisciplinary research into all aspects of the use and conservation of biological diversity should be promoted and supported.

Practical principle 7: The spatial and temporal scale of management should be compatible with the ecological and socio-economic scales of the use and its impact.

Practical principle 8: There should be arrangements for international cooperation where multinational decision-making and coordination are needed.

Practical principle 9: An interdisciplinary, participatory approach should be applied at the appropriate levels of management and governance related to the use.

Practical principle 10: International, national policies should take into account:

1. Current and potential values derived from the use of biological diversity;
2. intrinsic and other non-economic values of biological diversity, and
3. market forces affecting the values and use.

Practical principle 11: Users of biodiversity components should seek to minimize waste and adverse environmental impact and optimize benefits from uses.

Practical principle 12: The needs of indigenous and local communities who live with and are affected by the use and conservation of biological diversity, along with their contributions to its conservation and sustainable use, should be reflected in the equitable distribution of the benefits from the use of those resources.

Practical principle 13: The costs of management and conservation of biological diversity should be internalized within the area of management and reflected in the distribution of the benefits from the use.

Practical principle 14: Education and public awareness programmes on conservation and sustainable use should be implemented and more effective methods of communications should be developed between and among stakeholders and managers.

Source: The full text of the Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity can be found at www.cbd.int.

1.4 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)

The Aarhus Convention¹⁴ was adopted under the aegis of the UN Economic Commission for Europe. It was signed on 25 June 1998 in Aarhus, Denmark, and entered into force on 30 October 2001. Although regional in scope,¹⁵ the convention is considered global in its significance, namely in the

¹⁴ For the full text of the convention and information about its implementation, see www.unece.org.

¹⁵ The parties to the Aarhus Convention currently are Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Community, Finland, France, Georgia, Germany, Greece, Hungary, Italy, Kazakhstan, Kyrgyzstan, Latvia, Netherlands, Norway, Poland, Portugal,

recognition that governments achieve sustainable development only through the involvement of all stakeholders. The global character of the convention is also reflected in its provisions on accession. Any state may become a party to the convention: in the case of states that are not members of the UN Economic Commission for Europe, their accession is subject to the approval of the convention's Meeting of the Parties (article 19).

The convention establishes three sets of rights for the public (through the creation of corresponding international obligations for member countries), which governments should implement through appropriate legislation and regulatory instruments. First, the convention requires public authorities to provide environmental information upon request from the public (article 4), as well as an obligation to collect and disseminate available environmental information to the public proactively (article 5). Second, the convention requires public authorities to establish transparent and fair procedures allowing public participation in environmental decision-making (article 6), including in the preparation of plans and programmes relating to the environment (article 7) or in the drafting of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment (article 8). Third, the convention requires public authorities to establish procedures guaranteeing public access to justice (a review procedure before a court of law or another independent and impartial body established by law) in case of denial of access to information or public participation or to challenge acts and omissions by private persons and public authorities that contravene provisions of its national law relating to the environment (article 9).

The Aarhus Convention applies to every government body performing duties, activities or services related to the environment and possessing environment-related information, including to bodies dealing with wildlife management. The detailed rules of the Aarhus Convention thus provide useful specifications for the implementation of more general public participation principles supported by the biodiversity-related conventions.

Romania, Slovakia, Slovenia, Spain, Sweden, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine and the UK.

Box 1-5: Relevant definitions of the Aarhus Convention Article 2

"Public authority" means:

- (a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration organization referred to in Article 17 which is a party to this convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity.

"Environmental information" means any information in written, visual, aural, electronic or any other material form on:

- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

"The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.

"The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Source: www.unece.org

1.5 Relevant human rights instruments

Certain implications of international human rights instruments should also be taken into account by national wildlife legislators working toward the legal empowerment of the poor. The **UN Declaration on the Right to Development**, for instance, calls upon national governments to respect the right to development, which implies ensuring the active, free and meaningful participation in development and in the fair distribution of the resulting benefits for the entire population and of all individuals (General Assembly Resolution 41/128, 4 December 1986, article 2).

According to the **International Covenant on Economic, Social and Cultural Rights** (General Assembly Resolution 2200A (XXI), 16 December 1966) and the **International Covenant on Civil and Political Rights** (General Assembly Resolution 2200A (XXI), 16 December 1966), in no case may a people be deprived of its own means of subsistence (article 1 in both Covenants). In addition, the right to culture (Covenant on Economic, Social and Cultural Rights, article 15; Covenant on Civil and Political Rights, article 27) implies that acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on the opportunity to participate in the decision-making process and on whether a minority will continue to benefit from its traditional economy (Shelton. 2009).¹⁶

With specific regard to indigenous peoples, the International Labour Organization (ILO) **Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries** (Geneva, 27 June 1989)

¹⁶ Shelton's argument was based on *Apirana Mahuika et al v. New Zealand* (Communication No. 547/1992, *Apirana Mahuika et al v. New Zealand*, CCPR/C/70/D/547/1993, views issued on 16 November 2000).

provides useful standards even for those countries that are not parties to the convention,¹⁷ such as:

- consulting indigenous peoples, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly (article 6(1)(a));
- establishing means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in bodies responsible for policies and programmes (article 6(1)(b));
- to this end, ensuring that consultations be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures (article 6(2));
- designing projects for the development of the areas indigenous peoples inhabit, so as to promote improvements of the conditions of life and work and levels of health and education of indigenous peoples concerned, with their participation and cooperation (article 7(2));
- ensuring that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on these peoples of planned activities. The results of these studies must be considered as fundamental criteria for the implementation of such activities (article 7(3));
- obtaining indigenous peoples' free and informed consent if their relocation from the land they occupy is considered necessary, and provide full compensation for any resulting loss or injury (article 16).

Other useful standards can also be drawn from the more recent and widely supported **UN Declaration on the Rights of Indigenous Peoples** (General Assembly Resolution 61/295, 13 September 2007), according to which national governments should:

- obtain the free, prior informed consent of indigenous peoples concerned and agreement on just and fair compensation before forcibly removing them from their lands, possibly providing the option of return (article 10);

¹⁷ The membership of the convention is currently limited to 20 parties (see www.ilo.org).

- respect the right of indigenous peoples' participation in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions (article 18);
- consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (article 19).

The international standards and obligations described above have clear implications for the good governance of natural resources, including wildlife, that are connected to the lands or waters traditionally occupied by local and indigenous communities, to their livelihoods and to their traditional, religious or cultural practices. They should inform practical legal mechanisms that may contribute to preventing conflicts and ensuring more successful implementation of wildlife law.

1.6 Guidance from IUCN

National legislators and wildlife managers may find it useful to draw upon the guidelines elaborated by the International Union for Conservation of Nature (IUCN) – an international organization with both governmental and non-governmental members.¹⁸ With regard to wildlife, two specific instruments may be consulted:

- The **IUCN Red List of Threatened Species**, which assesses the conservation status of species, subspecies, varieties and even selected subpopulations on a global scale. The main purpose of the IUCN Red List is to highlight those taxa that are facing a higher risk of global extinction (i.e. those listed as "critically endangered", "endangered" and "vulnerable"). The IUCN Red List also includes information on taxa that are categorized as "extinct" or "extinct in the wild"; on taxa that cannot be evaluated because of insufficient information (i.e. "data deficient"); and on taxa that are either close to meeting the threatened

¹⁸ See www.iucn.org, where the text of all the recommendations of the IUCN World Park Congress mentioned later in the text can be found.

thresholds or that would be threatened were it not for an ongoing taxon-specific conservation programme (i.e. "near threatened").¹⁹

- The **IUCN Protected Area Management Categories**, which aim to increase understanding about the different categories of protected areas.²⁰ The categories are defined by the objectives of management, not by the title of the area or by the effectiveness of management in meeting those objectives. Each category implies a different gradation of human intervention. Countries can use these categories when planning to set up new protected areas and when reviewing existing ones, with a view to meeting objectives consistent with national, local or private goals and needs. The categories defined in 1994 include areas managed mainly for:
 - I. strict protection (strict nature reserve and wilderness area);
 - II. ecosystem conservation and protection (i.e. national park);
 - III. conservation of natural features (i.e. natural monument);
 - IV. conservation through active management (i.e. habitat/species management area);
 - V. landscape/seascape conservation and recreation (i.e. protected landscape/seascape);
 - VI. sustainable use of natural resources (i.e. managed resource protected area).²¹

Along with the management categories, IUCN has recognized the need for different governance types. It has thus identified four main types, depending on the responsible managers:

- government-managed protected areas (at various levels);
- co-managed protected areas (in various forms and including transboundary protected areas);
- private protected areas (for profit and not for profit);
- community conserved areas (including areas conserved by indigenous peoples) (IUCN World Park Congress (WPC) Recommendation V.17).

In addition, the WPC explicitly recognized that "protected areas should strive to contribute to poverty reduction at the local level, and at the very minimum must not contribute to or exacerbate poverty" (WPC Recommendations V.29).

¹⁹ See www.iucnredlist.org.

²⁰ See www.iucn.org.

²¹ The guidelines for applying protected area management categories are currently under revision, available at www.parksnet.org.

Other resolutions and recommendations adopted in the context of IUCN address wildlife management issues. With regards to **humane trapping standards**, the IUCN World Conservation Congress declared that conservation and sustainable use imply a sense of caring for the welfare of wild animals that are killed or captured (World Conservation Congress 2004, Recommendation 3.089). The congress unequivocally condemned the killing of animals in small enclosures where they have little or no chance of escape or where they do not exist as free-ranging (so-called, "**canned hunting**"). Southern African agencies in particular were thus required to protect wild animals from methods of hunting, trapping, and fishing that cause extreme, prolonged or avoidable suffering (World Conservation Congress 2004, Recommendation 3.093).

With regards to **human-wildlife conflicts**, governments and conservation authorities at local, national, and international levels have been encouraged to recognize the pressing need to alleviate these conflicts, to prioritise management decisions, to undertake planning and action for preventing and mitigating human-wildlife conflict, and to incorporate global, regional and local mechanisms to ensure that these issues are properly addressed; and to designate and allocate adequate financial resources for supporting programmes targeted at prevention and mitigation of human-wildlife conflicts (WPC Recommendation V.20, 2003).

During the IUCN World Conservation Congress in October 2008, 27 organisations (that have become over 40 at the time of writing) formed a Global Coalition and launched the **Global Sustainable Tourism Criteria** – a set of guidelines for sustainable practices in the tourism industry.²² The fourth criterion (maximize benefits to the environment and minimize negative impacts) specifically refers to wildlife and requires that use is sustainable, regulated and appropriately assessed so as to avoid adverse effects on wildlife populations. Wildlife species are expected to be harvested from the wild, consumed, displayed, sold or internationally traded, as part of a regulated activity that ensures sustainability (para. D.3.1). Businesses should not hold captive wildlife, except for properly regulated activities, and living specimens of protected wildlife species should only be kept by those authorized and suitably equipped to house and care for them (para. D.3.2). Tourism enterprises should use native species for landscaping and restoration, and avoid the introduction of invasive alien species

²² See www.sustainabletourismcriteria.org.

(para. D.3.3). Interactions with wildlife must not reduce the viability of populations in the wild. Any disturbance of natural ecosystems should be minimized, rehabilitated, and mitigated through a compensatory contribution to conservation management (para. D.3.5).

1.7 The European Union (EU) and wildlife law²³

EU environmental legislation deserves a closer examination, as it requires a timely and effective integration of its rules into national legislation by EU member states. In the treaties establishing the European Union, member states²⁴ have subscribed either to the direct application of legislation issued by the EU, or to take adequate action to implement it. The existence of a judicial system able to impose financial penalties for lack of implementation or enforcement, to which all member states are subject, strengthens the obligations that derive from EU legislation.

As a consequence, EU environmental rules have had an outstanding impact on the legal systems of member countries. In the case of the least progressive members, their legal reforms for environmental protection and sustainable natural resource management have been largely the consequence of the EU initiatives. At the same time, the examples set by more progressive member states have encouraged the EU to strengthen the legislation of all member countries. EU environmental legislation has also led to stronger legislation of non-member countries, as for various reasons (requirements of the pre-accession phase, participation in funding programmes to which they may be entitled, etc.) a process of "approximation" of their legislation with that of the EU is underway.²⁵

The legislation adopted by the EU concerning nature conservation thus far has limited its scope to specific aspects – mainly protection of species and

²³ This section draws from Chapter 2.3 of Cirelli, M.T. 2002. *Legal trends in wildlife management*. FAO Legislative Study, No. 74. Rome, Italy.

²⁴ Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

²⁵ Indeed, countries that have concluded an Association Agreement with the EU are often called upon to approximate their national legislation (particularly on natural resources management) to that of the European Union. See Marin Duran G. and Morgera, E. 2006. Towards Environmental Integration in EC External Relations? A Comparative Analysis of Selected Association Agreements. *Yearbook of European Environmental Law* 6 : 179–210.

habitats of particular interest – although recent initiatives have extended to other forms of sustainable use of wildlife and nature conservation, adopting a more integrated approach. Generally, the EU has been silent on issues such as tenurial arrangements over wildlife, accessibility of private lands for hunting (except as regards prohibited species and methods) and size of holdings.

The EU generally uses two legal instruments to address environmental issues: directives and regulations. Directives are most frequently used as they allow member states to decide the form and means of implementation, as long as the common objective is reached. Regulations in turn are directly applicable to member states, but member states may still adopt stricter rules. When it comes to nature conservation, the most significant ones are Council Directive 79/409/EEC of 2 April 1979, as amended, on the conservation of wild birds, known as the Birds Directive, and Council Directive 92/43/EEC of 21 May 1992, as amended, on the conservation of natural habitats and of wild fauna and flora, known as the Habitats Directive. These two instruments create an interrelated system for biodiversity conservation based on the setting up of a network of protected sites. In addition, the discussion below also briefly addresses EU regulations implementing CITES.

1.7.1 The Birds Directive

The Birds Directive²⁶ relates to the conservation of all naturally occurring wild birds within the member states. The directive requires member states to maintain or adapt the population of these species at a level which corresponds to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements (article 2). Species listed in Annex I must be the subject of special conservation measures concerning their habitats, to ensure their survival and reproduction. Members must take account of species in danger of extinction, or vulnerable to habitat changes, or rare, or otherwise requiring particular attention because of their habitat's nature. Members must classify the most suitable territories in number and size for the conservation of these species as **special protection areas** (article 4(1)). Similar measures must be taken for regularly occurring migratory species not listed in Annex I as regards their breeding, moulting and wintering areas and staging posts along their migration routes (article 4(2)).

²⁶ The text of the directive can be found at eur-lex.europa.eu.

A specific regime is set out for derogations from the provisions of the Directive, in specified cases, relating mainly to public health and security, protection of fauna and flora and scientific purposes. These derogations are admissible only "where there is no other satisfactory solution". Derogations thus authorised by member states must specify all applicable conditions, i.e. concerned species, means, circumstances of time and place, and responsible authorities (article 9).

Article 7 of the directive allows **hunting** for species that are listed in Annex II, subject to limitations to ensure the viability of the species through a sustainable management system. Hunting should be practiced in a way that ensures a favourable conservation status and wise use. A general prohibition of hunting applies to all species of wild birds during the rearing periods and the various stages of reproduction and, in the case of migratory species, during pre-mating migration and during their return to their rearing grounds. States should forbid methods for the large-scale or non-selective capture or killing of birds and methods that may cause the local disappearance of a species (article 8). Member states are allowed to apply derogations from provisions concerning marketing and hunting, but this possibility is subject to certain conditions that need to be examined on a case-by-case basis. To facilitate member states' compliance, the European Commission (the executive arm of the EU) published in 2004 a "Guide on Hunting under the Birds Directive", which was updated in 2007.²⁷

1.7.2 The Habitats Directive

The Habitats Directive²⁸ is the most comprehensive legislative instrument adopted by the EU regarding wildlife. Its main aim is "to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements" (preamble). The directive provides for the designation of special areas of conservation to ensure the restoration or maintenance of natural habitats and species of EU interest (respectively listed in Annexes I and II) at a favourable conservation status, with a view to creating a coherent European ecological network, named "Natura 2000". In the case of species ranging over wide areas, sites to be proposed correspond to the places within the natural range of such species that present the physical or biological factors essential to their life and reproduction (article 4).

²⁷ See ec.europa.eu.

²⁸ The text of the directive is available at eur-lex.europa.eu.

On the basis of criteria set out in Annex III of the directive, the European Commission establishes a draft list of sites of EU importance in agreement with member states. The list identifies sites that host one or more priority natural habitat types or priority species, pursuant to a specified procedure (set out in article 21), which involves the assistance of a committee made up of representatives of member states (article 5(2)). Member states must designate such sites as special areas of conservation (article 4(4)) and establish the necessary conservation measures, including management plans (which may be specific or integrated into other land use plans), as may be appropriate (article 6(1)).

Natura 2000 is to include also the special protection areas classified by member states under the Birds Directive (article 3(1)), which are part of the network from the moment of their designation, and are not subject to the same procedure for declaration as special areas of conservation envisaged in the Habitats Directive.

Any plan or project not directly connected with the management of a site but likely to have a significant impact on it, either individually or in combination with others, is subject to an assessment. The competent authorities may agree to the plan or project only upon verification that it will not affect the integrity of the site. If, in spite of a negative assessment and the absence of alternatives, a plan or project must be carried out for reasons of overriding public interest, including those of a social or economic nature, the member state must take all compensatory measures necessary to protect the overall coherence of Natura 2000, informing the European Commission of the measures adopted. Where the site hosts a priority natural habitat type and/or species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion of the European Commission, to other imperative reasons of overriding public interest (article 6(2)–(4)). Arrangements are made for co-financing by the EU of action to be taken by states in relation to special areas of conservation hosting priority habitat types and/or priority species (article 8).

Member states also must protect features of the landscape that are of major importance for wildlife, such as those which may be essential for migration, dispersal or genetic exchange, with a view to improving the ecological coherence of the Natura 2000 network (article 10). Member states are further

required to monitor the conservation status of natural habitats and species of EU interest and particularly priority ones (article 11).

The directive includes provisions for the protection of specific listed species of animals and plants. Member states must prohibit capture or killing of these species, as well as disturbance, destruction of eggs, of breeding sites and of resting places, and keeping and sale of wild specimens (article 12).

The directive has numerous positive aspects and implications. When it was adopted, its objective was innovative in aiming to integrate the "maintenance of biodiversity" with economic, social, cultural and regional requirements. The directive also has a wide scope of application as it covers not only entirely natural areas but also significant areas in which human action and natural processes have interacted ("semi-natural habitats"). Natura 2000 sites are thus intended as sites where land use planning incorporates both nature conservation and development objectives (Cirelli, 2002).

Another positive effect of the directive has been to encourage states to adopt formal management plans for sites to be protected, although some member states have concerns about integrating these plans with other existing or future management plans (e.g. forestry plans, hunting plans, etc.). Standard requirements for data collection throughout the EU enhance the significance of these plans for rational wildlife management. Such requirements, further specified in subsequent implementing legislation²⁹ and consistently enforced by the Court of Justice, have promoted an unprecedented uniform gathering of environmental information relevant to species and sites of Union interest. The European Clearing House Mechanism (CHM),³⁰ created in 2001 and managed by the European Environment Agency, collects and disseminates information on biodiversity across the European Union. The CHM aims to provide scientific and technical guidance to decision-makers for the implementation of the CBD objectives along with improving public awareness of biodiversity issues.

Measures to be adopted by member states within each selected area are discretionary, subject to the general requirement to maintain species and habitats at a favourable conservation status. The flexibility allows

²⁹ Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites.

³⁰ See biodiversity-chm.eea.europa.eu.

management to be adapted to local requirements, in light also of economic and social concerns. The directive acknowledges that the maintenance of biodiversity "may in certain cases require the maintenance, or indeed the encouragement, of human activities" (preamble), and there are no such activities which are unconditionally prohibited. The identification of specific prohibitions is left to a case-by-case determination of the states. Notwithstanding the positive effects of the directive, numerous cases have been and continue to be brought before the Court of Justice in which member states have exceeded their margin of discretion and frustrated the objectives of the directive.³¹

1.7.3 CITES Regulation

CITES has been implemented by the European Union as a whole,³² rather than by every individual member state so as to ensure uniformity of restrictions on trade within the region. The so-called "Wildlife Trade Regulations" (Basic Regulation 338/97, Implementing Regulation 338/97³³ and successive regulations to update the European system in light of CITES COP decisions)³⁴ are in some ways stricter than CITES. A higher number of species may be listed under Annex A (the equivalent of Appendix I of CITES), for which commercial trade is prohibited. An additional annex – Annex D – is also included within the EU legal framework, according to which trade of listed species is monitored to detect conservation issues in advance. Moreover, the European Commission has the power to restrict trade of some species even if their trade is allowed under CITES. Furthermore, the EU Trade Regulations contain rules relating to the wellbeing of the wild animals such as their housing conditions and their transportation.

³¹ See Nature and Biodiversity Cases - Ruling of the European Court of Justice, available at ec.europa.eu.

³² See ec.europa.eu.

³³ Amended by Commission Regulation (EC) No 100/2008 of 4 February 2008. It lays down the different forms for all the permits, notifications and certificates, as well as the labels that are needed in specific cases.

³⁴ Regulation (EC) No 407/2009. Specific categories include 'hybrids' (where one of the parents is listed in one of the annexes or where parents are listed in different annexes) in which case the more restrictive action is adopted.

As the European Commission remains centrally responsible for the implementation of CITES in the Community, the Basic Regulation establishes the following bodies at the EU level:

- the Committee on Trade in Wild Fauna and Flora, which is charged with approving the implementing measures to be adopted by the commission;
- the Scientific Review Group, which responds to any scientific questions arising;
- the Enforcement Group, which is composed of representatives of the customs, police services and environmental inspectorates of each member state and is responsible for dealing with any technical implementation issues.

Equivalent bodies (a management authority, a scientific authority and a customs office) should be established at member state level, made responsible for the application of the trade regulations within their territory, and adequately staffed and appropriately trained.

In the case the specimen is coming from outside the European Union, the management authority of the importing state must issue an import permit that can last up to twelve months as well as verify the export permit or certificate of the exporting country (valid up to six months). The purpose for the import must be examined carefully to avoid any detrimental conservation effects. For live species, appropriate housing facilities should be arranged in advance and transportation of the specimens must comply with relative legislation, avoid any harm and minimise any such risk of damage (Regulation No. 1/2005 of 22 December 2004 on the protection of animals during transport and related operations; and Regulation 338/97, article 9).

Finally, Regulation 338/97 also provides rules on enforcement. A system of monitoring and information exchange is established between the different national authorities as well as between the competent authorities and the European Commission, based on a reporting system. Particular attention is paid to increasing public awareness on the rules of illegal wildlife trade. Further to that, each member state should adopt national action plans with penalties to detect and sanction any illegal wildlife trading. The "Study on the Enforcement of the EU Wildlife Trade Regulations in the EU-25"³⁵,

³⁵ European Commission. 2006, Study on the Enforcement of the EU Wildlife Trade Regulations in the EU-25, available at ec.europa.eu.

however, suggests that member states should adopt stronger sanctions to better implement the regulations.

1.8 Regional instruments

This section will provide an overview of regional agreements that are related or specific to wildlife management, which should be taken into account by policy-makers and legal drafters when discussing reforms of national wildlife legislation in a specific region. In some instances, regional agreements may provide detailed standards on how to frame wildlife regulation at the national level.

1.8.1 European instruments

This section will now turn to regional agreements in Europe, outside the framework of the EU. The **Convention on the Conservation of European Wildlife and Natural Habitats** (Bern, 1979 – called Bern Convention)³⁶ came into force in 1982.³⁷ Its main objective is to create a system for the protection and conservation of wild animals and plants listed within the appendices of the convention and their surrounding environment. To achieve this, the convention intends to promote cooperation between the parties, especially when it comes to migratory species listed within the appendices. Parties are expected to adopt national policies for the conservation of the species, integrate protection measures into other developmental policies and increase public awareness and information gathering on the conservation of animal and plant species (article 3). Parties are further to adopt legislative and administrative measures to ensure the conservation of habitats and fauna species (articles 4–7). Appendix II deals particularly with animal species. Any capture, killing, destruction of eggs or disturbance during periods of breeding, rearing and hibernation of listed wild animals is prohibited. Appendix III deals with species whose exploitation must be regulated to avoid their disappearance or serious disturbance.

The **European Charter on Hunting and Biodiversity** was drafted under the auspices of the Bern Convention as a non-binding instrument that addresses both regulators and managers, and hunters and hunting tour

³⁶ The text of the convention can be found at conventions.coe.int. The convention has 50 parties, including Eastern and Western European countries and some African countries.

³⁷ Information on the membership of the convention can be found at: conventions.coe.int.

operators. It was adopted by the Standing Committee to the Bern Convention in November 2007, with the recommendations that parties to the convention make reference to the charter in the elaboration and implementation of their hunting policies. The charter includes a set of principles and good practices to achieve sustainable hunting. *Sustainable hunting* is defined as the use of wild game species and their habitats in a way and at a rate that does not lead to the long-term decline of biodiversity or hinder its restoration, arguing that it can positively contribute to the conservation of wild populations and their habitats and also benefit society. It builds upon the idea that hunters can contribute towards the conservation of wildlife and biodiversity in general. The charter distinguishes between resident hunting – an activity conducted by hunters within their country of residence, and most commonly in the area where they physically reside and have hunting rights – and hunting tourism – an activity conducted by foreign hunters who travel abroad to hunt and/or own hunting grounds abroad. With regards to the latter, it suggests promoting forms of hunting tourism that provide local communities with socio-economic incentives.

The charter recommends that management plans and/or measures have clear objectives that take into account the behaviour and ecology (including predation and seasonal effects) and the long-term conservation status of wild species, with provisions to ensure proper implementation, monitoring and updating. Management plans should address harvest both by resident hunters and hunting tourists and should be developed in cooperation with hunters to apply simple and effective monitoring and management of populations, habitats and ecosystem services. Legislation should encourage harvest that provides socio-economic benefits to local stakeholders and communities, and should set official fees or taxes at reasonable levels so that these do not represent barriers to local participation. The charter suggests facilitating the empowerment and accountability of local stakeholders, especially hunters, in decentralised processes, and promotes models that ensure equitable sharing of benefits among user groups. It encourages education and training for hunters, and recommends cooperation with hunters' organisations that engage with all participants, including recruitment from both genders, all ages and backgrounds. Overall, policies should be clear, transparent and adaptive. Hunters are encouraged to contribute to research, management and monitoring, recognize the importance of wildlife conservation and acquire all the necessary knowledge on how to apply best hunting techniques by minimising any detrimental effects on biodiversity.

1.8.2 African instruments

Several regional agreements in Africa have direct or indirect relevance for wildlife management, and should be taken into account by legal drafters in the countries that are parties to them. The present section maps out relevant African agreements, starting from the broadest in geographical scope.³⁸

The **African Convention on the Conservation of Nature and Natural Resources** was originally concluded in 1968 in Algiers and was then revised in Maputo in 2003 by the Assembly of the African Union.³⁹ The revised convention⁴⁰ has been ratified by eight countries⁴¹ at the time of writing and will enter into force upon ratification by fifteen countries.

The overall objective of the revised convention is the conservation and management of animal and plant species and their environment (article IX). To conserve animals and particularly threatened ones, parties must adopt policies and management measures for the sustainable use and the conservation of those species *in situ* and *ex situ*. Continued scientific research and monitoring will guide management of the species and their environment. Parties must identify threatened or migratory species together with important areas for their survival. They must assure sustainable use of wildlife through regulation of hunting seasons or means of capture (article IX). Parties must identify and deal with the factors that are causing wildlife depletion and must adopt specific protection measures to avoid further depletion (article X). They must take appropriate steps to reduce and eliminate illegal trade in wild fauna (article XI) and must designate conservation areas according to the potential impacts and necessity (article XI).

³⁸ This section draws from Cirelli, MT. and Morgera, E. 2009. *Wildlife law and the legal empowerment of the poor in Sub-saharan Africa: additional case studies*, FAO Legal Paper Online No 79.

³⁹ At the time of writing, the original convention has been ratified by 26 states (Algeria, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Gabon, Ghana, Kenya, Liberia, Madagascar, Mali, Nigeria, Niger, Rwanda, Senegal, Sudan, Swaziland, Tanzania, Zambia, Uganda, Tunisia, and Togo) and signed by Burundi, Chad, Ethiopia, Gambia, Guinea, Libya, Lesotho, Mauritania, Mauritius, Sierra Leone and Somalia.

⁴⁰ The full text is available at www.ecolex.org.

⁴¹ Burundi, Comoros, Ghana, Libya, Lesotho, Mali, Niger and Rwanda.

The **Agreement establishing the Common Market for Eastern and Southern Africa (COMESA)**⁴² was signed in November 1993 in Kampala and entered into force on 8 December 1994.⁴³ COMESA is one of the pillars of the African Economic Community and regulates trading within the state parties. Interestingly, the agreement devotes one article to wildlife development and management, according to which states undertake to develop a collective and coordinated approach to sustainable development and management rational exploitation and utilisation and the protection of wildlife in the Common Market. In particular, they are expected to exchange relevant information, adopt common policies against poaching, use income from wildlife for the benefit of national parks and nearby areas, establish wildlife ranches, encourage breeding research programmes on disease resistance, and adopt a uniform trophy pricing system to regulate hunting (article 126).

The **Southern African Development Community (SADC)**⁴⁴ promotes and coordinates development projects within the region. The constitutive Treaty (adopted in Windhoek in 1992 and entered into force in 1993) includes a general provision for the sustainable use of natural resources (article 5). SADC countries are expected to cooperate in the field of natural resources and the environment to foster regional development and integration (article 21). SADC countries have been particularly active in the field of sustainable wildlife management, and have adopted a **Protocol on Wildlife Conservation and Law Enforcement** in Maputo in 1999. The protocol entered into force in November 2003. It affirms the sovereign right of states over natural resources and creates a framework for regional wildlife management (preamble and article 1). States must control activities within their territory so as not to cause any damage to wildlife (article 3). To promote the sustainable use of wildlife, the protocol aims to facilitate harmonisation of the relevant wildlife laws and management practices, their enforcement, the exchange of information and the establishment of transboundary conservation areas (article 4).

Cooperation and collaboration between the different stakeholders at a national level but also between states to achieve international objectives

⁴² The text of the treaty is available at about.comesa.int.

⁴³ It currently has 19 members (Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe).

⁴⁴ See www.sadc.int, where the full text of the treaty and its protocols can be found.

relative to wildlife is emphasized (article 3). The protocol requires the establishment of specific institutions to facilitate cooperation and enforcement. A Wildlife Sector Technical Coordinating Unit composed of the food, agriculture and natural resources ministers of the member states is to meet once a year. A committee of ministers will be responsible for adopting regional wildlife policies and strategies and supervise the implementation of the protocol. A committee of senior officials, comprising responsible ministry members for wildlife, will monitor and assess the implementation of the protocol. A Wildlife Sector Technical Committee will act as the secretariat for the protocol in supervising and coordinating the implementation (article 5).

The protocol further requires states to adopt measures for the protection, taking and trading of wildlife, incentives to promote wildlife conservation as well as appropriate sanctions and to enforce the relevant instruments (article 6). They must integrate into their national development plans, management programmes for the conservation and sustainable use of wildlife (article 7). They must monitor the maintenance of the populations, prevent over-exploitation, restrict trade and control activities that may affect wildlife. The protocol encourages the participation of multiple stakeholders in the process; the states must adopt programmes to promote cooperative management of wildlife resources at international, national and community-based levels. States must use economic and social incentives to encourage conservation and sustainable use. States must also adopt programmes for education, increase of public awareness and research (article 7). The parties will form a public regional database including information on wildlife status and management (article 8).

Furthermore, to ensure effective enforcement of wildlife conservation and sustainable use laws, states must ensure that adequate financial and human resources are available (article 9). In a transboundary context, states must cooperate and exchange relevant information to eliminate and prevent illegal trade and illegal taking of wildlife products (article 9). States must adopt training programmes of current and indigenous wildlife management practices with a view to reinforcing capacity for wildlife management needs (article 10). The parties will establish a Wildlife Conservation Fund to finance the programmes and projects related to the protocol (article 11).

The protocol provides for sanctions against any state that fails to fulfil its obligations in a persistent way or that undermines the principles and

objectives of the protocol by adopting conflicting policies (article 12). The Tribunal of the South African Development Commission is designated to settle any arising disputes (article 13).

The Lusaka Agreement on cooperative enforcement operations directed at illegal trade in wild fauna and flora⁴⁵ was adopted in September 1994 and came into force in December 1996.⁴⁶ It was initiated to help national law enforcement agencies stop illegal trade in wild flora and fauna. To achieve this, it establishes a regional institutional framework to assist in wildlife law enforcement and implementation. The agreement establishes a task force as an international legal entity charged with information collection and sharing, as well as with investigating infringements (article 5). It also creates the Governing Council consisting of delegates of the states responsible for determining the task force's agenda (article 7). States are required to investigate illegal trade and should return to the country of origin any specimen that was subjected to illegal trade. States are also tasked with collecting information and transmitting it to the Task Force as well as assisting it on technical matters to ensure the effective cooperation of the agreement (article 4). To this end, every party must designate a national bureau (article 6). The Governing Council or an arbitral body will deal with any disputes arising (article 10).

The **Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region**⁴⁷ was signed in Nairobi in 1985 and entered in force in 1996.⁴⁸ The protocol requires the development of national strategies to coordinate the protection and preservation of fragile ecosystems (article 2). Parties agree to prohibit the capture, killing, keeping and trading of animals listed in Annex II of the protocol, as well as to avoid any kind of disturbance to the environment of the species, especially during breeding, rearing or hibernation periods, or any taking of their eggs (article 4). Protection for species listed under Annex III of the protocol is limited to ensuring the maintenance and restoration of the population through the adoption of management plans for their capture, killing and trading

⁴⁵ See www.lusakaagreement.org.

⁴⁶ Congo (Brazzaville), Kenya, Tanzania, Uganda, Zambia and Lesotho ratified it. South Africa, Ethiopia and Swaziland are signatories.

⁴⁷ See www.unep.org.

⁴⁸ Comoros, La Reunion (France), Kenya, Madagascar, Mauritius, Mozambique, Seychelles, Somalia, Tanzania and South Africa are the current parties.

(article 5). Parties also agree to ensure special protection for migratory species listed in Annex IV of the protocol.

Finally, the protocol requires the establishment of protection areas according to some criteria enumerated within the protocol and which concentrate on the importance of the areas to the species. States should designate areas to maintain the greatest number of fauna and flora populations possible; to protect ecological and biological processes essential to the functioning of the Eastern African region; and to protect representative ecosystem samples and areas of particular scientific, aesthetic, cultural or educational importance. Natural habitats critical for threatened or endemic species of fauna and flora, migration routes, fragile ecosystems and areas of scientific interest should be taken into account in establishing protected areas (article 8).

The parties together are required to adopt guidelines for the identification and management of such areas (article 9). Individually, the parties must plan for and manage the protected areas, prohibiting the destruction of animals, regulating trade in wildlife and otherwise safeguarding the ecological processes in the areas (article 10). States may also designate buffer zones where activities are less restricted provided that the protection area purposes are respected (article 11). Exemptions to the objectives should not endanger the maintenance of the ecosystems or the survival of the species although indigenous practices must be taken into account by states (article 12).

States should endeavour to establish transfrontier protected areas and try to work together with non-party states to the convention (article 13). The protocol also contains some measures to increase public awareness and participation. To this end, states are encouraged to publicise the establishment of protected areas (article 14) and the importance of the conservation of protected areas (article 15). They must further exchange information (article 18) and coordinate research programmes (article 17) with a view to establishing and extending the network of protected areas around the region (article 16).

1.8.3 Latin American agreements

This section will in turn briefly review wildlife-related regional agreements in Latin America.⁴⁹ The **Convention for the Conservation and Management of the Vicuña** (Lima, 1979)⁵⁰ provides a good example of multilateral cooperation for the sustainable management of a single species. Within this framework, Argentina, Chile, Peru, Bolivia and Ecuador set an important precedent in achieving sustainable management through the adoption of national action plans for vicuña management. The Vicuña Convention establishes an obligation for parties to prohibit all hunting and trade in vicuña products, except in cases closely monitored by the state and approved as sustainable practices within the Vicuña Convention. Its effectiveness, however, relies on CITES to ensure global cooperation for the implementation of management decisions taken by the parties. The global membership of CITES ensures that all international trade in vicuña products takes place in harmony with the Vicuña Convention.

Regional agreements relating to biodiversity also include the **Amazon Cooperation Treaty** (Brasília, 1978), which created a cooperation and political mechanism aiming to harmonize regional policies with the objective of conservation and sustainable use of biodiversity in eight Amazon countries (Bolivia, Brazil, Colombia, Ecuador, Guyana, Suriname, Peru and Venezuela). It includes a 2004 strategic plan with a programmatic area focusing on biological diversity, biotechnology and biotrade.

The countries belonging to the Andean Community of Nations (CAN) also approved in 2002 a **Regional Biodiversity Strategy for the Tropical Andean Countries** (CAN Decision 523) with the objective of identifying joint, prioritized actions for the conservation and sustainable use of the elements of biological diversity, specifically referring to the *in situ* and *ex situ* conservation of wildlife in areas where Andean countries have comparative advantages.

Under the **Convention for the Conservation of the Biodiversity and the Protection of Wilderness Areas in Central America** (Managua, 1992),⁵¹

⁴⁹ This section draws from Aguilar, S. and Morgera, E. 2009. *Wildlife law and the legal empowerment of the poor in Latin America*, FAO Legal Paper Online No. 80.

⁵⁰ Full text available at www.ecolex.org.

⁵¹ The convention parties are Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

parties undertake to formulate national strategies and programmes and the creation of economic measures (articles 12–13), to establish national legislation for the conservation and sustainable development of biodiversity (article 16), to strengthen biodiversity conservation by in-situ and ex-situ measures and by control or elimination of alien species (articles 24 and 27), to broaden eco-tourism taking into account its economic potential in support of protected areas as well as neighbouring populations (article 28) and to enhance public participation in relation to measures for the conservation and sustainable use of biodiversity by means of education (article 35). The Central American Council for Protected Areas, in cooperation with national bodies, is to form a biological corridor of Central America by maintaining existing and creating new protected areas (articles 17–19).

1.8.4 Instruments in Asia and Oceania

Among regional wildlife-related treaties and initiatives in Asia and Oceania,⁵² the South Pacific Regional Environment Programme (SPREP),⁵³ the Convention on Conservation of Nature in the South Pacific, and the Agreement on the Convention of Nature and Natural Resources of the Association of Southeast Asian Nations (ASEAN)⁵⁴ can be singled out.

The **Agreement establishing the South Pacific Regional Environment Programme** (Apia, 1993) established SPREP as an intergovernmental organization with the objectives to: promote cooperation and coordination in the South Pacific region. It provides assistance in order to protect and improve the environment and to ensure sustainable development through an action plan adopted from time to time. The action plan includes monitoring and assessment of the state of the environment in the region, including the impacts of human activities on the ecosystems; promotion and development of programmes, including research programmes, to protect terrestrial, freshwater, coastal and marine ecosystems and species, while ensuring ecologically sustainable utilization of resources; and promotion of integrated legal, planning and management mechanisms (article 2).⁵⁵

⁵² This section draws from Tsioumani, E. and Morgera, E. 2010. *Wildlife law and the legal empowerment of the poor in Asia and Oceania*, FAO Legal Paper Online No. 83.

⁵³ See www.sprep.org.

⁵⁴ See www.aseansec.org.

⁵⁵ The agreement counts 18 parties (Australia, Cook Islands, Fiji, France, Kiribati, Marshall Islands, Micronesia, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon

The **Convention on Conservation of Nature in the South Pacific** (Apia, 1976 – called the Apia Convention) established a broad framework for nature conservation in the South Pacific region, particularly in relation to migratory and endangered species and the preservation and management of wildlife habitat and terrestrial ecosystems. It includes provisions on the establishment of protected areas (article 2). It calls on parties to prohibit hunting and commercial exploitation of species in national parks (article 3) and to maintain lists of indigenous fauna and flora in risk of extinction for their full protection (article 5). It further notes that provision may be made as appropriate for customary use of areas and species in accordance with traditional cultural practices (article 6).⁵⁶

The **ASEAN Agreement on the Conservation of Nature and Natural Resources** (Kuala Lumpur, 1985) has the objectives of maintaining essential ecological processes and life-support systems, preserving genetic diversity and ensuring the sustainable utilization of harvested natural resources (article 1(1)). It provides for species and ecosystem conservation through extensive management measures, including species sustainable use (article 4) and for environmental planning measures with a view to integrating natural resource conservation into the land use process, including by the establishment of protected areas (article 13) and impact assessments (article 14). It also addresses public participation in planning and implementation of conservation measures (article 16).⁵⁷

The **Agreement on the Establishment of the ASEAN Centre for Biodiversity** (Bangkok, 2005) establishes the Centre to facilitate cooperation and coordination among ASEAN members and with relevant governments and international organizations, on the conservation and sustainable use of biological diversity and the fair and equitable sharing of benefits arising from the use of such biodiversity in the region (article 2).⁵⁸

Islands, Tonga, Tuvalu, USA and Vanuatu – see www.ecolex.org), and SPREP has 25 member countries (see www.sprep.org).

⁵⁶ As of April 2008, the Apia Convention has five parties: Australia, Cook Islands, Fiji, France and Samoa.

⁵⁷ Ratified by the Philippines, Cambodia, Indonesia, Lao PDR, Myanmar and Thailand, but not yet in force.

⁵⁸ The agreement was ratified by Brunei Darussalam, Lao PDR, Philippines, Singapore and Viet Nam.

1.8.5 An inter-regional initiative: the Agreement on International Humane Trapping Standards

The Agreement on International Humane Trapping Standards was signed by the European Community (now European Union), Canada and the Russian Federation in 1997. The US signed it in 1998. It concentrates on the trapping of wild terrestrial or semi-aquatic mammals listed in Annex I for wildlife management purposes, including pest control; for obtaining fur, skin or meat; and for the capture of mammals for conservation (article 3). The agreement defined "traps" as both killing and restraining mechanical capturing devices, as appropriate, and "trapping methods" as traps and their setting conditions, including target species, positioning, lure, bait and natural environmental conditions (article 3).

Each party has to establish appropriate processes for certifying traps in accordance with the standards, prohibit the use of restraining and killing traps that are not certified in accordance with the standards, require manufacturers to attach a mark to identify certified traps and ensure compliance with these trapping standards.

The agreement calls upon each party to take the necessary steps to ensure that its respective competent authorities establish appropriate processes for certifying traps in accordance with the standards, prohibit the use of traps that are not certified, require manufacturers to identify certified traps, and provide instructions for their appropriate setting, safe operation and maintenance (article 7). Each competent authority is expected to grant or remove permission for the use of traps, enforce legislation on humane trapping methods and ensure that trappers are trained in the humane, safe and effective use of trapping methods, including new methods as these are developed (article 8). Derogations are envisaged for traditional wooden traps essential for preserving cultural heritage of indigenous communities, subject to written conditions to be determined on a case-by-case basis by competent authorities (article 10).

1.9 Concluding remarks

The international obligations and standards illustrated in this chapter are either applicable to specific wildlife species or their habitats, or contribute to a holistic concept of sustainable wildlife management as part of each country's efforts to preserve biodiversity and ensure the sustainable use of its

components. Some obligations pose significant limits to the sovereignty of countries in regulating wildlife use and conservation (as in the case of CITES and CMS Appendix-I listed species), so state parties have limited flexibility in translating them into national legislation, unless they adopt a stricter approach than that adopted at the international level. On the other hand, other international commitments are of a more general nature, adopting broad principles, methods and processes (most notably, the Biodiversity Convention), so states have wider options in implementing them at the national level. Nonetheless, these broad principles and general obligations may have a highly innovative impact on the design of national legislation, particularly when introducing new concepts in a national legal framework (for instance, the participatory approach).

On the basis of the international legal framework on wildlife management, the following chapters will discuss the main elements of wildlife legislation, based on the experience of the FAO in advising member countries in the review of existing and drafting of new legislation on renewable natural resources⁵⁹ and on the identification of trends in national wildlife legislation in different regions of the world.⁶⁰ For each element, recommendations and legal options have been drawn up to provide guidance to national legal drafters that are embarking on reforms.

⁵⁹ See, for instance, the following earlier publications of the FAO Development Law Service: Cirelli, M.T. 2002. *Legal Trends in Wildlife Management*, FAO Legislative Study No. 74; Lindsay, J. 2004. *Legal frameworks and access to common pool resources*, FAO Legal Paper Online No. 39; and Rosenbaum, K. L. 2007. *Legislative drafting guide: A practitioner's view*, FAO Legal Paper Online No. 64. The FAO Legal Papers Online are available at www.fao.org/legal.

⁶⁰ Morgera, E., Wingard, J. and Fodella A.; 2009. *Developing Sustainable Wildlife Legislation in Central and Western Asia*, FAO/CIC. 2009. Cirelli, M.T. and Morgera, E. 2009. *Wildlife law and the legal empowerment of the poor in in Sub-Saharan Africa*, FAO Legal Paper Online No. 77; *Wildlife law and the legal empowerment of the poor in Sub-Saharan Africa: additional case studies*, FAO Legal Paper Online No. 79; Aguilar, S. and Morgera, E. 2009. *Wildlife law and the legal empowerment of the poor in Latin America* FAO Legal Paper Online No. 80; Tsioumani, E. and Morgera E., 2010. *Wildlife law and the legal empowerment of the poor in South-East Asia and Oceania* FAO Legal Paper Online No. 83. These are all available at www.fao.org/legal.