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Decentralised International Cooperation

Enhancing Conservation and Sustainable Management of Transboundary Natural Resources

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A chi mi ha insegnato che
i sogni non sono mai troppo grandi e, con pazienza,
mi ha incoraggiato a realizzarli.

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List of Abbreviations

ACHPR	African Convention/Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Report
AJIL	American Journal of International Law
ALPARC	Alpine Network of Protected Areas
ANAC	Mozambican National Administration of Conservation Areas
ASCI	Areas of Special Conservation Interest
BAP	Biodiversity Action Plan
CBD	Convention on Biological Diversity
CBNRM	Community-based Natural Resource Management
CBO	Community-based organization
CNPA	Carpathian Network of Protected Areas
CNPPA	(IUCN) Commission on National Parks and Protected Areas
COE	Council of Europe
COP	Conference of the Parties
COSO	Committee of Senior Officials
CPA	Communal Property Association
DENR	Department of Environmental and Natural Resources
EGTC	European Grouping of Territorial Cooperation
ECG	Euroregional Cooperation Grouping
ECJ	European Court of Justice
ERDF	European Regional Development Fund
EU	European Union
GL	Great Limpopo
GLTP	Great Limpopo Transfrontier Park
IACHR	Inter-American Court of Human Rights
ICA	Intensive Conservation Area
ICCAs	Indigenous peoples and community conserved territories and areas
ICGJ	International Courts of General Jurisdiction
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ITHCP	Integrated Tiger Habitat Conservation Programme
IUCN	International Union for Conservation of Nature
JMB	Joint Management Board
JMC	Joint Management Committee
JPMC	Joint Park Management Committee
KAZA	Kavango Zambezi
MAB	Man and the Biosphere
MEA	Multilateral Environmental Agreement
MIDP	Master Integrated Development Plan
MNC	Multinational Corporation
MOU	Memorandum of Understanding
NACSO	Namibian Association of Community-based Natural Resource Management Support Organisation
NGO	Non-governmental organisation
OUP	Oxford University Press
PCA	Permanent Court of Arbitration

PCIJ	Permanent Court of International Justice
PoWPA	Programme of Work on Protected Areas
RBS	Regional Biodiversity Strategy
SANParks	South African National Parks
SAC	Special Area of Conservation
SADC	Southern Africa Development Community
SDG	Sustainable Development Goal
SPA	Special Protection Area
SWI	Shared Watercourses Institution
TC	Transfrontier Conservation
TBNRM	Transboundary Natural Resources Management
TBPA	Transboundary Protected Area
TBR	Transboundary Biosphere Reserve
TFCA	Transfrontier Cooperation Area
TPB	Transboundary Protection of Biodiversity
TPW	Transboundary Protection of Wildlife
UN	United Nations
UNECE	United Nations Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
WCED	World Commission on Environment and Development
WCMC	World Conservation Monitoring Centre
WDA	Wildlife Dispersal Area
WDPA	World Database on Protected Areas

Chapter 1. Introduction: reconfiguring cooperative governance of shared resources

1.1 Framing the problem

The cooperative governance of transboundary natural resources has been traditionally defined and studied in terms of inter-State cooperation. Notwithstanding the former, there is a long-lasting practice of cross-border collaboration among the populations and authorities placed in borderland areas that developed under a variety of forms and is not always acknowledged by central governments. These decentralised cooperative mechanisms, their governing principles, and their main institutional elements define the scope of this research. The comparative analysis of four selected case studies might serve to identify useful elements, if any, for the governance of shared resources and spaces with the involvement of sub-national actors; notwithstanding the fact that decentralised cooperative experiences are context-specific.

1.1.1 Nature crossing borders: transboundary natural resources

The Earth system hosts a 'web of life'[1] of incomparable value; the concept of biological diversity – or biodiversity[2] – exemplifies the variety of life resulting from countless natural components and their interactions. Biodiversity is borderless, in the sense that animals do not respect man-made frontiers, rivers often traverse many countries along their path, and forests cover large areas cutting across jurisdictional divisions. Although biodiversity is borderless, it has been fragmented by artificially imposed boundaries, at times following natural features such as mountain ranges and rivers. Some boundaries have been drawn in order to apportion natural resources between neighbouring States, while some others have had unintentional effects on

[1] Secretariat of the Convention on Biological Diversity. 'Sustaining Life on Earth: How the Convention on Biological Diversity Promotes Nature and Human Well-being' (April, 2002) https://www.cbd.int/iyb/doc/prints/cbd-sustain-en.pdf accessed 2 March 2016

[2] This term is defined in Art. 2 of the Convention on Biological diversity as 'the variability among living organisms from all sources including, inter alias, 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'. Convention on Biological Diversity (Rio de Janeiro) 5 June 1992, in force 29 December 1993, 31 ILM 822 (1992). Hereinafter, Biodiversity Convention, also known as CBD.

their conservation and management, for example, by artificially separating small and declining populations of endangered species.[3]

International borders are established according to the logic of power and the course of history, and not on the basis of ecological criteria. Yet, issues of ecosystem integrity cannot be solved by adjusting international borders to reflect environmental conditions and put a resource under unilateral appropriation for many reasons (e.g., political, historical, dimensional, for reasons of expediency: how could you contain migratory species?).[4] When natural resources are not enclosed within national boundaries and subjected to the jurisdiction of a single State, they can be characterised as transboundary[5] and shared. The conservation and management of such resources challenge State-centric logic and demand cooperative efforts among neighbouring States that share them.

Defining transboundary natural resources is a challenging task. *Natural resources* can refer to both living and non-living resources (oil, gas, coal, etc.), which leads to the distinction between renewable and non-renewable. This thesis focuses on the conservation and sustainable management of living resources, 'plants, animals, micro-organisms, and the non-living elements of the environment on which they depend', that is their habitats and relating species, their ecosystems and biodiversity.[6] For Perrez, *transboundary* natural resources can be generally used to refer to 'resources which are on or straddle boundaries and thus fall under the

[3] Habitat fragmentation is affecting jaguars across the U.S.A.-Mexico border as described in Brian King and Sharon Wilcox, 'Peace Parks and Jaguar Trails: Transboundary Conservation in a Globalizing World' (2008) 71 GeoJournal 221. Similarly, protected and endangered species waterfowls, fish and amphibians inhabiting transboundary wetlands are also affected by inappropriate conservation across the borders as explained in Jonathan Verschuuren, 'The Case of Transboundary Wetlands Under the Ramsar Convention: Keep the Lawyers Out!' (2008) 19 Colorado Journal of International Environmental Law and Policy 49.

[4] On this point, Benvenisti recalls the only three cases in which political borders were drawn in a way to ensure unilateral control over natural resources and their effective management. See Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use* (2004) 23–24.

[5] In this thesis, the following words are used as synonyms: transboundary, transfrontier, cross-border, transnational, and international. However, it is acknowledged that, when referring to inter-State/intergovernmental cooperation or more generally relations, the word 'international' is preferred among the others.

[6] On this point see Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 586.

jurisdiction of more than one State'.[7] Hence, transboundary resources are *shared*. The issue of defining shared natural resources was addressed in the framework of the UNEP Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States. The proposal that received the most support reads as follows: 'The term "shared natural resource" means an element of the natural environment used by man which constitutes a biogeophysical unity and is located in the territory of two or more States'.[8] Notwithstanding the general consensus around the definition, no conclusion was formally reached on this matter.

The concept of transboundary natural resources could be seen as a synonym of transboundary biodiversity[9] or rather framed within it. In fact, the definition of biodiversity, provided in Article 2 of the Biodiversity Convention, refers to organisms, ecosystems and species as smaller components of a whole system. Therefore, dealing with transboundary natural resources enables a conceptualisation that is linked to the holistic concept of biodiversity, but is also independent from it and valuable despite its more limited scope. Transboundary natural resources can be interpreted as embracing diverse terrestrial and marine ecosystem units (such as wetlands, forests, lagoons, and coral reefs), but also terrestrial and marine species that move across boundaries.[10] In this thesis, *transboundary natural resources*

[7] Furthermore, Perrez cites five examples included in 1975 Report of the UNEP Executive Director on environmental cooperation over shared resources, namely 'i) an international water system, including both surface and ground water; ii) an air-shed or air mass above the territories of a limited number of States; iii) enclosed or semi-enclosed seas and adjacent coastal waters; iv) migratory species which move between the waters of several States; and v) a special ecosystem spanning the frontiers between two or more States, such as a series of mountains, forests or areas of special conservation nature'. In addition, he argues that even the whole globe can be conceived as a shared resource. UNEP, Report of the Executive Director, 'Cooperation in the field of the environment concerning natural resources shared by two or more States', (20 February 1975) UN Doc.. UNEP/GC/44, available at https://undocs.org/UNEP/GC/44 accessed 27 June 2017. Franz Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law* (Springer 2000) 300–301.

[8] UNEP/IG.7/3, 17 cited in the Report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or Mores States (1978), 17 ILM 1091.

[9] There is an increasing body of literature on transboundary biodiversity governance, see, for instance, Louis J. Kotzé and Thilo Marahun (eds), *Transboundary Governance of Biodiversity* (Brill Nijhoff 2014). Nevertheless, the definition of biodiversity, provided in Article 2 of the Biodiversity Convention, refers back to organisms, ecosystems and species as smaller components of a the whole system. Hence, dealing with transboundary natural resources enables a conceptualisation that is linked to the totalising concept of biodiversity, but also independent from it and valuable despite its more limited scope.

[10] Focusing only on migratory species would be too restrictive since there are non-migratory species that would have to be disregarded despite having a transboundary range. Migratory species can rather be comprised within the concept of transboundary wildlife, following the approach adopted by the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 23 June 1979; in force 1 November 1983, 19 ILM 15 (1979); hereinafter, Convention on Migratory Species. According to Article 1(1)(a) of CMS, 'migratory species' are defined as such when 'a significant portion of [their] members cyclically and predictably cross one or more national jurisdictional boundaries'; nevertheless, the CMS COP has interpreted

are conceived in a broad sense and within their surrounding environment. The definition proposed for this concept refers to any element coming from nature that can be used by people[11] and is shared by two or more countries for geographical or ecological reasons, thus encompassing ecosystems and broad natural spaces, like mountain ranges.[12] This definition implies two key aspects: that of use and that of proximity. First, people and States usually have the necessity and interest in using shared natural resources and are concerned with preserving them. In this context, they might have a greater incentive to regulate such use and cooperate to this end. Second, the idea of proximity means that adjoining States, sub-national authorities, and local communities are strongly connected, not only through geographical location,[13] but also by the presence of an international resource that has a direct impact on their lives in terms of sustenance and survival: an international resource with localised relevance.

For example, wetlands are among the most productive ecosystems of the planet: they are habitats for a large number of animals and plants, and provide a wide range of ecosystem services[14] for human beings (e.g., water filtration and recreational uses). In the case of a wetland located in a border area and shared by two countries, its sustainable use and appropriate management are primary concerns for the people inhabiting this area (local communities) and the local governments administering it across the border, perhaps more so than for the

this definition in an extensive manner as confirmed by the presence of transboundary species – not only migratory ones – within the Annexes to the Convention. For further details, see SA Jeanetta Selier and others, 'The Legal Challenges of Transboundary Wildlife Management at the Population Level: The Case of a Trilateral Elephant Population in Southern Africa' (2016) 19 Journal of International Wildlife Law & Policy 101, 116.

[11] Indeed, for Cano natural resources are 'physical natural goods, as opposed to those made by man (which are termed cultural resources)' and are constitutive elements of the human environment. Cano is cited in Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 15.

[12] This thesis does not look at marine examples since marine species and ecosystems require a careful analysis and additional research efforts.

[13] For Blanco and Razzaque '[g]eographical proximity or contiguity is the key aspect that determines which resources are "shared" between more than one State as they do not fall exclusively under the territory of a State'. Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar 2011) 87.

[14] The 2005 Millennium Ecosystem Assessment defines ecosystem services as 'the benefits that people obtain from ecosystems' and divides them into four categories: provisioning, regulating, cultural, and supporting service. *Provisioning services* are material or energy outputs from ecosystems (e.g., food, wood and raw materials); *regulating services* are those provided by plant, animals or other organisms (e.g., pollination, prevention of soil erosion, water purification, carbon sequestration and storage); *cultural services* encompass recreation and tourism, mental and physical health, and spiritual experience; and *supporting services* enable the maintenance of genetic diversity, like soil formation, photosynthesis, etc. For further information see Millennium Ecosystem Assessment, *Ecosystem and Human Well-Being: Synthesis* (Island Press 2005).

populations of the countries as a whole and, potentially, central governments. National development plans entailing hydropower generation or industrial development may affect a river upstream of the wetland with serious consequences for the ecological status[15] of this ecosystem. Such a wetland would be an example of an international ecosystem with localised relevance; its international character is determined by its geographical location in a border area, while its localised relevance is influenced by the different degrees of interest that relevant actors pay to the ecological status of this ecosystem.

Transboundary natural resources, as defined in this thesis, aim to reflect the complexity of nature and the intricate connections among its components, in line with the definition of biodiversity provided in the Biodiversity Convention that covers 'diversity within species, between species and of ecosystems'.[16] Therefore, the conservation and sustainable management of transboundary natural resources rely on the adoption of the ecosystem approach,[17] which not only addresses the aforementioned complexity, but also overcomes the mismatch between ecological and political boundaries characterising transboundary resources.[18] Indeed, the Conference of the Parties of the Biodiversity Convention (CBD COP) clarifies that ecosystems, as defined in this same Convention,[19] do not belong to any particular spatial unit or scale, but rather 'can refer to any functioning unit at any scale' that has to be determined by the problem

[15] Since water resources are an essential part of wetlands the idea of ecological status can be derived from that of the EU Water Framework Directive, Annex V (Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy). In this sense, the ecological status of a wetland can be interpreted as the quality of the biological community inhabiting the wetland, in terms of abundance of aquatic fish flora and fish fauna, the hydromorphological features of surface water (e.g., quantity and water flow, water depths and structures of its stream), and chemical characteristics (such as nutrients, salinity, etc.).

[16] *Supra*, note 2.

[17] This is 'a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way'. CBD COP Decision V/6 'Ecosystem approach', (22 June 2000) UN Doc. UNEP/CBD/COP/5/23, available at https://www.cbd.int/decision/cop/?id=7148, accessed 22 June 2017.

[18] Marauhn and Böhringer highlight: 'Instead of protecting particular categories of species or particular ecosystems, [the Biodiversity Convention] considers biodiversity as a whole, including all its parts and in particular its genetic bases. Applying an integrated approach requires that one pays attention to the many links within an ecosystem between many distinct species'. Thilo Marauhn and Ayşe-Martina Böhringer, 'An Ecosystem Approach to the Transboundary Protection of Biodiversity' in T Marauhn and L Kotzé (eds), *Transboundary Governance of Biodiversity* (Brill 2014) 95. On the main elements characterising the ecosystem approach, including its human component, see Jutta Brunnee and Stephen J Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (1997) 91 The American Journal of International Law 26, 55; Arie Trouwborst, 'The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages' (2009) 18 Review of European Community & International Environmental Law 26, 28.

[19] Art. 2 of the Biodiversity Convention defines ecosystem as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'.

addressed:[20] an ecosystem is a 'functional unit'.[21] Therefore, when considering transboundary natural resources, the conservation and management unit is certainly transnational, but its precise delimitation varies depending on the resources considered and the actors involved. The ecosystem approach pays attention to human interaction with the environment and, in particular, recognises indigenous peoples and local communities as important stakeholders, thus adding a cultural dimension to this approach.[22]

1.1.2 Common pool resources in a circumscribed geographical area

Transboundary natural resources can in some cases be characterised as 'common pool resources'.[23] Common pool resources have the following characteristics: they are openly accessible; preventing their exploitation is often difficult; and their use by one subject has an impact on potential use by other subjects, in absolute or relative terms as well as in qualitative and/or quantitative terms. Common pool resources are not necessarily open access, but may be shared by a limited number of countries; therefore, they are 'partially excludable and rival',[24] and can be sustainably governed via the adoption of collective actions.[25] Indeed, cooperation is

[20] CBD COP Decision V/6, Annex, A.1.
[21] Biodiversity Convention, Art. 2.
[22] CBD COP Decision V/6, Annex, B.6, Principle 1. On multi-stakeholder engagement see also Principle 12.
[23] Ostrom defines them as 'natural or man-made resource system[s] that [are] sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from [their] use'; Elinor Ostrom, *Governing the Commons* (1990) 30. According to Lovecraft, a common pool resource must meet two requirements: '[it] is one (a) from which it is difficult to exclude people and (b) which, when used by one person cannot be used by any other person', this is the case of fisheries or water. Amy Lauren Lovecraft, 'Transnational Environmental Management: U.S.-Canadian Institutions at the Interlocal Scale' (2007) 37 American Review of Canadian Studies 218, 221.
[24] Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use*, *cit.*, (n 4) 32. Natural resources can be categorised as public goods, private goods, toll goods, and common pool goods. Such a categorisation is based on two elements: (1) the feasibility of exclusion – i.e., to what extent it is difficult to control access to the good – and (2) the nature of consumption, which can be subtractive (when person A consumes a good, person B will not be able to consume the same good anymore) or joint (when person A consumes a good without impacting on the availability of that good for other people, or when more than one person can benefit from the same good at the same time). Pure public goods are 'non-excludable' and 'non-rival', hence, it is difficult to control access to them and they can be subjected to joint consumption, for example clean air or high seas. On the opposite side of the spectrum there are private goods, which are 'excludable' and 'rival' since access to them can be easily controlled and the benefits are subtractive, as it is the case for crops planted in a private field. Between these two categories there are toll goods and common pool goods. The former are 'excludable' but 'non-rival', like those in game reserves and parks: access to them can be easily controlled and the consumption benefits can be enjoyed jointly by several users. Instead, for the latter the feasibility of exclusion is difficult and the consumption of benefits is subtractive as in the case of pastures or forests. James Thomson and Karen Schoonmaker Freudenberger, 'Crafting Institutional Arrangements for Community Forestry' (1997) <http://www.fao.org/docrep/w7483e/w7483e00.htm#Contents>. See also Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use*, *cit.*, (n 4) 32–33.
[25] Benvenisti applies the theory of collective action to transboundary resources stressing that, by coordinating their activities and excluding the access of external actors, sharing States can prevent their depletion and avoid the 'tragedy of the commons'

more beneficial than unilateral action since apportioning these resources is difficult if not impracticable and ecologically unreasonable: how can you apportion a water basin? How can you divide a herd of elephants or a school of fish?[26] Moreover, cooperation among sharing States increases the possibility of excluding outsiders from accessing these resources as well as regulating access among insiders that is otherwise theoretically unlimited.

Benvenisti highlights that prospects for cooperation depend on both the number of States involved and their ability to coordinate and monitor the activities of domestic actors.[27] The role and interest of sub-national actors is crucial since transboundary natural resources can be common pool resources with localised relevance. Therefore, it is crucial to ascertain what is held in common, who these commons belong to, and, who manages them.[28] First, delimiting transboundary natural resources and defining the socio-cultural contexts in which they are inserted requires a careful analysis in each specific case due to the dynamic character of both socio-cultural and ecological components. Shared natural resources are not necessarily attached to a geographical space, as in the case of migratory species, and their categorisation as common pool resources can change over time and depends on the jurisdiction or cultural reference system considered. Then, it is important to identify both the actors interested in a determined shared resource and why they are important for its appropriate management.

Both Murphree and Lovecraft clarify that the 'commons' label does not imply open access *tout court*; therefore, clear rules should define access to or exclusion from these resources and

deriving from unilateral actions. Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use*, *cit.*, (n 4) 33. The tragedy of the commons was theorised by Garret Hardin who maintained that, when a resource is open to all without limit, every single user will act independently aiming to increase its individual benefits and consume the maximum extent possible of such resource. This consumption race perpetuated by each individual will decrease the availability of the resource and eventually lead to its complete depletion. See Garret Hardin, 'The Tragedy of the Commons' (1968) 162 Science 1243.

[26] It can be argued that some resources are easier to apportion than other. For instance, dividing a forest into shares is easier than allotting portions of a river (since water flows through boundaries), but the ecological processes that happen within both a forest and a river cannot be enclosed within national boundaries and pertain to the ecosystem considered as a whole.

[27] Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use*, *cit.*, (n 4) 33.

[28] Marshall W Murphree, 'Protected Areas and the Commons' [2002] The Common Property Resources Digest 1, 3; Lovecraft, 'Transnational Environmental Management: U.S.-Canadian Institutions at the Interlocal Scale', *cit.*, (n 23) 221.

ensure protection through controlled use.[29] More importantly, access and management rights should be granted to the actors living in direct contact with transboundary natural resources, namely sub-national authorities and local communities. Hence, in this thesis, transboundary natural resources are characterised as common pool resources located in close proximity to international borders and actively governed – across boundaries – by local institutions and people inhabiting those areas.

1.1.3 Governing transboundary natural resources: traditional and decentralised forms of cooperation

The conservation and management of natural resources are highly interdependent: they can be seen as two sides of the same coin, both contributing to the governance[30] of natural resources. The use of natural resources is unavoidable since human life and activities are necessarily located within the natural environment and substantially depend on these resources, like water.[31] The necessity to use a resource raises concerns over its exploitation rate and modalities,

[29] Murphree explains that '[open access] resources are the property of no-one and are available to everyone', hence, 'people use, opportunistically, the resources, but do not manage them'. Instead, when resources are subjected to a communal property regime, they are managed under a regime establishing clear rules on access to or exclusion from proprietorship. Marshall W Murphree, 'Communities As Resource Management Institutions' [1993] Gatekeeper Series 12, 3. Similarly, Lovecraft argues that if a resource is considered a commons, 'open access does not necessarily follow for everyone who comes across that resource or geographic location'; then, she provides a practical example: 'In Alaska, subsistence hunting rules provide open access to hunting some species, such as walrus, for some groups of people and not others in order to preserve indigenous cultural practices and harvest levels'. Lovecraft, 'Transnational Environmental Management: U.S.-Canadian Institutions at the Interlocal Scale', *cit.*, (n 23) 221. On this matter see also Jan Glazewski and Alexander Ross Paterson, 'Protected Areas and Community-Based Conservation' in Jan Glazewski (ed), *Environmental Law in South Africa* (Butterworths 2000) 334.

[30] There is no single definition of governance. Generally speaking, it can refer to how society defines its goals and priorities: the processes used to take decisions and implement them, the actors involved, and the structures set in place to this end. It relates to the interactions among the legislative, institutional, and political frameworks operating in a specific context and relevant for the aforementioned goals and priorities. Therefore, governance of natural resources encompasses the conservation and development objectives connected to such resources, the institutional structure useful to achieve them, the relevant legal and political orders, the actors involved in decision-making and implementation of decisions as well as management activities. Similarly, 'good governance' does not have a standardised definition; however, it is usually linked to the realisation of human rights and is conceived as essential for sustainable development. Several international organisations have provided different definition of governance; for instance, IUCN defines it as 'the interaction among political and social structures, processes and traditions that determine how power and responsibilities are exercised, how decision are taken, and how citizens or other stakeholders have their say', Barbara Lausche, *Guidelines for Protected Areas Legislation* (IUCN, Gland 2011) 40. For Paterson, the characterising aspect of governance is authority. For example, in the context of protected areas, governance relates to 'how the power is allocated and exercised in the protected areas, and the manner in which those who exercise such power are held accountable', Alexander Ross Paterson, 'Protected Areas Governance in a Southern African Transfrontier Context' in Louis J Kotze and Thilo Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill Nijhoff 2014) 168–170. Other definitions of governance have been collected by Lausche, *Guidelines for Protected Areas Legislation, cit.*, 41. For a general discussion on the definition of governance see Thomas G Weiss, 'Governance , Good Governance and Global Governance: Conceptual and Actual Challenges' (2000) 21 Third World Quarterly 795.

[31] In this regard, Dudley notes 'few if any areas of the land, inland waters and coastal seas remain completely unaffected by direct human activity, which has also impacted on the world's oceans through fishing pressure and pollution. If the impacts of

that is to say its management, as well as over its preservation in order to ensure its continuous availability. The Biodiversity Convention acknowledges the strong link between conservation and sustainable use by including both among its goals.[32] Therefore, sustainable use and conservation are not alternative objectives, rather, sustainable use through appropriate management is instrumental to conservation. The ecosystem approach moves along similar lines by aiming to combine conservation and use.[33]

Managing natural resources effectively is a complex task that requires the intervention of numerous institutional and non-institutional actors, the combination of their diverging interests and needs with those of the environment itself, the adoption of an integrated (i.e., ecosystem) approach since natural resources are not located in a vacuum and are closely interconnected, as for surface and ground waters and the species living therein. The mismatch between political and ecological boundaries brings additional challenges[34] since natural resources are subjected to overlapping legal regimes, competing regulatory authorities, diverging socio-economic conditions and resource-use strategies. Shared natural resources represent a source of interdependence among the States sharing them due to their indivisibility, thus fostering

transboundary air pollution and climate change are factored in, the entire planet has been modified'. Nigel Dudley (ed), *Guidelines for Applying Protected Area Management Categories* (IUCN 2008) 12. The human impact on the Earth and its systems is addressed in the narrative of the Anthropocene, that is a new time in geo-ecological history where human activity is influencing ecological outcomes, including biodiversity loss. The term 'Anthropocene' was coined by Paul J. Crutzen and Eugene F. Stoermer, see Paul J Crutzen and Eugene F Stoermer, 'The Anthropocene' (2000) 41 Global Change Newsletter 17; Paul J Crutzen, 'The Effects of Industrial and Agricultural Practices on Atmospheric Chemistry and Climate during the Anthropocene' (2002) 37 Journal of Environmental Science and Health 423; Will Steffen, Paul J Crutzen and John McNeill, 'The Anthropocene: Are Humans Now Overwhelming the Great Firces If Nature?' (2007) 36 Ambio 614. Kotzé discusses the concept of the Anthropocene in relation to the transboundary governance of biodiversity, Louis J Kotzé, 'Transboundary Environmental Governance of Biodiversity in the Anthropocene' in Louis J Kotzé and Thilo Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill Nijhoff 2014).

[32] Biodiversity Convention, Article 1. For Scholtz the fact that 'the CBD distinguishes use from conservation implies that the two concepts are somewhat independent.' Conservation embraces protection and preservation, which 'besides management of natural resources, includes restoration and safeguarding of ecological processes and genetic diversity in order to sustain their maintenance through sustainable utilization. Sustainable utilization is pivotal to conservation.' See Werner Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issue of Biodiversity and Custodial Sovereignty' (2005) 2 Macquarie Journal of International and Comparative Environmental Law 9, 14–15. To further explore the meanings and overlaps between the 'managerial terms' protection, preservation, conservation and sustainable use, in relation to biodiversity, see Rosemary Rayfuse, 'Biological Resources' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 370 ff.

[33] CBD COP Decision V/6, Annex, B.6, Principle 10.

[34] For instance, Glazewski addresses this point by pointing at the value of transboundary protected areas, which are usually created by adjoining protected areas of two or more countries across international borders. He says: '[Transboundary protected areas] make sense from and ecological point of view as ecosystems do not recognise political borders. In Africa, political boundaries are often located at the worst possible ecological location'. Glazewski and Paterson, 'Protected Areas and Community-Based Conservation', *cit.*, (n 29) 340.

cooperative actions.[35] Shelton highlights that the legal status of shared resources is an unresolved and debated issue; nevertheless, they constitute a limit to State sovereignty since 'there are international obligations that arise from the fact that a resource is shared',[36] *in primis*, the duty to cooperate and the principle of equitable use, which are widely recognised in international environmental law[37]. This thesis looks at instances of *active* cooperation in which States and sub-national entities engage across borders in legal, political, and financial terms.[38]

According to a traditional international law approach, sharing countries would be considered the only qualified actors to enjoy unlimited access to transboundary (i.e., common pool) resources. However, it can be argued that they are not the only relevant actors, and that their access to resources is not unlimited. International environmental law[39] recognises the

[35] Benvenisti explains it clearly: "Nature implies that riparian States share property. This is the starting point for further collective action". See Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use*, *cit.*, (n 4) 30.

[36] On this point see Laura Pineschi, 'L'evoluzione Storica' in Alessandro Fodella and Laura Pineschi (eds), *La protezione dell'ambiente nel diritto internazionale* (2009) 33.

[37] Both the duty to cooperate and the principle of equitable use are included in several instruments: the UNEP Draft Principles; The Law of Transboundary Aquifers, UN Doc. A/RES/63/124 (15 January 2009); the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki) 17 March 1992, in force 6 October 1996, 31 ILM 1312 (1992), hereinafter, Helsinki Water Convention; the Convention on the Law of the Non-Navigational Uses of International Watercourses (New York) 21 May 1997, in force 17 August 2014, 36 ILM 700 (1997), hereinafter, UN Watercourses Convention. On this point see also Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 336 ff.; Dinah Shelton, 'International Cooperation on Shared Natural Resources' in Sharelle Hart (ed), *Shared Resources: Issues of Governance* (IUCN 2008) 13; Alessandro Fodella and Laura Pineschi (eds), *La Protezione Dell'Ambiente Nel Diritto Internazionale* (Giappichelli 2009) 110 ff.; Nadia Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers' (2015) 24 Review of European, Comparative & International Environmental Law 4, 14. For the 'UNEP Draft Principles' refer to the Report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or Mores States, 'Draft Principles of Conduct in the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States' (19 May 1978) UN Doc. UNEP/GC6/CRP2 approved by the UNEP Governing Council, 17 ILM 1091(1978).

[38] This is the case of Transfrontier Conservation Areas (TFCAs) established in the Southern African Development Community (SADC) region. TFCAs have been purposely designed to foster cooperation across international borders to achieve conservation and sustainable management of shared wildlife resources. In contrast, the Korean Demilitarized Zone (DMZ) was created as a 4-kilometer wide buffer zone between the northern Democratic People's Republic of Korea and the southern Republic Korea with the Armistice Agreement in 1953. Although established for military reasons, the DMZ has become an important wildlife hot-spot. In this case, transboundary conservation has been a casual rather than a planned result in a non-cooperative context and interactions across border are completely absent. For a detailed description of the Korean DMZ see Kim Kwi-Gon, *The Demilitarized Zone (DMZ) of Korea: Protection, Conservation and Restoration of a Unique Ecosystem* (Springer 2013). Further information on TFCAs at the SADC website dedicated page http://www.sadc.int/themes/natural-resources/transfrontier-conservation-areas/ accessed 3 November 2015. The idea of active cooperation is in line with the concept of 'positive peace' discussed by Perrez in connection to the general duty to cooperate that emerges from the UN Charter. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 257 and 266.

[39] International environmental law can be defined as a 'specialised and (relatively) autonomous' corpus of law, institutions, and practices that has emerged after the 1970s and developed rapidly through conventions and practice. Addressing environmental concerns has required the adoption of a new perspective, at times alternative to that of general international law. This is the case of transboundary natural resources: the classic concept of absolute sovereignty has been challenged and limited since the States sharing them have, not only, to preserve the ecological integrity of these resources, but also consider the equivalent sovereignty, rights, and interests of other concerned States, as reflected in Principle 1 of the UNEP Draft

importance of other actors than States in both law-making and law-enforcement activities, similarly to international human rights law. The expanded role of legal and natural persons operating within and across States has been confirmed by international soft law and binding legal instruments.[40] Therefore, traditional inter-State cooperation is not sufficient to frame transboundary conservation and management of shared natural resources, which develop across multiple governance levels and involve different actors. Environmental lawyers and practitioners are only starting now to look at instances of cooperation involving sub-national authorities and local communities,[41] the primary focus of this thesis.

1.1.4 The emergence of sub-national actors

This thesis looks at a wide range of sub-national actors including both intermediate jurisdictions and local communities. Sub-national administrative structures vary across countries and include departments, regions, provinces, districts, and municipalities; these differences are described in more detail, where relevant, in the case studies. Agenda 21[42] emphasises the prominence of *local authorities*[43] as 'the level of governance closest to people' and their primary role in achieving sustainable development.[44] *Local communities* encompass common citizens as well as indigenous peoples, or other forms of traditional societal structures, like fishery

Principles.See the Report of the ILC Study Group, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN Doc. A/CN.4/L.682 (2006).

[40] For example, the whole 1992 Rio process and especially Agenda 21 focus on the role of non-State actors in environmental decision-making and in the implementation phase. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [(Aarhus) 25 June 1998, in force 30 October 2001, 38 ILM 517 (1999); hereinafter, Aarhus Convention] introduces the rights of the public, as to say individuals and their associations, in relation to environmental matters to be implemented at national level: access to environmental information, public participation in environmental decision-making, and access to justice. According to Sands, the rationale behind these norms is valid at the international level as well. Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 86–87.

[41] In this regard see Alessandro Fodella, 'I Soggetti' in Alessandro Fodella and Laura Pineschi (eds), *La protezione dell'ambiente nel diritto internazionale* (Giappichelli 2009) 40.

[42] Agenda 21: Programme of Action for Sustainable Development, UN Doc. A/Conf.151/26 (1992). Hereinafter, Agenda 21.

[43] The expression 'local authorities' is used for simplification purposes and is preferred over others in line with Agenda 21. Nevertheless, other expressions are also used as synonyms, including sub-national authorities, sub-State entities, local governments, and intermediate jurisdictions.

[44] Agenda 21, Chapter 28, paragraph 1.

communities.[45] This concept is purposely conceived in broad terms in order to be as inclusive as possible given the heterogenous composition of the communities relevant to the case studies, as well as to allow a move beyond definitions and criteria for their recognition as provided at national and international levels.[46] Therefore, communities are 'cohesive local units'[47] comprising an identifiable group of individuals that inhabit and operate, including by using natural resources, within a defined jurisdiction.

In some contexts, local authorities are the political reflection of communities,[48] while, in other cases (as in post-colonial countries) local authorities are the decentralised expression of central governments and are supposed to represent the interests of the whole community. However, local communities in rural and remote areas that do not feel represented tend to gather around traditional leaders. Therefore, these two realities – the administrative and the community – operate in parallel, follow different logics though not necessarily in conflict with each other, and need to interact. Interaction may be more complex where indigenous peoples or traditional communities are involved, since they might have exploitation rights and management practices that could contrast not only with the interests of central authorities and

[45] In this thesis, the concept of 'local communities' is used in general terms to identify the inhabitants of a circumscribed area that share their living space, have access to a common pool of natural resources, and interact with each other. The composition of local communities is context-specific and can include indigenous peoples. Local communities could be permanently settled or mobile, they usually 'have extended residence in a given environment, a rich tradition in their relationship with the land and the natural resources, well-established customary tenure and use practices, effective management institutions and a direct dependence on the resources for their livelihoods and cultural identity. They too claim "rights" to their land and natural resources', see Grazia Borrini-Feyerabend and others, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation* (IUCN 2004) 8. The identification of local communities is contended in international law, for an in-depth discussion on this topic, see Adriana Bessa, 'Traditional Local Communities in International Law' (Doctoral Dissertation, European University Institute 2013). Defining 'indigenous peoples' goes beyond the scope of this thesis; however, it is important to acknowledge that this concept has been extensively debated in international law. Although a comprehensive definition of 'indigenous peoples' is missing due to historical and cultural differences among the various groups, as well as the refusal of indigenous peoples themselves to be defined, a few distinctive criteria have been elaborated at the international level in order to assess the applicability of indigenous rights. For further details refer to the work of the Working Group on Indigenous Populations (a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights operating since 1982), the Permanent Forum on Indigenous Issues, and the UN Special Rapporteur on the Rights of Indigenous Peoples, in particular Erica-Irene Daes; see also Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002). Fodella notes that some MEAs explicitly recognise the importance of indigenous peoples and enhance their role in environmental protection. Sometimes, such prerogatives are borrowed for local communities more generally. Fodella, 'I Soggetti', *cit.*, (n 41) 54.

[46] Arguably states also define local communities for political ends, so that they can be entitled to certain rights (e.g., property and cultural rights) or, more often, be excluded from enjoying these rights.

[47] Marshall W Murphree, 'Protected Areas and the Commons' [2002] The Common Property Resources Digest 1, 2.

[48] In this case local authorities have a traditional character and can be identified as non-State actors.

development agendas, but also with that of local authorities and the general environmental interest.[49] Therefore, it is crucial to find a common path bringing together local authorities – that follow legal formality – and local communities – that follow traditional practices – and clarify the role of the State, if any, in cross-border arrangements.[50] In the case of transboundary natural resources, sub-national interaction happens within countries and across countries, thus requiring the identification of the most appropriate partner across borders.

1.1.5 Defining 'decentralised international cooperation'

Traditionally, intergovernmental agreements have been considered the sole means for channelling cooperation; nevertheless, it can be argued that the effective protection and management of shared natural resources can be better ensured by cross-border agreements involving sub-national authorities and local communities. Decentralised management of natural resources is recognised among the principles of the ecosystem approach and is said to ensure efficiency, effectiveness, and equity by increasing the responsibility, ownership, accountability, and participation of local actors.[51] Although understudied, this phenomenon has *de facto* characterised natural resource governance in border areas and is now emerging in international environmental law in connection to watercourses, transboundary species, mountain regions, forests, etc. In each of these cases, the cross-border management unit varies and depends on the specific resource, ecosystem or natural space considered. Although the practical terms of

[49] Indigenous practices might not be in line with international environmental standards, as in the case of hunting protected or threatened species. Moreover, the access of local communities/indigenous peoples to natural resources could be restricted for preserving biodiversity, as in the case of some protected areas. There is an emerging literature on reconciling indigenous rights and biodiversity conservation, see Ellen Desmet, *Indigenous Rights Entwined with Nature Conservation* (Intersentia 2011). See also Federica Cittadino, 'Indigenous Rights and the Protection of Biodiversity: A Study of Conflict and Reconciliation in International Law' (Doctoral Dissertation, University of Trento 2017). A significant input to the development of indigenous peoples' rights connected with the environment is provided by global human rights treaties' monitoring bodies, like the Human Rights Committee. In this regard see Alessandro Fodella, 'Indigenous Peoples, the Environment, and International Jurisprudence' in Nerina Boschiero and others (eds), *International Courts and the Development of International Law* (Springer Netherlands 2013).

[50] According to Galligan non-State normative orders coexist and interact with state legal orders, but cannot be conceived as completely autonomous; see DJ (Denis James) Galligan, *Law in Modern Society* (Oxford University Press 2007).

[51] CBD COP Decision V/6, Annex, B.6, Principle 2.

cooperation need to be tailored to each specific case, natural resources can be subject to similar governance principles in general terms.

Cross-border cooperation over transboundary natural resources involving local authorities and local communities is labelled here as *decentralised international cooperation* and represents the main focus of this thesis. While the term 'decentralised' refers to the role of sub-national actors, the term 'international' qualifies cooperation in two ways: on the one hand, it clarifies that these actors connect across borders, on the other, it acknowledges the role of States in this process. In fact, the concept of decentralised international cooperation is not an alternative to traditional intergovernmental cooperation, but is supplemental to it, since it aims to reconcile the multiple dimensions and actors involved in cooperation over shared resources from a governance, spatial, and ecological perspective.

With regards to governance, limiting cooperation to the intergovernmental level might not be an effective solution for protecting and managing shared resources appropriately; nevertheless, it is essential that national governments formally support cooperation and ensure their long-term commitment. Decentralised governance and the participation of sub-State entities and local communities administering and living in transnational natural spaces are crucial as well. These subjects are strongly connected to the resources, from a physical, cultural, and subsistence point of view.

While intergovernmental cooperative frameworks are essential to ensure the joint protection and management of shared natural resources from a formal point of view, they might not guarantee optimal results in practical terms. The effective governance of transboundary natural resources can be enhanced by cross-border agreements involving sub-State entities and local communities. Despite being divided by political borders, local authorities and communities share an indivisible natural space and are faced with similar challenges which

motivate them to work together.[52] Indeed, decentralised governance and the participation of local communities in transnational natural spaces takes place through a variety of formal and informal cross-border cooperative mechanisms implemented at sub-national level. It is difficult to identify a standardised scheme that exemplifies this form of cooperation based on currently available research. One of the aims of this thesis is to illustrate how decentralised international cooperation can work in practice by presenting four case studies.

Intergovernmental cooperation and decentralised international cooperation connect to different legal systems. While the former clearly belongs to international law, since it involves States who are the main international subjects, the affiliation of the latter is more problematic.[53] Decentralised international cooperation does not adopt the typical forms foreseen by international law, yet it has some similar features. The international element is ensured by the fact that cooperation is cross-border; however, the actors involved in decentralised cooperative mechanisms can be sub-national jurisdictions as well as local communities, including indigenous peoples. Hence, it is essential to study how the actors involved interact by looking at the relation between traditional cooperative mechanisms (for example, bilateral/multilateral agreements and transboundary protected areas) and decentralised cooperative mechanisms.

The spatial element has a political connotation: it is different from the natural space and relates to the territorial divisions created through borders. Political borders do not follow ecological criteria, thus dividing natural spaces and species, as well as local communities that share territorial, cultural, religious, and ethnic ties, and identify as a social unit, despite the existence of international boundaries. Decentralised cooperative mechanisms that include local authorities and communities could neutralise these political divisions and ensure integrity from both ecological and socio-cultural points of view.

[52] Lovecraft, 'Transnational Environmental Management: U.S.-Canadian Institutions at the Interlocal Scale', *cit.*, (n 23) 222.
[53] Ruffert hints at the difficulty to legally categorise transboundary regional and local cooperation. Matthias Ruffert, 'Transboundary Co-Operation between Local or Regional Authorities' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2009) paragraph 12 ff.

The ecological dimension refers not only to the idea of natural resources as an ecological unit, but entails another issue. Decentralised cooperative mechanisms should be integrated within existing intergovernmental cooperative frameworks in order to address ecological concerns at a macro- and micro-level. On the one hand, macro-cooperative frameworks, like transboundary protected areas, can potentially cover diverse natural spaces and ecosystems or resources (from mountain ranges to coastal areas, from water to animal species) if geographically or ecologically connected[54] for the achievement of conservation and ecological connectivity objectives over large areas. On the other hand, decentralised cooperative mechanisms serve to address specific concerns and management problems focusing on a delimited area or species and can be established within existing macro-cooperative frameworks. This solution goes beyond existing literature that focuses on specific ecosystems or resources and does not integrate macro- and micro-cooperative mechanisms.

1.2 Research framework and methodological aspects

This thesis studies decentralised international cooperation that is cross-border cooperation over shared natural resources involving sub-national actors (i.e., local authorities and local communities) to explore their role in the conservation and management of such resources and the (quasi-)institutional mechanisms created for this purpose, identified here as decentralised cooperative mechanisms. Hence, the main puzzle is based on the fact that sub-national actors are not typical subjects of international law; nonetheless, they have a protagonist role in conserving and managing transboundary natural resources, and this role is being operationalised through decentralised cooperative mechanisms. The emergence of these mechanisms can be facilitated by a broader intergovernmental cooperative context.

[54] Among the examples of the IUCN typology of TBPAs, Lausche lists 'a cluster of separated protected areas without intervening land' and explains 'It is not always politically or practically possible to include intervening land, and some successful transboundary initiatives have involved protected areas that are geographically separated but share common ecology or problems, and usually have some interchange between species'. Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 268.

The final goal of the research is to identify, through a comparative exercise, the common elements, if any, of the decentralised cooperative experiences analysed. On the basis of this analysis, it might be possible to identify successful practices that could be replicated in different regions of the world. The adoption of a case study approach enables a detailed investigation of a few empirical cases, four in this thesis, that are representative of a wider reality. Hence, this research follows an inductive path and has a descriptive function since it uses case studies to observe the development of a new phenomenon, that is decentralised international cooperation.

This thesis combines the use of conventional legal techniques with materials collected during fieldwork and interviews conducted in European and southern African countries. In particular, a synthetic review of primary and secondary sources of law (including international law principles, treaties,[55] Memorandum of Understanding, case law, and legislation) is carried out to ascertain to what extent the concept of decentralised international cooperation can be identified at the international level. This analysis aims to explore the extent to which a role is assigned (if any) to local authorities and local communities in conserving and managing natural resources in the context of the main biodiversity-related treaties – namely the Biodiversity Convention, World Heritage Convention,[56] and Ramsar Convention[57] – and the decisions of their governing bodies as well as in the context of protected areas and biosphere reserves. Although the aforementioned regimes are meant to regulate inter-State relations, they are increasingly recognising a role for non-State actors at local level, thanks to the decisions of their governing bodies as well as their operational documents. Indeed, the fact that local communities play a stronger role in governing natural resources, regardless of political

[55] Including the treaties establishing the (transboundary) protected areas analysed in the case studies.
[56] Convention for the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 ILM 1358 (1972). Hereinafter, World Heritage Convention.
[57] Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar) 2 February 1971, in force 21 December 1975, 11 ILM 1358 (1972). Hereinafter, Ramsar Convention.

boundaries, is also in line with the conception of a global citizenship entitled to act for and demand the protection of the Earth.[58]

Several elements conducive to the concept of decentralised international cooperation are distilled from this review. Some of these elements also emerge from regional and sub-regional legal instruments (such as those adopted in the framework of the Council of Europe, EU, African Union, and Southern African Development Community) and reflect their propensity towards favouring decentralised international cooperation.

The study of primary legal sources is complemented by a critical analysis of secondary sources including academic work, government and other reports and studies. For the purpose of the empirical data collection, semi-structured interviews[59] with key actors were conducted in southern African and European countries.[60] Empirical data have been essential in the development of case studies that examine how decentralised international cooperation is evolving in practice in different regions of the world, focusing on Europe and southern Africa.

In Europe, cross-border cooperation among local authorities and communities has a long history. Both the Council of Europe and the European Union (EU) worked on systematising this phenomenon through the adoption of the European Outline Convention on Transfrontier Cooperation between Territorial Communities and Authorities[61] and the Regulations on the European Grouping of Territorial Cooperation (EGTC)[62] respectively. Two case studies have been selected in this region: (1) the Parc européen Parco europeo Alpi Marittime – Mercantour

[58] In this regard refer to the work of Klaus Bosselmann and its conceptualisation of global citizenship. See, for instance, Klaus Bosselmann, 'Governing the Global Commons: The "Planetary Boundaries" Approach' (2017) 13 Policy Quarterly 37.
[59] Basic transcripts and audio files of all interviews are available on file with the author.
[60] Yin explains that the case studies method is useful to examine contemporary events and, in addition to the sources typically used by the historical method – namely, primary documents, secondary documents, cultural and physical artefacts – relies also on the direct observation of the events that are being studies and the interviews of the persons involved in these events. Robert K Yin, *Case Study Research: Design and Methods* (4th ed, Sage Publications 2009) 11.
[61] Madrid, 21 May 1980, in force 22 December 1981, ETS No. 106. Hereinafter, Madrid Convention. This instrument is analysed in detail in Chapter 4 Section 4.3.1.
[62] Regulation (EC) 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European Grouping of Territorial Cooperation (EGTC) of 31 July 2006, OJEU L 210/19. This has been later modified by the Regulation (EU) N. 1302/2013 of the European Parliament and the Council of 17 December 2013 amending on a European grouping of territorial cooperation (EGTC) as regards the clarification, simplification and improvement of the establishment and functioning of such groupings, OJEU L 347/303. Hereinafter, EGTC Regulation. For a detailed analysis refer to Chapter 4 Section 4.3.2.

EGTC[63], and (2) the ZASNET EGTC. These mechanisms are useful to study the involvement of local governments and communities in cross-border cooperation over shared resources.

Southern Africa, instead, is endowed with an international organisation, the Southern African Development Community (SADC), aimed at fostering regional development and integration among neighbouring countries by cooperating in several areas,[64] including natural resources and the environment.[65] To this end, the mechanism of Transfrontier Conservation Areas (TFCAs) was created. TFCAs are a declination of transboundary protected areas (TBPAs), thus offering a privileged context for the development of decentralised cooperative mechanisms. Indeed, this is happening in two cases: the Kavango Zambezi and the Great Limpopo TFCAs, which have been selected as case studies for this thesis. The focus on both the southern African sub-region and the work of the SADC rather than on the whole African continent and the African Union is justified for several reasons. First of all, the African continent is characterised by the presence of several sub-regional organisations[66] with more precise cooperation objectives and more effective implementing structures. Second, a governing body regulating TFCAs does not exist in the framework of the African Union. Third, the southern African sub-region is highly rich in biodiversity and counts more than 40 percent of endemic species[67] that require conservation measures.

The case selection is also based on a review of existing literature on cross-border cooperation over transboundary natural resources and the role of sub-national actors in this

[63] Hereinafter, Alpi Marittime Mercantour EGTC.
[64] See Article 5 on the objectives of SADC and Article 21 on the areas of cooperation of the Treaty of the Southern African Development Community (Windhoek) 17 August 1992, in force 5 October 1992, 32 ILM 116 (1992), 5 AJICL 418..
[65] Ibid., Art. 21(3)(e).
[66] Eight Regional Economic Communities have been officially recognised as regional associations of African States by a decision of the African Union Assembly of Heads of State and Government, but there are more regional cooperation frameworks. Many African countries are members of several of these organizations at the same time with consequences in terms of overlapping and conflicting competences. On this point see the official list of the African Regional Economic Communities at https://www.au.int/web/en/organs/recs accessed 28 June 2017. See also Woodrow Wilson International Center for Scholars, 'African Regional and Sub-Regional Organizations: Assessing Their Contributions to Economic Integration and Conflict Management' (2008) 34.
[67] SADC Regional Biodiversity Strategy (2008), 32. Available at https://www.sadc.int/files/1213/5293/3516/SADC_Regional_Biodiversity_Strategy.pdf accessed 01 January 2019.

context; relevant information has been also gathered from institutional websites[68] and derived from semi-structured interviews with IUCN officers and academics dealing with conservation issues. For instance, the 'interlocal institutional model' presented by Lovecraft[69] builds on cooperative experiences on transboundary species, like polar bears and beluga whales, in the border between Alaska (United States) and the Yukon Territory (Canada). As the author explains, the institutions created to jointly govern and administer these species[70] across borders have both 'grassroots' and 'top-down' elements; in particular, they leave 'significant space for local users in the design of the institutional goals and actions [thus allowing] some degree of self-governance by those who actually use the resources'.[71] Although these institutions can be categorised as decentralised cooperative mechanisms in the sense explained in this thesis, they cannot be inserted in a (sub)regional cooperative framework similar to those offered by the EU and SADC. For this reason, they have been excluded from the case studies since the existence of such a macro cooperative framework is an important element for the purpose of the comparative exercise developed in this thesis. Nevertheless, their analysis could be developed in a successive research phase.

Similarly, interesting experiences of decentralised international cooperation emerged from several interviews with IUCN officers,[72] especially in transboundary river basins[73] and for the

[68] For instance, the EGTC Platform managed by the EU Committee of the Region (COR) was essential in selecting the two EGTC case studies. See https://portal.cor.europa.eu/egtc/Pages/welcome.aspx accessed 6 March 2018.
[69] Lovecraft, 'Transnational Environmental Management: U.S.-Canadian Institutions at the Interlocal Scale', *cit.*, (n 23).
[70] In particular, Lovecraft refers to the Agreement between the Inuvialuit and the Inupiat on Polar Bear Management in the Southern Beaufort Sea (1988), the Alaska and Inuvialuit Beluga Whale Committee (1988), the International Porcupine Caribou Commission (1987), and the US-Canada Yukon River Salmon Agreement (2002). ibid 234.
[71] ibid 235.
[72] These interviews were conducted in person during a visiting period at the IUCN Headquarter in Gland (Switzerland) from the 23 of May to the 3 of June 2016. The officers interviewed belong to different thematic teams, namely, protected areas, species, and water. Basic transcripts of these interviews are available on file with the author.
[73] In this regard, Stefano Barchiesi, Project Officer of the IUCN Global Water Programme, explained that the direct involvement of subnational authorities and local communities is pursued in several transboundary basins in South and Central America and eastern and southern Africa, which are hotspots of the BRIDGE Project. This Project aims to enhance cooperation among riparian countries through the development of a shared visions, the application of benefit-sharing principles, and the establishment of joint institutions based on coherent normative frameworks. Further information on the BRIDGE Project available at https://www.iucn.org/theme/water/our-work/curent-projects/bridge accessed 13 March 2018. Barchiesi highlights that the formal recognition of the role played by local authorities and communities depends on the specific case and the political situation in the riparian countries, especially with regard to indigenous peoples. Hence, decentralised cooperative mechanisms are largely informal, but their formalisation is encouraged in the context of the BRIDGE Project through the creation of multi-stakeholder committees. Interview with Stefano Barchiesi, Project Officer of the IUCN Global Water Programme, Gland (Switzerland), on 25 May 2016; interview 1 in Annex I.

conservation of transboundary species. Particularly telling are the results of some projects funded through the 'Integrated Tiger Habitat Conservation Programme' (ITHCP).[74] This programme aims to contribute to increasing wild tiger populations throughout Asia, in particular by 'improving the management of tiger habitats, tackling human-tiger conflicts, increasing anti-poaching and law enforcement efforts, and engaging and actively involving local communities in tiger conservation'.[75]

Three of the ICTHP projects are transboundary: (1) a project led by the WWF Germany in Nepal and India to recover sites of the Chitwan-Parsa-Valmiki complex; (2) a project led by the Zoological Society of London for the recovery of five transboundary sites in Nepal and India; and (3) a project led by the Wildlife Conservation Society aimed at recovering tiger populations between India and Myanmar and focusing also on transboundary tourism and cultural landscape in these two countries.[76] Moreover, there are two projects that have a national character and are separate, but are located in bordering areas: (4) a project led by Aaranyak for increasing the tiger population in the Manas National Park as well as in the Manas, Daodhora, Batabari, Dihira, and Subankhata Reserved Forests, all located in India; and (5) a project led by the Department of Forests and Park Services of Bhutan for the preservation of tiger populations in Bhutan's Royal Manas National Park.[77]

During the interview, the ICTHP Coordinator presented the developments of these five projects in terms of cross-border cooperation, both from an institutional point of view and in terms of the involvement of local communities. He explained that cross-border cooperation is advanced in Projects (1) and (2), which deal with the same tiger population and adopt also a

[74] All the information on the ITHCP Projects and their results in terms of transboundary cooperation and involvement of subnational actors are based on the interview with Sugoto Roy, Coordinator of the ITHCP, IUCN Global Species and Key Biodiversity Areas Programme, Gland (Switzerland), on 27 May 2016, interview 2 in Annex I.

[75] In this regard see the dedicated webpage 'https://www.iucn.org/theme/species/our-work/action-ground/integrated-tiger-habitat-conservation-programme' accessed 12 March 2018.

[76] For more details on these projects see the ITHCP Project Portfolio, available at https://www.iucn.org/sites/dev/files/content/documents/ithcp_project_portfolio_snapshots_march_2018_9mo_0.pdf accessed 12 March 2018. For the sake of simplification, these projects are identified as Project (1), Project (2), and Project (3).

[77] Refer again to the ITHCP Project Portfolio, ibid. In this case, the projects are identified as Project (4), and Project (5).

habitat-range focus. A common Steering Committee has been created for the projects in order to ensure the exchange of information across countries as well as across projects. As for Project (3), cooperation has been hampered by governmental changes in Myanmar and activities have been developed at national level rather than across borders, as if there were two distinct projects and not a transboundary one. Communication is made difficult by the fact that languages differ considerably across the border of India and Myanmar. In this context, local actors can be crucial in enhancing cooperation at a cross-border localised level – in the ecological unit of the project – thus pursuing decentralised international cooperation. In fact, the Naga people, which includes several tribes located across the borders of these two countries and share the same language and traditions, have been identified as key actors to this end. Projects (4) and (5) are separate and have national scope, but deal with the same tiger population and habitat range, which includes two nearby parks. The IUCN ITHCP has encouraged cooperation across the borders between park authorities, which started to share information and data, not only on the relevant tiger population, but also on elephants and other issues, and are performing trainings at transboundary level.

Although many of the ITHCP projects are led by external actors, such as NGOs or conservation organisations, the presence of a wide range of stakeholders across governance levels and the involvement local actors are crucial elements in all, and are key requirements for accessing ITHCP funds. To ensure direct participation, stakeholders' engagement is pursued in the preparative phase of each project; in particular, sub-national authorities and communities are actively involved in the performance of local activities, especially with the aim to address human-tiger conflicts. Moreover, pursuing decentralised international cooperation can be easier than aiming for inter-State cooperation *tout court*, since this is difficult or even impossible in certain circumstances, as in the case of India and Bhutan, or may be too superficial and would not address the specific conservation goals pursued through specific cooperative actions.

Arguably, decentralised international cooperation is emerging in ITHCP projects; it is functional to the specific objectives pursued in each case, and is enabling the connection between intermediate jurisdictions, park authorities, and communities across the borders. In turn, it is facilitated by the linguistic and cultural connections that link people across the borders, as in the cases of India-Bhutan and India-Nepal.

Therefore, decentralised international cooperation, as meant in this thesis, is emerging in the context of IUCN conservation projects like BRIDGE and the ITHCP,[78] but has an elusive character that hinders the feasibility of a comparative exercise, at least in the short term. In these cases, decentralised international cooperation is largely informal, is project-based, can rarely count on sound legal and institutional frameworks, and occurs in a wide variety of contexts. On the other hand, decentralised cooperative mechanisms in the EU and in the SADC region can be subjected to a 'structured, focused comparison'[79] through the identification of several reference elements that are researchable in each of the case studies.

The number of cases selected, four in total, is appropriate within the time frame of a PhD programme. All the four case studies have the same outcome: the involvement of sub-national actors (local authorities and communities) in the conservation and management of transboundary natural resources is enabled by an *ad hoc* institutional mechanism, that is a decentralised cooperative mechanism. Two of these cases belong to the EU context, while the other two are located in the SADC region; hence, they are comparable both in an intra-regional[80]

[78] The information relating to the BRIDGE and ITHCP Projects are up to date at June 2016, when the interviews with IUCN officers where conducted.

[79] See Alexander L George, 'Case Studies and Theory Development: The Method of Structured, Focused Comparison' in Paul Gordon Lauren (ed), *Diplomacy: New Approaches in Theory, History, and Policy* (Free Press 1979).

[80] Despite the presence of multiple decentralised cooperative mechanisms in the European region beyond the EGTC, as explained in Chapter 4, the analysis was restricted to the EU EGTC mechanism for its clear legal basis and advanced institutional structure. For this reason, cooperation in the Skadar/Shkodra Lake involving sub-national authorities of Albania and Montenegro was excluded in the case selection phase for being a mechanism different from the EGTC – indeed, Albania and Montenegro are EU Candidate Countries and cannot resort to such a cooperative mechsnism before acquiring full membership, unless they collaborate with EU Member States. The Skadar/Shkodra Lake has the status of a national park in Montengro, while is a nature reserve in Albania, and is further designated as a Ramsar and Emerald Site and an Important Bird and Plant Area (in this regard see https://www.iucn.org/regions/eastern-europe-and-central-asia/projects/supporting-long-term-sustainable-management-transboundary-lake-skadar accessed 13 March 2018), thus being subject to multiple conservation regimes. Possibly, this transboundary lake could be compared with the Alpi Marittime Mercantour EGTC if the comparative exercise was based on other selection criteria and was focusing on protected/conservation areas-like cases.

and interregional perspectives applying a paired comparison strategy[81] developed through two main steps. First, a paired comparison of most-similar cases is developed within each region, the EU and SADC; and second, a most-different cases comparison concludes the thesis by exploring to what extent decentralised international cooperation works in practical terms in the two regions and examining the decentralised cooperative mechanisms developed to this end. Through this comparative analysis it is possible to extrapolate the common institutional features of the decentralised cooperative experiences: including governing principles, relevant legal frameworks, joint management structures, decision-making procedures, actors involved, and costs. It is also important to define the types of arrangement in place (e.g., formal or informal), the position of central governments in these arrangements, by clarifying if they are supportive or not and included in the arrangements or not, and the impacts in terms of biodiversity conservation and effective management of shared resources, for example, in terms of ecosystem restoration and good environmental status. All these elements are relevant for the operationalisation of decentralised international cooperation in a specific context. In fact, the participation of sub-national actors – especially indigenous peoples and local communities – needs to be contextualised. In this sense, decentralised international cooperation can be considered as a general legal phenomenon, but its concrete value emerges once it is put into practice through decentralised cooperative mechanisms. These mechanisms can be thought of as locally specific solutions for the cross-border governance of transboundary natural resources and spaces.

Although this comparison evaluates diverse decentralised cooperative mechanisms that are placed in different regions of the world, it is a valuable exercise to share knowledge and experience on the inclusion of sub-national actors in the cooperative governance of

[81] In this regard refer to Sidney Tarrow, 'The Strategy of Paired Comparison: Toward a Theory of Practice' (2010) 43 Comparative Political Studies 230.

transboundary natural resources.[82] Indeed, all these mechanisms tackle the same problem – i.e., reconciling the multiple governance, spatial, and ecological dimensions relevant for the conservation and management of shared resources – and pursue the same objectives – i.e., both to enhance such conservation and management, and to ensure the active participation of all interested actors. Moreover, it can be argued that innovative solutions emerge when diversity is embraced and investigated. When this is not the case, one is left with the danger that the proposals, solutions and observations may be homogenous.

Fisher et al explain the methodological challenges inherent to research in environmental law due to the 'speed and scope' of its development, its reactive nature, and its interdisciplinarity: across legal disciplines, across jurisdictions, and for the incorporation of non-legal aspects[83]. In particular, the authors highlight the difficulty of studying governance regimes that depart from traditional regulatory models and imply new forms of authority and decision-making processes; they explain that 'there are no overarching methodological solutions for legal scholars dealing with the emergence of these environmental governance regimes'.[84] Arguably, decentralised international cooperation can be included among these regimes since it aims to address long-lasting governance problems, like the conservation and management of transboundary natural resources, in a non-traditional way that foresees the involvement of sub-national actors. Challenging is also the fact that the issue at stake – i.e., the governance of transboundary natural resources – occurs in multi-jurisdictional frameworks, thus integrating several layers of environmental law (local, national, regional, and international) and, often, non-legal precepts and traditional institutional structures.[85] In this regard, Fisher et al stress the importance of studying the interrelationship among the aforementioned layers, urge

[82] On the feasibility of comparative exercises that evaluate different legal instruments in different contexts see Francesco Sindico and Stephanie Hawkins, 'The Guarani Aquifer Agreement and Transboundary Aquifer Law in the SADC: Comparing Apples and Oranges?' (2015) 24 Review of European, Comparative and International Environmental Law 318.
[83] Elizabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 Journal of Environmental Law 213, 228–230.
[84] ibid 238.
[85] Like local chiefs in southern African countries or 'Le Regole' in the Venetian provinces of Belluno and Vicenza.

the development of rigorous techniques useful for such an analysis as well as for advancing the use of comparative legal methodologies in environmental law.[86] The purpose of this thesis is not to investigate all the of environmental law exhaustively nor to conduct a systematic comparison of the selected case studies, but to identify cross-border cooperative mechanisms that enable the participation of sub-national actors in the governance of transboundary natural resources and analyse their similarities and differences through a comparative exercise. Nevertheless, the information collected during the fieldwork and the results presented in the conclusions can provide useful insights for such methodological developments. Useful to this end is also the fact that this thesis looks at diverse natural resources and shared natural spaces; in this way, it traces connections among distinct areas of international environmental law, otherwise unexplored, to outline an effective regime for transboundary biodiversity governance. In this regard, Fisher et al criticise the issue-specific and jurisdiction-specific approaches that characterise international environmental law scholarship, and which have undermined the development of a broader analytical perspective.[87]

Morgera would characterise decentralised international cooperation as a global legal phenomenon since it occurs through a plurality of legal mechanisms, relies on a plurality of legal orders, and requires the participation of non-traditional international actors.[88] In this context, comparative methods enable a study of the effectiveness of a variety of decentralised

[86] Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship', *cit.*, (n 83) 241–242.
[87] ibid 240.
[88] Morgera explains: 'A perspective informed by global environmental law, understood as the promotion of environmental protection through a plurality of legal mechanisms relying on a plurality of legal orders, thus prompts the study of environmental law at the international, regional, national and sub-national level as inter-related and mutually influencing systems. It further calls for an analysis of the practice of non-State actors'. Elisa Morgera, 'Global Environmental Law and Comparative Legal Methods' (2015) 24 Review of European, Comparative & International Environmental Law 254, 255. Arguably, the presence of non-traditional international actors and their active participation in decentralised international cooperation, both as a theoretical concept and a practice, brings in this thesis an interdisciplinary perspective that is acknowledged but not directly investigated. Possibly an interdisciplinary approach to decentralised international cooperation could be applied in a successive research phase, once the profiles of this concept are delineated, and building on the comparative exercise developed in this thesis. On the benefits of applying an interdisciplinary approach to the study of global environmental legal phenomena see Louisa Parks and Elisa Morgera, 'The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-Sharing' (2015) 24 Review of European, Comparative and International Environmental Law 353.

cooperative mechanisms in strengthening transboundary biodiversity governance. In fact, Morgera highlights that the scope of comparative methods have expanded beyond the nation-State and 'can be applied in different ways to different levels, forms, stages or aspects of regulation with a view to understanding the infinite varieties of legal expressions of human experience'.[89] Therefore, the comparative exercise that concludes this thesis should be seen as an 'open-ended process of knowledge acquisition' that is methodologically imperfect, but aims to observe innovative legal solutions for the governance of transboundary natural resources by taking an active participatory stance.[90]

In this regard, Wiener defines 'legal entrepreneurs' those who have 'a constructive role to play in transplanting efficient legal ideas across echelons';[91] arguably, researchers are among them. While 'lawyers borrow what they know'[92] by relying mostly on traditional horizontal legal transplants from one country to another, researchers should purposely look for the most appropriate legal ideas for solving global environmental problems[93] by searching across environmental law echelons, across environmental law areas, and across countries. According to Wiener, global environmental problems derive from the failure of national institutions and national boundaries rather than of legal ideas adopted in domestic law.[94] Indeed, decentralising environmental competences to local authorities and enabling the participation of local actors in environmental decision-making are commonly included in national legislation and can be

[89] Morgera, 'Global Environmental Law and Comparative Legal Methods', *cit.*, (n 88) 257.
[90] Indeed, according to Morgera: 'the work of the comparative lawyer resembles that of a detective: an informal, almost intuitive, knowledge process that arises from methodologically looking for clues in the material identified, proceeding towards explanations up to the point where the different interpretative elements fit together into a thick narrative that attempts to explain differences and similarities'. She concludes by stressing that 'global environmental lawyers thus need to take as their starting point the realization that they are active participants in – and not detached observers of – the complex legal phenomena they are comparing'. ibid 262 and 263.
[91] Jonathan B Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology Law Quarterly 1295, 1352. In this article, Wiener describes the utility of 'trans-echelon' or vertical legal borrowing, which allows the transplant of legal concepts from national to international law.
[92] Wiener cites Allan Watson and his seminal work on legal transplant. ibid 1343.
[93] Wiener presents the evolution of the international climate change regime as an example of trans-echelon borrowing. He maintains that two key concepts of this regime were developed in the late 1980s to revive the U.S. climate policy: first, the comprehensive approach aimed to address all major greenhouse gases and their sources and sinks, and second the emission trading system. He emphasises that the vertical borrowing of these legal ideas was not arbitrary, rather it 'was a conscious and deliberate attempt to select the most appropriate legal ideas for addressing the climate change problem'. ibid 1320.
[94] ibid 1366.

consciously – although cautiously and with the necessary adaptation – adopted for the governance of transboundary natural resources. Such a vertical borrowing indirectly advances the role of sub-national actors at the international level. Moreover, the cross-echelon borrowing of legal solutions makes sense in (sub)regional contexts like the EU or SADC, which integrate both national and international law aspects and are perfect laboratories for horizontal and vertical borrowing.

1.2.1 Relevant sources of international environmental law

International environmental law can be defined as the body of substantive, procedural, and institutional rules of international law that apply to environmental issues.[95] As part of international law, it remains anchored to the inter-State paradigm and derives mainly from the sources of law identified in Article 38(1) of the Statute of the International Court of Justice;[96] nevertheless, it has some distinctive features in terms of main concerns, law-making process, and actors involved.

According to Bodansky and others, international environmental problems are caused by private activities more than governmental conduct,[97] are dynamic and involve scientific uncertainties, often relate to technological and physical processes, and cannot be solved in isolation, but only by considering their repercussions at the ecosystem and global levels.[98] Moreover, environmental issues often elude State-centric logic and are projected into the

[95] On this point see Sands and Peel, *Princ. Int. Environ. Law, cit.*, (n 40) 13; Birnie, Boyle and Redgwell, *International Law and the Environment, cit.*, (n 6) 2, 106; Catherine Redgwell, 'International Environmental Law' in Malcom Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 657.

[96] According to this provision, the sources of international law are: international conventions, international custom, the general principles of law recognised by civilised nations, and the judicial decisions and teachings of the most highly qualified publicists of the various nations, which have subsidiary value. In addition, Art. 38(2) allows the Court to decide a case *ex aequo et bono* (i.e., according to equity and good conscience) if the parties agree. United Nations, Statute of the International Court of Justice, 18 April 1946, at http://www.refworld.org/docid/3deb4b9c0.html accessed 24 July 2017. Pineschi highlights that, in addition to the normative sources mentioned in Article 38 of the ICJ Statute, more sources can be deduced from state practice, in particular unilateral acts of States and binding acts of international organisations. Laura Pineschi, 'Le Fonti' in Alessandro Fodella and Laura Pineschi (eds), *La protezione dell'ambiente nel diritto internazionale* (Giappichelli 2009) 84.

[97] They provide examples that range from emissions of carbon dioxide and other 'greenhouse gases' contributing to climate change to threats to endangered species and deforestation. Daniel Bodansky, Jutta Brunnée and Ellen Hey, 'International Environmental Law: Mapping the Field' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *International Environmental Law* (Oxford University Press 2008) 6.

[98] ibid 6–8.

future.[99] In this context, soft law has widely contributed to the evolution of international environmental law since traditional law-making mechanisms were not always effective in addressing environmental challenges and adapting to their dynamism.[100] Crucial in this sense are declarations, statements and other acts of intergovernmental conferences addressing environmental and developmental issues.[101] In fact, COP decisions, technical reports, and guidelines are key in providing practical lines of action enabling the execution of environmental principles and provisions on the ground.

Another characterising trend of international environmental law is the use of framework treaties, supplied with well-functioning institutional structures and regular meetings of the parties (better known as Conference of the Parties, COP), which has facilitated the progressive development of environmental regimes, thereby unfolding their regulatory character.[102] Indeed, environmental regimes are defined as normative icebergs where the treaty text is the tip and the bulk is made of successive protocols and, above all, non-legally binding decisions developed through more flexible and dynamic processes.[103] In these processes actors other than States can participate in normative developments.[104] For instance, during COPs, civil society groups can

[99] ibid 10–15. The transboundary dimension of environmental issues is evident in the case of transboundary pollution or governance of shared resources, but it also emerges in relation to collective environmental concerns further articulated through the concepts of common areas or common property, common heritage, and common concerns. On this point see Jutta Brunnée, 'Common Areas, Common Heritage and Common Concern' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2007). In addition, concepts like sustainable development, inter-generational equity, precaution have highlighted the long-term consequences of environmental damages or unsustainable behaviours.

[100] For instance, Drumbl affirms 'much of international environmental law is informally generated by "soft law"', Mark A Drumbl, 'Actors and Law-Making in International Environmental Law' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research handbook on international environmental law* (Edward Elgar 2010) 3. Pineschi explains that soft law instruments have two positive aspects: first, their adoption is faster and easier than that of treaties since they are not legally binding and they do not require to be transposed at national level, and second, they are flexible and can be easily modified when new (scientific) conditions arise. Pineschi, 'Le Fonti', *cit.*, (n 96) 90.

[101] The 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development are only two among the most famous examples of non-binding instruments contributing to the development of international conventions as well as customary international (environmental) law. On this point see Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 110–111. For further reference see Declaration on the Human Environment (Stockholm) 16 June 1972, UN Doc. A/Conf.48/14/Rev.1 (1973), 11 ILM 1416 (1972); hereinafter, Stockholm Declaration. Rio Declaration on Environment and Development (Rio de Janeiro) 14 June 1992, UN Doc. A/Conf.151/26 (1992), 31 ILM 874 (1992). Hereinafter, Rio Declaration.

[102] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 13.

[103] Bodansky, Brunnée and Hey, 'International Environmental Law: Mapping the Field', *cit.*, (n 97) 21.

[104] ibid 22; Jutta Brunnée, 'The Global Climate Regime: Wither Common Concern?' in Holger P Hestermeyer and others (eds), *Coexistence, cooperation and solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill 2011) 729.

provide inputs through NGOs and influence the decisional process by applying external pressure, even if final decisions are taken by State representatives, thus making COPs similar to traditional negotiations.[105] Arguably, through this interaction, civil society contributes to the understanding and evolution of international environmental law.[106] In addition, COP meetings provide the opportunity to further the development of international environmental law on a periodic and continuous basis rather than limiting it to a unique negotiating moment, as it was conceived traditionally.

Particularly important for this thesis is the role of the COPs operating in specific environmental regimes, such as the Biodiversity Convention, the Ramsar Convention, and the World Heritage Convention. Through their acts, the Conferences of the Parties add regulatory details and *de facto* advance and shape environmental regimes without the formal consent of State Parties.[107] Nevertheless, the binding character of COP acts varies and, if not specified in the relevant treaty, it needs to be verified on the basis of the powers entrusted to the COP, the issues regulated and the goals pursued through these measures.[108] Pineschi emphasises that State Parties should also respect non-binding COP decisions due to the principle of *bona fide* or otherwise justify their divergent behaviour.[109] In Chapter 3, decisions of the CBD COP, Ramsar COP, and World Heritage Convention COP relating to the participation of local authorities and local communities in each specific regime are analysed in order to argue for a

[105] The only exception in this sense is provided by the Aarhus Convention and its Compliance Committee, established in Article 15, which foresees the appropriate involvement of the public. In fact, the public (individuals, NGOs, etc.) can directly report possible state violations of the Convention to the Committee.

[106] In this sense refer to Jutta Brunnée and Stephen J Toope, 'Constructivism and International Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary perspectives of international law and international relations. the State of the art.* (Cambridge University Press 2013) 129. In describing the convergence between constructivism and international law, these authors highlight the work of Harold Koh. He focuses on how the interactions between actors operating at the international level shape legal rules that respond to the interests and identities of these actors, and are useful in regulating their future interactions [at 131].

[107] In this regard see Brunnée, 'The Global Climate Regime: Wither Common Concern?', *cit.*, (n 104) 729. More generally on the role of COPs in the development of international environmental regimes see Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 Leiden Journal of International Law 1.

[108] On this point see Pineschi, 'Le Fonti', *cit.*, (n 96) 88; Alexandre Kiss and Dinah Shelton, *Guide to International Environmental Law* (Brill 2007) 9.

[109] Pineschi, 'Le Fonti', *cit.*, (n 96) 88–89.

strengthened role for sub-national actors in the conservation and sustainable management of transboundary natural resources.

Regulatory and policy documents of international and regional organisations are also examined in several chapters in order to derive elements useful for applying the concept of decentralised international cooperation, especially in regional contexts. In fact, the conservation and management of transboundary natural resources are not regulated by a single international instrument, but build on a plurality of legal sources that include environmental law principles, international and regional conventions, and soft law instruments. Therefore, this thesis indirectly outlines a regime applicable to transboundary natural resources and spaces; however, more precise regulatory boundaries can be traced only in relation to each specific case depending on the shared natural resources or spaces considered as well as their geographical scope.

In this sense, it can be argued that this thesis departs from a legal constructivist standpoint. International environmental law is not perceived as fixed, but as a dynamic system that is given meaning by the people applying it in practice. Arguably, the regime applicable to transboundary natural resources and spaces evolves and is changed by the phenomenon of decentralised international cooperation and its locally specific solutions, namely decentralised cooperative mechanisms. Both State and non-State actors, especially local communities and local authorities, contribute to this process.[110]

1.3 Organisation of the thesis

Chapters 2 and 3 provide the conceptual background of the thesis by focusing on the regime governing transboundary natural resources and spaces, and identifying the concept of decentralised international cooperation in international environmental law principles and

[110] For a general overview of the relevance of the constructivist approach in international law see Brunnée and Toope, 'Constructivism and International Law', *cit.*, (n 106).

instruments. Chapters 4 to 7 are dedicated to regional case studies. Chapter 4 sets the background for discussing decentralised international cooperation in Europe by looking at regional instruments that regulate cooperation among local authorities and communities across European countries in the context of both the Council of Europe and the EU. Chapter 5 considers two case studies in the EU: the EGTC Alpi Marittime – Mercantour and the ZASNET EGTC. Chapters 6 and 7 focus on the southern African region. Chapter 6 looks at the evolution of conservation policy and law in this region, and analyses the African Union's and SADC's legal and policy instruments relevant for the governance of natural resources. Chapter 7 focuses on decentralised cooperative processes in two TFCAs: the Kavango Zambezi and the Great Limpopo. Chapter 8 concludes by developing a comparative analysis of the case studies presented in the previous Chapters (5 and 7) in order to identify the common features of decentralised cooperative experiences analysed as well as the elements facilitating their emergence in different contexts.

Chapter 2. Framing decentralised international cooperation within relevant principles of international environmental law

2.1 Introduction

The concept of decentralised international cooperation introduced in Chapter 1 is useful for structuring cooperation over transboundary natural resources in an innovative way. This concept has the potential to reconcile the multiple levels of governance featuring shared resources: on the one hand, it confirms the intergovernmental foundations of cooperation and, on the other, it acknowledges the role of sub-national actors (both local authorities and local communities), their relations across borders, and the need to enable the active participation of these actors to achieve effective conservation and management of shared resources.

In this context, it is worth exploring to what extent the concept of decentralised international cooperation is featured in existing international environmental law. This Chapter, at first, discusses the emergence and increasing role of non-State actors at the international level. The purpose of this discussion is to highlight the potential importance of the role of local authorities and local communities – in addition to States – in the cooperative governance of transboundary natural resources. As a result, an argument in support of decentralised international cooperation is constructed. Then, the analysis looks at the principles of international environmental law applicable to the governance of transboundary natural resources. The aim is to determine if these principles oblige States not only among themselves, but also towards sub-national actors. In this regard, it is also worth exploring to what extent these principles assign rights and obligations to sub-national actors.

2.2 Intergovernmental cooperation and beyond: the actors of international environmental law

The originality of international environmental law has not only required the development of a dynamic and flexible normative process that combines hard and soft law instruments,[111] but relates also to the variety of actors involved in its development and application. Although States remain the primary subjects, their role is changing, and they are part of an increasingly complex governance structure. This aspect is crucial in this thesis that focuses on decentralised international cooperation and argues for an expanded role of sub-national actors – i.e., local authorities and local communities – in the conservation and management of transboundary natural resources.

2.2.1 Inter-State cooperation: a traditional approach

Despite the expansion and changes that have characterised the international community since the 1950s,[112] States remain the primary subjects of the international legal order.[113] According to Treves, the notions of subjectivity, personality, and capacity converge in international law.[114] States are typical subjects of international law since they have both direct international rights and responsibilities, can bring international claims, and take part in the creation, development,

[111] For a discussion of the sources of international environmental law see Chapter 1, section 1.2.1.

[112] Fodella recalls three main occurrences that transformed the international community: the process of decolonisation and the end of the Cold War, which resulted in the emergence of new States; the institutionalisation of international cooperation through the creation of international organisations; and globalisation, which catalysed State interdependence and participatory democracy, thus prompting the emergence of non-State actors on the international scene. Fodella, 'I Soggetti', *cit.*, (n 41) 37–38.

[113] On this point, Marahun argues that States are not as much in decline as usually claimed, and their early demise could destabilise the international legal order since there is no valid alternative to their administrative capacity. Thilo Marauhn, 'Changing Role of the State' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 728. A similar reasoning is developed by Venter when discussing State sovereignty vis-à-vis environmental concerns, he argues that State sovereignty is undergoing a transformation especially when confronted with issues relating to transboundary natural resources, sustainable use, biodiversity conservation, and indigenous rights. Nevertheless, he underlines that 'the world of constitutional and international law is still far from the point where sovereignty is qualified to such an extent that the national and international communities can function without it. An underlying reason for this is that, however one might want to construe the nature and ultimate source of authority, any legal order will collapse if it does not unambiguously identify and empower the bearers of governmental authority'. Francois Venter, 'Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty' in Louis J Kotzé and Thilo Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill 2014) 78.

[114] Tullio Treves, *Diritto Internazionale: Problemi Fondamentali* (Giuffrè 2005) 51.

and enforcement of international law.[115] Indeed, States create, adopt and implement international legal principles and rules, establish international organisations, and permit the participation of other actors in the international legal process'; therefore, they can be defined as the 'original subjects' since all the other subjects acquire their personality based on the rules that States set.[116]

International law governs inter-State relations and, most of the time, aims to coordinate State actions to achieve common objectives. This is particularly true in the environmental field where coexistence and cooperation challenge traditional concepts like sovereign equality of States,[117] territorial integrity and territorial sovereignty in their traditional conception.[118] While, at first, limitations were meant to prevent transboundary harm in State-to-State relations,[119] they were later extended to areas beyond national jurisdiction for the protection of global common areas and for the benefit of the whole international community.[120] In addition, a clear limitation to sovereignty and unilateral actions exist when natural resources are shared by two or more States.

The protection and management of transboundary natural resources pose both challenges and opportunities to the States sharing them. While competing national interests might deplete these resources irremediably, concerted actions can decrease management costs and enhance

[115] McCorquodale, 'The Individual and the International Legal System' in Malcom Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 308. See also Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 51.
[116] In this regard, refer to Treves, *Diritto Internazionale: Problemi Fondamentali*, *cit.*, (n 114) 51. On this point, Warbrick explains: 'International law is *mainly* to do with states and, where it is to do with something else, it is because states have chosen to make it so', See Colin Warbrick, 'States and Recognition in International Law' in Malcom Evans (ed), *International law* (2nd edn, Oxford University Press 2006) 218. See also Fodella, 'I Soggetti', *cit.*, (n 41) 38.
[117] The principle of common but differentiated responsibilities demonstrates that States have different rights and obligations depending on their contribution to a specific problem and their capacity to address it (e.g., in socio-economic, financial, technological terms). See Bodansky, Brunnée and Hey, 'International Environmental Law: Mapping the Field', *cit.*, (n 97) 18.
[118] In this regard see Marauhn, 'Changing Role of the State', *cit.*, (n 113) 729–730. See also Bodansky, Brunnée and Hey, 'International Environmental Law: Mapping the Field', *cit.*, (n 97) 9; Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 232.
[119] In the famous *Trail Smelter* Arbitration, it was decided that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence', Trail Smelter Arbitration (United States v. Canada), 16 April 1938, 11 March 1941, 35 AJIL (1941), 716.
[120] This is explicitly established in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration as well as in several multilateral treaties, like the Outer Space Treaty (1967), the Moon Treaty (1979), the London Dumping Convention (1972), the UN Convention of the Law of Sea (1982), and the Protocol to the Antarctic Treaty on Environmental Protection (1991).

conservation. sharing States can choose among different normative models of cooperation: they can sign bilateral or multilateral agreements aimed to cover collaborative activities in all sectors, including the environment, or specific ones dedicated to a selected resource or site.[121] However, intergovernmental cooperation might be difficult and inadequate for a variety of reasons, such as the inability of the institutional apparatus to perform an appropriate management of shared resources in line with local interests and needs.

Intergovernmental cooperation is essential to ensure the long-term commitments of co-sharing and interested States and to formally recognise the intrinsic value of natural resources; however, limiting cooperation to the intergovernmental level might not be sufficient nor effective. The implementation of international agreements and their sound functioning largely depends on the response and action of the authorities and communities that are closely connected to these resources: their inclusion in decision-making and management is crucial to foster stewardship and strengthen conservation. Therefore, the conservation and management of transboundary natural resources can be enhanced by cross-border agreements that involve sub-State entities and local communities, here called decentralised cooperative mechanisms. The involvement of sub-national actors in the governance of transboundary resources is in line with the evolution of the contemporary international system that has expanded beyond the realm of States.

[121] For instance, there is a significant number of treaties over international freshwater bodies. According to the International Freshwater Treaties Database there are more than 600 international, freshwater-related agreements for the period 1820-2007 [visit http://transboundarywaters.science.oregonstate.edu/content/international-freshwater-treaties-database accessed 20 March 2018]. International water law is very advanced and can count on international and regional framework conventions, such as the Watercourses Convention and the Helsinki Water Convention (which was originally negotiated as a regional instrument, but a 2013 amendment has opened it to universal membership starting from 2015) as well as instruments dedicated to specific bodies of water, like the 1994 agreement between Angola, Botswana and Namibia on the Okavango river basin or the Danube River Protection Convention signed by eleven of the Danube riparian States. Instead, transboundary conservation efforts for the protection of species can be connected to the Convention on Migratory Species, which is the only international instrument specifically aimed to enhance the protection and sustainable use of migratory animals and their habitats by bringing together the 'Range States' through which these species pass. Inter-State cooperation is well developed also for biodiversity conservation through transboundary protected areas. Agreement between the Governments if the Republic of Angola, the Republic of Botswana and the Republic of Namibia on the Establishment of a Permanent Okavango River Basin Water Commission (OKACOM) (Windhoek) 15 September 1994, in force 15 September 1994, ECOLEX TRE-001851; Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Sofia) 29 June 1994, in force 22 October 1998, ECOLEX TRE-001207; hereinafter, Danube River Protection Convention.

2.2.2 Emerging actors on the international scene

In addition to States, international environmental law is characterised by the participation of a wide variety of other actors that have different roles and functions depending on the rights and obligations they are granted by general international law as well as treaty provisions and other rules.[122] According to Treves, identifying the protagonists of the international society is the first step to determine who the subjects of international law are.[123] International legal personality is not based on abstract premises, rather it is possible to discern which actors possess such personality by analysing the international society, its structure and features as well as its main developments at a given time.[124]

It is undisputed that international organisations can possess international legal personality; these are created by States to address specific environmental concerns, are endowed with an institutional structure, powers and procedures to pursue the objectives foreseen in their foundational treaties.[125] International legal personality can be explicitly provided in the treaty or implied by the tasks, rights, and responsibilities foreseen therein and exercised in practice.[126] Moreover, an essential feature of international organisations is their independence from the Member States.[127] Such an independence is reflected in the capacity of international

[122] The multiplicity of actors intervening in the modern international society is discussed, not only, in relation to the environmental field, but also, in general international law. To expand on this issue beyond the content of the present section, refer to international law manuals and international environmental law manuals. See for instance, Treves, *Diritto Internazionale: Problemi Fondamentali*, *cit.*, (n 114); Malcom Evans (ed), *International Law* (2nd ed, Oxford University Press 2006); Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6); Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40).

[123] Treves, *Diritto Internazionale: Problemi Fondamentali*, *cit.*, (n 114) 161. In particular, he explains that to determine who are the addresses of the rights, obligations, and other legal consequences deriving from international law, it is necessary to scrutinise the international society in its historic concreteness and material essence.

[124] ibid 162.

[125] For a more detailed analysis of the role that international organisations play in the modern international society see ibid. To explore their role in international environmental law see, among others, ibid 113 ff.; Dapo Akande, 'International Organizations' in Malcom Evans (ed), *International Law* (2nd edn, Oxford University Press 2006); Ellen Hey, 'International Institutions' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007); Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 52 ff.

[126] Akande, 'International Organizations', *cit.*, (n 125) 281–282; Drumbl, 'Actors and Law-Making in International Environmental Law', *cit.*, (n 100) 6.

[127] Treves, *Diritto Internazionale: Problemi Fondamentali*, *cit.*, (n 114) 139; Fodella, 'I Soggetti', *cit.*, (n 41) 40.Treves explains that such independence has not the same material premise of that of States, that is supremacy within specific territorial boundaries and over the population located therein. Rather, the independence of international organisations has a functional basis and it is configured as an *independence from States* in their internal structure as well as in achieving specific purposes

organisations to adopt decisions expressing a position that is autonomous from that of all its Member States and not requiring a unanimous vote. Moreover, international organisations can be able to adopt binding acts that Member States have to respect, regardless to the fact that they have consented to the specific decision; otherwise, they can be obliged to conform to the decision and sanctioned by the organisations having enforcement powers and compliance mechanisms.[128]

International organisations materially prove the importance and utility of inter-State cooperation at the global, regional, sub-regional and bilateral levels for political, social, economic or technical reasons. According to Treves, they represent a distinctive feature of the contemporary international system and enable a more effective cooperation among States;[129] nevertheless, they do not aim to replace States nor alter the basic inter-State structure of the international society.[130]

The issue of international personality and subjectivity is addressed by the International Court of Justice (ICJ) in its Reparation for Injuries Advisory Opinion,[131] which concludes that other entities than States possess international legal personality. In particular, the ICJ explains:

> 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international life, and the progressive increase in the collective activities of States has already given rise to instance of action upon the international plane by certain entities which are not States'.[132]

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and performing certain activities within the territorial sphere of the same States. Treves, *Diritto Internazionale: Problemi Fondamentali*, *cit.*, (n 114) 137. The functional capacity of international organisations is reiterated in the Advisory Opinion on the Use of Nuclear Weapons, which explains 'international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of speciality", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them'. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion 8 July 1996, ICJ Reports 1996, 226, at 78. Hereinafter, *Nuclear Weapons* Advisory Opinion.

[128] In this regard, it is worth clarifying that a few organisations have enforcement powers: this is the case of the UN Security Council and the EU system, for example. As for compliance mechanisms, environmental convention bodies have been developing such mechanisms to facilitate – more than ensure – the achievement of their objectives, as in the case of the United Nations Framework Convention on Climate Change (New York) 9 May 1992, in force 21 March 1994, 1771 UNTS 107. Hereinafter, Climate Change Convention.

[129] Treves, *Diritto Internazionale: Problemi Fondamentali*, *cit.*, (n 114) 129.

[130] ibid 135.

[131] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports 1949, 174. Hereinafter, *Reparation for Injuries.* This case followed the murder of a UN mediator by a Jewish group in Jerusalem. The General Assembly requested an opinion to the ICJ regarding its capacity to bring an international claim against a State (Israel in this case) to obtain reparation of injuries suffered by the organisation and its agents.

[132] *Reparation for Injuries*, 178.

Therefore, the protagonists of the international legal system can change over time according to the needs of the international society, but their operational capacity depends on the possession of legal personality. In this regard, the Opinion explains that, given the characteristics of the UN, as provided in the Charter by its members and how it functions in practice,

> 'the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane'.[133]

However, the Opinion clarifies that recognising that the UN is an international person 'is not the same as saying that it is a State, which is certainly not, or that its legal personality and rights and duties are the same as those of a State';[134] rather, '[it] means that it is a subject of international law and capable of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims'.[135]

According to McCorquordale, the rationale developed in the Reparation for Injuries Advisory opinion can be applied to any non-State actor at the international level.[136] Therefore, as international organisations have a different nature and stature than States,[137] other actors that function in the international legal order also have different degrees of international personality. Treves maintains that discussing if individuals or NGOs are subjects of international law is a theoretical and irrelevant concern: what matters is their practical presence at the international level and their capacity to influence and be part of international law, in particular by creating

[133] Ibid. 179. Moreover, according to the Court, the UN possesses *objective* international personality that can be affirmed vis-à-vis its Member States as well as third States. Ibid. 185.
[134] Ibid 179. Indeed, Fodella notes that the independence of international organisations from Member States is a characterising feature that proves their international subjectivity, notwithstanding the fact that they have a limited legal capacity. Fodella, 'I Soggetti', *cit.*, (n 41) 41.
[135] *Reparation for Injuries*, 179. Similarly, Judge Ago, in his Separate Opinion relating to the Interpretation of the Agreement of 25 March 1951 between the World Health Organization and Egypt, says that 'an international organization is like a State, but it is one which *enjoys a limited international legal capacity*, and in particular, unlike a State, it is a subject of law which lacks all territorial basis'. (emphasis added) Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, 20 December 1980, ICJ Reports 1980, 155.
[136] McCorquodale, 'The Individual and the International Legal System', *cit.*, (n 115) 309.
[137] Treves, *Diritto Internazionale: Problemi Fondamentali*, *cit.*, (n 114) 140.

and developing rules as well as by implementing them.[138] In this sense, the term 'actor' or 'participant' can be used expediently to avoid that of 'subject' and its theoretical implications.[139] Therefore, the key issue is to ascertain to what extent actors other than States participate to the international legal order to capture their, albeit limited, legal capacity. Along these lines, the active presence of sub-national actors, namely local authorities and local communities, on the international scene and their effective involvement in the conservation and management of transboundary natural resources is an essential component of this thesis.

The international prominence of non-State actors[140] in the development and application of international environmental law, as well as in other sectors, is confirmed by the fact that 'in limited circumstances, [they are] entitled with *de jure* rights'.[141] In this way, non-State actors are increasingly contributing to the enforcement of national environmental laws and obligations before national courts and tribunals, especially when they are direct victims of pollution or environmental damages, including in a transboundary context[142] by way of the equal treatment or non-discrimination principle.[143] Moreover, non-State actors can also enforce international environmental law before national courts, this is foreseen by international regimes on civil

[138] Tullio Treves, 'Introduction' in Tullio Treves and others (eds), *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press 2005) 3.

[139] ibid. For McCorquodale participation is a useful framework to analyse the involvement of individuals in the international legal system. McCorquodale, 'The Individual and the International Legal System', *cit.*, (n 115) 311. When analysing the status of multinational corporations (MNCs) in international law, Morgera discusses the different approaches and terms used to this end. She explains that MNCs cannot be considered as independent subjects, but have been presented as significant actors, participants in the international legal system, members of the international community, entities *sui generis* and with limited and functional legal personality. She concludes that such a debate has an abstract value and has limited practical implications, including for the purpose of corporate accountability, which is the focus of her book. Elisa Morgera, *Corporate Accountability in International Environmental Law* (Oxford University Press 2009) 56–60.

[140] Affolder critiques the term 'non-State actors' and its all-embracing use that disregard the variety of 'norm-creating actors' and their different roles, positions and contributions to biodiversity law-making, and international environmental law more generally. See Natasha Affolder, 'Non-State Actors' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017).

[141] Sands and Peel, *Princ. Int. Environ. Law, cit.*, (n 40) 155. See also ibid 86–92. In this regard see also Fodella, 'I Soggetti', *cit.*, (n 41) 51 ff.

[142] This enforcement role at national level is foreseen both in declaratory and binding instruments. The former category includes Agenda 21 (Chapter 27, paragraph 27.13), the Rio Declaration (Principle 10), and OECD instruments that detail equal access rules for persons affected by transfrontier pollution; while, the 1998 Aarhus Convention belongs to the latter. In this regard refer to Sands and Peel, *Princ. Int. Environ. Law, cit.*, (n 40) 154–155.

[143] On the principle of equal access or non-discrimination see *infra* Section 2.8 on public participation in environmental matters.

liability[144] and is increasingly happening in the context of climate litigation.[145] Beyond that, the legal standing of non-State actors at the international level is quite limited outside the field of

[144] Sands and Peel explain that, in this regard, there are two categories of treaties. The first category includes treaties that provide victims with legal standing in the State in which the transboundary pollution originated, like nuclear liability conventions and oil pollution conventions. While, treaties belonging to the second category allow victims a choice of courts (either in the State in which the pollution originated or in the State in which the damage was suffered) and apply to transboundary environmental disputes although not originally foreseen to this scope. Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 156–157.

[145] Olszynski *et al.* note that 'even the first wave of climate litigation has restricted its edge-cutting ambition to defendants within their domestic jurisdictions'. In fact, although climate change has been described as a multi-scalar problem that encompasses several levels of governance, focusing on defendants identifiable as major contributors to climate change on global scale has potential pitfalls, since it can be difficult to enforce judgements. See Martin Olszynski, Sharon Mascher and Meinhard Doelle, 'From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability' [2017] Georgetown Environmental Law Review (Forthcoming) 1, 30. Nevertheless, there are cases that seek to address these challenges and focus on the transboundary dimension of environmental harm, as for two cases filed in 2015: one with the Commission on Human Rights in the Philippines, and another one with the Essen Regional Court in Germany. In the first case, Greenpeace Southeast Asia, together with other organisations and individuals in the Philippines, targets the fifty largest fossil fuel companies, the 'carbon majors', for threatening or violating human rights as a result of the impact of climate change, especially extreme weather events. Moreover, States in which these companies are incorporated are also allegedly responsible since they have both procedural and substantive obligations in relation to environmental protection, including the customary duty to prevent harm by ensuring that these companies refrain from activities that interfere with the rights of Filipinos. The Commission has, not only, accepted the petition, but also asked the defendants to respond by the end of September 2016 and, despite their attempts to dismiss the complaint, called for a national inquiry to appraise the possible contribution of these fuel companies on climate change and its effects on the human rights of the Filipinos. Greenpeace Southeast Asia and Others, Petition to the Commission on Human Rights of the Philippines, Requesting for investigation of the responsibility of the Carbon Majors for human rights violations or threats of violation resulting from the impacts of climate change, Case No. CHR-NI-2016-0001, submitted on 22 September 2015. The petition and other relevant document are available at http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/10 January 2018. For further analysis of this case see also Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 Transnational Environmental Law 37, 21–22. In the second case, a Peruvian farmer living in Huaraz (Peru) filed suit in a German court against a German utility, RWE that is Germany's largest electricity producer. According to the applicant, RWE has knowingly contributed to climate change through GHG emissions, thus bearing some responsibility for the melting of the mountain glaciers, with a consequent volumetric increase of the connected glacial lake Palcacocha located above his town. Hence, the applicant sought a declaratory judgement and damages to offset flood protection costs, but the Court dismissed his requests given the impossibility to discern a 'linear causal chain' between RWE emissions of GHG and the specific climate change impacts on the glaciers and glacial lake. Nevertheless, the appeal court has reversed this decision and found the complaint as well-pled and admissible, thus moving the case forward into the evidentiary phase. With such a recognition, the appeal court has paved the way to the possibility that a private company is held liable for climate change related damages resulting from its GHG emissions. See Lliuya v. RWE AG, Case N. 2 O 285/15, Essen Regional Court, 15 December 2016. For further information refer to http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/ accessed 10 January 2018.

human rights.[146] The majority of both regional[147] and international[148] human rights regimes allow individuals or NGOs to bring complaints directly to international bodies, and, in this context, they may even enforce the respect of international environmental obligations, as they are doing in multiple cases.[149]

Perhaps, in the near future, sub-national actors/individuals will be considered as *concerned ecological citizens*, and their participation at the international level will be strengthened on this

[146] Sands and Peel, *Princ. Int. Environ. Law, cit.*, (n 40) 157. In this regard, refer to the arguments deployed *infra* in Section 2.9 on the rights of future generations. Peel e Osofsky describe an increasing trend of climate change-related lawsuits in which petitioners (individuals, groups of individuals, and NGOs) deploy rights arguments to force greater action by States to address climate change. Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?', *cit.*, (n 145). Indeed, there are also some cases that have an international dimension. For example, the 2005 Inuit petition filed with the Inter-American Commission on Human Rights against the US, as the largest emitters of green-house gas (GHG) at that time, for human rights violations caused by the impacts of climate change. Sheila Watt-Cloutier et al., Petition to the IACHR seeking relief from violations resulting from global warming caused by acts and omissions of the United States, submitted on 7 December 2005, http://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/ accessed 21 December 2017. Hereinafter, 2005 Inuit Petition. Also in the context of the Aarhus Convention, 'members the public' – as to say, individuals, groups of individuals, NGOs, etc. – can report directly to the Compliance Committee about a Party's compliance with the Convention (Article 15). In this regard, see Jeremy Wates, 'NGOs and the Aarhus Convention' in Tullio Treves and others (eds), *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press 2005); Cesare Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters' in Tullio Treves and others (eds), *Non-compliance procedures and mechanisms and the effectiveness of international environmental agreements* (TMC Asser Press 2009). In the context of the Alpine Convention, instead, NGOs, as observers, can trigger the compliance mechanism, while the public and local authorities cannot do it directly, but through a Contracting Party or an observer, as explained in Laura Pineschi, 'The Compliance Mechanism of the 1991 Convention on the Protection of the Alps and Its Protocols' in Tullio Treves and others (eds), *Non-compliance procedures and mechanisms and the effectiveness of international environmental agreements* (TMC Asser Press 2009). More generally, on the role of civil society vis-à-vis international courts and compliance bodies see Tullio Treves and others (eds), *Civil Society, International Courts and Compliance Bodies* (TMC Asser Press 2005).

[147] For instance, Article 34 of the European Convention on Human Rights, Article 44 of the American Convention on Human Rights, and Articles 55-56 of the African Charter on Human and Peoples' Rights. Respectively, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (Rome) 4 November 1950, in force 3 September 1953, 213 UNTS 222; American Convention on Human Rights (San Jose) 22 November 1969, in force 18 July 1978, 9 ILM 673 (1970); and African Charter on Human and Peoples' Rights (Banjul) 27 June 1981, in force 21 October 1986, 21 ILM 58 (1982).

[148] In particular, communications by individuals and groups of individuals to the Human Rights Committee are foreseen in the 1966 Optional Protocol to the ICCPR as well as in the 2008 Optional Protocol to the ICESCR. Respectively, UN General Assembly, Resolution 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171; and UN General Assembly, Resolution 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008, in force 5 May 2013 UN Doc. A/RES/63/117.

[149] In this regard, see the two cases filed with the Inter-American Commission of Human Rights by indigenous peoples: the 2005 Inuit petition seeking relief from human rights violations resulting from global warming caused by acts and omissions of the US, and the 2013 Earthjustice petition seeking relief from violations of the rights of Arctic Athabaskan Peoples resulting from rapid arctic warming and melting caused by emission of black carbon by Canada. Arctic Athabaskan Council, Petition to the IACHR seeking relief of the rights of Arctic Athabaskan Peoples resulting from rapid arctic warming and melting caused by emission of black carbon by Canada, submitted on 23 April 2013, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2013/20130423_5082_petition.pdf accessed 21 December 2017. For further information on these petitions see http://climatecasechart.com/non-us-jurisdiction/inter-american-commission-on-human-rights/ accessed 10 January 2018. Further discussion on the 2005 Inuit petition is developed *infra* in Section 2.9. Peel and Osofsky identify regional human rights tribunals and quasi-judicial bodies as appropriate to bring rights-based claims in the context of climate litigation. Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?', *cit.*, (n 145) 28. Regarding the relations between environmental protection and human rights see Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (Cambridge University Press 2011). See also Birnie, Boyle and Redgwell, *International Law and the Environment, cit.*, (n 6) 271 ff.; Sands and Peel, *Princ. Int. Environ. Law, cit.*, (n 40) 277 ff. See also John g Merrills, 'Environmental Rights' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007).

basis.[150] Bosselmann's ecological citizenship is not connected to nationality, but citizens are seen as both members of a social community and an ecological community that are relevant at any governance level, from the local to the global.[151] For Venter, this global dimension of citizenship is central for environmental protection.[152] Arguably, this generalised interest in environmental protection has already emerged through the concept of common concern of humankind.[153] The innovative aspect of ecological citizenship is that non-human beings can be recognised as fellow citizens and thus be represented in the political decision-making process by ecological citizens – i.e., individuals – thanks to a fiduciary relationship.[154] Possibly, the recognition of the Whanganui River as a legal person and the nomination of two guardians that 'will act as the human face of the [River]'[155] signals a first move in this direction. It can also be argued that recent cases dealing with States' obligations to address climate change and environmental protection in the interest of current and future generations[156] prove – at least from a practical and jurisprudential perspective – the emergence of concepts of global and ecological citizenship.

[150][150] The issues of public participation in environmental matters and the identification of the public concerned are further explored *infra* Sections 2.8 and 2.8.1.

[151] Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate 2008) 204.

[152] Venter argues that the 'global citizen' encompasses the individuals belonging to the present and future generations and has '(consciously or unknowingly) a profound interest in the protection of the natural environment, since his or her livelihood, personal safety and welfare depend thereon'. Venter, 'Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty', *cit.*, (n 113) 89.

[153] Common concern regimes are further addressed in Section 2.5.

[154] Bosselmann, *The Principle of Sustainability: Transforming Law and Governance*, *cit.*, (n 151) 204.

[155] See the Whanganui River Deed of Settlement between the Crown and the Whanganui Iwi (5 August 2014), available at https://www.govt.nz/dmsdocument/2731-whanganui-iwi-whanganui-river-deed-of-settlement-summary-5-aug-2014 accessed 21 November 2018, Overview, Section 3. The Settlement further explains that the role of the guardians is 'to act and speak on behalf of the [River], uphold the legal status of the [River and its spiritual values], and *promote and protect the health and well-being* of the [River]'. (emphasis added) For further information see https://www.worldfuturecouncil.org/recognising-nature-legal-person-whanganui-river-new-zealand/ accessed 21 November 2018. A similar attempt was made in India, where the High Court in the Uttarakhand State ruled that the Ganges Rover and it main tributary, the Yamuna River, are granted the status of living human entities. See Mohd. Salim v. State of Uttarakhand and others, High Court of Uttarakhand, PIL N. 126/2014, decision on 20 March 2017, paragraph 19, available at http://lobis.nic.in/ddir/uhc/RS/orders/22-03-2017/RS20032017WPPIL1262014.pdf accessed 21 November 2018. This decision was meant to advance the environmental protection of the rivers, which are venerated as sacred and are heavily affected by pollution. However, the Supreme Court of India reversed this decision on 7 July 2017. The decision of the Supreme Court of India is not available online, for general information refer to the BBC article https://www.bbc.com/news/world-asia-india-40537701 accessed 21 November 2018.

[156] In this regard refer to Sections 2.5 and 2.9.

The emergence of new actors apart from States and international organisations, finds a first formal recognition in the Rio process.[157] In particular, Agenda 21 dedicates a full section (Section III) to the increasing involvement of 'major groups' for the achievement of sustainable development and environmental protection: indigenous peoples[158] and their communities, and local authorities are among these groups.[159] Although local communities were not originally mentioned among the major groups, there is a continuous reference to them in the other sections of Agenda 21. Moreover, Principle 22 of the Rio Declaration groups local communities in with indigenous peoples and their communities. More recently, the outcome document of Rio+20,

[157] All international environmental law manuals address the rise of non-State actors in the international scene. For a general overview on their role, see, among others, Ellen Hey, *Advanced Introduction to International Environmental Law* (Elgar 2016) 20–22. For instance, Sands identifies six categories of non-State actors operating in the environmental field: namely, the scientific community, NGOs, private companies and business concerns, legal organisations, the academic community, and individuals. Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 86. Similarly, Bodansky *et al.* explicitly refer to scientists, private actors and the business community, and environmental NGOs as part of this group. Bodansky, Brunnée and Hey, 'International Environmental Law: Mapping the Field', *cit.*, (n 97) 19–21.While Fodella mentions NGOs, business companies, local authorities, indigenous peoples, and individuals. Fodella, 'I Soggetti', *cit.*, (n 41) 50–51. Moreover, Pineschi notes that one of the main innovations of the World Summit on Sustainable Development (Johannesburg, 26 August – 4 September 2002) is the active involvement of non-State actors through *ad hoc* mechanisms. Such a development carries a 'symbolic value' by showing that sustainable development-related decisions cannot be agreed by States alone (as typical subject of international law), but need to be legitimised through the participation of civil society. On this point see Pineschi, 'L'evoluzione Storica', *cit.*, (n 36) 20.

[158] It is worth clarifying that the Rio Declaration and Agenda 21 use the singular form 'indigenous people' instead of the plural 'indigenous peoples'. The latter is adopted consistently in this thesis in line with human rights law on this issue (e.g., UN Declaration of the Rights of Indigenous Peoples) and the evolution of international environmental law. For instance, in the biodiversity regime the term 'indigenous peoples and local communities' has replaced the original 'indigenous and local communities' found in the Biodiversity Convention. In fact, States were reluctant to resort to the word 'peoples' for its implicit value in terms of rights and recognition. This attitude emerged, in particular, during the negotiation for the adoption of the United Nations Declaration on the Rights of Indigenous People. Discussion on the definition and tacit value of the term 'indigenous peoples' continues.

[159] The nine 'major groups' officially recognised in Agenda 21 are: women, children and youth, indigenous peoples, NGOs, local authorities, workers and trade unions, business and industry, scientific and technological community, and farmers. The structure envisioned in Agenda 21 was formalised through a dedicated programme set up within the UN Division for Sustainable Development with the aim to facilitate the participation of these groups in the intergovernmental process. The interaction between 'major groups' and States has been particularly successful in the framework of the Commission on Sustainable Development (CSD) established after the Earth Summit in 1992. Multi-stakeholder dialogues have boosted the participation of major groups since 1998, those mechanisms were particularly useful in the framework of the 2002 World Summit on Sustainable Development (Johannesburg) and provided the basis to develop new forms of interactive participation and to integrate 'major groups' in the official CSD sessions. The importance of the direct contribution of non-State actors has been restated in Rio+20 and in its outcome document 'The Future We Want' (11 September 2012) UN Doc. A/RES/66/288, paragraph 43. It is worth noting that this Declaration recognises the role of civil society since its incipit by saying: 'We, the Heads of State and Government and high-level representatives, having met at Rio de Janeiro, Brazil, from 20 to 22 June 2012, *with the full participation of civil society*, renew our commitment to sustainable development…' at paragraph 1 (emphasis added). At Rio+20 new sectors of society were invited to participate in the UN processes related to sustainable development, in particular, local communities, volunteer groups and foundations, migrants, families, older persons, and persons with disabilities. Moreover, at Rio+20 the CSD was replaced with a new body: the high-level political forum on sustainable development (HLPF), which seeks to enhance the involvement of 'major groups' and other stakeholders in achieving sustainable development commitments. For instance, the participation of these groups was foreseen during the intergovernmental Open Working Group on Sustainable Development Goals, which identified 17 Sustainable Development Goals (SDGs) guiding the post-2015 development agenda. For detailed information on how 'major groups' and other stakeholders can provide inputs in the framework of the Open Working on Sustainable Development Goals see https://sustainabledevelopment.un.org/owg.html accessed 15 December 2017. For general information on 'major groups' visit https://sustainabledevelopment.un.org/majorgroups/about, accessed 15 December 2017.

'The Future We Want', specifically acknowledges their role in promoting sustainable development and recognise them among the stakeholders to be actively engaged in decision-making, planning, and implementation of sustainable development policies and programmes.[160] Therefore, local authorities and local communities are arguably among the protagonists of international environmental law.

Brunnée highlights that one of the characterising aspects of treaty-based law-making processes – like those foreseen in the framework of the climate and biodiversity regimes – is to 'provide a setting in which non-State actors, such as international organizations, NGOs, or business entities can be directly engaged'.[161] The expanded role of these new actors is in line with the changing concept of environmental governance. According to Kotzé, governance should be interpreted in the context of the current globalised world and is characterised by an increasing disengagement from a traditional mode of governing associated with the State-centered concept of government. He explains that '[g]overnance is experimental and innovative; decentralised and more diverse; more flexible and revisable; it allows for improved participation and the coordination of multiple levels of government; and it fosters greater deliberation'. [162] Therefore, governance is shaped by a multiplicity of actors that operate both at supranational and sub-national levels and is moving away from the dominant role of the State.[163]

This is particularly evident when observing the contribution of supranational entities – either environmental organisations, like convention bodies, or regional and sub-regional organisations, like the EU and SADC respectively – to the development and application of international environmental law. As said, their international subjectivity is accepted since they

[160] In particular, paragraph 42 affirms 'the key role of all levels of government and legislative bodies in promoting sustainable development. [It further acknowledges the] efforts and progress made at local and subnational levels, and recognize[s] the important role that such authorities and communities can play in implementing sustainable development, including by engaging citizens and stakeholders ...'. The Future We Want, *cit.*

[161] Brunnée, 'The Global Climate Regime: Wither Common Concern?', *cit.*, (n 104) 729.

[162] Kotzé, 'Transboundary Environmental Governance of Biodiversity in the Anthropocene', *cit.*, (n 31) 23.

[163] In this regard refer to ibid 20–25.

have an intergovernmental origin. On the other hand, the international capacity of sub-national authorities is debated since they are subordinated to the State. Indeed, Drumbl highlights that sub-national authorities can influence transnational environmental regulation by legislating on environmental matters within their own jurisdiction,[164] but Treves clarifies that they are international subjects only in so far as they can participate to international relations directly and independently from the central government; nevertheless, even when national constitutions exceptionally allow sub-national authorities to conclude international agreements with other States, this occurs with the consent of the central government.[165] For instance, in the environmental field, sub-national governments (federated States, regions, provinces, districts, etc.) enjoy a certain degree of operational autonomy at the international level and capacity to carry out joint projects or conclude agreements with corresponding authorities in other States,[166] which can arguably be defined as decentralised international cooperation.

Ruffert explains that the capacity of sub-national entities to conclude cross-border cooperative agreements depends on the legal categorisation of the relevant agreement, which can be governed by international or national law.[167] A treaty under international law can be concluded by all subjects of international law, including local and regional authorities vested with legal personality under constitutional law.[168] Moreover, national constitutions can provide intermediate authorities with powers to conclude international agreements in areas of their domestic competence;[169] otherwise, States can confer powers to intermediate authorities in transboundary matters through the same legal basis used for international organisations.[170] On the other hand, sub-national authorities – as entities with legal capacities under the relevant

[164] Drumbl, 'Actors and Law-Making in International Environmental Law', *cit.*, (n 100) 8.
[165] Treves provides the examples of the Swiss Confederation, Germany, Canada, and Italy. Treves, *Diritto Internazionale: Problemi Fondamentali, cit.*, (n 114) 69–71.
[166] Fodella, 'I Soggetti', *cit.*, (n 41) 40.
[167] Ruffert, 'Transboundary Co-Operation between Local or Regional Authorities', *cit.*, (n 53) paragraphs 12 and 16.
[168] This happens in federal States like Germany, as provided by Article 30 of the German Basic Law. ibid paraghraphs 13 and 16.
[169] Like in Article 32(3) of the German Basic Law. ibid paragraph 19.
[170] For instance, in the German Basic Law such a legal basis is provided by Articles 23(1) and 24(1). ibid paragraph 18.

legal system – can generally conclude private law contracts with foreign partners within their competences and respecting limitations prescribed by law.[171]

It is worth adding that the international role of sub-national governments is expanding in the framework of regional organisations like the EU,[172] including in the environmental sector. In this regard, Ruffert affirms that transboundary cooperation between sub-national entities is 'a typically European development'[173] since this region relies on decentralised cooperative mechanisms introduced by both the Council of Europe[174] and the EU.[175] Arguably, decentralised international cooperation in Europe is more institutionalised than in other regions thanks to the development of specific governance mechanisms and the existence of a regional cooperative framework. Nevertheless, decentralised international cooperation exists also in other regions of the world, but most of the times it has an informal character and it is being addressed on a case by case basis, through the adoption of site-specific solutions.[176] It can be argued that the interaction between the supranational and sub-national levels is particularly acute when transboundary natural resources exist: while a supranational structure can provide a stable cooperative framework for the conservation and management of transboundary resources, specific actions can be performed on the relevant localised shared resource or area with the involvement of sub-national actors across the borders.

Ruffert describes transboundary cooperation between local or regional authorities as a relatively new development deriving from the inefficacy of containing some economic, environmental and security regulatory problems within national boundaries, even if they have

[171] ibid paragraph 17.
[172] Further discussion on this point is provided in Chapter 4.
[173] Ruffert, 'Transboundary Co-Operation between Local or Regional Authorities', *cit.*, (n 53) paragraph 11. He also hints at the fact the legal categorisations of cooperative regimes developed in the framework of international or supranational organisations can be particularly challenging. ibid paragraph 12 ff.
[174] In particular, the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities (Madrid) 21 May 1980, in force 22 December 1981 ETS 106. Available at https://rm.coe.int/1680078b0c accessed 22 March 2018.
[175] Namely the EGTC through Regulation (EC) No 1082/2006.
[176] For instance, this thesis describes the development of decentralised cooperative mechanisms in southern Africa in the framework of SADC TFCAs in Chapter 6.

only regional or local importance. In these cases, inter-State borders are factually less important since the geographical, economic, or ecological dimensions have a transnational shape that do not correspond with international borders.[177] Transboundary cooperation between local or regional authorities can solve this mismatch and, to be effective, needs to be supplemented through appropriate legal regimes in the form of international or supranational organisations.[178] The author further notices that, despite their importance, these regimes attract little attention from public international scholarship due to their relatively small range of application.[179]

This thesis aims to address this gap and studies transboundary cooperation between local or regional authorities, which is here defined as decentralised international cooperation. In particular, it focuses on the role that sub-national authorities – and local communities – play in the conservation and management of transboundary natural resources through decentralised cooperative mechanisms. In so doing, it implicitly reflects on the potential role that sub-national actors, especially local communities, play at the international level, both directly in the framework of specific regimes (like the Biodiversity Convention) and indirectly through decentralised cooperative mechanisms.

The following sections aim to identify the international environmental principles applicable to the conservation and management of transboundary natural resources and, in this context, focus on the role reserved to sub-national actors as holders of rights and obligations, in order to argue for their increasing capacity to operate across borders.

[177] In Ruffert's word 'borders often reflect a certain historical step which is neither appropriate with respect to the factual situation nor with current developments'. Ruffert, 'Transboundary Co-Operation between Local or Regional Authorities', *cit.*, (n 53) paragraph 1.
[178] ibid paragraph 2.
[179] ibid.

2.3 Principles of international environmental law and shared natural resources

General principles of law are an essential element of international environmental law:[180] they are incorporated in soft law[181] and binding instruments,[182] and their existence and value is confirmed by courts and tribunals.[183] Their legal status and effect change depending on both the individual principle considered and the specific situation in which it applies:[184] they serve

[180] For further reference, both general or specific, on the principle of international environmental law discussed in this thesis refer to international environmental law manuals, including Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) Chapter 5; Alessandro Fodella, 'I Principi Generali' in Alessandro Fodella and Laura Pineschi (eds), *La protezione dell'ambiente nel diritto internazionale* (Giappichelli 2009); Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) Chapter 6; Ved P Nanda and George W Pring, *International Environmental Law and Policy in the 21st Century* (2nd rev, Brill 2013) Chapter 2; Laura Pineschi, 'I Principi Del Diritto Internazionale Dell'ambiente: Dal Divieto Di Inquinamento Transfrontaliero Alla Tutela Dell'ambiente Come Common Concern' in Rosario Ferrara and Maria Alessandra Sandulli (eds), *Trattato diritto dell'ambiente - Volume I 'Le politiche ambientali, lo sviluppo sostenibile e il danno'* (Giuffrè Editore 2014). On this point see also Pierre-Marie Dupuy, 'Formation of Customary International Law and General Principles' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 461.

[181] Several authors maintain that these principles were introduced and consolidated through soft law instruments adopted at the global level, including the 1972 Stockholm Declaration on the Human Environment, the 1982 World Charter for Nature [UN General Assembly Resolution 37/7 'World Charter for Nature' (28 October 1982), UN Doc. A/RES/37/7], the 1992 Rio Declaration on Environment and Development, the 2002 Johannesburg Declaration on Sustainable Development [(Johannesburg) 4 September 2002, UN Doc. A/Conf.199/20] and, more recently, these principles emerge in the Rio+20 outcome document 'The Future We Want'. They also benefitted from doctrinal development, as in the 1987 Proposed Legal Principles for Environmental Protection and Sustainable Development laid out by the WCED Expert Group on Environmental Law, the 1995 IUCN Draft International Covenant on Environment and Development revised in 2010, and the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development developed by the International Law Association (ILA). Moreover, in the commentaries to the ILC Draft Articles on the Prevention of Transboundary Harm, the ILC analyses in depth the content of the principle of cooperation and that of prevention and reflects on their customary nature. See ILC, *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission,* 2001, vol. II, Part Two. General principles regarding the conservation and use of shared resources are set out in the 1978 UNEP Draft Principles and in the ILC *Draft Articles on Transboundary Aquifers* (UN Doc. A/CN4/L.724, 29 May 2008). On this point see Dupuy, 'Formation of Customary International Law and General Principles', *cit.*, (n 180) 458; Fodella, 'I Principi Generali', *cit.*, (n 180) 96; Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 52–53.

[182] These principles have been also incorporated into treaties both in a direct and indirect way. For instance, Climate Change Convention lists in Article 3 the principles guiding the parties in the implementation of the Convention and achievement of its objective. While the Biodiversity Convention, in its Article 20, contains an implicit reference to the principle of common but differentiated responsibilities. See Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 181; Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 54.

[183] For instance, in paragraph 223 of the *Iron Rhine* Arbitration, the tribunal clarifies that it is applying the principles of international environmental law. Iron Rhine Arbitration (Belgium-Netherlands), PCA Award 24 May 2005, ICGJ 373 (PCA 2005) (OUP reference), available at http://legal.un.org/riaa/cases/vol_XXVII/35-125.pdf accessed 16 August 2017. The ICJ resorted to the general principles in several decisions and has occasionally expressed itself on the legal status of such principles. For instance, the no-harm principles (also known through the Latin maxim *sic utere tuo ut alienum non laedas*) was explicitly formulated in the decision of the Corfu Channel case [(United Kingdom v. Albania) Judgement 9 April 1949, ICJ Reports 1949, 4] and its customary nature was affirmed both in the *Nuclear Weapons* Advisory Opinion and in the Case concerning the Gabčíkovo-Nagymaros Project [Hungary v. Slovakia, Judgment 25 September 1997, ICJ Reports 1997, 7, *Gabčíkovo-Nagymaros Project* Case]. Dupuy, 'Formation of Customary International Law and General Principles', *cit.*, (n 180) 461–462.

[184] See Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 187–188. Beyerlin discusses the nature and normative potential of what he calls international environmental 'twilight' norms that include general principles like 'cooperation', 'common but differentiated responsibilities', 'polluters pays', and concepts like 'common heritage of mankind' or 'common concern of mankind'. By 'twilight' norms Beyerlin means 'any norm that does not clearly set out legal consequences that follow automatically from the presence of all stipulated facts'. In particular, he explains that '[i]f incorporated in the operative part of a treaty, the principle shares the treaty's legal status. Thus, it legally binds the contracting parties… [Otherwise,] a non-treaty norm can become legally binding on States only if it meets the requirements of a norm of customary international law'. Ulrich Beyerlin, 'Different Types of Norms in International Environmental Law: Plocies, Principles, and Rules' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 428 and 437 respectively. On this see also Fodella, 'I Principi Generali', *cit.*, (n 180) 96.

multiple purposes[185] and can reflect customary law, emerging legal obligations, or influential but vague concepts with normative potential.[186] In this regard, Dupuy explains that

> '"general principles" of international environmental law differ from customary norms based only on the level of generality of their formulation. Nevertheless, both kinds of norms proceed from the same progressive sedimentation of general statements, together with more or less coherent State practice and sometimes assisted by judicial consolidation (…) whether referred to as "principle" or "custom", the rule derives its legally binding character from the same type of process'.[187]

Many authors stress that general principles of international environmental law are peculiar to the environmental field and cannot be automatically included in the general principles of law recognised by the civilised nations.[188] Indeed, 'principles are perhaps more widely used in international environmental law than in any other field of international law',[189] for several reasons. Environmental concerns are new, complex, in continuous evolution, and touch upon essential State interests. As a consequence, negotiating specific and long-lasting rules is more difficult than adopting general principles that can find application depending on specific circumstances. Moreover, since international environmental law is based on fragmented treaty law, general principles – particularly those with a customary status – can provide a 'unifying

[185] Hey explains that they 'serve to frame legal debate, guide negotiations and the interpretation and application of treaties, customary international law as well as regimes developed by private actors'. See Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 52. See also Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) 89.

[186] Dupuy describes the category of 'normative concepts' as key environmental concepts introduced by the UN or other institutions and having a broad formulation that 'may incorporate a whole range of potential normative developments and suggest a certain approach rather than prescribing a specific conduct', like that of sustainable development. Dupuy, 'Formation of Customary International Law and General Principles', *cit.*, (n 180) 461. These principles are also said to be similar to constitutional principles since they influence judicial decisions, guide normative developments, and inform the functioning of international institutions. See also Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 28. Fodella, 'I Principi Generali', *cit.*, (n 180) 95–96; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 188.

[187] Dupuy, 'Formation of Customary International Law and General Principles', *cit.*, (n 180) 461. By referring to sustainable development and the precautionary principle, as examples, he argues that these concepts, or principles, 'imply the further definition of precise prescriptions and specific duties' and require 'a certain level of effective application demonstrated by the actual practice… Ultimately, state practice is yet again the necessary and exclusive route for acceptance into the realm of international law'. ibid 462. Other authors affirm that the authority and legitimacy of these principles derives from the endorsement of States. See, for example, Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 28; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 190.

[188] See Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 27–28; Pineschi, 'Le Fonti', *cit.*, (n 96) 82; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 188. Along the same lines, Fodella argues that international environmental law principles have customary nature or that of general principles of law recognised by civilised nations if they fulfil the conditions prescribed to this end in general international law; otherwise, their legal value is that of the documents in which they are included. Fodella, 'I Principi Generali', *cit.*, (n 180) 96. Nevertheless, other authors subsume international environmental law principles in the category of the general principles listed in Art. 38(1)(c) of the ICJ Statute, as for Drumbl, 'Actors and Law-Making in International Environmental Law', *cit.*, (n 100) 17.

[189] Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) 89.

basis' to address environmental issues.[190] Sands identifies seven 'general rules and principles which have broad, if not necessarily universal, support and are frequently endorsed in [State] practice'.[191]

Hence, principles can be used to regulate or guide States in addressing new or controversial issues that are not dealt with in any specific multilateral environmental agreement. For instance, the international debate on the mutual obligations of neighbouring States over shared natural resources culminated in 1978 with the adoption of the so-called UNEP Draft Principles by the UNEP Governing Council.[192] The explanatory note clarifies that these fifteen principles are meant to 'encourage States sharing a natural resource, to co-operate in the field of the environment', they are purposely drafted in a way as to avoid creating legally binding obligations, but such language 'does not prejudice whether or to what extent the conduct envisaged in the principles is already prescribed by existing rules of general international law'.[193]

Despite their practical value, their formal adoption met the resistance of many States and they never took a binding form. The General Assembly took note of their existence and invited

[190] On this point see Dupuy, 'Formation of Customary International Law and General Principles', *cit.*, (n 180) 463–464.

[191] These are States' sovereignty over their natural resources and the responsibility not to cause transboundary environmental damage; preventive action; cooperation; sustainable development; precaution; polluter pays; and common but differentiated responsibility. Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 187.

[192] For a general overview of the UNEP Draft Principles, see Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 130–133. In particular, Principle 1 recognises the importance of cooperation among States sharing resources in order to control, prevent, reduce or eliminate negative environmental effects deriving from an inappropriate utilisation. Cooperation should ensure an equitable utilisation of shared resources based on the equality of sharing States. According to Principle 2, cooperation can be structured through specific bilateral or multilateral agreements and operationalised by establishing joint institutions. Principle 3 recalls the permanent sovereignty over natural resources and the corresponding responsibility not to cause environmental damage to other States or areas beyond national jurisdiction when utilising shared resources and with the broader aim to ensure environmental protection. In its first paragraph, Principle 3 repeats the text of Principle 21 of the Stockholm Declaration, but then elaborates further by clarifying the scope of negative environmental impacts and requiring to consider, where appropriate, the practical capabilities of sharing States, which *de facto* decreases the level of environmental protection. Principle 4 urges States to carry out environmental assessment before engaging in risky activities. Principles 5 and 6 include procedural obligations that have to be respected on a regular basis and under specific circumstances: such a collaborative behaviour contributes to the principle of good faith and good neighbourliness enunciated in Principle 7. Moreover, Principle 8 encourages sharing States to develop joint scientific studies and assessment; Principle 9 clarifies the behaviour to adopt in emergency situations; and Principle 10 invites sharing States to jointly resort to international organisations to address specific environmental issues. Principle 11 deals with dispute settlement and Principle 12 with State responsibility and liability. Principle 13 promotes non-discrimination and Principle 14 applies it in the context of accessing judicial and administrative remedies for environmental damages. Principle 15 concludes by providing that the UNEP Draft Principles should be interpreted and applied in a way that ensures the fair development and interests of all countries, especially developing ones.

[193] See the UNEP Governing Council's report adopting the UNEP Draft Principles, 1097-1098.

States to use them as 'guidelines and recommendations' when regulating shared resources.[194] Therefore, the UNEP Draft Principles cannot be intended as a distinct legal regime for governing 'shared resources'; nevertheless, they include some principles useful to this end that have developed normatively and through State practice, and even acquired the status of customary international law.

Given the scope of this thesis, it is worth highlighting that the UNEP Draft Principles do not pay attention to the involvement of non-State actors in the conservation and management of shared natural resources. In fact, they are dominated by an intergovernmental logic and the only glimmer in this sense is provided by Principle 14, that entitles people to equal access to judicial and administrative remedies when (potentially) affected by environmental damage.

Notwithstanding the fact that governance of transboundary natural resources is not addressed by any single legal instrument, it can be argued that the UNEP Draft Principles are partially useful to this purpose. In fact, they would offer a limited regime given the multiplicity of issues at stake in terms of the resources concerned, actors involved, and the legal and institutional frameworks that are relevant in each specific situation. Moreover, the participation of sub-national actors – i.e., local authorities and local communities – to the governance of shared resources eludes the traditional logic of international law, and this multi-stakeholder dimension is not captured in the UNEP Draft Principles. Therefore, a regime applicable to the cooperative governance of shared resources involving sub-national actors rests on a variety of sources that include international environmental law principles, multilateral environmental conventions, declaratory instruments and cooperative conservation mechanisms developed through practice.

[194] UN General Assembly Resolution 34/186 'Co-operation in the field of environment concerning natural resources shared by two or more States' (18 December 1979), UN Doc. A/RES/34/186. In this regard see Birnie, Boyle and Redgwell, *International Law and the Environment, cit.*, (n 6) 193; Michael Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research handbook on international environmental law* (Edward Elgar 2010) 498; Blanco and Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives, cit.*, (n 13) 88; Sands and Peel, *Princ. Int. Environ. Law, cit.*, (n 40) 36.

The first step to shape such a regime consists in identifying selected international environmental law principles and considering to what extent they bind States not only among themselves, but also in relation to non-State actors, and thus support the concept of decentralised international cooperation. The thesis' focus on transboundary natural resources and sub-national actors requires a change of governance paradigm and moves away from those principles that are traditionally applied to natural resources, *in primis* that of permanent sovereignty. After introducing the principle of permanent sovereignty and highlighting its limitations, the following sections discuss the principles and concepts – including cooperation, trusteeship, public participation, and intergenerational equity – applicable to the governance of transboundary natural resources, and useful for the development of cross-border localised cooperative solutions and the emergence of decentralised international cooperation. The analysis shows also that the principles of international environmental law are inevitably interconnected and cross-reference each other.

2.4 Governing shared resources: moving away from permanent sovereignty

According to the principle of permanent sovereignty over natural resources, States can directly exploit and use *all*[195] their natural resources as well as accept and control foreign economic activities on their territory with similar purposes.[196] Permanent sovereignty can be derived from the principles of State sovereignty[197] and territorial integrity.[198] It predates the 1950s,[199] but it

[195] Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers', *cit.*, (n 37) 9.
[196] ibid 13. On this point see also Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 72–73.
[197] Sánchez Castillo explains that permanent sovereignty is based on the principle of territorial sovereignty and is exercised over exclusive resources – as to say those located entirely within the borders of a State, thus being under its sole jurisdiction – to the exclusion of all other States. Furthermore, she clarifies that while national law regulates the use of exclusive resources, any transboundary impact deriving from such a use is subject to international law. Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers', *cit.*, (n 37) 9.
[198] Sands explains that 'the sovereign right to exploit natural resources includes the right to be free from external interference over their exploitation'. Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 192.
[199] According to Birnie, Boyle and Redgwell, '[the] control of natural resources depended on the acquisition of sovereignty over land territory and territorial seas'; therefore, disputes over resources were treated as boundary delimitations or aimed to ascertain the status of a resource when falling outside the exclusive control of a State. Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 190.

was spurred by the decolonisation process and evolved mainly through normative resolutions of UN organs, *in primis* the General Assembly.[200]

This principle aimed to support not only the aspirations of developing and newly independent countries, but also the right of peoples to self-determination.[201] To this end, the General Assembly acknowledged self-determination as a basic human right[202] and prompted the inclusion of permanent sovereignty in the International Covenants on Human Rights,[203] thus opening up a debate on its social and economic dimensions.[204] Resolution 1803 (XVII)[205] reported the Declaration on Permanent Sovereignty over Natural Resources,[206] drafted by the Commission on Permanent Sovereignty over Natural Resources.[207] This Resolution was

[200] Although this principle is not stated in the UN Charter, Schrijver highlights that the provisions concerning the equality of States, non-intervention, self-determination of peoples, and non-self-governing territories are all inherent to the principle of permanent sovereignty over natural resources. Nico J Schrijver, 'Permanent Sovereignty over Natural Resources' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2008) paragraphs 3 and 4.

[201] ibid paragraph 1; Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 72.

[202] UN GA Resolution 421 (V), 'Draft International Covenant on Human Rights and measures of implementation: future work of the Commission on Human Rights' (4 December 1950), UN Doc. A/PV.317, p. 43, paragraph 6. Available at http://research.un.org/en/docs/ga/quick/regular/5 accessed 25 March 2018.

[203] UN GA Resolution 545 (VI), 'Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination' (5 February 1952), UN Doc. A/PV.375, p. 36. Available at http://research.un.org/en/docs/ga/quick/regular/6 accessed 26 March 2018.

[204] For a detailed analysis of the normative evolution of the principle of permanent sovereignty as a human right refer to Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 49 ff.; Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 75 ff. Major discussions took place in the context of the Commission on Human Rights. In this context, Chile argued that 'the right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources' [Chilean draft resolution, UN Doc. E/CN.4/L.24 (16 April 1952)]. While developing and socialist States endorsed such a proposal, developed States opposed it for its potential interference with colonial issues and foreign investments in developing countries by arguing that control over natural resource 'was an attribute of sovereignty', rather than being connected to self-determination. On this point refer to Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 58; Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7).

[205] UN GA Resolution 1803 (XVII) 'Permanent sovereignty over natural resources' (14 December 1962), 17 UN GAOR Supp. (No.17) at 15, UN Doc. A/5217. An intense discussion on the draft resolution on permanent sovereignty took place within the Second Committee and then in the plenary meeting of the General Assembly, Schrijver provides a detailed account in Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 70–76.

[206] United Nations Commission on Permanent Sovereignty over Natural Resources, Draft resolution I (22 May 1961) UN Doc. A/AC.97/10 reproduced in Report of the Commission, E/3511, annex. See http://legal.un.org/avl/ha/ga_1803/ga_1803.html accessed 31 March 2018.

[207] For a detailed analysis of the work of this Commission refer to Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 59–68. The UN General Assembly set up this Commission 'to conduct a full survey of the status of this basic constituent of self-determination'. UN GA Resolution 1314 (XIII), 'Recommendations concerning international respect for the right of peoples and nations to self-determination' (12 December 1958), UN Doc. A/PV.788, p. 27, paragraph 1. The Commission on Human Rights had already recommended the establishment of a Commission on permanent sovereignty in 1954, but the UN Economic and Social Council (ECOSOC) did not transmit such a proposal to the General Assembly due to the opposition of Western nations. Such a request was reiterated in 1955 and the ECOSOC decided to transmit it through Resolution 586 D (XX) to the General Assembly, which took it up a few years later. On this point see ibid 57 ff.

adopted and endorsed by a great majority of States[208] and is considered as 'one of the most significant statements regarding permanent sovereignty'.[209] It attributes the right to permanent sovereignty both to peoples and nations and affirms that it 'must be exercised in the interest of their national development and of the well-being of the people of the State concerned'.[210] Therefore, according to Resolution 1803 (XVII), the exercise of the States' right to permanent sovereignty has to pursue the interest and well-being of their citizens and respect general international law. Despite the fact that it recognises some limits to States' exploitation rights, it does not distinguish between living and non-living resources, address shared resources,[211] or foresee any duty of conservation.[212] Throughout the 1960s, developing countries sought ways to exercise permanent sovereignty with the aim of reinforcing their control over natural resources and enhancing\ their development,[213] including by '[asserting] the right to nationalize or control foreign-owned resources'.[214] However, the scope of permanent sovereignty would soon be limited by its human rights dimension and growing environmental concerns.

[208] With eighty-seven votes to two (France and South Africa) and twelve abstentions. Vote records are available online at http://research.un.org/en/docs/ga/quick/regular/17 accessed 14 November 2017. Schrijver reports that in the Texaco v. Libya award [Texaco Overseas Petroleum Co v Government of the Libyan Arab Republic, Award of 19 January 1978, 17 ILM 1 (1978)], Dupuy, who was the sole arbitrator, noted that this Declaration had been adopted by many States representing all geographical areas and all economic systems, which proved the existence of an *opinio iuris communis* and the customary character of this field of law. Schrijver, 'Permanent Sovereignty over Natural Resources', *cit.*, (n 200) paragraph 23.

[209] Perrez 81. Several authors point out that this Resolution has been said to reflect customary international law and has been referred as such by some international tribunals, like in Texaco v. Libya and in Kuwait v. American Independent Oil Co., 21 ILM 976 (1982). On this point see Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 88–92; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 191; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 192.

[210] Paragraph 1. The Declaration consists in eight paragraphs and defines the conditions for exercising the principle of permanent sovereignty. According to paragraph 2, the exploitation of natural resources and the foreign capital used to this end are subjected to the conditions that peoples and nations consider appropriate. Moreover, the exercise of permanent sovereignty lays on the mutual respect of the sovereign equality of States (paragraph 5). In paragraph 6, reference is made to international cooperation that should benefit developing countries and strengthen their independent national development while respecting their sovereignty over their natural wealth and resources. Paragraph 7 affirms that violating permanent sovereignty is contrary to the UN Charter and undermines international cooperation and the maintenance of peace.

[211] Sánchez Castillo explains that permanent sovereignty can be applied only to exclusive resources and not to shared ones. Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers', *cit.*, (n 37) 11.

[212] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 191.

[213] Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 82 ff. Since permanent emerged as instrumental to advance the economic growth of underdeveloped countries, Perrez notes that '[it] is more often invoked when states wish to resist international pressure to protect their natural resources from overuse and depletion', Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 95.

[214] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 191.

In 1966, this principle was included in Article 1(2) of both the International Covenant on Civil and Political Rights[215] and the International Covenant on Economic, Social and Cultural Rights.[216] This provision attributes the right to freely dispose of natural resources to peoples rather than States, emphasises its collective character, and highlights its main function: 'to serve the people of *all* [developing and developed] *nations* to enjoy prosperity and well-being'.[217] On the one hand, peoples can exercise this right vis-à-vis other States and foreign companies as well as with regards to their nation State; on the other hand, States have the corresponding obligation 'to use the natural resources for the benefit and in the interest of their peoples'.[218] This paradigmatic shift is significant for this thesis, not only because it identifies peoples – which arguably encompasses indigenous peoples and local communities – as the right holders, but also because it binds States to respect and achieve this right actively, both in national and international contexts.

Although it emerged for its developmental and human rights potential, the principle of permanent sovereignty soon became relevant in the environmental field as well.[219] In fact, it is enshrined in Principle 21 of the Stockholm Declaration[220] and reiterated in Principle 2 of the

[215] International Covenant on Civil and Political Rights, 16 December 1966, in force 23 March 1976, 6 ILM 368 (1967). Hereinafter, ICCPR.

[216] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, in force 3 January 1976, 6 ILM 360 (1967). Hereinafter, ICESCR. Article 1(2) states that 'all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law'.

[217] Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 77. (emphasis added) These purposes emerge from the *travaux préparatoires.*

[218] ibid 78.

[219] The principle of permanent sovereignty is affirmed in several environmental agreements, including before the Stockholm Declaration. This is the case of the Convention Relative to the Preservation of Fauna and Flora in their Natural State [(London) 8 November 1933, in force 14 January 1936, 172 LNTS 241, hereinafter, 1933 London Convention), Article 9(6), and the 1971 Ramsar Convention, Article 2(3). After Stockholm, this principle is included in the Preamble of both the Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal [(Basel) 22 March 1989, in force 5 May 1992, 28 ILM 657 (1989); hereinafter, Basel Convention] and the Climate Change Convention. It is also reaffirmed in Article 15(1) of the Biodiversity Convention and in Article 6 of the Nagoya Protocol to the Biodiversity Convention. Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity (Nagoya) 29 October 2010, in force 12 October 2014, in CBD COP Decision X/1, 'Access to genetic resources and the fair and equitable sharing of benefits arising from their utilization', UN Doc. UNEP/CBD/COP/10/27 (2011). On this point see Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 192.

[220] It reads '*States* have, in accordance with the Charter of the United Nations and the principles of international law, *the sovereign right to exploit their own resources* pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. (emphasis added)

Rio Declaration.[221] Principle 21/2, also referred to as the *no harm* principle, is considered 'the cornerstone of international environmental law',[222] its customary character is uncontested and it was confirmed by the ICJ in the *Nuclear Weapons* Advisory Opinion and the *Pulp Mills* case.[223] This principle is made of an indissoluble compound that joins the States' sovereign right to exploit their own natural resources with their obligation to avoid causing damage to the environment of other States or of areas beyond the limits of national jurisdiction. [224] Such an obligation can be derived from the principle of good neighbourliness[225] and respect for the territorial sovereignty of neighbouring States.[226]

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[221] Rio Principle 2 repeats Stockholm Principle 21 literally, except for the notable addition of two words, by saying that States can exploit their natural resources 'pursuant to their own environmental *and developmental* policies'. This addition has been interpreted in both a negative and a positive way. For Schrijver '[it] expresses the conviction of developing countries that their environmental policies cannot override their developmental policies, especially not as regards the exploitation of natural resources'; however, he recognises that Principle 3 and 4 aim to fine-tune the environment vs. development concerns by urging to ensure intergenerational equality and the pursue of sustainable development. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 136. According to Perrez, this addition reflects the 'Rio paradox' that seeks to integrate environment and development forcefully. However, he provides a positive interpretation and argues that it can be seen 'as an extension of the scope of the obligation not to cause transfrontier damage … [Hence,] not only national environmental policies, but also national development policies are subject to the duty not to cause transboundary pollution … [In so doing,] the Rio Declaration clearly includes environmental concerns into developmental rights, namely, the right to development must be fulfilled so as to equitably meet environmental needs of present and future generations and to reduce and eliminate unsustainable patterns of production and consumption', which is a 'step forward' from Stockholm. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 102–103. Although presenting opposing views, it can be argued that both authors intend Principles 3 and 4 of the Rio Declaration as aimed to limit that developmental interests prevail over environmental ones. For Duvic-Paoli and Viñuales, this 'minor change' is 'subtle' and 'revealing': it is meant 'to integrate the developmental perspective advocated by developing countries' and reinforces the importance of sovereignty over natural resources vis-à-vis environmental protection purposes. Nevertheless, it succeeds in both reaffirming Principle 21 without replacing it with another concept and tracing a *file rouge* between the Stockholm and Rio Declarations. Leslie-Anne Duvic-Paoli and Jorge E Viñuales, 'Principle 2: Prevention' in Jorge E Viñuales (ed), *The Rio Declaration on environment and development: A commentary* (Oxford University Press 2015) 112–113.

[222] Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 191. This principle has been also defined as the 'golden rule' of international environmental law by Duvic-Paoli and Viñuales, 'Principle 2: Prevention', *cit.*, (n 221) 110.

[223] Its customary nature is recognised in the ICJ's *Nuclear Weapons* Advisory Opinion at paragraph 29, and reiterated in the 1997 decision on the *Gabčíkovo-Nagymaros Project* Case at paragraph 53. More recently, it was confirmed in the Pulp Mills on the River Uruguay (Argentina v. Uruguay), 20 April 2010, ICJ Reports 2010, 14, at paragraph 101. Hereinafter, *Pulp Mills* case. The no harm rule is contained in numerous environmental conventions and soft law instruments. While its customary nature in international environmental law is pacific, it is widely accepted but still debated in general international law due to the lack of consistent State practice as highlighted by Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 196; Jutta Brunnée, 'Sic Utere Tuo Ut Alienum Non Leadas' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2010) paragraphs 15-16. For further details on this principle see also Nicolas de Sadeleer, 'The Principle of Prevention and Precaution in International Law: Two Heads of the Same Coin?' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research handbook on international environmental law* (Edward Elgar 2010) 182; Duvic-Paoli and Viñuales, 'Principle 2: Prevention', *cit.*, (n 221) 120–121.

[224] In this regard, Sands notes, 'state practice since 1972 has assiduously avoided their decoupling', Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 191. For Perrez, this connection 'is a derivation from the general maxim that the possession of rights involves the performance of corresponding obligations', Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 101. For Duvic-Paoli and Viñuales the widespread acceptance of this principle is due to the fact that it embodies a compromise and has composite nature that enables States to interpret it flexibily. See Duvic-Paoli and Viñuales, 'Principle 2: Prevention', *cit.*, (n 221) 109–110.

[225] On the principle of good neighbourliness see *infra* Section 2.6.

[226] Duvic-Paoli and Viñuales explain that Principle 21/2 does not originate from a direct concern for environmental protection. Indeed, 'environmental harm was only a concern inasmuch as the exploitation of natural resources would have damaging consequences on a neighbouring State and would therefore encroach on the territorial sovereignty of another State'. Duvic-Paoli and Viñuales, 'Principle 2: Prevention', *cit.*, (n 221) 108.

Therefore, Principle 21/2 confirms that permanent sovereignty over natural resources is not unrestrained.[227] Perrez discerns three distinct limitations: one from above imposed by general international law and limiting sovereignty itself; one from the side deriving from the sovereign equality of States and the obligation of mutual respect; and one from below that requires States to use their natural wealth and resources for the benefit and well-being of their population.[228] Therefore, precepts of public international law, human rights, and environmental law all contribute to limit the principle of permanent sovereignty and re-interpret it in light of the legal evolution in these fields.

It can be argued that, in the context of this thesis, the existence of transboundary natural resources and spaces as well as the more advanced role played by sub-national actors across borders, challenge the application of permanent sovereignty and restrict its scope even further.

While permanent sovereignty can be applied to all exclusive resources, it fails to address the cooperative dimension inherent to the protection and utilisation of shared resources.[229] To exemplify, Sánchez Castillo explains that a transboundary aquifer constitutes an ecological unit as a whole and cannot be divided into parts to be subjected to the exclusive sovereignty of sharing States. In fact, the use of water by one State would inevitably have repercussions on the aquifer and threaten the rights and legitimate interests of all the other aquifer States. Therefore,

[227] Clear limitations are also stated in previous formulations of the principle of permanent sovereignty over natural resources, in particular, that of Resolution 1803 (XVII) and Article 2(1) of the Human Rights Covenants. In this regard see Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 105–106.

[228] ibid 97. Moreover, he argues that these limitations parallel those applied to sovereignty itself since 'permanent sovereignty is based upon and is an element of the general principle of state sovereignty'. ibid 107. See also Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issue of Biodiversity and Custodial Sovereignty', *cit.*, (n 32) 23; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 192; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 191–192.

[229] Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers', *cit.*, (n 37) 8. Sánchez Castillo argues that sovereignty over exclusive resources and sovereignty over shared resources are two different concepts and relate to distinct legal regimes. While sovereignty over exclusive resources builds on the principle of permanent sovereignty, this cannot be applied in the case of shared resources, which are regulated under a specific discipline centred on cooperation and equitable use. Although, in her article, she focuses on transboundary aquifers and defines shared resources as '[those] contained in a single geological formation (i.e., groundwater, oil and natural gas) situated in the territory of a limited number of States', the legal regime developed for transboundary aquifers can be generally applied to any natural resources having a transboundary character. ibid 4. The definition of transboundary natural resources used in this thesis is provided in Chapter 1 Section 1.1.1.

the character of a resource – exclusive or shared – determines the application of a distinct legal regime.[230]

Along the same line, Marauhn argues that 'the physical fact of a resource transcending political boundaries stimulated legal cooperation [since] the Westphalian system of absolute sovereignty and integrity could never be operational to the full with respect to transboundary natural resources'.[231] States adopt a pragmatic approach by concluding agreements for the shared utilisation of transboundary resources and, in so doing, they deploy the concept of sovereignty as a claim rather than a fact.[232] Therefore, it can be argued that, despite the reaffirmation of sovereignty and permanent sovereignty, the value of these concepts is eroded in the case of transboundary natural resources that are subject to a more appropriate governance framework, which includes the principles of cooperation, reasonable and equitable utilisation, the ecosystem approach, procedural obligations, and the no harm rule.[233] This framework regulates inter-State relations with respect to shared resources and is based on the sovereign equality of States, their obligation of mutual respect, and, above all, the legitimate interests of sharing States over transboundary resources.

As said, States have to use natural resources – either exclusive or shared – for the benefits and interest of their citizens and in a sustainable way, in light of the principle of sustainable development. Hence, States are bound to wise management of natural resources that ensures their preservation in the long term for the benefit of present and future generations.[234] Arguably, a limitation from below to permanent sovereignty that expands beyond the borders of national

[230] Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers', *cit.*, (n 37) 9–10. On this point, Sánchez Castillo argues that the emergence of specific environmental rules on shared resources, from the 1970s onwards, proves that shared and exclusive resources were perceived as requiring different regulations. In fact, these new regulations were meant to enable the utilisation and environmental protection of shared resources rather than ensuring the right to self-determination as in the case of the principle of permanent sovereignty. ibid 12–13.
[231] Marauhn, 'Changing Role of the State', *cit.*, (n 113) 731.
[232] ibid 730–731.
[233] On the same point, Sánchez Castillo argues that the four basic principles for managing shared natural resources are: equitable and reasonable utilisation; no harm; prior notification, consultation and exchange of information; and cooperation. See Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers', *cit.*, (n 37) 14–15.
[234] Fodella, 'I Principi Generali', *cit.*, (n 180) 118–119.

jurisdictions and benefits the world's citizens or humankind – in an intergenerational perspective[235] – belongs to natural resources protected through collective concern regimes as well as where the application of a trusteeship regime is foreseen.[236]

To conclude, environmental concerns have increasingly eroded State sovereignty and permanent sovereignty over natural resources, thus modifying how they are perceived and exercised. Several authors highlight a new element, that of responsibility, which complements and qualifies the traditional authority deriving from sovereign rights.[237] In particular, in exercising their sovereignty and exploiting their natural resources, States have to observe the limits imposed by international (environmental) law, respect the equal rights of neighbouring States on shared resources, pursue the benefits and well-being of their populations, and seek environmental protection, including by addressing collective concerns. Perrez notes that 'responsibility embraces authority, competence, obligations and duty, and accountability'[238] and 'is the expression of the social character of sovereignty',[239] thus putting States in relation

[235] In this regard see Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 338.

[236] This is the case of the World Heritage Convention that accords a reinforced protected status to natural heritage of outstanding universal value and foresees the world's people as beneficiaries of the conservation of these sites entrusted to the States hosting them. A trusteeship logic emerges in several environmental regimes both species-based, like the 1946 Whaling Convention, and habitat-based, like the Ramsar Convention, as well as applying more generally to the field of biodiversity, as in the case of the International Treaty on Plant Genetic Resources for Food and Agriculture. On this point refer to Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 502–503 and 506 ff.; Peter H Sand, 'The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity' in L Kotze and T Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill 2014) 57–58 and 60 ff. International Convention for the Regulation of Whaling (Washington) 2 December 1946, in force 10 November 1948, 161 UNTS 72 (as amended 19 November 1956, 338 UNTS 336), hereinafter, 1946 International Whaling Convention. International Treaty on Plant Genetic Resources for Food and Agriculture, Rome, 3 November 2001, in force 29 June 2004 available at http://www.fao.org/3/a-i0510e.pdf accessed 30 December 2018. Regarding collective concern regimens and the concept of trusteeship see *infra* Section 2.5.

[237] In this regard see Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 335 ff.; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 192. When discussing the impacts of environmental concerns over State sovereignty, Venter affirms: 'international law requires that sovereignty must be exercised *responsibly*, especially where natural resources are shared, and for the purpose of sustainable use, the conservation of biological diversity and the rights of indigenous peoples'. Venter, 'Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty', *cit.*, (n 113) 78. Other authors focus on the duties accompanying the exercise of sovereign rights, see, for example, Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 168; Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issue of Biodiversity and Custodial Sovereignty', *cit.*, (n 32) 21 ff. Arguably, the concept of responsibility is embedded in the formulation of Principle 21/2, which adjoins the sovereign right of exploiting natural resources with the responsibility not to cause transboundary environmental damage. For a detailed analysis of both Principle 21/2 and its two components see Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 190 ff.

[238] Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 336.

[239] ibid 335.

with each other as well as with other actors and placing them into the real world that rests on the principle of cooperation.

Since this thesis deals with transboundary natural resources and spaces, the principle of permanent sovereignty has to be redefined[240] to facilitate a governance framework that is more appropriate to the shared essence/character and connectivity of natural resources. Hence, global obligations and commitments to ensure environmental protection and tackle common concerns, cooperation and good neighbourliness, equitable and reasonable use, the ecosystem approach, public participation, and intergenerational equity define States' obligations[241] in the cooperative governance of transboundary natural resources involving sub-national actors, that is decentralised international cooperation.

2.5 The general duty to cooperate for environmental protection and common concerns

Environmental protection and common concerns are overarching goals to which decentralised international cooperation can contribute. Their achievement requires the commitment of the international community as a whole: States *in primis*, but also non-State actors, such as international organisations, NGOs, peoples. Hence, cooperation is indispensable for tackling common concerns and ensuring environmental protection. In this context, the principle of cooperation acquires an expanded dimension since it binds States, but can also be applied to the other actors operating in international contexts, as where decentralised international cooperation is at work.

Cooperation is seen as the consequence of an increasingly interdependent world[242] in which States are not able to fulfil their traditional tasks and functions autonomously, but

[240] State sovereignty, more generally, needs to be redefined in the wake of globalization, global environmental challenges and the increasing protection granted to individuals. Venter describes this transformation in State sovereignty, but recognises its ongoing importance as the pillar of the national and international communities. Venter, 'Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty', *cit.*, (n 113) 76 ff.

[241] In this regard, it is worth clarifying that these obligations and commitments do not always originate from enforceable hard law, but can also derive from soft law. On this point refer to Chapter 1 Section 1.2.1.

[242] In this regard, Pinto argues that 'the concept of "co-operation" is derived from "interdependence" as the parent relationship or condition subsisting among States, and is seen as a means of its active and practical expression'. MCW Pinto, 'The Duty of

become dependent on activities of other States and decide to act in a coordinated way.[243] In this sense, cooperation is inherent to international law and finds its practical manifestation in the proliferation of international agreements and institutions.[244]

Several authors distinguish between a general obligation to cooperate in international law and concrete obligations to cooperate in some areas of international law or stemming from specific treaties.[245] While there is disagreement on the customary nature of a general obligation to cooperate in general international law,[246] the obligation to cooperate for the protection of the environment is beyond any doubt.[247] This principle is included 'in virtually all international

Co-Operation and the United Nations Convention on the Law of the Sea' in Adriaan Bos and Hugo Siblesz (eds), *Realism in Law-Making: Essays on international law in honour of Willem Riphagen* (Martinus Nijhoff Publishers 1986) 133.

[243] Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 256. He claims the existence of a general duty to cooperate in general international law that finds its normative basis in the UN Charter and is meant to advance the general interest. ibid 264 ff. Although this duty is too vague and indefinite to provide the basis for concrete actions, 'it requires the States to act in a constructive and cooperative way, to respect and consider legitimate interests of the others, and to adopt a cooperative attitude towards each other'. ibid 267. That cooperation entails action is expressly stated by Pinto, 'The Duty of Co-Operation and the United Nations Convention on the Law of the Sea', *cit.*, (n 242) 154.

[244] According to Article 1(3) of the UN Charter, one of the purposes of the UN is 'to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. Moreover, it is explicitly mentioned in its Article 55 and 56 that require States to cooperate with each other as well as with UN institutions for addressing international problems in several fields. Although the protection of the environment is not specifically mentioned among the objectives of Article 55, it arguably contributes, *inter alia*, to the achievement of higher standards of living and to the solutions of socio-economic and health problems; therefore, this general spur to cooperation can be extended to the environmental field. The commitment to international cooperation expressed in the UN Charter is reiterated in the 1970 Friendly Relations Declaration. The UN Charter is available at http://www.un.org/en/charter-united-nations/index.html, accessed 11 September 2017. See also the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), UN Doc. A/RES/2625(XXV) (24 October 1970). More recently, the UN Millennium Reform list the respect for nature among the six fundamental values of international relations and clarifies its commitment to environmental protection, especially through the application of the principles of sustainable development. UN Millennium Declaration, UN Doc. A/RES/55/2 (18 September 2018), available at http://www.un.org/millennium/declaration/ares552e.htm accessed 10 November 2018.
For Nanda and Pring cooperation results from the 'enlightened self-interest and self-preservation' of States, which voluntarily decide to coordinate their efforts under a legal regime and achieve specific objectives that would not otherwise be achieved through unilateral actions. Nanda and Pring, *International Environmental Law and Policy in the 21st Century*, *cit.*, (n 180) 21. On the general obligation to cooperate see also Jost Delbrück, 'The International Obligation to Cooperate : An Empty Shell or a Hard Law Principle of International Law? A Critical Look at a Much Debated Paradigm of Modern International Law' in Vöneky S Hestermeyer, H. P., König, D., Matz-Lück, N., Röben, V., Seibert-Fohr, A., Stoll, P. T. (ed), *Coexistence, cooperation and solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers 2012); Rüdiger Wolfrum, 'International Law of Cooperation' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, Oxford University Press 2010); Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) 12.

[245] On this point see, among the others, Delbrück, 'The International Obligation to Cooperate : An Empty Shell or a Hard Law Principle of International Law? A Critical Look at a Much Debated Paradigm of Modern International Law', *cit.*, (n 244); Wolfrum, 'International Law of Cooperation', *cit.*, (n 244); Fodella, 'I Principi Generali', *cit.*, (n 180); Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7).

[246] For instance, Perrez provides evidence to support the customary nature of such a duty 'to further the general interest'; instead, for Wolfrum – that intends it as an obligation to cooperate for development – this is not the case. See Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 266; Wolfrum, 'International Law of Cooperation', *cit.*, (n 244).

[247] Sands affirms that among the general principles of international environmental law 'Principle 21/Principle 2 [namely, the State sovereign right to exploit their natural resources and the obligation not to cause transboundary harm], the prevention and the cooperation principles are sufficiently well established to provide the basis for an international cause of action; that is to say, to reflect an international customary legal obligation the violation of which would give rise to a free-standing legal remedy'

environmental agreements of bilateral and regional application, and global instruments'[248] as well as other instruments, including the Stockholm and Rio Declarations. Moreover, it has been confirmed by State practice and addressed as a key issue in famous international disputes.[249]

Principle 24 of the Stockholm Declaration introduces the principle of cooperation in the environmental realm and indicates a diffuse commitment to cooperate for controlling, preventing, reducing and eliminating adverse environmental effects in all spheres.[250] This principle is reiterated in the 1982 World Charter for Nature,[251] enshrined in Principle 27 of the Rio Declaration and further modulated in its Principles 5, 7, 9, and 14 in relation to specific goals.[252]

Principle 27 affirms that 'States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the future development of international law in the field of sustainable development'. Beyond framing the cooperative duty to protect the environment within the principle of good faith,[253] such a formulation introduces new elements and aims to provide an 'operational directive for future implementation of the Rio Declaration as a whole'.[254] First of all, it anticipates a change of

Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 188. The customary nature of the principle of cooperation in international environmental law is reiterated in, among the others, Wolfrum, 'International Law of Cooperation', *cit.*, (n 244) paragraph 28; Fodella, 'I Principi Generali', *cit.*, (n 180) 109; Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) 12; Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 279; Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 247.

[248] Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 204. In particular, the principle of cooperation is included in the Biodiversity Convention, Ramsar Convention, and World Heritage Convention as described *infra* in the dedicated sections.

[249] Among the ICJ cases, this principle has been relevant in the *Gabčíkovo-Nagymaros Project* case and the *Pulp Mills* case. Moreover, other international tribunals and courts affirmed its importance as in the *Lac Lanoux* Arbitration [(France v. Spain) 16 November 1957, 24 ILR 101 (1957)], and in the *MOX Plant* case [(Ireland v. United Kingdom) Provisional Measures 3 December 2001, 41 ILM 405 (2002).

[250] Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 203.

[251] Article 21(a).

[252] In these principles, cooperation is encouraged to eradicate of poverty, protect the Earth's ecosystem, strengthen endogenous capacity for sustainable development, and deter the relocation and transfer to other States of activities or substances that are potentially harmful to the environment and human health, respectively.

[253] The principle of good faith or *bona fide* is included in Article 2(2) of the UN Charter as well as in the Friendly Relations Declaration. It is a general principle of law and at the very foundation of the international legal order since it implies reciprocity. For a general overview refer to Markus Kotzur, 'Good Faith (Bona Fide)' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2009). Along the same lines, Perrez explains that 'the principle of good faith also supports the existence of a general duty of the States to cooperate in good faith for the protection of the environment'. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 282.

[254] Peter H Sand, 'Cooperation in a Spirit of Global Partnership' in Jorge E Viñuales (ed), *The Rio Declaration on environment and development: A commentary* (Oxford University Press 2015) 618.

paradigm by prompting the evolution of international environmental law for sustainable development,[255] and second, it identifies individuals and groups in society as new addressees of the duty to cooperate,[256] thus calling for their participation in the implementation of the Declaration.[257] In this respect, Principle 27 has revolutionary potential, since it can serve to frame the relationship between States and people as a global environmental trusteeship in which the international community acts as the creator of the trust, States are identified as trustees responsible for safeguarding the earth's resources,[258] and present and future generations are the beneficiaries.[259] According to Sand, this trusteeship perspective connects Principle 27 with Principle 10 – that enshrines public participation in environmental matters – and strengthens the international role of major social groups indicated in Principles 20-22, namely, women, youth, indigenous and local communities.[260]

Arguably, the trusteeship role of States can be also based on Principle 7 that requires cooperation for the conservation, protection, and restoration of the global ecosystem.[261] In addition, according to Principle 27, this duty to cooperate is not limited to inter-State relations, but has to be realised 'in the spirit of global partnership', and thus articulated through new levels of cooperation among States, key sectors of societies and peoples, as foreseen in the Preamble. Therefore, it can be argued that the Rio Declaration expands the duty to cooperate for the

[255] According to Sand this change of paradigm did not occur. ibid 619–621.
[256] Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 56. Sand explains how the identification of these addresses changed during the *travaux préparatoires* and that 'people' was selected as an overarching term referring to civil society as a whole. The enhanced participation of non-State actors is also postulated in the preamble of the Declaration and articulated in the preamble and chapters 8 and 23 of Agenda 21. Sand, 'Cooperation in a Spirit of Global Partnership', *cit.*, (n 254) 621–622.
[257] Especially through public-private partnership programmes and projects. Sand, 'Cooperation in a Spirit of Global Partnership', *cit.*, (n 254) 622.
[258] ICJ Judge Weeramantry exposed the principle of trusteeship of earth resources in his separate opinion in the *Gabčíkovo-Nagymaros Project* case, 213.
[259] Sand, 'Cooperation in a Spirit of Global Partnership', *cit.*, (n 254) 625 ff. Intergenerational equity is further addressed in Section 2.9.
[260] ibid 631–632.
[261] According to Cullet this first sentence of Principle 7 reflects 'the broader duty of cooperation well established in general international law'. Philippe Cullet, 'Common but Differentiated Responsibilities' in Jorge E Viñuales (ed), *The Rio Declaration on environment and development: A commentary* (Oxford University Press 2015) 234.

protection of the environment at the international level to other actors than States, including sub-national actors.

The rapid proliferation of multilateral environmental treaties since the 1970s and the rise in the number of parties 'exemplifies the increasing willingness of States to accept international obligations to conserve nature and natural resources'.[262] This attitude is confirmed in the Stockholm Declaration by a combined reading of Principles 2, 5 and 21 and further maintained by the General Assembly in the years following Stockholm, as exemplified by Resolutions 35/7[263] and 37/7 adopting the World Charter for Nature. The Charter takes full account of States' sovereignty over their natural resources, but requires them to give effect to its provisions unilaterally and in cooperation with other States.[264] Arguably, cooperation emerges as necessary to address environmental protection goals that States cannot fulfil individually.

The Charter requires the conservation of 'all the areas of earth, both land and sea' and accords special protection 'to unique areas, to representative samples of all the different types of ecosystems and to the habitats of rare or endangered species'.[265] Moreover, it prescribes to 'ensure that activities within their jurisdiction or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction'[266] and, interestingly, attributes this obligation not only to States, but also 'and *to the extent they are able, [to] other public authorities, international organizations, individuals, groups and corporations'*.[267] In so doing, the Charter for Nature extends the responsibility to prevent environmental harm, and thus protect the environment, to actors other than States, and

[262] Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties, cit.*, (n 11) 234.
[263] UN General Assembly Resolution 35/7 'Draft World Charter for Nature' (30 October 1980), UN Doc. A/RES/35/7. At paragraph 2, the General Assembly '*solemnly invites* Member States, in the exercise of their permanent sovereignty over their natural resources, to conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations'.
[264] World Charter for Nature, paragraph 22. The Charter further recognises that 'man can alter nature and exhaust natural resources by his action or its consequences' and establishes five principles of conservation 'by which all human conduct affecting nature is to be guided and judged'. ibid., Preamble.
[265] World Charter for Nature, paragraph 3. Moreover, it requests to take due account of the conservation of nature when planning and implementing social and economic activities (Paragraph 7). It also urges not to waste natural resources, but to use them with restrain, and establishes the conditions for such an appropriate use (Paragraph 10).
[266] World Charter for Nature, paragraph 21(d).
[267] World Charter for Nature, paragraph 21. (emphasis added)

recognises that they can have an impact at transboundary level. Both the promotion of cooperation for environmental protection and the expanded role of non-State actors are in line with the concept of decentralised international cooperation discussed in this thesis.

In line with this trend, at the third meeting of the Preparatory Committee to the Rio Conference, some States proposed the creation of an obligation to protect the planet that would bind States, individuals and organisations and introduced new concepts like 'ecosystems', 'global commons', and 'human kind'.[268] In fact, international environmental law has developed not only to address environmental concerns deriving from external interference with States' sovereign rights, but also to respond to collective environmental concerns relating to areas or issues beyond States' sovereign spheres that States could not tackle individually.[269]

Collective environmental concerns – such as common property, common heritage of mankind, and common concern of humankind – emerged to tackle issues that, regardless of their peculiarities, 'have physical and legal attributes [that] place them beyond the reach of individual States'.[270] These concepts saw major development through specific treaty-based regimes.[271] Despite their differences, especially in terms of derived legal obligations, they share a few characteristics: they can count on well-functioning institutional structures;[272] they are

[268] Duvic-Paoli and Viñuales, 'Principle 2: Prevention', *cit.*, (n 221) 111. In particular, the authors retrace the negotiations on the new version of Principle 21 to be discussed at the Rio Summit and present the different views expressed by States. According to such an account, the G77 were focusing on the sovereignty component of Principle 21 without mentioning the corresponding obligation to prevent environmental harm. Nigeria and the G22, instead, were focusing more on the prevention component and proposed to foresee a duty to prevent environmental harm over the domestic territory of States rather than in a transboundary perspective. Other States like Austria, Canada and Chile aimed to broaden the obligation to prevent transboundary harm and make it binding for other actors than States. The approach of the European Economic Community, instead, focused on the procedural aspects of prevention. ibid 110–111.

[269] Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 552–553.

[270] ibid 554.

[271] Brunnée highlights that this treaty-based institutionalisation has been central in '[constituting] the collective, or "communities"' capable of addressing such concerns and operating at different levels. ibid 568.

[272] Each regime has a governing body – a COP – that meets regularly and plays an important international-law making function. In this context, soft regulatory processes are often used to expand or adjust the regime, including on central treaty matters, without subsequent formal consent of individual States, and opportunities are provided for the direct engagement of non-State actors. ibid 569–570. In particular, Brunnée maintains that law-making becomes a 'collective enterprise' and 'while states' sovereignty is respected through consent requirements, consent processes are structured as to maximize opportunities for collective outcomes', ibid 569. In this regard see also Fodella, 'I Soggetti', *cit.*, (n 41) 48.

supported by expert forums;[273] they are usually endowed with compliance procedures that are proving to be more effective than dispute settlement options.[274]

The concepts of common property,[275] common heritage of mankind,[276] and common concern of humankind deal with issues that engage all States and even transcend the inter-State

[273] Consensus and knowledge around the nature of the collective concerns and on the collective actions needed to address them benefit from the contribution provided by scientific and technical experts. These forums can be established as subsidiary bodies, as the Subsidiary Body for Scientific and Technological Advice established by Article 9 of the Climate Change Convention, or as independent intergovernmental bodies responsible for providing policymakers with objective assessment of available scientific information on specific issues. This is the case of the Intergovernmental Panel on Climate Change (IPCC) and the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES). The IPCC was set up in the 1988 by UNEP and the World Meteorological Organization (WMO) to assess available scientific information on climate change and its potential environmental and socio-economic impact. IPBES was established in 2012 as an independent intergovernmental body dealing with the scientific knowledge on biodiversity, ecosystems and the benefits they provide to people, and proposing tools and methods for their protection and sustainable use. For more information visit the respective websites: http://www.ipcc.ch/index.htm and https://www.ipbes.net/ accessed 21 November 2017.

[274] They reflect a pragmatic approach by providing a set of measures that facilitate, promote and enforce compliance. These measures can include capacity building and financial assistance for non-complying parties, like States with limited technical and financial capacities. Compliance mechanisms can be triggered by any State Party, including low-performing States and the treaty's Secretariat. On this point see Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 570–572.

[275] The Bering Sea Fur Seals Arbitration initiated an international debate over the preservation of living and non-living resources that are common property and openly accessible. Bering Sea Fur Seals Arbitration (Great Britain v. United States), *Moore's International Arbitration* (1893), 755. On this point, see Fodella, 'I Principi Generali', *cit.*, (n 180) 114–115. Bowman offers a detailed analysis of this Arbitration, see Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 494 ff. For a general discussion refer to Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 399–400. The concept of common property is specifically used for the high seas and the outer space, which lie beyond the jurisdiction of individual States and cannot be appropriated by any of them; hence, the principle of permanent sovereignty over natural resources does not find application in this context. As common property, these areas are openly accessible to all States – especially to those having technological and financial resources – and can be subject to their exploitation, unless access is regulated to avoid the worrisome 'tragedy of the commons'. Common property are also the living resources found in or migrating through these areas, like fish, mammals, and birds. The basic legal framework applying to common areas binds the States to cooperate, exchange information, and not to cause environmental damage to these areas. See Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 557 ff. For further details on the concept of common property and its implications refer to Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 194 ff.; Fodella, 'I Principi Generali', *cit.*, (n 180) 114–115. Regarding the 'tragedy of the commons' see Hardin, 'The Tragedy of the Commons', *cit.*, (n 25).

[276] Although widely used in the environmental field, this concept acquires a legally binding form only in relation to two conventions, namely, the 1979 Moon Treaty [Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (New York) 5 December 1979, in force 11 July 1984, 18 ILM 1434 (1979)] and in Part XI of the United Nations Convention on the Law of the Sea (Montego Bay) 10 December 1982, in force 16 November 1984, 21 ILM 1261 (1982), hereinafter, UNCLOS. According to Bowman, this concept has determined 'the genuine "internationalisation" of a resource for the benefit of humanity generally' and highlights the main components of a common heritage regime: '(i) the impermissibility of individual appropriation or exploitation of the resource in question; (ii) the establishment instead of a regime of exploitation to be exercised on behalf of, and for the benefit of, mankind as a whole; (iii) the limitation of exploitation to exclusively peaceful purposes, and (iv) the incorporation of appropriate measures regarding conservation and environmental protection'. Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 500. Wolfrum maintains that the common heritage legal status implies 'the obligation of all States to co-operate internationally' in the utilisation of the resources so declared, and requires the creation of an appropriate institutional structure to this end. This obligation to cooperate is said to be stronger than that required by general international law, possibly because 'State Parties are meant to act as trustee on behalf of mankind as a whole'. Rüdiger Wolfrum, 'Common Heritage of Mankind' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2009) paragraphs 14-15. Indeed, the innovative character of common heritage lies in the fact that it provides 'one of the most developed applications of trusteeship or fiduciary relationship in an environmental context', thus providing a reference model to this end. Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 198. For further analysis on the application of the concept of trusteeship in international environmental law see Sand, 'The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity', *cit.*, (n 236). It has been noted that the implications connected to the common heritage regimes had a negative impact on the fate of such a concept. In fact, this has not found any further application beyond the Moon Treaty and the UNCLOS Part XI and proposal to enshrine it in the climate change and biodiversity regimes were soon abandoned and paved the way for the concept of common concern. On this point see Brunnée, 'Common Areas, Common Heritage and Common

dimension, capturing the interests and concerns of the international community and requiring international cooperation.[277] In this context, common concern is functional to discuss a few elements that are conducive to the concept of decentralised international cooperation proposed in this thesis: namely, an expanded conception of the international community that encompasses non-State actors (especially individuals and groups, in addition to NGOs and international organisations) and the general obligation to cooperate to achieve environmental objectives and preserve natural resources for the benefit of humankind.

The concept of common concern evolved in the context of the Rio Conference and is used both in the Climate Change[278] and Biodiversity[279] Conventions. Arguably, the uniqueness of this concept lies in its suitability to reflect the magnitude of certain global environmental issues[280] and communicate the urgency to address them collectively,[281] as well as in the legal consequences deriving from its application.[282]

The flexibility of this concept allows its application to environmental concerns arising both within and beyond national jurisdictions.[283] Notwithstanding the reaffirmation of States'

Concern', *cit.*, (n 99) 563; Birnie, Boyle and Redgwell, *International Law and the Environment, cit.*, (n 6) 198; Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 501. Arguably, this attitude shows that States are reluctant to internationalise the ownership of resources and renounce direct exploitation rights, thus perpetuating the tragedy of the commons and potentially undermining the endurance of other regimes that favour ecosystem preservation over resources exploitation.

[277] On this last point see Fodella, 'I Principi Generali', *cit.*, (n 180) 114 ff.

[278] Its Preamble opens by acknowledging that 'change in the Earth's climate and its adverse effects are a common concern of humankind'.

[279] Its Preamble recognises that 'the conservation of biological diversity is a common concern of humankind'.

[280] In this regard, Brunnée points out its difference with the concepts of common areas and common heritage that, instead, have a limited focus on specific geographic areas and resources. Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 564.

[281] In this regard, it has been stressed that the precautionary approach finds particular favour in matters of global concern. Birnie, Boyle and Redgwell, *International Law and the Environment, cit.*, (n 6) 130.

[282] Although the legal implications of this concept are not settled, Brunnée identifies commonalities among existing common concern regimes, which can contribute to shape a future customary framework. Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 565–566. On this point see also Birnie, Boyle and Redgwell, *International Law and the Environment, cit.*, (n 6) 129–130.

[283] Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 564. She further stresses that 'it is not areas or resources that are common concerns, but certain environmental processes or protective actions'. Brunnée, 'The Global Climate Regime: Wither Common Concern?', *cit.*, (n 104) 723. Hey notes that while the principle of common heritage refers to the legal status of an area (the deep seabed or the moon) and its resources, thus 'excluding them from the jurisdiction of States and bringing them under "international jurisdiction"; the principle of common concern of humankind, instead leaves the legal status of the locality and the resources in that locality intact'. Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 63.

sovereign rights over their own resources,[284] the common concern concept 'gives the international community of States both a legitimate interest in resources of global significance and a common responsibility to assist in their sustainable development'.[285] Therefore, State sovereignty is *de facto* limited by the global responsibility to avoid the environmental degradation of the areas and resources that are (or are part of) a common concern.[286] Such a responsibility is potentially owed *erga omnes*[287] since all States have concomitant legal interests in addressing the issues of common concern and could demand other States to adjust their conduct to this end.[288] In this sense, the concept of common concern '[expands] relations of interdependence beyond those of neighbouring States',[289] and it has been conceived as entailing an international obligation to cooperate to address the common concern.[290] It has been noted

[284] UNEP Report on the Concept of Common Concern, paragraph 7. The Climate Change Convention reiterates such a sovereignty in its Preamble, while the Biodiversity Convention reaffirms it in the Preamble as well as in Articles 3 and 15. On this point see Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issue of Biodiversity and Custodial Sovereignty', *cit.*, (n 32) 22.

[285] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 130.

[286] Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 566; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 130. In this regard, Fodella highlights the indirect legal consequences deriving from the concept of common concern. First, the resources or issues of common concern are subtracted to domestic jurisdiction in the sense that host States maintain their sovereignty over these resources, but are bound to conserve and manage them in the respect of international law and in the interest of the whole international community. Second, cooperation for addressing common concerns is extended to *all States*; therefore, the obligations connected to the relevant common concern regime have an *erga omnes* character. Fodella, 'I Principi Generali', *cit.*, (n 180) 115. See also Pierre-Marie Dupuy and Jorge E Viñuales, *International Environmental Law* (Cambridge University Press 2015) 85.

[287] Brunnée highlights that State practice is not consistent in this regard and 'it is uncertain whether the concept [of common concern] unfolds any legal effects in the absence of a treaty that identifies a concern as "common"'. Brunnée, 'The Global Climate Regime: Wither Common Concern?', *cit.*, (n 104) 723.

[288] On this point see Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 566; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 130; Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 513; Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 63. Nevertheless, Brunnée notes that the issue of standing deriving from *erga omnes* obligations is debated since the ICJ has not clarified its stance on this issue, State practice is unclear, and the ILC Draft Articles on State Responsibility embodies a cautious approach by allowing any State to invoke the responsibility of another for violating *erga omnes* obligations, but differentiating the remedies and countermeasures available to the applicant(s). Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 555–556; Brunnée, 'The Global Climate Regime: Wither Common Concern?', *cit.*, (n 104) 724. See also ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53 UN GAOR Supp. No. 10 at 43, UN Doc. A/56/10 (2001).

[289] Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 62. Similarly, Fodella explains that, in this case, cooperative obligations do not bind only states sharing natural resources or concerned with specific dangerous or hazardous activities, but *all States*, which have to cooperate for addressing common concerns. Fodella, 'I Principi Generali', *cit.*, (n 180) 115. For instance, Venter stresses the importance of international cooperation to fight climate change and highlights that positive actions in some countries can be weakened by the inaction of other countries. In this context, he explains that 'given the global environmental impact of local actors, all States on Earth are in this sense neighbours'. See Venter, 'Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty', *cit.*, (n 113) 67.

[290] Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 566. In particular, Brunnée points out that such an obligation is reflected in several international instruments, *in primis*, in the first part of Principle 7 that reads: 'States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem'. This Principle suggests that the conservation, protection and restoration of the Earth's ecosystem are common concerns of humankind as reiterated in Article 3 of the IUCN Draft International Covenant on Environment and Development and paragraph 1.3 of the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development.

that common concern features characterise other regimes than those on climate change and biodiversity that are explicitly identified as such.[291] Common concern regimes result from different combinations of distinctive features, which ensure 'the legitimate, collective interest of the global community in the conservation and wise use of nature and natural resources to be superimposed upon the traditional sovereign rights of individual States'.[292]

Although States remain the key players in creating and enforcing international law, common concern regimes seek to enhance the role of non-State actors in multiple ways. This aspect is exemplified by the climate change example that foresees specific mechanisms to enable the participation of international organisations, NGOs and business entities in the law-making processes, by granting them observer status at COP meetings, accepting their inputs through policy papers, or accepting their affiliation to official delegations. Indeed, the broad legitimation and timely evolution of common concern regimes is ensured by COP structures that maximise opportunities for collective action and enable the legal development of these regimes.[293]

Hey analyses the concept of common concern in the context of the climate change regime and explains that the key purpose of the dedicated Convention is to limit the externalities deriving from greenhouse gas (GHG) emissions 'in the interest of humankind, including both present and future generations'.[294] In this sense, she arguably expands the range of actors with a legitimate interest in addressing climate change beyond the circle of States. Hence, States are

See IUCN, *Draft International Covenant on Environment and Development* (4th ed, IUCN 2010); ILA, 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' [2002] Netherlands International Law Review 211.

[291] In particular, Bowman maintains that the Ramsar Convention has a common concern structure despite it predates the development of this concept. See Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 506 ff. It has been argued that this is also the case of the World Heritage Convention and Antarctica Convention. In this regard see Fodella, 'I Principi Generali', *cit.*, (n 180) 116; Maria Clara Maffei, 'La Protezione Delle Specie, Degli Habitat e Della Biodiversità' in Alessandro Fodella and Laura Pineschi (eds), *La protezione dell'ambiente nel diritto internazionale* (Giappichelli 2009) 275 ff.

[292] Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 511.

[293] Brunnée, 'The Global Climate Regime: Wither Common Concern?', *cit.*, (n 104) 728–729. For further analysis on the role of COP in treaty-based law-making processes refer to Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements', *cit.*, (n 107).

[294] Ellen Hey, 'Conceptualizing Global Natural Resources: Global Public Goods Theory and International Legal Concepts' in Holger P Hestermeyer and others (eds), *Coexistence, cooperation and solidarity: Liber Amicorum Rüdiger Wolfrum* (Brill 2012) 895.

bound by environmental obligations stemming from the climate change regime (like reducing GHG emissions, limiting rising temperatures below two degrees Celsius, carrying out adaptation and mitigation strategies) that also concern individuals as members of present and future generations. In fact, States should be seen as 'functional actors, acting in the interest of individuals and groups in society, including future generations', which are the beneficiaries of GHG reduction.[295]

It can be argued that, in the context of a common concern regime, environmental obligations seem to be reinforced by their *erga omnes* character: the fact that they are a matter of concern to all States[296] and humankind as a whole, not only legitimises any State to hold violators accountable,[297] but, in an evolutive perspective, can arguably provide individuals with legal standing, especially if acting on behalf of future generations. Such an entitlement would reinforce the international role of individuals and strengthen environmental objectives.

This is already happening at national level in several domestic jurisdictions, where individuals or groups of individuals are challenging State behaviour in court for contravening international environmental obligations. By dealing with common concerns, these cases do not have a mere national relevance, but arguably have international implications as well. In the *Urgenda* case, for example, is given that the Urgenda Foundation has a case against the State when acting on behalf of the current generation of Dutch citizens.[298] In addition, the Hague

[295] ibid 896. Such an argument is increasingly deployed in the context of climate litigations. The 2015 ruling of the famous *Urgenda* case required the Dutch Government to immediately take more action on climate change. See Urgenda Foundation v. The State of the Netherlands, Hague District Court, C/09/456689/HA ZA 13-1396, decision on 24 June 2015, available at https://elaw.org/nl.urgenda.15 accessed 06 November 2018. Hereinafter, 2015 *Urgenda* decision. This decision has been recently upheld by the Hague Court of Appeal of 9 October 2018. The Court of Appeal upheld the 2015 sentence and confirmed that failure by the Dutch Government to reduce its GHG emissions, in accordance with its commitment, would amount to a violation of the rights of Dutch citizens. See The State of the Netherlands v. Urgenda Foundation, Hague Court of Appeal, C/09/456689/HA ZA 13-1396, decision on 9 October 2018, English version available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610&showbutton=true&keyword=urgenda accessed 06 November 2018.

[296] Both the Climate Change and Biodiversity Conventions can be seen as universal agreements since they respectively have 197 parties (196 States and 1 regional economic integration organisation) and 196 parties. Detailed information on the parties is available on the dedicated webpages, for the Climate Change Convention at http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php and for the Biodiversity Convention at https://www.cbd.int/information/parties.shtml both accessed 12 January 2018.

[297] In this regard refer to Bruno Simma, 'Bilateralism and Community Interest Confronted' in Yoram Dinstein (ed), *International Law at times of perplexity* (Kluwer Academic Publishers 1989).

[298] 2015 *Urgenda* decision, paragraph 4.5.

District Court finds that Urgenda can also act against the State in the interests of future generations of Dutch citizens, that is to say, 'in perpetuity'.[299] What is more, the Court finds that Urgenda's objective to pursue a more sustainable society – 'beginning in the Netherlands'[300] – 'demonstrates prioritisation … and not limitation to Dutch territory'.[301] For this reason, the Court maintains that Urgenda wants to defend 'primarily but not solely Dutch interests' and that 'the term "sustainable society" has an inherent international (and global) dimension'.[302] In defending the interest of a sustainable society, Urgenda 'actually protects *an interest that by its nature crosses national borders.* Therefore, Urgenda can partially base its claims on the fact that *Dutch emissions also have consequences for persons outside the Dutch national borders*'.[303] Moreover, the Court highlights the intergenerational dimension of the term sustainable society and, for this reason, recognises that Urgenda's claims are also presented in the interest and on behalf of future generations.[304] In so doing, the Court recognises the international and intertemporal dimensions of Urgenda's claims, which perhaps signals the possibility of granting *locus standi* to members of civil society (individuals and/or groups) for international environmental matters in the future.[305]

Such an entitlement has, arguably, already emerged in specific contexts, as in the *Serengeti* case.[306] Here, the African Network for Animal Welfare (ANAW), an NGO registered in Kenya

[299] 2015 *Urgenda* decision, paragraph 4.6.
[300] In accordance to Article 2 of Urgenda's by-laws, as cited in the 2015 *Urgenda* decision at paragraph 4.7.
[301] 2015 *Urgenda* decision, paragraph 4.7.
[302] ibid.
[303] Ibid. (emphasis added)
[304] 2015 *Urgenda* decision, paragraph 4.8.
[305] In the wake of the Urgenda case, an increasing number of climate lawsuits are challenging government's inaction on climate change. See, for instance, Earthlife Africa Johannesburg v. the Minister of Environmental Affairs et al, High Court of South Africa, Gauteng Division, Pretoria, Case N. 656662/16, Judgment 8 March 2017, available at https://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf accessed 22 November 2018. Regarding lawsuits addressing the transboundary dimensions of environmental harm, including climate change, see *supra* Section 2.2, note 145. On the issue of representing the interests of future generations in court see *infra* Section 2.9.
[306] See the African Network for Animal Welfare (ANAW) vs The Attorney General of the United Republic of Tanzania, East African Court of Justice at Arusha, First Instance Division, Reference n. 9 of 2010, Judgement on the Merit of 20 June 2014, available at http://eacj.org/wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf accessed 01 January 2019. Hereinafter, EACJ 1st instance, ANAW v Tanzania, Merits, 2014. Tanzania appealed this judgement, but the Appelate Division ruled again in favour of ANAW in 2015. See Between the Attorney General of the United Republic of Tanzania and African Network for Animal Welfare (ANAW), East African Court of Justice at Arusha, Appellate Division, Appeal n. 3 of 2014, 29 July 2015, available at http://eacj.org/wp-content/uploads/2015/08/APPEAL-NO-3-OF-2014-FINAL-31ST-JULY-205-Anwaw.pdf accessed 01 January 2019. Hereinafter, EACJ Appellate Division, Tanzania v ANAW, Merits, 2015.

with offices in Nairobi, challenged the Government of the Republic of Tanzania (Tanzania) proposal to construct a road[307] cutting across the northern part of the Serengeti National Park before the East African Court of Justice (EACJ). ANAW acted on the basis of Article 30(1) of the Treaty for the Establishment of the East African Community (EACT) that grants any legal or natural person resident in a Partner State the right to refer cases to the EACJ relating to 'the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that [it] is unlawful or is an infringement of the provisions of [the] Treaty'.[308]

In particular, ANAW contested the deleterious environmental effects that would derive from such a construction project, in particular damage to wildlife and more general environmental damage,[309] with negative repercussions for the entire biodiversity of the area.[310] Concerns regarding this project were also raised by the UNESCO World Heritage Committee, since the Serengeti is included in the World Heritage List for its uniqueness.[311] On this basis, it can be argued that the Serengeti contributes to biodiversity conservation, which is a common concern of mankind.

Moreover, in response to a jurisdictional objection of Tanzania, the EACJ reaffirmed the *locus standi* of ANAW in this case[312] and further clarified that 'a claimant … does not have to demonstrate a personal tort, right, infringement, injury or damage specific to himself… The mere fact of the treaty breach, is itself the cause of action'.[313] In this sense, the EACT provides civil society members with a stewardship role in the EAC system and enables them to trigger

[307] Know as the 'Natta – Mugumu – Tabora B – Kleins Gate – Loliondo Road', referred to also as 'the highway' or the 'Superhighway' in the EACJ 1st instance, ANAW v Tanzania, Merits, 2014, paragraph 10.
[308] Treaty for the Establishemnt of the East African Community (Arusha) 30 November 1999, in force on 7 July 2000, ECOLEX TRE-001329.
[309] EACJ 1st instance, ANAW v Tanzania, Merits, 2014, par. 11.
[310] On this point see Andrew P Dobson and others, 'Road Will Ruin Serengeti' (2010) 467 Nature 272.
[311] UNESCO World Heritage Committee, Report of the 34th Session, Brasilia, 25/7/2010- 3/8/2010. For further details on the UNESCO World Heritage Convention and its relevance for this thesis, refer to Chapter 3 Section 3.5.
[312] See EACJ 1st instance, ANAW v Tanzania, Preliminary Objections, 2011, par. 10-12; EACJ Appellate Division, Tanzania v ANAW, Preliminary Objections, 2012, p. 5.
[313] EACJ Appellate Division, Tanzania v ANAW, Preliminary Objections, 2012, p. 14.

the judicial system to ensure the integrity of the Treaty and act in the interest of the East African Community as a whole. Moreover, the Appellate Body underlined the self-executing character of all EACT provisions,[314] including those relating to the environment,[315] which are fully operational and directly applicable regardless of their framework-like structure.

More specifically, on the environmental damage likely to derive from the proposed road in the Serengeti, ANAW highlights the cross-border impacts that the road would have in 'adjoining national parks such as the Masai Mara in Kenya'.[316] Arguably, this argument connects to the aforementioned *no harm* principle[317] as well as to State's general obligation to cooperate in environmental matters, especially when sharing natural resources.[318] In this sense, this argument triggers the obligation of Tanzania to undertake a prior environmental impact assessment, as well as to inform and consult with Kenya – at an early stage and in good faith – in order to value and address the potential transboundary environmental impacts of the proposed project. Hence, it is possible to trace a connection between these general principles and the EACT's environmental provisions, which incorporate the former and should be interpreted in their light. Therefore, the EACT enables the indirect justiciability of the aforementioned general principles of international environmental law thanks to their incorporation in the Treaty's environmental provisions. The innovative aspect of the EACT is that it enables – in addition to other State Parties[319] – any natural or legal person who is resident in a State Party to bring a claim on environmental matters before the EACJ against any State Party to the Treaty. Since the Serengeti contributes to biodiversity conservation, that is a common concern of humankind,

[314] EACJ Appellate Division, Tanzania v ANAW, Merits, 2015, par. 22.
[315] In this sense, the Appellate Body rejected Tanzania's argument that the EACT environmental provisions (Chapter Nineteen, Articles 111-114) were 'unimplementable' due to the existence of an ad hoc AEC Protocol on Environment and Natural Resource Management (Arusha, 3 April 2006) with more specific provisions, which was not yet in force. On this point see The East African Court of Justice, Appellate Division, Appeal n. 3 of 2014, Between the Attorney General of the United Republic of Tanzania and African Network for Animal Welfare (ANAW), Written Submission by the Appellant in Support of the Grounds of Appeal, par. 8 ff.
[316] EACJ 1st instance, ANAW v Tanzania, Merits, 2014, par. 11.
[317] The *no harm* principle is also addressed *supra* in Section 2.4.
[318] In this regard, refer to the arguments deployed *infra* in Section 2.6.
[319] EACT, Article 28.

it can be argued that, in presenting its lawsuit, ANAW has acted not only on behalf of the EAC community, but more generally in the interest of current – and future[320] – generations. In this sense, the EACT arguably grants *locus standi* to members of civil society (natural or legal persons) for international environmental matters.

By adopting the common concern dimension and recalling that the Serengeti is a world heritage site, it can be further argued that any State, in addition to parties to the EAC, may have an interest in the protection of the Serengeti and its transmission to future generations. In this context, Tanzania has the corresponding obligation to protect the Serengeti towards not only EAC Parties, but also towards the international community, as this obligation would have an *erga omnes* character.[321]

Indeed, under a common concern regime, the obligation to cooperate can be articulated in two ways. On the one hand, cooperation is essential to address common concerns that actually require collective action and transcend national borders, like combating global climate change. On the other, cooperation is also required to protect resources that are found within a national jurisdiction but contribute to a common benefit, like the conservation of biodiversity. In this regard, cooperation and global responsibility are closely connected, but need to be balanced in accordance with common but differentiated responsibilities,[322] technical capabilities, and the social and economic conditions of the countries involved.[323] Arguably, by imposing the responsibility to avoid environmental degradation and demanding cooperation to this end from all States, the concept of common concern not only erodes State sovereignty, but also permanent

[320] On intergenerational equity se *infra* Section 2.9.
[321] The analysis of the *Serengeti* is based on a thorough discussion with Alessandro Fodella that is researching this case and writing on its relevance and implications.
[322] For Hey the cooperative dimension of the climate change regime lies in the fact that 'burdens associated with [this] regime are to be shared among States, in particular between developed and developing countries' in line with the principle of common but differentiated responsibilities. She highlights that this principle is expressly included in the Climate Change Convention under Article 3(1). Moreover, cooperative obligations stem from Article 4(7) that require developed countries to assist developing countries in effectively implementing this Convention by providing technical and financial assistance. Hey, 'Conceptualizing Global Natural Resources: Global Public Goods Theory and International Legal Concepts', *cit.*, (n 294) 895–896.
[323] On this point see Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 566; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 130.

sovereignty over natural resources in so far as addressing common concerns limits States' freedom of action within their jurisdiction.[324] In this sense, it is possible to foresee the application of a trusteeship regime in connection to the concept of common concern of humankind, which makes both the location State and other States – who play a supportive role – responsible for preserving natural resources and requires them to cooperate to this end.

In fact, notions like sovereignty and permanent sovereignty '[do] not reflect the reality of the biosphere as an organism which is oblivious of borders created by man';[325] hence, these concepts need to be reinterpreted to tackle existing common concern challenges,[326] like the protection and preservation of 'global environmental resources'.[327] Although located within a State, the protection and preservation of these resources would benefit the whole community of States and, more generally, humankind. In this perspective, States are seen as 'trustees responsible for [their] protection'[328] and as bearing the duty 'to share in preserving global environmental resources'.[329] Therefore, a cooperative understanding of the common concern concept entails that location States have '*custodial obligations*' to preserve global environmental resources and act as trustees,[330] while other States have 'support obligations' to

[324] In this regard, Brunnée argues that, although no specific rule of State conduct can be derived from this concept, 'States' freedom of action may be subject to limits even when other States' sovereign rights are not affected in a manner that would engage the no harm principle. Such limits flow precisely from the fact that the concept identifies the degradation of certain areas or resources as of concern to all'. Brunnée, 'The Global Climate Regime: Wither Common Concern?', *cit.*, (n 104) 723.
[325] Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issue of Biodiversity and Custodial Sovereignty', *cit.*, (n 32) 25.
[326] In this regard, Scholtz explains that 'a modern understanding of sovereignty must acknowledge the importance of co-operation and interdependence in accordance with global reality, and should not focus on the fiction of absolute independence'. ibid 24. The idea of a cooperative sovereignty has been put forward by Perrez that proposes a positive understanding of sovereignty that entails rights but also responsibilities, and it is far from its traditional conception as 'independence and freedom'. In this context, 'permanent sovereignty over natural resources has to entail the authority to participate in decision that concern the use of common resources, shared resources, and resources of common concern. This authority includes the responsibility not to infringe upon the right of others … and to cooperate in good faith'. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 331–332.
[327] See Michael J Glennon, 'Has International Law Failed the Elephant?' (1990) 84 American Journal of International Law 1. For Perrez internationally shared resources are those reflecting global ecological interdependencies. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 297 ff. See also Venter that discusses the transformation of State sovereignty in the wake of global environmental concerns and stresses the need to exercise sovereignty responsibly when resources are shared across boundaries. Venter, 'Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty', *cit.*
[328] Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issue of Biodiversity and Custodial Sovereignty', *cit.*, (n 32) 24.
[329] Scholtz citing Glennon, ibid.
[330] The application of trusteeship to biological resources is also discussed in Sand, 'The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity', *cit.*, (n 236) 57 ff.

contribute to custodianship by providing financial and technical support.[331] In this sense, Scholtz proposes 'to refer to *custodial sovereignty* in relation to the issue of biodiversity',[332] and, arguably, other issues of common concern. Hence, 'the custodial State is still entitled to exploit its resources in accordance with its (permanent) sovereignty, but the latter is restricted by the expectation of other States [to protect such resources]'.[333]

Hence, the principle of cooperation generally applies to all States for the achievement of specific environmental objectives like biodiversity conservation or the fight against climate change and desertification.[334] Such environmental issues challenge the international community as a whole, thus requiring the commitment of all States, not only those parties to the relevant conventions, and encouraging the participation of other actors that can contribute to the achievement of the specific environmental goals. Cooperation is also applicable for the conservation and management of transboundary natural resources, which pose regulatory problems due to their ecological significance that transcends inter-State boundaries and require decentralised cooperative solutions.

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[331] See Werner Scholtz, 'Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism' (2008) 55 Netherlands International Law Review 323, 24. (emphasis added)

[332] Scholtz, 'Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issue of Biodiversity and Custodial Sovereignty', *cit.*, (n 32) 25. (emphasis added)

[333] ibid. He adds that the custodial State is also entitled 'to deter unwanted aggression by other states regarding its resources'.

[334] In its Preamble, the Climate Change Convention calls for '*the widest possible cooperation by all countries* and their participation in an effective and appropriate international response' to climate change. (emphasis added) Moreover, it includes cooperation among the principles guiding State Parties in their action to implement the Convention (in Article 3(3) and (5)) and prescribes specific cooperative obligations (in particular, see Articles 4(1)(c), (d), (e), (g), (h), and (i); 5(c); and 6(b)). Arguably, the solicitation contained in the Preamble is directed towards all the States of the international community and not only to State Parties to the Convention. In this case cooperation is mentioned in the Preamble and included in both the principles guiding State Parties (in Article 3(b) and (c)) and the general obligations (Article 4(1)(c), (d) and(f)). The UN Desertification Convention does not limit cooperation to the inter-State level, rather explores its multiple dimensions. Indeed, the Preamble recognises 'the importance and necessity of international cooperation and partnership in combating desertification and mitigating the effects if drought', thus containing a very general statement directed to all the actors that can potentially operate at international level. Moreover, Article 3(c) affirms that 'the parties should develop, in a spirit of partnership, cooperation among all levels of government, communities, non-governmental organizations and landholders to establish a better understanding of the nature and value of land and scarce water resources in affected areas and to work towards their sustainable use'. This norm hints at the invitation to establish a global partnership articulated in new levels of cooperation contained in the preamble of the Rio Declaration, which extends cooperation to other actors than States. In addition, Article 4(2)(e) requires State Parties to 'strengthen subregional, regional and international cooperation', thus corroborating the idea that cooperation needs to be developed at multiple governance levels and might imply the involvement of actors operating at those levels. UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris) 17 June 1994, in force 26 December 1996, 1954 UNTS 3. Hereinafter, UN Desertification Convention.

2.6 Cooperation over transboundary natural resources and good neighbourliness

The importance of cooperation in protecting and managing transboundary natural resources is self-evident and derives from their intrinsic shared character, which curb a State from acting unilaterally.[335] Inter-State cooperation for the joint management of shared natural resources has customary nature[336] and agreements over shared surface water, fishery and birds were already concluded in the XIX Century, long before international environmental law developed since 'the physical fact of a resource transcending political boundaries stimulated legal cooperation'.[337] According to Delbruck, 'the operational meaning of the term "cooperation" can only be derived from the specific goal to be pursued by cooperation'.[338] Therefore, cooperation can be seen as an abstract principle that needs to be operationalised in each specific cooperative context, thus being applied in an infinite number of ways. This is certainly true in the case of transboundary natural resources as, depending on the resources or ecosystems considered, the practical terms of cooperation vary significantly: this is exemplified by the four case studies presented in this thesis, but can also be ascertained by analysing those regimes that encourage cooperation on specific natural resources.

For instance, in the case of shared water basins, cooperation has both a substantial and a procedural aspect. The UN Watercourses Convention includes various provisions relating to the duty to cooperate which help reconstructing its meaning.[339] From a substantial point of view, Article 8 contains a general obligation to cooperate aimed to establish the primary and very broad goals – namely, 'optimal utilisation and adequate protection of an international watercourse'[340] – as well as to foster the conclusion of *ad hoc* agreements and the creation of

[335] On this point see the definition of transboundary natural resource provided in Chapter 1, section 1.1.1.
[336] Pineschi notes that its customary nature is recognised in the *Lac Lanoux* Arbitration. Pineschi, 'Le Fonti', *cit.*, (n 96) 64.
[337] Marauhn, 'Changing Role of the State', *cit.*, (n 113) 730–731.
[338] Delbrück, 'The International Obligation to Cooperate : An Empty Shell or a Hard Law Principle of International Law? A Critical Look at a Much Debated Paradigm of Modern International Law', *cit.*, (n 244) 5.
[339] For a detailed analysis of the content of the UN Watercourses Convention, see the UN Watercourse Convention Online User's Guide available at http://www.unwatercoursesconvention.org/ accessed 25 March 2018.
[340] Article 8(1). According to this Article, inter-State cooperation is based on sovereign equality, territorial integrity, mutual benefit and good faith. Such a formulation reflects the strong connection between cooperation, good faith and good neighbourliness already discussed in the previous section (2.2.1). While the principle of good faith is clearly stated, that of

appropriate institutional structures for the achievement of these goals in transboundary basins.[341] In fact, the water basin has to be seen as an indivisible unit that is subject to a community of interests resulting from the integration of the diverse demands of the States sharing the basin.[342] In this context, cooperation aims, not only, to reconcile the tension between development and conservation objectives, but also to harmonise the potential conflicting interests and uses of riparian countries.

What makes cooperation explicit is the principle of reasonable and equitable utilisation foreseen in Article 5(1). This provision recognises, on the one hand, the right that every riparian country has to benefit from the use of the water resources and, on the other hand, the obligation to respect the same right of the other riparians. Arguably, equitable and reasonable utilisation should be interpreted as a dynamic concept that can vary depending on the changing needs of riparian States; hence, the cooperative mechanisms set up for its application have to be flexible enough to adapt over time. Article 6 identifies the factors to consider when defining the equitable and reasonable utilisation of a shared basin, in order to balance the interests of riparian countries and those of the environment.

Cooperation has also procedural aspects that are reflected in the obligations to inform, notify and consult with riparian countries on planned measures.[343] The primary goal of maintaining a cooperative approach between riparians is also ensured by a detailed provision on the settlement of disputes.[344] Arguably, in the UN Watercourses Convention, cooperation pursues both eco-centric and anthropocentric objectives, thus reconciling the potential

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good neighbourliness can be derived from territorial integrity and mutual benefit. As for sovereignty, both Perrez and Delbrück explain that cooperation is a fundamental element of a modern understanding of sovereignty since it enables States to act in a globalised world and within the boundary of international law. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 332; Delbrück, 'The International Obligation to Cooperate : An Empty Shell or a Hard Law Principle of International Law? A Critical Look at a Much Debated Paradigm of Modern International Law', *cit.*, (n 244) 15.

[341] Article 8(2).

[342] In Article 2(c), the Convention defines the 'Watercourse State' as 'a State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organisation, in the territory of one or more of whose Member States part of an international watercourse is situated'. Basin State/Country, riparian State/Country are here used as synonyms of watercourse State.

[343] Procedural obligations are foreseen in Part III of the UN Watercourses Convention.

[344] Article 33.

conflicting interests of the riparian States and ensuring the environmental protection and sustainable utilisation of the shared basin.

In the case of the Convention on Migratory Species, instead, it can be argued that cooperation adopts an eco-centric approach[345] since it aims to enhance the protection of migratory animals and their habitats by both bringing together the 'Range States'[346] through which migratory species pass and fostering coordinated conservation efforts throughout the migratory range (habitats and migration routes). The Convention on Migratory Species, like the UN Watercourse Convention, is a framework Convention that supports the conclusion of appropriate regional or global agreements for the sound protection and management of specific migratory species and their ranges. Hence, cooperation can be operationalised in different ways and has to be tailored to the conservation needs of the species considered, to their habitats and migration routes.

Although different in scope, both examples clarify that when natural resources transcend political boundaries they have to be conceptualised as a unit and seen as indivisible, thus requiring cooperative efforts and the adoption of a holistic conservation approach. Cooperation has a strong multidimensional character, especially in a transboundary context. Multidimensionality is given by the multi-layered governance system, the various (institutional and non-institutional) actors involved in its administration, and the complex legal framework applicable to the transboundary resources considered. In this thesis, this multidimensionality is – theoretically – captured in the concept of decentralised international cooperation, while it is practically reflected in the decentralised cooperative mechanisms presented in the case studies and shaped by the reality on the ground.

[345] It is worth noticing that the attention paid to the 'wise management' of migratory species is residual in the Convention on Migratory Species.
[346] According to Article 1(1)(h) of the Convention on Migratory Species: '"Range State" in relation to a particular migratory species means any State (and where appropriate any other Party referred to under subparagraph (k) of this paragraph) that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species'.

Transboundary natural resources usually imply the *proximity* of States sharing them.[347] Pinto claims that cooperation flourishes when there are two elements: reciprocity and a time perspective. Reciprocity entails that 'each party is able and willing to help the other', and the time perspective ensures that the parties will interact for a long time and thereby benefit from mutually supportive actions.[348] It can be argued that a time perspective is always present in the case of neighbouring States, while reciprocity is likely to emerge since they share a common space and have an interest to coordinate their actions for managing that space and its resources. Hence, geographical proximity not only encourages, but also qualifies cooperation by connecting it to the general principles of good neighbourliness and that good faith.[349]

In fact, the principle of good neighbourliness is meant to guide the relations between States sharing a common border – i.e., neighbours. Due to their geographical proximity, they are likely to cooperate, especially in border areas.[350] Neighbouring States have more stringent obligations towards each other than non-neighbouring States, which anticipate key international environmental law principles,[351] such as the no harm rule, the preventive and precautionary approaches, and procedural obligations to inform and consult in relation to transboundary resources and environmental impacts.

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[347] In this regard refer to the definition of transboundary natural resources proposed in this thesis in Chapter 1, Section 1.1.1.
[348] Pinto 135.
[349] Good faith 'is about legitimate expectation of the parties' and 'the closer the relationship between international actors becomes, the more important becomes mutual confidence in common endeavours to achieve common objectives'. Kotzur, 'Good Faith (Bona Fide)', *cit.*, (n 253) paragraphs 22-26. Along the same lines, Perrez explains that acting in good faith 'implies to take into account and to respect the rights of the others and to act cooperatively'. Perrez, *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Environmental Law*, *cit.*, (n 7) 282.
[350] Laurence Boisson de Chazournes and Danio Campanelli, 'Neighbour States' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2006) paragraphs 4-5. The authors specify that rarely neighbouring States do not engage with each other and the total absence of relations is limited to very specific political context. One of the most famous cases is that of North and South Korea.
[351] As reported by Boisson de Chazournes and Campanelli, in the decision of the Case concerning filleting within the Gulf of St. Lawrence between Canada and France, the Arbitral Tribunal explains that 'the law of neighbourliness is intended to enable neighbour states to avoid friction, reconciling their diverging interests through a continuous cooperation in all activities comporting a necessary interpenetration between them'. The four fundamental rules condensed into the so called 'law of neighbourliness' are 1) States are prohibited to use or permit the use of the territories adjacent to the border in a way that causes damages to the territory of their neighbours; 2) States have to take into consideration the legitimate interests of their neighbours, thus adopting measures aimed to avoid or reduce transboundary damages; 3) States have to inform, notify, and consult neighbours on any situation likely to cause transboundary damage; and 4) States have to tolerate the consequences of legitimate activities taking place in the neighbours' territory, unless these consequences exceed an acceptable threshold. ibid paragraphs 7, 11 and 14.

Despite its inclusion in Article 74 of the UN Charter, in numerous international conventions, and elaboration in the Bandung principles,[352] good-neighbourliness lacks precise legal content, and its full legal meaning and practical fulfilment occur only in conjunction with the rules of peaceful coexistence, cooperation, and reciprocal tolerance. [353] Although cooperation and good-neighbourliness are different legal concepts,[354] they often overlap[355] and are strongly interconnected: on the hand, cooperation helps shape the legal contours of good-neighbourliness and enables its operationalisation in a practical context, on the other, cooperation is facilitated and strengthened by the geographical proximity of States behaving as good neighbours, especially when they share natural resources. In addition, it can be argued that the principle of good neighbourliness is not limited to neighbour States, but, conceptually, has acquired a global dimension and applies to the international community as a whole, as discussed in relation to global environmental objectives like those promoted by common concern regimes.

This global dimension of good neighbourliness also emerges from the implication to respect the territory of other States expressed in the maxim *sic utere tuo ut alienum non leadas*,[356] which, for Brunnée, finds it clearest manifestation at international level in the no

[352] Ten principles of good-neighbourliness were adopted by the Conference of Asian and African Nations at Bandung, Indonesia on 24 April 1955. Seven of these principles were later included in the 1970 Friendly Relations Declaration. See ibid paragraph 21.

[353] Good-neighbourliness has been identified as a 'political principle' in both the commentary to the UN Charter edited by Simma and that edited by Cot, Pellet, and Forteau, as cited in ibid paragraph 20. See also paragraphs 28 and 30.

[354] For instance, it is affirmed that the principle of good-neighbourliness 'has been translated into the development and application of rules promoting international environmental co-operation'. Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 203.

[355] Other authors, instead, refer to the duty of cooperation and the general principle of good-neighbourliness interchangeably. For instance, see Nanda and Pring, *International Environmental Law and Policy in the 21st Century*, *cit.*, (n 180) 21–22.

[356] This maxim means that 'one State's sovereignty to use its territory is circumscribed by an obligation not to cause injury to, or within, another State's territory' and aims to balance conflicting sovereign rights. See Brunnée, 'Sic Utere Tuo Ut Alienum Non Leadas', *cit.*, (n 223) paragraph 1. She also explains that this maxim is often associated to the concepts of abuse of rights and good neighbourliness: despite conveying the same idea – i.e., 'that a State's use of its territory is inherently limited by the right of other States not to be harmed in the use of their territory' – they have different legal contours and implications. See ibid paragraphs 3-4. Sands traces the connection among the principle of good-neighbourliness, the maxim *sic utere tuo*, and the no harm principle by explaining: 'The principle of good-neighbourliness [*ex* Article 74 of the UN Charter] underlines the *dicta* of the ICJ [in the Corfu Channel case] that the principle of sovereignty embodies "the obligation of every State not to allow its territory to be used for acts contrary to the rights of other States"'. Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 192. See Corfu Channel case at 22.

harm rule that 'protects not just the territorial integrity of neighbouring States, but also the environment of all States, as well as the global commons'[357] and has customary nature.[358]

Therefore, the principles of cooperation and good neighbourliness apply both globally in relation to environmental protection and common concerns and, specifically, for the governance of transboundary natural resources. In this latter case, the proximity element emerges more clearly and has a spatial significance more than a conceptual one. In addition, cooperation has to be contextualised for its operational dimension; to emerge such a process needs to be guided by the principle of equitable and reasonable utilisation and the ecosystem approach, which ensure a holistic consideration of the shared resources/space, the actors involved, and interests at stake in order to shape cooperative solutions that respond to specific realities.

2.7 Equitable and reasonable utilisation and the ecosystem approach

Transboundary natural resources, as common concern regimes, reveal the inability of the existing traditional State-based structure to address problems connected to the conservation of the environment that have a supranational or global character, due to the mismatch between geopolitical arrangements and ecological realities.[359]

It has been argued that shared resources are subject to 'a limited form of community interest, usually involving a small group of States in geographical contiguity, which exercise shared rights over [them]'.[360] The concept of the *community of interests* derives from international water law which played a pioneering role in regulating shared natural resources and, for this reason, can contribute to identify the principles applicable – *mutatis mutandis* – to shared natural resources, and to define their scope.

[357] Brunnée, 'Sic Utere Tuo Ut Alienum Non Leadas', *cit.*, (n 223) paragraph 13.
[358] The no harm rule is also addressed *supra* Section 2.4.
[359] In this regard see Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 494. For further details on common concern regimes see *supra* Section 2.5.
[360] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 192.

The *River Oder* case introduces this concept and recognises that a community of interests of riparian States exists in the case of a navigable river traversing several States. It provides all riparians with a common legal right to share the benefits deriving from using the river, in particular for navigation, and reflects the sovereign equality of riparian States.[361] Moreover, the presence of a community of interests leads to the creation of a 'community of law',[362] namely the joint regime for the use of the shared resources, which is different from the domestic laws of individual States and is based on a sense of solidarity developed among bordering States. In this regard, it can be argued that decentralised international cooperation reflects the community of law applicable to a specific transboundary natural resource or space and decentralised cooperative mechanisms are the practical result of such a community of law, as exemplified by the case studies.

In the *Gabčíkovo-Nagymaros Project* case,[363] the ICJ affirms that the existence of a community of interests – and the deriving common legal rights for the sharing States – prevent any riparian State from assuming unilateral control over the shared resource and depriving others of their right to an *equitable and reasonable share of the resource* in question.[364] Notwithstanding the fact that the case relates to a section of the Danube river shared between Hungary and Slovakia, it can be argued that, by generally referring to 'shared resources' and not specifically to water, the ICJ extends the concept of a community of interests and deriving common rights and obligations for all sharing States to any shared – i.e., transboundary –

[361] Territorial Jurisdiction of the International Commission of the River Oder, Judgement No. 16 (10 September 1929), PCIJ Series A N. 23, 27. Hereinafter, *River Oder* case. The Court points out that the common right of all the riparians to use the international river for navigational purposes 'extends to the whole navigable course of the river and does not stop short at the last frontier', at 29. In this sense, the Court stresses that the international character of a river is a fact: it depends from it traversing several countries and extends to the whole waterway regardless of national frontiers. As a consequence, the community of interests and the common legal rights of all riparians apply to the waterway as a unit.

[362] Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976, PCA, Arbitral Award (12 March 2004), ICGJ 347 (PCA 2004) (OUP reference), unofficial English translation at https://pcacases.com/web/sendAttach/78 accessed 28 November 2017, paragraph 97.

[363] In particular, the ICJ recognises that the common legal rights of all riparian States based on the existence of a community of interests is applicable also to non-navigational uses of international watercourses, as embedded in the 1997 UN Watercourses Convention. *Gabčíkivo-Nagymaros Project* case, paragraph 85.

[364] *Gabčíkivo-Nagymaros Project* case, paragraph 85. (emphasis added)

resource. Therefore, it can be derived that the existence of a community of interests over shared resources triggers the duty for States sharing them to cooperate for their joint protection and use, as confirmed in the *Pulp Mills* case.[365]

Equitable and reasonable utilisation is a 'basic right' of a riparian State,[366] as has been recognised as an established principle of international law[367] and confirmed in numerous international instruments.[368] Articles 5 and 6 of the UN Watercourses Convention are particularly useful to explore its meaning further.[369] This principle is based on the notion of equity and builds on the sovereign equality of riparian States, which gives them a 'qualitatively equal' right to utilise the watercourse.[370] Hence, the watercourse is not divided into equal shares,[371] rather the cooperative efforts aimed at its protection and management result from a balancing exercise that accommodates the needs and reasonable uses of each State,[372] as reflected in both the *Gabčíkovo-Nagymaros Project*[373] and the *Pulp Mills*[374] cases.

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[365] According to the ICJ, Argentina and Uruguay have successfully cooperated through the CARU (Administrative Commission of the River Uruguay) to the extent that they 'have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment'. *Pulp Mills* case, paragraph 281.

[366] *Gabčíkivo-Nagymaros Project* case, paragraph 78.

[367] On this point see Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 542.

[368] In particular, see Article 12 of the ILA's Berlin Rules [Report of the 71st Conference 3 (2004); 71 ILA 337, available at https://www.asil.org/eisil/berlin-rules-water-resources], Article 2(2) of the Helsinki Water Convention, and Article 5 of the UN Watercourses Convention.

[369] The principle of equitable and reasonable utilisation is seen as the cornerstone of such Convention For further reference see David Freestone and Salman MA Salman, 'Ocean and Freshwater Resources' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbooks of International Environmental Law* (Oxford University Press 2007) 351–352; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 541 ff.; Malgosia Fitzmaurice, 'The Relationship between the Law of International Watercourses and Sustainable Development' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research handbook on international environmental law* (Edward Elgar 2010) 607–609; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 310–312; Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 59–62.

[370] See the commentary to Article 5 in the UN Watercourses Convention Online User's Guide published by the University of Dundee, at http://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-5-equitable-and-reasonable-utilisation-and-participation/5-1-2-what-is-meant-by-equitable/ accessed 29 November 2017. See also Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 542; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 214.

[371] In this sense, the term 'equitable' should not be interpreted in quantitative terms, but in qualitative ones.

[372] ILC, *Draft Articles on the Law on the Non-navigational Uses of International* Watercourses, in Report of the International Law Commission on the Work of its Forty-Sixth Session, UNGAOR, 49th Sess. Sup. No. 10, UN Doc. A/49/10 (1994), 98. Hereinafter, 1994 UNWC Draft Articles. UN Watercourses Convention Online User's Guide, *cit.*, Commentary on Article 5; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 542.

[373] According to the ICJ, Czechoslovakia violated international law 'by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its rights to an equitable and reasonable share of the natural resources of the Danube'. *Gabčíkivo-Nagymaros Project* case, paragraph 86.

[374] In particular, the ICJ affirms that '[the] utilization [of the river Uruguay] could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account'. *Pulp Mills* case, paragraph 177.

It has been argued that the ILC distinguishes between 'reasonable' and 'equitable' by resorting to the former when discerning the quality of use, and applying the latter to balancing exercises to settle conflicts of use between riparian States.[375] Reasonable use does not necessarily mean most efficient, nor beneficial or best possible use; reasonableness needs to be rationally justified by taking into consideration several factors like the socio-economic development of the relevant State. However, reasonable uses are also subject to an equitable judgement, since what may be reasonable for one of the riparians may be inequitable if considered in a broader watercourse perspective as well as in comparison with the needs and interests of other States.[376] Article 5(1) offers further indications by clarifying that riparian States have to pursue an 'optimal and sustainable utilization' of the watercourse, 'consistent with [its] adequate protection', meaning that their cooperation must not be oblivious to environmental protection. The same is reiterated in Article 5(2) that stresses both the common rights to use the watercourse and the joint obligation to prevent environmental degradation.[377] Defining reasonable and equitable utilisation in concrete terms is a challenging and dynamic process, since the needs and uses of riparians can evolve over time. To this end, Article 6 offers some guidance by providing a non-exhaustive list of factors and circumstances useful when balancing the interests of riparian States.[378]

Arguably, the principle of equitable and reasonable utilisation – like the concept of the community of interests – can be applied to any shared resource. The balancing exercise it

[375] UN Watercourses Convention Online User's Guide, *cit.*, Commentary on Article 5, reference to the ILC Commentary of the 1994 UNWC Draft Articles, p. 98 paragraph 9.

[376] Hence, the term 'reasonable' has to be interpreted in the framework of an equitable utilisation since each riparian State might have a very different and utilitarian conception of a reasonable use, such as the most beneficial for its socio-economic development. On this point see UN Watercourses Convention Online User's Guide, *cit.*, Commentary on Article 5, *What is meant by 'reasonable'*, at http://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-5-equitable-and-reasonable-utilisation-and-participation/5-1-3-what-is-meant-by-reasonable/ See also UN Watercourses Convention User's Guide Fact Sheet on Equitable and Reasonable Utilization, available at http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf Both accessed 29 November 2017.

[377] This Article is said to reflect the concept of 'equitable participation' and is strictly linked to the general obligation to cooperate affirmed in Article 8 of the same Convention. See UN Watercourses Convention Online User's Guide, *cit.*, Commentary on Article 5.

[378] For further analysis refer to UN Watercourses Convention Online User's Guide, *cit.*, Commentary on Article 6.

entails, its dynamic character and the factors useful for its fair application show that the implementation of equitable and reasonable utilisation and, more generally, cooperation need to be tailored to each specific context and depend on the natural resource considered.

For Hey, the UN Watercourses Convention goes beyond the no harm rule by setting a goal for cooperation, namely optimal and sustainable utilisation, and prescribing how it has to be achieved: in an equitable and reasonable way.[379] Arguably, when dealing with shared resources the no harm rule is not sufficient. In fact, it aims to protect neighbouring States from the transboundary harmful effects provoked by the inappropriate use of natural resources within the territory of another State; however, the degradation of a shared resource cannot be simply configured as a transboundary effect and requires an additional dose of care. For this same reason, procedural obligations[380] acquire a reinforced character in the case of shared resources and become a *sine qua non* condition for cooperation. In this sense, a riparian State cannot ignore the equal and correlative rights of other riparians when using a shared resource as it might if exercising its sovereignty over an exclusive resource.

The transboundary – i.e. shared – character of a natural resource negates the possibility to accord exclusive sovereignty over its parts. Rather, transboundary natural resources have to be addressed as an ecological functional unit, oblivious of national borders and overlapping jurisdictions, and thus subject to the ecosystem approach. [381] This approach requires the

[379] Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 60. Similarly, Freestone and Salaman discuss which one takes priority in the UNWC between the principle of reasonable and equitable utilisation and the no harm rule and conclude that the former qualifies the latter Freestone and Salman, 'Ocean and Freshwater Resources', *cit.*, (n 369) 352.
[380] These are included in Part III of the UNWC.
[381] Article 2 of the Biodiversity Convention defines ecosystem in broad terms by saying that it is a 'dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'. The CBD COP has elaborated further on this approach and specified that '"Ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'. Moreover, it highlights that this definition 'can refer to any functioning unit at any scale. Indeed, the scale of analysis and action should be determined by the problem being addressed'. CBD COP Decision V/6, Annex A, 104. The UN Watercourses Convention deals with the protection and preservation of the ecosystems of international watercourses in its Article 20. For a detailed analysis of the application of an ecosystem approach in transboundary contexts refer to Marauhn and Böhringer, 'An Ecosystem Approach to the Transboundary Protection of Biodiversity', *cit.*, (n 18).

consideration and integrated management of the whole system, rather than individual components, since these are interconnected and interact on a continuous basis.[382]

In this respect, the Biodiversity Convention brings a paradigmatic change by focusing on biodiversity as a whole instead of protecting specific species or ecosystems like other conventions.[383] Since the actual implementation of the ecosystem approach depends on the specific context considered, the CBD COP has elaborated twelve principles useful for guiding its operationalisation.[384] In particular, principle 2 affirms that 'management should be *decentralized* to the lowest appropriate level'[385] to ensure efficiency, effectiveness and equity since 'the closer the management is to the ecosystem, the greater the responsibility, ownership, accountability, participation, and use of local knowledge'.[386] However, local management decisions need be framed in a bigger perspective that considers the different levels of interest and governance converging on the shared resources.[387] Arguably, decentralised international cooperation offers an appropriate solution to this end by foreseeing the integration of inter-State and localised cross-border efforts. Hence, decentralised cooperative mechanisms that enable the participation of local actors across borders can be articulated within a bigger cooperative framework, such as transboundary protected areas (TBPAs),[388] which are useful to conceive an

[382] On this point, Brunnée and Toope explain that the interconnected character of ecosystems requires 'management approaches that are broad-based in a spatial sense' and that 'human interaction and use of the environment respect the need for maintaining "ecosystem integrity"'. Jutta Brunnée and Stephen J Toope, 'Environmental Security and Freshwater Resources: A Case for International Ecosystem Law' (1995) 5 Yearbook of International Environmental Law 41, 55. Along the same lines, Trouwborst lists the three main components of an ecosystem approach: '(1) the holistic management of human activities, (2) [is] based on the best available knowledge on the components, structure and dynamics of ecosystems, (3) and [aims] at satisfying human needs in a way that does not compromise the integrity or health, of ecosystems'. Trouwborst, 'The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages', *cit.*, (n 18) 28. Arguably, an ecosystem approach aims to minimise the human impact on the natural environment by guiding such an interaction.

[383] Marauhn and Böhringer, 'An Ecosystem Approach to the Transboundary Protection of Biodiversity', *cit.*, (n 18) 95.

[384] See CBD COP Decision V/6, Annex B.

[385] Biodiversity Convention, Article 2. (emphasis added)

[386] CBD COP Decision V/6, Annex B, 105.

[387] In this regard, the CBD COP provides as an operational guidance to 'define the appropriate level for management decisions and actions' depending on the problem or issue addressed and at the scale at which the ecosystem operates as a functioning unit, including by cooperating at transboundary or global level. See CBD COP Decision V/6, Annex B, 108-109. Moreover, 'The Ecosystem Approach Advanced User Guide' encourages the development of mechanisms aimed to coordinate decisions and management actions at all relevant levels. At https://www.cbd.int/ecosystem/sourcebook/advanced-guide/ accessed 30 November 2017.

[388] Venter discusses TBPAs – which he identifies as 'transfrontier protected areas' TFPAs – as a useful framework to rethink and even suspend State sovereign rights. Venter, 'Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty', *cit.*, (n 113) 80 ff.

ecosystem-wide strategy for the conservation and management of transboundary natural resources.

2.8 Public participation in environmental matters: State duties and peoples' rights[389]

Decentralised international cooperation implies the involvement of sub-national actors in governing transboundary natural resources and, consequently, requires their effective participation. Procedural environmental rights support the concept of decentralised international cooperation since, on the one hand, they provide the (concerned) public with the opportunity to participate in environmental matters, and, on the other, they oblige States to enable such participation, including in transboundary contexts. Therefore, peoples' rights of participation in environmental protection and sustainable development and the corresponding State obligations to ensure the appropriate enjoyment of these rights are two sides of the same coin.

The idea of, and concerns for, public participation are not relegated to the environmental sphere, but are rooted in the very concept of democracy and build on existing human rights concepts.[390] Applications to environmental matters were anticipated under the guise of environmental education in Principle 19 of the Stockholm Declaration[391] and affirmed more clearly in Principle 23 of the World Charter for Nature[392] and Principle 10 of the Rio

[389] Most of this section is based on Emma Mitrotta, 'Strengthening Conservation through Participation: Procedural Environmental Rights of Local Communities in Transboundary Protected Areas' in Jerzy Jendrośka and Magdalena Bar (eds), *Procedural Environmental Rights: Principle X in theory and practice* (Intersentia 2017).

[390] In this regard see Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 288–289. In its Article 21(1), the 1948 Universal Declaration of Human Rights states 'Everyone has the right to take part in the government of his country, directly or through freely chosen representatives'. See also Article 25 of the ICCPR, *cit.*, and Article 23 of the Inter-American Convention on Human Rights; Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: http://www.refworld.org/docid/3ae6b36510.html accessed 4 December 2017. For a brief overview on the connection between participatory rights in environmental matters and human rights regimes refer to Jonas Ebbesson, 'Principle 10: Public Participation' in Jorge E Viñuales (ed), *The Rio Declaration on environment and development: A commentary* (Oxford University Press 2015) 297 ff.

[391] In its first part, Principle 19 affirms that 'Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension'. Stockholm Declaration, *cit.*

[392] According to Article 23, 'all persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage and degradation'. World Charter for Nature, *cit.*

Declaration,[393] which exemplifies that public participation can take place at any relevant governance level.[394] This was later codified at national level and included in several international conventions: its maximum expression is reflected in the 1998 Aarhus Convention,[395] which represents a milestone in international law.[396] For Hey the rationale behind extending participation to the environmental field lies in the fact that, since individuals suffer from the consequences of environmental degradation and unsustainable use of natural resources, they can exercise participatory rights to voice their interests and uphold their substantive rights; hence, enhancing environmental protection is a consequence, but not the main purpose of these rights.[397]

Public participation is complex both in its conceptual structure and in its practice. It is composed of three distinct pillars: (1) access to information, (2) participation in decision-making, and (3) access to administrative and judicial remedies. These pillars are strongly interlinked and mutually reinforcing since accessing appropriate information is essential to satisfy the right to know[398] and to participate meaningfully in decision-making, while access to remedies provides the opportunity to both redress unjust outcomes[399] and directly enforce environmental law provisions.[400] In this sense, access to remedies indirectly ensures that States

[393] Principle 10 reads as follows: Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. Rio Declaration, *cit*.

[394] On this point see Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 83.

[395] Given the importance of this Convention, it is used as a reference point to define key terms like 'public concerned'.

[396] For Hey the increasing public participation in the environmental field has been facilitated by the availability of new technologies, like the accessibility of relevant information on the websites of multilateral environmental conventions and international organisations. Moreover, she shows the ductility of public participation by explaining that it found implementation in several ways at the international level. Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 83–84.

[397] ibid 83.

[398] For example, to know the environment we are living in, to know potential risks that would affect the environment surrounding us, to know how certain activities could affect environmental conservation. The right to know is also functional to exercise the right to live in a healthy environment, thus reinforcing the human rights to life, to health, and to family.

[399] Such as the refusal to access information and the use of inappropriate decision-making procedures. On this point see Jonas Ebbesson, 'Access to Justice in Environmental Matters' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2009) paragraph 2.

[400] See also the arguments regarding the *locus standi* of individuals deployed *supra* Section 2.5 and *infra* Section 2.9.

and other relevant actors apply and respect the first two pillars of public participation and environmental law in general.

Obviously, there are several degrees of public participation since its practical application depends on the jurisdictional system considered, for example in terms of participatory mechanisms in national provisions, and on the conditions on the grounds, like the availability and collection of environmental information, the capability of responsible authorities/actors to share such information, and the competence of the public to contribute to decision-making processes. Therefore, the scope of non-State actors' participation is inevitably conditioned by the will of States.[401]

In addition to the three pillars, there is a fourth and crosscutting component: the principle of non-discrimination and equal access in environmental matters, which, arguably, defines the 'extraterritorial' dimension of participatory rights by enabling their application across borders.[402] Ebbesson explains that it allows 'members of the public to participate in decision-making and trigger judicial and administrative procedures in environmental matters across State borders'[403] and that it 'matters also for access to information in transboundary contexts'.[404] The

[401] For instance, the Biodiversity Convention requires State Parties to introduce the environmental impact assessment (EIA) for any proposed project likely to impact on biodiversity and, 'where appropriate, [to] allow for public participation in such procedures', in its Article 14(1)(a). Therefore, the Convention sets an obligation to allow for public participation in EIA, but does not define when and how. Rather, it leaves room for national legislation and successive protocols to identify the circumstances for public participation in EIA, 'where appropriate'. Regarding public participation in the Biodiversity Convention see Lalanath de Silva, 'Public Participation in Biodiversity Conservation' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017). In particular, he describes public participation in the framework of the Cartagena Protocol on Biosafety and the Nagoya Protocol on Access and Benefit Sharing. He argues that, although public participation is explicitly acknowledged in the biodiversity regime, it finds limited application at national level, except for those States that are parties to the Aarhus Convention.

[402] This principle is also called 'national treatment' and, according to Nanda and Pring, has both a substantive and procedural character. In its substantive stance, it requires States to treat environmental harms caused to other States as seriously as they would do for harms occurred to their own territory or citizens. As such, it is asserted in the 1974 OECD Principles Concerning Transfrontier Pollution (Title C), Principle 13 of the UNEP Draft Principles on Shared Natural Resources, Article 13 of the WCED Legal Principles for Environmental Protection and Sustainable Development, and Principle 14 of the Rio Declaration. On the substantive level, instead, non-discrimination derives from good neighbourliness, equity, and fairness, but, is also motivated by the fact that 'equal access to justice is yet imperfectly available, so that a State's environmental harms in other States may leave those victims without a practical remedy'. From a procedural point of view, it demands that a State proposing or carrying out an activity with transboundary environmental effects, grants non-nationals that are going to (or are likely to) be affected by such activity equal access to information, participation, and remedies as it provides to its own citizens. Nanda and Pring, *International Environmental Law and Policy in the 21st Century*, *cit.*, (n 180) 59.

[403] Jonas Ebbesson, 'Public Participation in Environmental Matters' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2009) paragraph 7.

[404] Jonas Ebbesson, 'Access to Information on Environmental Matters' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2009) paragraph 6. See also Jonas Ebbesson, 'The Notion of Public Participation in International Environmental Law' (1998) 8 Yearbook of International Environmental Law 51, 82.

principle of non-discrimination and equal access in environmental matters is widely accepted,[405] and is said to have achieved the status of general international law.[406]

Ebbesson explains that non-discrimination does not impose international minimum standards for public participation, rather it extends the application of national participatory standards to persons across State borders – i.e., extraterritorially – in order to provide non-nationals with '*no less effective opportunities* to make use of remedies and procedures *for the protection of health and the environment* in the state of the harmful activity or installation'.[407] This rationale should not be limited to environmental damage as a consequence of harmful activities or installations, but extended to environmental protection in general,[408] in line with the preventive approach that has evolved in international law to forestall environmental damage and avoid reparatory intervention *ex post*.[409] Prevention can be interpreted in extensive terms as encompassing environmental protection and conservation, thus including integrated ecological planning and management in a long-term perspective, preservation of biodiversity,

[405] Article 3(9) of the Aarhus Convention reiterates its application to the three public participation pillars. This is also the case of Art. 9 of the Convention on the Transboundary Effects of Industrial Accidents (Helsinki) 17 March 1992, in force 19 April 2000, 2015 UNTS 457. Instead, other instruments apply non-discrimination only to one of the three participation pillars. For example, transboundary access to information and participation in decision-making are expressly foreseen by Art. 3(8) of the Convention on Environmental Impact Assessment in Transboundary Context (Espoo) 25 February 1991, in force 10 September 1997, 1989 UNTS 309. The equal access to administrative and judicial remedies is widely embedded in international environmental law instruments; for instance, it is foreseen in Article 3 of the Nordic Environment Protection Convention, which predates the Rio Declaration. On this point see George (Rock) Pring and SusanY Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resource Development' in Donald M Zillman, Alastair Lucas and George (Rock) Pring (eds), *Human Rights in natural resource development: public participation in the sustainable development of mining and energy resources* (Oxford Scholarship Online 2002) 44 ff.

[406] Ebbesson, 'Access to Information on Environmental Matters', *cit.*, (n 404) paragraph 6; Ebbesson, 'Access to Justice in Environmental Matters', *cit.*, (n 399) paragraph 7.

[407] Ebbesson, 'Access to Justice in Environmental Matters', *cit.*, (n 399) paragraph 7. (emphasis added)

[408] Arguably, this is happening in the *Serengeti* case as well as in climate litigation more generally. On this point see *supra* Section 2.5.

[409] On this point, Kiss and Shelton explain that most of the international environmental treaties adopt a preventive logic rather than a responsive logic: '[T]he objective of almost all international environmental instruments is to prevent environmental deterioration … Only a few international instruments rely on other approaches, such as the traditional principle of State responsibility for harm already caused or direct compensation of the victims by the originator of the pollution'. Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) 92. In addition, Sands highlights that 'the preventive principle seeks to minimise environmental damages as an object in itself' and 'a state may be under an obligation to prevent not only transboundary harm, but also damage to the environment within its own jurisdiction'. Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 201. This principle is reflected in State practice and embedded in national legislation on environmental protection, while, at the international level, has been widely endorsed by soft and binding instruments. Moreover, the international jurisprudence has confirmed its application to transboundary resources, as emerges from the *Trail Smelter* Arbitration and the *Lac Lanoux* Arbitration, and, more recently, has confirmed its customary nature in both the *Iron Rhine* Arbitration (see paragraphs 59 and 222) and the *Pulp Mills* case (paragraph 101). For a general overview see also Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 137; Fodella, 'I Principi Generali', *cit.*, (n 180) 101 ff.

and sustainable development.[410] All these aspects are relevant in the case of decentralised international cooperation.

The extraterritorial application of participatory rights is crucial in the context of regional organisations since higher participatory standards in one country can boost improvements towards this direction in the other Partner Countries. This result is facilitated by the presence of an appropriate regional legal framework, as in the case of the EU, where law harmonisation has been consistently and expressly pursued, including in the field of participatory rights. As a party to the Aarhus Convention, the EU has put in place several measures to ensure its implementation at community level as well as in the Member States.[411] Arguably, the presence of a regional legal framework with effective participatory provisions strengthens public participation in both its national and extraterritorial dimensions.

In the context of this thesis, the extraterritorial application of participatory rights strengthens the case for allowing local communities to access information and participate in decision-making over transboundary natural resources, especially when they are directly affected by the use of these resources or inhabit the transboundary natural space, hence, can be qualified as public concern.

[410] Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) 92 ff.

[411] For further details see the draft report prepared by the Commission as the basis of the 4th EU Aarhus Implementation Report and currently open for consultation at http://ec.europa.eu/environment/aarhus/pdf/aarhus_implementation_report_2017.pdf accessed
2 December 2017. Arguably, the presence of a regional legal framework with effective participatory provisions strengthens public participation in both its national and extraterritorial dimensions. Far from imposing complete uniformity, EU secondary law has created a common ground for the recognition of participatory rights in all EU Member States and is fostering changes in those countries that do not as yet fulfil the existing obligations, especially in relation to access to remedies. Hence, on the basis of non-discrimination and equal access (Art. 18 of the Lisbon Treaty), European citizens can access remedies in a Member State different from that of their nationality to seek redress in environmental matters. In the context of judicial procedures, the claimant can also rely on EU provisions on public participation that are precise, clear and unconditional, but have not been applied in the State of the trial,[411] thus strengthening both the application of participatory rights in a transboundary context and of EU law. The European Court of Justice has actively strengthened the primacy of EU law over national laws especially through the theory of direct effect introduced in the Van Gend en Loos judgement (Case 26–62), while the supremacy doctrine was developed in the decision of the Costa/ENEL (Case 6–64). The Treaty of Lisbon explicitly recognises the primacy of EU law over the law of the Member States (Declaration n. 17). Treaty of Lisbon Amending the Treaty of European Union and the Treaty Establishing the European Community (Lisbon) 13 December 2007, 2007/C 306/01.

2.8.1 Exploring the participation of local communities in conservation initiatives[412]

In the context of public participation, it is possible to distinguish the public and the 'public concerned'. The former includes all actors outside the governmental administration,[413] while the latter refers to a more restricted group of subjects that are 'affected or likely to be affected by, or have an interest in, the environmental decision-making'.[414] In Article 9(2), the Aarhus Convention clearly demands the access to administrative and judicial review procedures for concerned members of the public. Therefore, depending on the context considered, it is necessary to identify who is concerned in order to ensure effective participatory mechanisms. When cooperative efforts are foreseen to conserve and manage transboundary natural resources or shared natural spaces, local communities can be identified as concerned publics and need to be involved as soon as possible in the cooperative process due to possible repercussions on their survival and livelihoods.

In fact, these communities have often developed physical and cultural connections with their surrounding environment over the course of time.[415] Aware of the significance of natural

[412] This section is mainly based on Mitrotta, 'Strengthening Conservation through Participation: Procedural Environmental Rights of Local Communities in Transboundary Protected Areas', *cit.*, (n 389).

[413] These are individuals, groups, civil society organisations, indigenous peoples, and local communities. Article 2(4) of the Aarhus Convention defines 'the public' as 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations, or groups'.

[414] According to Article 2(5) of the Aarhus Convention, this definition extends to 'nongovernmental organizations promoting environmental protection and meeting any requirements under national law [that] shall be deemed to have an interest'. The conditions to qualify as public concerned are: '(a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition'. The Aarhus Convention reiterates these conditions in several provisions.

[415] As explained by Borrini-Feyerabend *et al*., local communities could be permanently settled or mobile, they usually 'have extended residence in a given environment, a rich tradition in their relationship with the land and the natural resources, well-established customary tenure and use practices, effective management institutions and a direct dependence on the resources for their livelihoods and cultural identity. They too claim "rights" to their land and natural resources'. Borrini-Feyerabend and others, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, *cit.*, (n 45) 8. It has been pointed out that certain groups, *in primis* indigenous people, have been and, often, are still excluded from decision on the exploitation of natural resources and their request for a 'meaningful consultation'. Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 289. More in general see Gillian Triggs, 'The Rights of Indigenous Peoples to Participate in Resource Development: An International Legal Perspective' in Donald M Zillman, Alistair Lucas and George (Rock) Pring (eds), *Human Rights in natural resource development: public participation in the sustainable development of mining and energy resources* (Oxford Scholarship Online 2002). For instance, see the Maya Indigenous Communities of the Toledo District v Belize, Case 12.053, IACHR, 12 October 2004, Merit Report No. 40/04, available at http://cidh.org/annualrep/2004eng/Belize.12053eng.htm accessed 29 March 2018. The IACHR found that the Maya communities' rights to property had been violated by the State of Belize, which had not recognised their communal property rights to their ancestral lands and territories, rather was acquiescent to oil exploration, exploitation and logging activities carried out by private companies in the traditional lands of these communities, even in the year after the aforementioned decision. See http://www.oas.org/en/iachr/media_center/preleases/2013/032.asp accessed 29 March 2018.

resources and the surrounding natural space for their survival and concerned with their preservation, these communities conceived conservation regimes long before national governments created protected areas.[416] Governments have generally privileged pure conservation objectives leading to the displacement of local communities that had inhabited or used certain territories for centuries.[417] Nevertheless, the perception of protected areas has evolved over time and benefitted from the innovative approaches developed since the Stockholm and Rio Conferences. Since then, biodiversity conservation has to be pursued together with the sustainable use of natural resources, the preservation of ecosystem services, and the realisation of socio-economic developmental objectives. This evolution was guided by lessons learned in the field that demonstrated the need to both integrate the specific protected territory and resources in the surrounding context, and engage with indigenous peoples and local communities in order to establish successful conservation regimes.[418]

The connection between local communities and natural resources is entrenched in international environmental law. Principle 10 of the Rio Declaration includes public participation, while Principle 22 specifically acknowledges the role of local communities and their strong connection with nature.[419] In line with these principles, the primary role of indigenous people and local communities in the conservation and management of natural resources is recognised by several international conventions or acknowledged by their

[416] Grazia Borrini-Feyerabend, 'Indigenous and Local Communities and Protected Areas: Rethinking the Relationship' (2002) 12 Parks 5. The concept of Indigenous peoples and community conserved territories and areas (ICCAs) captures the phenomenon of biodiversity conservation governed by local and indigenous peoples. ICCAs are estimated to cover at least as much areas as State-designated protected areas. Regarding ICCAs see Chapter 3 Sections 3.3.3 and 3.6. It is worth noting that traditional practices carried out by these communities might not be in line with international environmental standards, as in the case of hunting protected or threatened species. Moreover, the access of indigenous peoples/local communities to natural resources could be restricted for preserving biodiversity, as in the case of some protected areas. There is an emerging literature on reconciling indigenous rights and biodiversity conservation, see Desmet, *Indigenous Rights Entwined with Nature Conservation, cit.*, (n 49).

[417] The history of conservation has also been a history of exclusion in South Africa; see Jane Carruthers, 'National Parks in South Africa' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009).

[418] Borrini-Feyerabend and others, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation, cit.*, (n 45) 8.

[419] According to this Principle 'Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development'.

governing bodies, including the COP to the Ramsar Convention and that to the Biodiversity Convention.

For instance, in its Resolution VII.8 on Local Communities and Indigenous People,[420] the COP to the Ramsar Convention reiterates the importance of traditional rights, values, knowledge, and institutions of these communities related to the management of wetlands; it also includes a set of guidelines aimed to ensure their participation in the management of wetlands, which arguably project the role of local communities at the international level.

The Biodiversity Convention calls on its parties to 'respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyle relevant for the conservation and sustainable use of biological diversity and promote their wider application with approval and involvement of the holders';[421] moreover, it recognises the strong link between conservation and sustainable use by including both among its goals together with compelling the fair sharing of benefits deriving from the utilisation of genetic resources.[422] Therefore, sustainable use and conservation are not alternative objectives; rather, sustainable use through appropriate management can be instrumental to conservation.

In addition, Ebbesson highlights that the 2010 Nagoya Protocol on Access and Benefit-Sharing[423] not only foresees the participation and involvement of indigenous and local communities through procedures of prior informed consent and approval for accessing genetic resources, but directly 'addresses participatory processes across state borders: [hence,] the parties must cooperate in transboundary contexts with the involvement of indigenous and local communities concerned'.[424]

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[420] Ramsar Convention, COP Resolution VII.8 'Guidelines for establishing and strengthening local communities' and indigenous people's participation in the management of wetlands', at https://www.ramsar.org/sites/default/files/documents/library/key_res_vii.08e.pdf accessed 4 December 2017.
[421] Biodiversity Convention, Article 8(j). The issue of indigenous peoples' and local communities' participation under the Biodiversity Convention is addressed in Louisa Parks and Mika Schröder, 'What We Talk about When We Talk about "Local" Participation: Indigenous Peoples and Local Communities' Participation under the Convention on Biological Diversity' (2018) BENELEX Working Paper N. 18.
[422] CBD, Article 1.
[423] Nagoya Protocol, Articles 6 and 21.
[424] Ebbesson, 'Principle 10: Public Participation', *cit.*, (n 390) 296–297.

This preferential relation between communities and natural resources has to be ensured in the context of conservation initiatives, including protected areas, as pursued through Goal 2.2 of the CBD Programme of Work on Protected Areas.[425] Therefore, protected areas provide a conservation framework useful to explore the application of participatory rights of local communities, and the analysis developed in relation to protected areas can be applied, *mutatis mutandis*, to other conservation initiatives or arrangements.

The role of communities in protected areas has been enhanced by international organisations, such as the International Union for Conservation of Nature (IUCN), which advanced the conceptual development and practice of protected areas.[426] The so-called IUCN protected areas matrix is a classification system that integrates management categories which reflect the main management objectives of the area with governance approaches identifying who owns, controls, and has responsibility for managing a protected area. According to this matrix there are some protected areas, identified as Category V 'Protected Landscape/Seascape', whose peculiarity derives from the interaction between people and nature that over time has resulted in a unique ecological, biological, cultural and scenic area that, precisely due to this interaction, deserves to be preserved.[427] This Category focuses on the connection between nature and people and aims to preserve it since it is vital for both community livelihood and nature conservation. Hence, whoever is responsible for decision-making and management in protected areas belonging to Category V has to take into consideration the need of people inhabiting the area and involve them actively in its

[425] The CBD Programme of Work on Protected Areas was adopted by the Conference of the Parties to the Biodiversity Convention and included in CBD COP Decision VII/28, 'Protected Areas (Article 8 (a) to (e)' (13 April 2004) UN Doc. UNEP/CBD/COP/DEC/VII/28. Hereinafter, CBD PoWPA. Goal 2.2 requires 'to enhance and secure involvement of indigenous and local communities and relevant stakeholders' and poses as its target 'the full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment of new protected areas'. For further analysis of the CBD PoWPA see Chapter 3 Section 3.3.3.

[426] For an exploratory review of IUCN work on protected areas see Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30); Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31). For further analysis of protected area regimes see Chapter 3 Section 3.6.

[427] For an overview of Category V see Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 20; Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 182–184.

management. To this end, management authorities have to foresee mechanisms for the meaningful participation of communities. Therefore, communities can be considered as concerned publics, and procedural environmental rights apply to them with a reinforced character.[428]

In some cases, indigenous peoples and local communities hold the authority and responsibility to manage protected areas.[429] In this case, procedural environmental rights should find their maximum expression in terms of decision-making and direct participation in managing natural resources. Nevertheless, access to information and access to justice might still be hindered since they imply the involvement of other actors, and depend on the legislative framework applicable in the relevant jurisdiction. Even when other governance approaches apply – hence, the authorities responsible for managing the protected areas are governments, private actors, or a group of different stakeholders[430] – procedural environmental rights have to be recognised for local communities to ensure good governance.[431]

Governance embraces multiple aspects. Public participation forms one of them, since it contributes to evaluate its quality – that is to say, how one governs – in a specific context. Good governance is strongly linked to human rights principles and is essential for sustainable development, including in the context of protected areas.[432] Hence, the meaningful involvement of (concerned) publics in environmental matters represents a manifestation of good

[428] In this sense, Ebbesson explains that 'by providing for participation for the public concerned, a broader range of burdens and benefits may be taken into account'. Ebbesson, 'Public Participation in Environmental Matters', *cit.*, (n 403) paragraph 11.
[429] Among the IUCN governance approaches, these cases are grouped as Type D 'Governance by indigenous people and local communities', also referred as Indigenous Peoples and Community Conserved Territories and Areas (ICCAs). Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 26. See also Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 81 ff. On ICCAs refer to Chapter 3 Sections 3.3.3 and 3.6.
[430] For the other types of IUCN governance approaches refer to Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 26–27.
[431] There is no single definition of governance nor of 'good governance'. For IUCN it consists in 'the interaction among political and social structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say'. See Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 40. Generally speaking governance refers to how society defines and achieves its goals and priorities: the processes used to take decision and implement them, the actors involved, and the structures set in place to this end.
[432] See Element 2 of the CBD PoWPA, and, in particular, activities 2.1.3 and 2.1.5 as well as Goal 2.2 and the connected activities.

governance.[433] In protected areas local communities embody the notion of concerned publics; therefore, it can be argued that their meaningful involvement in protected area-related decision-making and management contributes to good governance.

Moreover, public participation contributes to the fulfilment of citizens' environmental rights, which are human rights illustrating 'the integrated interrelationship between humans and the environment and the claim of people to an environment of a particular quality'.[434] Protected areas are purposely established to conserve valuable natural resources and, under certain circumstances, allow for their sustainable use – i.e., to maintain an environment of a particular quality – thus motivating public participation. Nevertheless, these areas are experiencing several internally-generated threats, such as inappropriate management and poaching, and threats from outside their boundaries, like off-site pollution and climate change-related events, with serious repercussions for biodiversity conservation.

Public participation in protected areas can be enhanced globally by applying the Aarhus Convention through two main mechanisms. First of all, it has been argued that the provisions of this Convention apply to all projects supported by State Parties in other countries, including financial and technical assistance for the development of (transboundary) protected areas.[435] Second, although negotiated and adopted in the framework of the United Nations Economic Commission for Europe, the Convention is open to all UN Member States upon approval by the Meeting of the Parties by virtue of its Article 19(3); therefore, virtually any State can become party to the Aarhus Convention.

In the context of protected areas, the three participatory pillars acquire a specific connotation.

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[433] In this sense, Lausche confirms that the Aarhus Convention is 'the leading international instrument for defining and elaborating a good governance framework of principles for governments'. Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 44.

[434] Anel Du Plessis, 'A Role for Local Government in Global Environmental Governance and Transnational Environmental Law from a Subsidiarity Perspective' [2015] Cilsa 281, 3–4.

[435] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 44.

(1) The right of the public to access environmental information implies two types of duties for governments: a proactive duty and a reactive duty.[436] In the first case, government agencies collect, compile, and actively disseminate information without request. In relation to protected areas, the relevant information to be made public includes draft and final protected area system plans, proposals to declare an area as protected, draft and final management plans as well as monitoring, evaluation, and financial reports to detail the expenditure of public money. Furthermore, protected area legislation has to identify the government agencies or other bodies responsible for providing access and distribution of relevant information, where and how this can be accessed, and the process and timeframe for commenting.[437]

The reactive duty for governments consists in the obligation to provide information upon request of the public. Again, protected area legislation will define the details on how to obtain the information, the agencies responsible, timeframe, etc., as well as clarify the conditions to respect when information is refused.[438]

The sound application of the right to access environmental information results, on the one hand, in enhanced transparency, legitimacy, and accountability of governmental actions and protected area authorities, and, on the other hand, in an increased environmental education of the public – in line with Principle 19 of the Stockholm Declaration – and a stronger capacity to exercise the other two participatory rights. According to Verschuuren, the government has a proactive duty to provide environmental information to the concerned public, while it exercises a reactive duty towards the general public.[439]

(2) Public participation in decision-making consists in contributing to important decisions by providing written comments or participating in meetings and expressing opinions in these

[436] Pring and Noé, 'The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resource Development', *cit.*, (n 405) 29–30.
[437] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 44.
[438] ibid 45.
[439] Jonathan Verschuuren, 'Public Participation Regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention' (2004) 4 Yearbook of European Environmental Law 29.

contexts. In order to be appropriate and well-informed, such a contribution presupposes access to accurate, relevant, and clear information. Nevertheless, competent agencies need to take into consideration people's comments accurately, otherwise the effort of the public will be vain. In the case of protected areas, crucial decisions relate to the spatial delineation of a protected area, the identification of management authorities, the development of management plans as well as strategies for a protected area system or a Marine Protected Area (MPA) network, and the revision of draft environmental and social impact assessments of proposed actions.[440]

(3) Accessing administrative and judicial remedies has several applications: to appeal the refusal of access to information, to gain review of decisions made by protected area authorities under the law, to seek redress for inappropriate environmental governance in the context of protected areas, to seek damages for environmentally harmful activities carried out within the protected space as well as to prevent such activities, and to directly enforce protected area law and environmental law more generally.[441] Rules and procedures for accessing justice and appealing administrative decisions authorised by law have to be foreseen in PA legislation if they are not already provided for at national level. Hence, access to justice is a means to reinforce the exercise of the other two participatory rights; moreover, it gives people the power to monitor the action of protected area authorities, thus making them accountable.

National protected area legislation has to encompass all the aforementioned provisions or complement existing laws that are adequate for participation purposes. However, the existence of participatory provisions at national level is not a sufficient element: participation is effective only when local communities are able to influence the outcome of the decisional process and, to this end, participation has to be informed and culturally appropriate.[442]

[440] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 44.
[441] Nanda and Pring, *International Environmental Law and Policy in the 21st Century*, *cit.*, (n 180) 56.
[442] In regard to an effective and culturally appropriate participation refer to the *Endorois* case described in Chapter 7 Section 7.2.1.

To conclude, when people hold or claim rights over existing or proposed protected areas and attach spiritual and cultural values to these areas or natural features located therein,[443] they can be identified as concerned publics. It is often the case that local communities live within or adjacent to protected areas,[444] hence, they are always entitled to procedural environmental rights as concerned publics since they are 'affected or likely to be affected by, or having an interest in, the environmental decision-making'[445] related to these protected areas. Such a situation requires a proactive attitude of protected area authorities and governments towards local communities.

2.8.2 Participatory rights of local communities in transboundary contexts[446]

When ecological and political boundaries do not coincide, cross-border conservation efforts can be conceived and implemented through the creation of a transboundary protected area (TBPA), which can be used as a proxy to discuss the exercise of participatory rights in relation to the conservation and management of transboundary natural resources and argue for the meaningful engagement of local communities across borders in line with the concept of decentralised international cooperation.

TBPAs can be established in several ways, the most common and simple being to visualise the linkage of two or more contiguous protected areas across a national boundary.[447] The creation of TBPAs responds to the recent trend of expanding conservation areas and integrating

[443] The linkages between local communities, especially indigenous people, and nature or natural elements can be related to religious beliefs and traditional practices like in the case of sacred sites. Their importance can be appreciated also by people with a different value system and transcend biodiversity and ecological considerations. These sites can be characterised as 'cultural heritage' and they can benefit from transboundary conservation. On this point see Maja Vasilijević and others, *Transboundary Conservation: A Systematic and Integrated Approach* (IUCN 2015) 29 ff.
[444] Vasilijević and others, *Transboundary Conservation: A Systematic and Integrated Approach, cit.,* (n 443).
[445] Article 2(5) of the Aarhus Convention.
[446] Most of this section is based on Mitrotta, 'Strengthening Conservation through Participation: Procedural Environmental Rights of Local Communities in Transboundary Protected Areas', *cit.,* (n 389).
[447] For a detailed analysis of TBPAs see Chapter 3 Section 3.6.1.

them within the surrounding environment, since they often encompass intervening land or operate as a means to foster sympathetic sustainable use across the borders.[448]

In the context of TBPAs, the role of local communities is as important as it is in the national context.[449] Besides, it can be argued that it would be illogical to think that the conditions for good governance and the procedural environmental rights applicable to local communities in a protected area – hence, within the domestic jurisdiction – fade in the context of a TBPA. Moreover, the principle of non-discrimination and equal access allows for the extraterritorial application of procedural environmental rights, including in the context of TBPAs, in line with the expanded application of participatory rights at multiple governance levels as foreseen in the Rio+20 outcome document The Future We Want.[450]

In TBPAs, cross-border cooperation is meaningful in ecological as well as social terms, and the relevance for participatory rights is confirmed by the key management principles guiding the design and management of such a cooperative framework.[451] Moreover, Article 3(7) of the Aarhus Convention requires contracting parties to apply procedural environmental rights in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment. Regardless of being a party to the Aarhus Convention, the rationale behind this article can be extended to the application of participatory rights in decision-making processes relating to the conservation and management of transboundary natural resources, especially in the context of TBPAs or other transboundary

[448] Several international environmental regimes support a stronger development of TBPAs to ensure the effective conservation of transboundary natural resources: for instance, Goal 1.3 of the CBD PoWPA is specifically dedicated to it. In addition, the World Heritage Convention foresees the possibility to recognise World Heritage Sites that cross national boundaries and the Ramsar Convention demands consultation and coordination between relevant parties for the designation and management of transboundary wetlands according to its Article 5 and Ramsar COP Resolution VII.19 (1999), paragraph 2.1.1. The list of Transboundary World Heritage Sites is available at http://whc.unesco.org/en/list/?&_dc=1512409712217&&transboundary=1 accessed 4 December 2017.

[449] In this regard see (Vasiljievic) Vasilijević and others, *Transboundary Conservation: A Systematic and Integrated Approach*, *cit.*, (n 443) 26 ff.; Trevor Sandwith and others, *Transboundary Protected Areas for Peace and Co-Operation* (IUCN 2001) 19 ff.

[450] The Future We Want, paragraph 99. On this point see Ebbesson, 'Principle 10: Public Participation', *cit.*, (n 390) 294.

[451] In particular, TBPAs aim to (1) bring communities together across political boundaries, and (2) involve and benefit local communities in policy formation, PA planning and management. Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 271.

cooperation initiatives supported by *ad hoc* institutional arrangements. In fact, TBPAs can be conceived within a broader cooperative framework as an international organisation, as is the case of Transfrontier Conservation Areas (TFCAs) in the SADC region,[452] or are international organisation themselves.[453] Furthermore, the design, management and, more generally, governance of a TBPA result from international environmental decision-making processes, hence, the States or authorities involved in these processes have to respect participatory rights at all levels.

Partner States have established cross-border conservation initiatives, like SADC TFCAs, in order to conserve and manage shared natural resources as a unit and, for this purpose, joint management institutions are usually created. The cooperative process automatically qualifies local communities as concerned publics since they are both affected by the creation of the cross-border cooperative framework and interested in the conservation and management of the shared natural spaces and resources included therein. Their involvement can be institutionalised through *decentralised cooperative mechanisms* that facilitate the integration of cooperative activities happening at sub-national level within the inter-State cooperative framework dedicated to the joint conservation and management of shared resources, like TBPAs. Decentralised cooperative mechanisms are currently being developed in the Great Limpopo and KAZA TFCAs, as illustrated in Chapter 7.

In addition, local communities should be able to access remedies when their rights to access information and participate in decision-making in relation to transboundary natural resources are violated. In the context of an institutionalised transboundary cooperative initiative, like a TBPA, local communities should be able to uphold their participatory rights against any non-compliant Partner State, regardless of their nationality. Discrepancies in

[452] For a detailed analysis of SADC TFCAs see Chapters 6 and 7.
[453] For instance, the Kavango Zambezi Transfrontier Conservation Area (KAZA TFCA) is an international organisation according to Article 3 of its founding Treaty. A case study on decentralised international cooperation in the KAZA TFCA is developed in Chapter 7.

national legislation might hamper the possibility to access remedies when the uncompliant State is not endowed with remedial actions. However, in this case, the existence of a supranational cooperative framework (either the specific TBPA or, more generally, a regional organisation) can be useful to overcome these discrepancies and ensure participatory rights that are foreseen at the higher cooperative level. In fact, in order to achieve cooperative objectives, Partner States are motivated or required to harmonise their national law in specific fields. Hence, in the case of public participation, more advanced participatory standards in one Partner Country (or at regional level) can arguably guide the harmonisation process and be replicated in the other Partner Countries. This process can reinforce participatory standards both at national and regional levels as well as in the context of the shared cooperative space, allowing for a 'trans-echelon' transplant of participatory norms.[454] Such a dynamic can be favoured when decentralised cooperative mechanisms are in place, since they facilitate the participation of local communities at the cross-border level and allow their interests to emerge at higher governance levels. It can be argued that the concept of decentralised international cooperation and participatory rights are mutually reinforcing, since both support the direct involvement of local communities – i.e. the concerned public – in the conservation and management of transboundary natural resources that are environmental matters directly affecting their interests, livelihoods and, possibly, survival – especially in the case of indigenous peoples and rural communities.

Moreover, by imposing a duty on States to develop participatory processes at national level and providing the extraterritorial dimensions of participatory rights, international law is dealing with matters that were traditionally conceived under domestic jurisdiction, thus eroding State sovereignty and, consequently, limiting permanent sovereignty over natural resources since

[454] In regard to the idea of trans-echelon legal transplants refer to Jonathan B Wiener, 'Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law' (2001) 27 Ecology Law Quarterly 1295. See also Chapter 1 Section 1.2. Along the same lines, Ebbesson points out that participatory provisions and processes available at national and international levels are being integrated. Jonas Ebbesson, 'Public Participation' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007) 684.

nationals and non-nationals are also entitled to hold a State liable when it fails to protect the environment. In this context, Ebbesson notes that the development of participatory rights shows that 'the divide between national and international [levels] is being relaxed' and upholds the increasing involvement of non-State actors at the international level,[455] arguably legitimising their international role.

2.9 Preserving natural resources for the benefit of future generations

The principle of intergenerational equity expresses the idea that 'each generation holds the earth as a trustee or steward for its descendant',[456] and, together with intragenerational equity,[457] is conceived as an element of sustainable development.[458] This principle calls attention to the temporal dimension of environmental issues[459] and serves to guide the relationship between different generations[460] by seeking to balance their needs. Therefore, each generation should, when using use and developing natural and cultural resources, take into consideration the interests of future generations to receive such resources in no worse condition and be able to use them to meet their own needs and preferences.[461]

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[455] Ebbesson, 'Public Participation', *cit.*, (n 454) 684.

[456] Edith Brown Weiss, 'In Fairness to Future Generations and Sustainable Development' (1992) 8 American University International Law Review 19, 20.

[457] For Brown Weiss this concept aims to achieve 'equity among those who are living today' and ensure that 'all people meet their basic human needs'. ibid 21. In this sense, Birnie *et al* argue that it aims to redress the wealth imbalance between developed and developing countries and, although not explicitly mentioned in the Rio Declaration, it is pursued through its Principle 5 on poverty eradication and Principle 6 that recognises the special needs of developing countries. Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 122. According to Fodella, intragenerational equity is reflected in the principle of common but differentiated responsibilities (Principle 7), thus entailing an 'asymmetric' cooperation in environmental protection that requires developed countries to carry an heavier burden based on their greater contributions to environmental degradation and higher capabilities in technological and financial terms. Fodella, 'I Principi Generali', *cit.*, (n 180) 124. Such an asymmetric cooperation has found application in the climate change regime as well as in other environmental treaties. On this point see Cullet, 'Common but Differentiated Responsibilities', *cit.*, (n 261) 238–240. See also Fodella, 'I Principi Generali', *cit.*, (n 180) 125; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 122–123.

[458] In this regard refer to Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', *cit.*, (n 456); Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 116 ff.; Fodella, 'I Principi Generali', *cit.*, (n 180) 122–124; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 209–210; Claire Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity' in Jorge E Viñuales (ed), *The Rio Declaration on environment and development: A commentary* (Oxford University Press 2015) 151. The relation between the Rio Principle 3 on intergenerational equity and Principle 4 on sustainable development is further addressed in ibid 154–155.

[459] Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 140.

[460] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 119.

[461] For instance, Hey maintains that '[t]he main thrust of the principle is that our action today should not limit the choices that future generations have available to them'. Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 66. On this point see also Edith Brown Weiss, *In Fairness to Future Generations: International Law, Commom Patrimony and Intergenerational Equity* (The United Nation University and Transnational Publishers, Inc 1989) 37–38. For Brown Weiss

The idea of holding the earth and its resources in trust for future generations is shared among different traditions[462] and was advanced for the first time by the United States in the Bering Sea Fur Seals Arbitration in 1893.[463] Intergenerational equity was later included, both explicitly and implicitly, in declaratory[464] and binding international instruments. Molinari notes that the tension between the needs of present and future generations does not emerge from the Stockholm Declaration,[465] while it is clear in the language of Principle 3 of the Rio Declaration[466] that, in so doing, builds on the definition of sustainable development provided in the Brundtland Report.[467] The environmental treaties seeking to protect specific natural resources or other assets for the benefit of present and future generations include the 1946 International Whaling Convention,[468] the 1968 African Nature Convention,[469] the 1972 World Heritage Convention,[470] the 1973 CITES,[471] the 1979 Convention on Migratory Species,[472] the

intergenerational equity has a substantive character and is composed of three basic principles: the conservation of options; the conservation of quality; and the conservation of access. These three principles seek to limit the present generation in managing natural and cultural resources 'to ensure a reasonably secure and flexible natural and cultural resource base for future generations [– whose preferences cannot be predicted –] and a reasonably decent and healthy human environment for the present generation'. See ibid 39 ff. She holds that these three principles form the basis of a set of planetary or intergenerational obligations and rights that have a collective nature, connect generations across time, and coexist in each generation. She explains that '[i]n the intergenerational dimension, the generation to whom the obligations are owed are future generations, while the generations with whom the rights are linked are past generations.' ibid 45.

[462] Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', *cit.*, (n 456) 20. For a thorough exploration of the trust concept applied for environmental protection in an intertemporal perspective see Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester University Press 1999).

[463] In this regard see Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 209; Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 140. See also Bowman that discusses this case in connection to State jurisdiction over natural resources and the concept of the common concern of mankind. Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 494 ff.

[464] In particular, the Stockholm and Rio Declarations, the Brundtland Report [WCED, *Our Common Future*, 10 March 1987, available at http://www.un-documents.net/our-common-future.pdf accessed 30 December 2018], and the UNESCO Declaration on the Responsibilities of the Present Generations towards Future Generations, adopted on 12 November 1997 by the General Conference of UNESCO at its 29th session.

[465] Both Principles 1 and 2 refer to present and future generations.

[466] Molinari explains that Principle 3 was negotiated to temper the right to development proposed by the G77 and China with the need to protect the environment for future generations promoted by northern countries. The developmental dimension that spurred the negotiation of Principle 3 has been outweighed by its temporal element that draws attention on intergenerational equity. See Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 141 ff.

[467] ibid 140–141. In fact, Principle 3 of the Rio Declaration declares that '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations', and the Brundtland Report affirms that '[s]ustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs', Brundtland Report, Chapter 2, paragraph 1.

[468] Preamble.

[469] African Convention on the Conservation of Nature and Natural Resources (Algiers) 15 September 1968, in force 9 October 1969, 1001 UNTS 3, Preamble. Hereinafter, African Nature Convention.

[470] Article 4.

[471] Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington) 3 March 1973, in force 1 July 1975, 993 UNTS 243, Preamble. Hereinafter, CITES.

[472] Preamble.

1992 Biodiversity Convention,[473] the 1992 Climate Change Convention,[474] and the 1992 Helsinki Water Convention.[475] Further reference to this principle can be found in international jurisprudence, which, according to Molinari, proves that 'intergenerational equity may be becoming more than mere guidance' for the interpretation, application and development of substantive norms.[476] Although the ICJ does not expressly recognise a principle of intergenerational equity nor the rights of future generations,[477] separate and dissenting opinions of its judges are useful to advance the discussion on the role of intergenerational equity in international (environmental) law.

In the *Nuclear Weapons* Advisory Opinion, the ICJ affirms that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.[478] Moreover, a correct application of relevant international law to this case cannot disregard 'the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause human suffering, and their ability to cause damage to generations to come'.[479] Judge Weeramantry goes even further by arguing that

> '[t]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves in international law through major treaties, through juristic opinion and through general principles of law recognized by civilised nations. … All of these [treaties] expressly incorporate the principle of protecting natural element for future generations, and *elevate the concept to the level of binding State obligation*'.[480]

[473] Preamble.
[474] Article 3(1).
[475] Helsinki Water Convention, Article 2(5)(c). Several authors refer to these and other instruments, see Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 119–122; Fodella, 'I Principi Generali', *cit.*, (n 180) 122; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 209–210; Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458).
[476] Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 145. On its inclusion in international jurisprudence see also Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 210; Dupuy and Viñuales, *Int. Environ. Law*, *cit.*, (n 286) 77; Hey, *Advanced Introduction to International Environmental Law*, *cit.*, (n 157) 67.
[477] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 121; Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 152.
[478] *Nuclear Weapons* Advisory Opinion, paragraph 29. (emphasis added)
[479] *Nuclear Weapons* Advisory Opinion, paragraph 36.
[480] *Nuclear Weapons* Advisory Opinion, dissenting opinion of Judge Weeramantry, 455. (emphasis added) Furthermore he maintains that the concept of intergenerational equity is 'academically well established' and, in this regard, refers to Brown Weiss 1989 seminal work *In Fairness to Future Generations*. This same Judge had already referred to intergenerational equity as 'an important and rapidly developing principle of contemporary international law' in his dissenting opinion to the Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests (New Zealand v. France), ICJ Reports 1995, 288, at 341.

Along the same lines, Judge Cançado Trindade restates the importance of intergenerational equity in the field of international environmental law in his separate opinion to the *Pulp Mills* case,[481] and in 2014 moves a step further by tracing a connection to general international law[482] in relation to the Whaling in the Antarctic case.[483]

Redgwell notes an increasing 'intergenerationalisation' in the field of international law.[484] She explains that ever larger numbers of international treaties refer to future generations in their preambular recitals and these can be used – by judges[485] – in the interpretation and application of treaty provisions.[486] Moreover, she argues that, beyond sustainable development, an intergenerational component can be discerned in other international environmental law principles, which thereby acquire an intertemporal dimension.[487] Fodella proposes a similar argument by maintaining that a reference to future generations expands the temporal dimension applicable to international environmental norms and principles, and increases their authority and compulsory character. Hence, obligations like the prevention of environmental damage, the equitable and sustainable utilisation of resources, the protection of endangered species and habitats, and the limitation of greenhouse gas emissions should be applied by considering their long-term implications and the impact on future generations.[488] Unfortunately, the legal

[481] In particular, he argues that '[n]owadays, in 2010, it can hardly be doubted that the acknowledgement of *inter-generational equity forms part of conventional wisdom in International Environmental Law*'. (emphasis added) ICJ, *Pulp Mills* case, Separate Opinion of Judge Cançado Trindade, paragraph 122.
[482] On this point refer to Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 145.
[483] In his separate opinion, he affirms that 'inter-generational equity marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law'. Whaling in the Antarctic (Australia v. Japan; New Zealand intervening), 13 March 2014, ICJ Reports 2014, 226, Separate Opinion of Judge Cançado Trindade, paragraph 47.
[484] Redgwell, *Intergenerational Trusts and Environmental Protection*, *cit.*, (n 462) 126.
[485] Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 147.
[486] Redgwell, *Intergenerational Trusts and Environmental Protection*, *cit.*, (n 462) 126.
[487] This is the case of the common heritage of mankind, the principle of custodianship or stewardship, the precautionary principle, and the principle of common but differentiated responsibilities. ibid 127.
[488] Fodella, 'I Principi Generali', *cit.*, (n 180) 123. For instance, Dupuy and Viñuales hold that intergenerational equity reflects, not only, the concept of sustainable development, but also that of nature conservation since '[it] aims to distribute the quality and availability of natural resources and the necessary efforts for their conservation between present and future generations'. Along this line, it can be argued that intergenerational equity extends the obligation to conserve nature over time. See Dupuy and Viñuales, *Int. Environ. Law*, *cit.*, (n 286) 77. In this regard see also Molinari that highlights the long lasting effects of environmental damages and maintains that 'the promotion of intergenerational equity does require, at a fundamental level, the appropriate management of natural resources and concern more broadly for the environment'. Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 140.

consequences of such references are unclear since none of the conventions – nor the international jurisprudence – explicitly states whether future generations have rights that are autonomous and additional to those foreseen for the present generation.[489] In this regard, several authors note that a major weakness relates to the representation of future generations in legal proceedings before international courts.[490] In fact, '[w]hat is lacking is a theory of representation before international tribunals capable of according standing to future generations independently of the states and international institutions which are at present the only competent parties in international litigation'.[491] Fodella adds that identifying who should be abstractly entitled with such a standing is not a straightforward decision.[492] According to Molinari, 'in the absence of an ombudsman for future generations, the main avenue is to allow for the representation of future generations by present ones'.[493] This legal standing has been granted in an increasing number of national cases and can arguably be based on the fact that all

[489] Fodella, 'I Principi Generali', *cit.*, (n 180) 123. In this regard see also Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 120; Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 146.

[490] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 121; Fodella, 'I Principi Generali', *cit.*, (n 180) 123.

[491] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 121.

[492] Fodella, 'I Principi Generali', *cit.*, (n 180) 123.

[493] Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 152. On the opportunity to have an ombudsman for future generations see ibid 147–148; and Brown Weiss, *In Fairness to Future Generations: International Law, Commom Patrimony and Intergenerational Equity*, *cit.*, 125–126. Brown Weiss addresses the 'critical' issue of implementing intergenerational rights by explaining that '[e]nforcement could be appropriately done by a guardian or representative of future generations as a group'. Furthermore, she stresses that '[w]hile the holders of rights may lack the capacity to bring grievances, and hence, depend upon the representatives to do so, *such incapacity does not affect the existence of the rights or obligations associated with them*'. Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', *cit.*, (n 456) 24. Hence, notwithstanding the difficulties in identifying who can exercise the rights of future generations in administrative and judicial proceedings, planetary rights and obligations arguably exist and bind States and other actors of the international community. Brown Weiss explains this issue more exhaustively in her 1989 seminal work. The rights of future generations correspond to planetary or intergenerational obligations that become enforceable once they are codified into local, national and international law and are applicable in relation to specific problems. 'All actors in the international community – States, transnational corporations, other nongovernmental organizations and individuals – must respect planetary obligations. States, as the entities which represent people in the international community and which exercise sovereignty over their own citizens, serve as guarantors for fulfilling these obligations. Since States are continuing entities, they represent past, present and future generations.' Brown Weiss, *In Fairness to Future Generations: International Law, Commom Patrimony and Intergenerational Equity*, *cit.*, (n 461) 48. She further stresses the primary role of States in implementing and enforcing planetary rights by maintaining that, if a violation of planetary rights occurs, States should be able to represent both present and future generations. Moreover, as parties to the agreements establishing such rights and obligations or to the extent that these have an *erga omnes* character, States should be able to act directly and regardless of the fact that their own nationals have been affected. ibid 109. However, States may have environmental interests that conflict with those of present and future generations or they can act in violation of the intergenerational rights of their future nationals. Arguably, in these cases, the representation of future generations needs to be performed by a different actor, such as an ombudsman or members of the present generations.

generations belong to the human family and have an equal fundamental right to a healthy environment as well as the responsibility to conserve and preserve the earth and its resources.[494]

The first and most prominent case recognising intergenerational equity is the 1993 Philippine Supreme Court Decision in *Minors Oposa.*[495] A group of petitioners sought to protect the Philippine rainforests by halting deforestation based on their right to a sound environment and a balanced and healthful ecology, as recognised in the 1987 Constitution as well as in national environmental legislation and policy.[496] To this end, they challenged the granting of further timber licences by the Department of Environment and Natural Resources (DENR). The Court recognised that the petitioners – a group of minors, represented by their parents – had the right to file a class suit[497] 'for themselves, for others of their generation and for the succeeding generations' based on the concept of intergenerational responsibility.[498] Among other things, the Court found that DENR had failed to preserve the environment and required it to revoke or rescind all timber licenses.[499]

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[494] It can be argued that the present generation can sue on behalf of future generations based on the fact that all generations belong to the humankind or 'human family' (as expressed in the Preamble of the UN Declarations of Human Rights). According to Brown Weiss, any theory of intergenerational equity in the environmental context should be informed by two basic relationships: that between people and the natural system, and that between different generations of people. In this context, '*all generations* are linked by the ongoing relationship with the earth … [and] *all generations* have an equal place in relation to the natural system'. (emphasis added) Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', *cit.,* (n 456) 20. She maintains that this notion is rooted in the Preamble of the UN Declarations of Human Rights that recognises the inherent dignity and the *equal and inalienable rights of all members of the human family* as the foundations of freedom, justice and peace in the world. She argues that '[t]he reference to all members of the human family has a temporal dimension which brings all generation within its scope. The reference to equal and inalienable rights affirms the basic equality of such generations in the human family', 21.

[495] Minors Oposa v. Secretary of the Department of Environment and Natural Resources, Philippine Supreme Court, 30 July 1993, 33 ILM 173 (1994). Hereinafters, *Minors Oposa.*

[496] For further details on the allegations refer to *Minors Oposa,* 182.

[497] In this regard, the Philippine Supreme Court affirms this case is a class suit since '[t]he subject matter of the complaint is of common and general interest not just to several, but to all citizens of the Philippines'. *Minors Oposa,* 184. Arguably, the resort to a class action in relation to rights of future generations hints at their collective nature. Brown Weiss points out that intergenerational rights 'may be regarded as group rights, rather than individual rights … They exist regardless of the number and identity of individuals making up each generation'. Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', *cit.,* (n 456) 24. In her 1989 book she further explains the rationale of such a collective nature: individuals rights exist only when connected to identifiable interests belonging to specific individuals; but, in the case of future generations, it is not possible to identify whom the individuals will be and how many of them there will be. Therefore, she claims that intergenerational rights cannot be possessed by individuals, but need to be conceived at a group level. Moreover, she points out that the '[e]nforcement of planetary rights is appropriately done by a guardian or representative of future generation as a *group,* not of future *individuals*, who are of necessity indeterminate.' Brown Weiss, *In Fairness to Future Generations: International Law, Commom Patrimony and Intergenerational Equity, cit.,* (n 461) 96. Indeed, the class suit-reasoning of the Philippine Supreme Court confirms her argument on the collective nature of intergenerational rights.

[498] *Minors Oposa,* 185. Molinari points out that this decision was criticised and a similar case was dismissed by the Supreme Court of Bangladesh. Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.,* (n 458) 153. On this last point see also Birnie, Boyle and Redgwell, *International Law and the Environment, cit.,* (n 6) 122.

[499] *Minors Oposa,* 193 and 195.

Molinari presents other cases recognising the application of intergenerational equity in different domestic jurisdictions, in particular, in Indian,[500] Australian, and Sri-Lankan courts, including by applying the concept of intergenerational equity in the context of environmental impact assessment.[501] Birnie *et al* explain that representative proceedings on behalf of future generations are, in principle, allowed in domestic jurisdictions, but warn about generalising on the justiciability of generational rights since much will depend on the procedural rules and context in each legal system.[502]

The most recent case invoking the principle of intergenerational equity is *Pandey v. India*[503] filed with the National Green Tribunal of India by a 9-year-old from the Uttarakhand region who sued the Indian Government for failing to take effective action to mitigate climate change in accordance with its commitments under the Paris Agreement[504] as well as existing national environmental laws and policies. The applicant, represented by her father, also acts on behalf of 'children of today and the future [that] will disproportionately suffer the dangers and catastrophic impacts of climate destabilisation and ocean acidification'.[505] The petition invokes the principle of sustainable development, the precautionary principle, intergenerational equity and the Public Trust Doctrine. In particular, it is argued that:

> 'the Applicant as well as the entire class of children and future generations have the right to a healthy environment under the principle of intergenerational equity. It is submitted that the Applicant is part of a class that amongst all Indians, is most vulnerable to changes in climate in India and yet are not part of the decision making process. Further it is to be noted that current and future generations of children will disproportionately experience the harms of climate change, due to the progressive nature of climate change impacts and the unique life phase of childhood. Furthermore, given the nature of the climate threat, children and their caregivers have no meaningful way of protecting themselves from the dangerous

[500] For further details refer to Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 145–146.
[501] ibid 153–154.
[502] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 121.
[503] R. Pandey v. Union of India & Others (2017) case pending before the National Green Tribunal at Principal Bench (New Delhi), available at http://climatecasechart.com/non-us-case/pandey-v-india/ accessed 20 December 2017. Hereinafter, *Pandey v. India*.
[504] The Paris Agreement includes a direct reference to intergenerational equity in its preambular recital 11. It was adopted at the XXI session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (Paris) 12 December 2105, in force 4 November 206, available at http://unfccc.int/paris_agreement/items/9485.php accessed 2 January 2018.
[505] *Pandey v. India*, 3.

> situation in which States have placed them. Therefore, only States … can reverse the danger.'[506]

On this ground, it can be argued that the international obligations to address climate change are not only owed to other States, but bind India to protect its citizens, especially the most vulnerable categories – which cannot directly participate in decision-making processes and the political life of their country – and ensure their right to life and to a healthy environment, as enshrined in Article 21 of the Indian Constitution.[507] This obligation to address climate change also derives from the need to conserve vital natural resources for the benefit of current and future generations under the Public Trust Doctrine.[508] Hence, although this proceeding is still pending before the court, it confirms that individuals can rely on intergenerational equity to enhance the enforcement of international and national environmental law before national courts.[509]

For Fodella the *Minors Oposa* case – and, arguably, the other cases cited above – proves that there are no theoretical obstacles to recognising substantive rights to future generations that can be claimed before national courts.[510] Moreover, he proposes an evolutive interpretation of intergenerational equity in the context of international environmental law and argues that a reference to the interests or rights of future generations in environmental norms and principles potentially implies that certain obligations are owed to *all individuals* – or, as Brown Weiss would say, *all generations*[511] – *more generally.*[512] Therefore, international environmental

[506] *Pandey v. India,* 25.
[507] On this point see *Pandey v. India,* 41. This reasoning is also deployed in connection to common concerns, see *supra* Section 2.5.
[508] In this sense, the petition maintains that '… the State and its machinery is a trustee of vital natural resource on which human survival and welfare depend, bound by a fiduciary duty under the Public Trust Doctrine to mitigate climate change so as to protect such resources for the benefit of current and future generations. The Applicant and others of a similar age are beneficiaries of these natural resources held in trust by their government.' *Pandey v. India,* 3.
[509] On the role that individuals, groups of individuals and NGOs are playing in strengthening the respect of international environmental obligations before national and regional courts see also the *Urgenda* and the *Serengeti* cases presented *supra* in Section 2.5.
[510] Fodella, 'I Soggetti', *cit.,* (n 41) 123.
[511] Brown Weiss, 'In Fairness to Future Generations and Sustainable Development', *cit.,* (n 456). She argues that '[p]lanetary rights of necessity inhere to all generations. … Planetary rights focus on rights to common patrimony, which each generation may use and develop but must pass on in at least comparable conditions to future generations. The common patrimony includes the natural environment and our natural and cultural resources.' Brown Weiss, *In Fairness to Future Generations: International Law, Commom Patrimony and Intergenerational Equity*, *cit.,* (n 461) 97.
[512] Fodella, 'I Soggetti', *cit.,* (n 41) 123–124.

obligations would not only be binding in inter-State relations, they would also be enforceable by individuals of the present generation that – acting as representatives of future generations and trustees/custodians of their assets – can bring claims against any State violating these obligations based on the principle of intergenerational equity, which thereby acquires a procedural character.[513]

For Sands and Peel, the connection between environmental protection and human rights can serve as a cornerstone to advance the justiciability of intergenerational equity based on the fact that the undertakings in favour of future generations are said to be closely related to the civil and political aspects of this environment-human rights connection.[514] Therefore, 'the rights of future generations might be used to enhance the legal standing of members of the present generations to bring claims, in cases relying upon substantive rules of environmental treaties where doubt exists as to whether a particular treaty creates rights and obligations enforceable by individuals'.[515]

Indeed, the only international human right case that arguably has intergenerational implications is the 2005 Inuit petition filed to the Inter-American Commission on Human Rights by Sheila Watt-Cloutier, an Inuk woman and Chair of the Inuit Circumpolar Conference,[516] on behalf of herself, sixty-two other named individuals, and all other affected Inuit populations of the arctic regions of the United States and Canada. The applicant seeks relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States. The effects of global warming are

[513] ibid 124.
[514] Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 210.
[515] *ibid*. For a different perspective on the same point see Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 121. The entitlement of individuals to act against States is also discussed in relation to common concerns *supra* in Section 2.5.
[516] The Inuit Circumpolar Conference (ICC) was established in 1977 to represent the interests of Inuit peoples from Alaska, Canada, Greenland, and Chukotka (Russia) on issues of common concern in order to strengthens their voice and promote their way of life. It evolved into a major NGO and holds Consultative Status II at the United Nations. For further details visit their website http://www.inuitcircumpolar.com/ accessed 2 January 2018.

said to violate Inuit's right to the benefits of culture;[517] their right to use and enjoy the lands they have traditionally occupied;[518] their right to use and enjoy their personal, intangible and intellectual property;[519] their right to the preservation of health;[520] their right to life, physical protection and security;[521] their right to their own means of subsistence;[522] and their rights to residence and inviolability of the home.[523] In particular, the petition stresses that climate change has impacted on 'the Inuit's ability to continue to practice the subsistence way of life central to their culture'.[524] The changing conditions have rendered much of the elders' traditional knowledge inaccurate, thus undermining their role as educators and their ability to transmit this knowledge to future generations.[525] Further repercussions on future generations are due to the fact that climate change has not only made the Inuit's traditional knowledge less valuable,[526] but 'has damaged the arctic environment to such an extent that the damage threatens human life',[527] and, given the long-term effects of environmental degradations, it is possible to argue that climate change threatens the right to life of both present and future generations.

The Inter-American Commission on Human Rights did not proceed with this petition due to 'insufficient evidence of harm'.[528] Nevertheless, this petition has interesting implications: first of all, the Applicant and some of the plaintiffs she represents are not US nationals; second, a regional human rights mechanism is used to ascertain if a State – which is not party to the

[517] 2005 Inuit Petition, 74 ff. The right to the benefits of culture is guaranteed by the Article XIII of the American Declaration of the Rights and Duties of Man (Bogotà) 2 May 1948, in Resolution XXX (1948) of the Organization of American States, https://www.cidh.oas.org/basicos/english/basic2.american%20declaration.htm accessed 21 December 2017. This right is reaffirmed in the UN Declarations on the Rights of Indigenous People adopted by the UN General Assembly in 2007, UN Doc. A/RES/61/295 (2 October 2007).
[518] 2005 Inuit Petition, 79 ff.
[519] 2005 Inuit Petition, 84 ff.
[520] 2005 Inuit Petition, 85 ff.
[521] 2005 Inuit Petition, 89 ff.
[522] 2005 Inuit Petition, 92 ff.
[523] 2005 Inuit Petition, 94 ff.
[524] 2005 Inuit Petition, 78.
[525] 2005 Inuit Petition, 78.
[526] 2005 Inuit Petition, 84.
[527] 2005 Inuit Petition, 91.
[528] This statement is contained in a dedicated article published by the New York Times on 16 December 2006, available at http://www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html accessed 21 December 2017. Similar information was found on a dedicated webpage of the Centre for International Environmental Law (CIEL) [http://www.ciel.org/project-update/inuit-petition-and-the-iachr/ accessed 21 December 2017]. Unfortunately, it was not possible to locate further clarification on this petition in the website of the Inter-American Commission of Human Rights.

climate regime[529] – has violated international environmental obligations stemming from such a regime by grounding them on human rights violations; and last, this case exemplifies the connection between climate change and human rights and has paved the way to the official recognition to such a connection.[530]

In conclusion, intergenerational equity can be conceived as a principle that guides the interpretation and application of substantive norms of international environmental law,[531] and, as such, it strengthens their compulsory character and protracts it over time, by way of referencing to future generations.[532] This principle cannot be interpreted as referring to States since it would not make any sense to protect the interests of future generations or 'generation unborn'[533] of States.[534] Therefore, environmental protection and the obligations it entails – including the obligations to cooperate in the conservation and management of shared resources, to equitably and reasonably use these resources, to address environmental issues that are of common concern of humankind and others analysed above – can be said to bind States not only among each other, but also vis-à-vis individuals as members of present and future generations. In this sense, it can be argued that intergenerational equity provides the aforementioned obligations with a global and intertemporal character; moreover, it enhances the legal standing of individuals that can act on behalf of future generations.

[529] On this point, the Applicant explains that the petition is meant to foster dialogue with the US and encourage their participation to international efforts to combat climate change. See the dedicated page of the Inuit Circumpolar Council Canada website, http://www.inuitcircumpolar.com/inuit-petition-inter-american-commission-on-human-rights-to-oppose-climate-change-caused-by-the-united-states-of-america.html accessed 2 January 2018.

[530] For instance, in 2006 a thematic hearing was held by the Interamerican Commission on Human Rights to investigate the connection between climate change and human rights. In 2007, the Malé Declaration on the Human Dimension on Global Climate Change explicitly recognises for the first time that climate change has implications for the enjoyment of human rights and request to address such an issue. The Malé Declaration is available at http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf accessed 2 January 2018 This connection has been further explored in the context of the UN Human Rights Council and affirmed in several of its Resolutions, see http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Discussion6March2015.aspx accessed 2 January 2018. Moreover, the Paris Agreement specifically requests parties to respect, promote and consider their human rights obligations when tackling climate changes in its Preamble. Regarding the recognition of the human rights-climate change linkage see Peel and Osofsky, 'A Rights Turn in Climate Change Litigation?', *cit.*, (n 145).

[531] On this point see Molinari, 'Principle 3: From a Right to Development to Intergenerational Equity', *cit.*, (n 458) 144–145.

[532] On this point refer to Fodella, 'I Principi Generali', *cit.*, (n 180) 122–124.

[533] As in the *Nuclear Weapons* Advisory Opinion, *cit.*, paragraph 29.

[534] On this point it is acknowledged the contribution of Professor Alessandro Fodella.

2.10 Placing decentralised international cooperation within international environmental law: preliminary conclusions

This chapter shows that the concept of decentralised international cooperation can find space in existing principles of international environmental law relevant for the governance of transboundary natural resources. In the first part, I outlined how the international realm has expanded beyond the circle of States – its typical subjects – and argued that new actors are increasingly participating in the international legal order, although they have a different nature and stature compared to States. Sub-national authorities and local communities are, arguably, among these emerging actors and can play a key role in the conservation and management of transboundary natural resources by operating across international borders. Such a role can be supported by the international environmental regime applicable to the cooperative governance of shared resources. This regime does not belong to a single instrument, but is composed of international environmental law principles, multilateral environmental conventions, declaratory instruments and cooperative conservation mechanisms developed through practice.

Although originally formulated to regulate inter-State relationships, the principles analysed above also bind sub-national actors – although only in isolated cases and to a limited degree.[535] For instance, the obligation to cooperate is generally meant to guide States in their relations, especially when sharing a common border.[536] In this case, States also share a common natural space and natural resources which need to be conserved and managed cooperatively since unilateral actions would not only encroach on the sovereignty rights of sharing States, but also affect the ecological status of the resources, thus requiring their equitable and reasonable utilisation.[537] Limitations to State sovereignty over shared resources derive not only from their transboundary character, but also from the general obligation to ensure environmental protection and intergenerational equity, as well as from States' responsibility to use natural

[535] Refer to the arguments deployed in Section 2.5.
[536] In regard to the principle of cooperation over shared natural resources see *supra* Sections 2.6.
[537] Refer to Section 2.7.

resources for the benefit and well-being of their peoples.[538] Intergovernmental cooperation is essential to ensure the long-term commitments of sharing States and formally recognise the intrinsic value of natural resources; however, the implementation of international agreements and their sound functioning largely depends on responses and actions on the ground. Hence, local authorities and communities need to be included in decision-making and management of shared resources, both within and across borders, to foster stewardship and strengthen conservation, also in accordance with the principles of public participation in environmental matters.[539] In this sense, the obligation to cooperate over transboundary natural resources can be expanded to sub-national actors.

This prospect is further strengthened by Principle 27 of the Rio Declaration that foresees the cooperation of both States and people 'in a spirit of global partnership' to advance environmental protection and sustainable development in line with the principles included in the Declaration. Therefore, people can be seen as new addressees of the duty to cooperate for the protection of the environment at the international level, which can also be applied through the cooperative governance of shared resources. Moreover, this cooperative global partnership can find application in common concern regimes, since States are required to act together to address the relevant concern – such as fighting climate change or conserving biodiversity – but people can contribute to these collective efforts in their interests and for the benefit of future generations.[540]

Hence, it can be argued that certain environmental obligations expand beyond States to people in general, although with different qualifications, making them responsible, among other things, for the conservation and sustainable use of transboundary natural resources. On the other hand, it can also be said that intergenerational equity can alter the scope of environmental

[538] See *supra* Section 2.4.
[539] In this regard see *supra* Section 2.8.
[540] Common concern regimes are further discussed *supra* in Section 2.5.

protection and the obligations it entails,[541] by providing them with a global and intertemporal character, and binds States not only among each other, but also vis-à-vis individuals as members of the present and future generations.[542]

The following Chapter investigates to what extent the role of sub-national actors in conserving and sustainably using natural resources, including across borders, emerges from specific environmental regimes and in the context of conservation initiative. By integrating the results of Chapters 2 and 3 it is possible to shape a composite legal framework useful for the governance of transboundary natural resources with the involvement of sub-national actors, defined here as decentralised international cooperation. Moreover, this analysis is also useful in identifying some elements that consistently emerge in these international environmental law principles and instruments and are conducive to the concept of decentralised international cooperation, arguably showing that this concept can be framed within the existing international environmental law framework.

[541] For instance, for their relevance to the topic of this thesis, the obligations to cooperate in the conservation and management of shared resources, to equitably and reasonably use these resources, to address environmental issues that are of common concern of mankind.
[542] Intergenerational equity is addressed *supra* in Section 2.9.

Chapter 3. Locating decentralised international cooperation in environmental law regimes and conservation initiatives

3.1 Introduction

While Chapter 2 frames the concept of decentralised international cooperation in selected principles of international environmental law, this chapter aims to discuss the same concept in connection to specific environmental regimes, in order to understand what role they entrust to sub-national actors for the conservation and management of natural resources.

In addition, it looks at two mechanisms for the governance of natural resources: protected areas and biosphere reserves, both applied in transboundary contexts and embodying the idea that biodiversity conservation can be enhanced through sustainable use. For both contexts it is possible to theorise the development of decentralised cooperative mechanisms since the involvement of all relevant stakeholders, in particular local actors, is a key component of their governance approach.

The analysis developed in Chapters 2 and 3 implicitly shapes the regime applicable to transboundary natural resources and provides the basis for distilling a few elements that are conducive to the concept of decentralised international cooperation. Some of these elements can be identified in the regional environmental regimes and selected case studies discussed in the following chapters.

3.2 International instruments

Preserving nature beyond borders is a goal pursued by numerous international environmental conventions. Many take the form of ‘framework conventions’ since they provide broad commitments, basic rules of conduct, and a general system of governance in relation to an environmental issue, thus leaving the regulation of specific aspects or the development of

detailed rules and targets to subsequent agreements: protocols, national legislation, bilateral or regional agreements, which adjust the general principles and objectives to a specific context.[543]

The 'framework-convention and protocol approach' has been widely used in international environmental law; nonetheless, it can be applied to any field of international law.[544] This regulatory technique is useful in several contexts: for issues that are complex from a technical point view[545] or politically sensitive and require a lengthy negotiation process;[546] when there is a broad diversity of interests on the issues discussed, which makes general principles more attractive and feasible than fixed targets and standards;[547] for issues that have a general theoretical dimension and numerous practical applications;[548] and to provide legally binding guidelines at international level for national regulations on a specific issue.[549]

Framework conventions are structurally flexible and do not follow a fixed model: they can deal with mere procedural aspects or contain substantive provisions; they can be followed by protocols open to all the parties to the mother convention or implementation agreements open to both parties and non-parties or cooperative arrangements relevant for some parties only; moreover, they can include annexes that are easier to modify than the main treaty text.[550]

Some treaties are explicitly labelled as 'framework conventions', others include specific provisions clarifying the intention of State Parties to create a general system of governance that

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[543] For a general overview on this regulatory technique, see Nele Matz-Lück, 'Framework Agreements', *Max Planck Encyclopedia of Public International Law* (online ed, 2011).

[544] As in the case of the Framework Convention on Tobacco Control (FCTC) signed in the framework of the World Health Organization.

[545] Technological progress and further scientific knowledge can influence the regulation of an issue, as in the case of ozone depletion. The Convention for the Protection of the Ozone Layer [(Vienna) 22 March 1985, in force 22 September 1988, 26 ILM 1529 (1985)] sets a framework for adopting appropriate measures 'to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer' (Art. 2(1)). The conclusion of its additional Protocol on Substances that Deplete the Ozone Layer [(Montreal) 16 September 1987, in force 1 January 1989, 26 ILM 1550 (1987)] followed the release of scientific evidence demonstrating that emissions of certain substances have a devastating impact on the ozone layer and potential consequences on the global climate.

[546] For instance, the theme of biodiversity is so vast that it would be unlikely to design a unique legal instrument that regulates all its aspects precisely.

[547] As in the case of climate change.

[548] The Convention on Migratory Species establishes a general framework for the conservation and sustainable use of transboundary species and their habitat, but supports the conclusion of appropriate agreements for the sound protection and management of specific species and their range.

[549] This is the case of the Framework Convention for the Protection on National Minorities negotiated in the framework of the Council of Europe, 1 February 1995, in force 1 February 1998, ETS 157.

[550] For an appraisal of the contribution of framework conventions to international environmental law see Nele Matz-Luck, 'Framework Conventions as a Regulatory Tool' [2009] Goettingen Journal of International Law 439.

will be complemented by successive and more detailed arrangements. Although explanatory of the intentions of contracting parties, this label is not a constitutive element of a framework convention nor does it imply any consequence under the law of treaties. Rather, the function and the regime-design foreseen are the key elements that allow a treaty to be defined as a framework convention.[551] Moreover, when treaties have the potential to regulate a certain issue appropriately and influence the conduct of a large number of States, they can be characterised as 'law-making treaties'.[552] This quality has been recognised for several conventions, including the International Whaling Convention, the Ramsar Convention, the World Heritage Convention, CITES, UNCLOS, the Climate Change Convention, and the Biodiversity Convention.[553]

The following sections focus on three of these instruments: the Biodiversity Convention, the Ramsar Convention, and the World Heritage Convention. These treaties enshrine, explicitly or implicitly, both the concept of common concern of humankind and the idea that the conservation of biodiversity resources, wetlands, and World Heritage sites should have an intertemporal character and be ensured in the present as well as in the future. The analysis below aims to explore to what extent the concept of decentralised international cooperation proposed in this thesis can be integrated within these regimes, and, to this end, follows the rules of interpretation of the Vienna Convention on the Law of Treaties.[554] Therefore, relevant

[551] Matz-Lück, 'Framework Agreements', *cit.*, (n 543).
[552] In this regard, it has been explained that 'factors which are relevant in assessing the authority of a treaty include: the subject matter it addresses; the number and representativity of States participating in its negotiation, and signing it or becoming Parties; the commitments it establishes; and practice prior to or following its entry into force. In relation to environmental obligations, certain treaties of potentially global application might be considered to have 'law-making' characteristics, particularly where they have attracted a large number of ratifications and are established to "manage" a problem area over time'. See Sands and Peel, *Princ. Int. Environ. Law, cit.,* (n 40) 97.
[553] For a more detailed list of 'law-making treaties' refer to ibid. Arguably, also the Convention on Migratory Species belongs to the same group of treaties since it matches the law-making characteristics. In fact, it has 126 Parties; in addition, 30 States that are not Parties to the Convention are anyway Parties to one or more of the agreements concluded in the framework of the it and/or have signed on or more of the Memorandum of Understanding. An updated list of the Parties and Range States can be found at http://www.cms.int/en/parties-range-states, accessed 14 December 2017. This is the only global convention focusing on the conservation and sustainable use of migratory animals, their habitats, and migration routes; it acts as a framework convention by encouraging Range States to conclude specific cooperative arrangements on migratory species listed in its Appendices. Several instruments have been concluded within this framework, they range from legally binding treaties to less formal arrangements; see http://www.cms.int/en/cms-instruments/agreements, accessed 14 December 2017.
[554] Convention on the Law of Treaties (Vienna) 23 May 1969, in force 27 January 1980, 8 ILM 679 (1969). Hereinafter, 1969 Vienna Convention.

provisions are interpreted literally[555] in light of the object and purpose of the treaty,[556] which emerge directly from dedicated articles and are derived from the context provided by the text, the preamble, and the annexes to the treaty.[557] Moreover, due consideration is given to, first, successive agreements between the parties that clarify the interpretation of the treaty or the application of its provisions; second, subsequent practice in the application of the treaty that proves the existence of an agreed interpretation of the parties; and third, international law rules that are applicable between the parties.[558] Hence, not only protocols, but also COP decisions, declarations and other arrangements serve to define the interpretation of a treaty. These additional and successive instruments are particularly useful to develop an evolutive interpretation of the treaty by adding more detail to the original text or addressing new problems or issues that were not appropriately articulated.[559] Successive rules applicable to the parties include both customary rules that crystallise after the conclusion of a treaty as well as successive conventions that address relating or overlapping issues, thus complementing existing regimes.[560] This is particularly useful in the field of international environmental law given the interconnectedness of environmental issues.

Moreover, the preparatory work of the treaty and the circumstances of its conclusion can be used as supplementary tools to clarify its interpretation.[561] It is worth underlining that a treaty

[555] In this sense, the terms of the treaty should be intended in their ordinary meaning, except if the Parties have agreed a special meaning that is explicitly clarified. In this regard see Article 31(1) and (4) of the 1969 Vienna Convention.
[556] 1969 Vienna Convention, Article 31(1).
[557] 1969 Vienna Convention, Article 31(2). In this provision it is specified the necessity to consider '(a) [a]ny agreement relating to the treaty which was made between all Parties in connection with the conclusion of the treaty; (b) [a]ny instrument which was made by one or more Parties in connection with the conclusion of the treaty and accepted by the other Parties as an instrument related to the treaty.' Moreover, Sands specifies that footnotes should be also considered in the case of at least two environmental treaties, namely the 1979 Convention on Long-Range Transboundary Air Pollution [(Geneva) 13 November 1979, in force 16 March 1983, 18 ILM 1442 (1979)] and the 1992 Climate Change Convention. See Philippe Sands, 'General Principles and Rules' in Philippe Sands (ed), *Principles of International Environmental Law* (2nd edn, Cambridge University Press 2003) 131.
[558] 1969 Vienna Convention, Article 31(3).
[559] In this regard, Pineschi stresses the importance of adopting an evolutive and dynamic interpretation of treaties to ensure an effective environmental protection as confirmed in the international jurisprudence. In particular, she cites the ICJ in the *Gabčíkovo-Nagymaros Project* case (paragraph 140) and the Arbitral Tribunal of the *Iron Rhine* Arbitration. Pineschi, 'Le Fonti', *cit.*, (n 96) 72–73. On this same point see also Sands, 'General Principles and Rules', *cit.*, (n 557) 132.
[560] In this regard see also Article 30 of the 1969 Vienna Convention regulating the application of successive treaties relating to the same subject-matter.
[561] 1969 Vienna Convention, Article 32.

is binding only upon its parties and does not create rights or obligations for third parties, except for rules having a customary value.[562]

By applying these rules of interpretation, it is possible to argue that the concept of decentralised international cooperation and its key elements emerge from an evolutive interpretation of the Biodiversity Convention, the Ramsar Convention and the World Heritage Convention.

3.3 Convention of Biological Diversity[563]

The Biodiversity Convention was adopted in June 1992 at the UN Conference on Environment and Development and has near universal membership.[564] Several authors note that it represents a change of pace by endorsing and going beyond species-, habitats- and issue-specific protection to address all aspects of biodiversity.[565] For Maffei, this Convention marks both an end and a starting point for biodiversity conservation: as an end point it encompasses some environmental law principles and processes embedded in national legislation and other sectoral environmental treaties; as a starting point, it provides broad goals and guiding principles that can be developed and articulated through supplementary legal agreements, like protocols and soft law instruments, especially COP decisions.[566] In this regard, the Biodiversity Convention has been criticised for both its many grey areas and for using qualifying terms and phrases that risk weakening its already broad objectives. Nevertheless, such vagueness was essential for concluding the Convention, given the reluctance of States to agree on more precise

[562] In this regard refer to Articles 34-37 of the Vienna Convention. See also Pineschi, 'Le Fonti', *cit.*, (n 96) 73.
[563] Latest developments resulting from CBD COP 14, held in Sharm El Sheikh (Egypt) from 14 to 29 November 2018, are not included in this thesis.
[564] At December 2017, the Biodiversity Convention has 196 Parties. For further details on membership see https://www.cbd.int/information/parties.shtml#tab=0 accessed 11 December 2017.
[565] In this regard see Kiss and Shelton, *Guide to International Environmental Law*, *cit.*, (n 108) 178; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 612–613; David M Ong, 'International Environmental Law Governing Threats to Biological Diversity' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 533.
[566] Maffei, 'La Protezione Delle Specie, Degli Habitat e Della Biodiversità', *cit.*, (n 291) 286. On the framework character of the Biodiversity Convention and its normative evolution see also Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 616; Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 461.

commitments, which were postponed to a later phase or were meant to be addressed at national level.[567] Indeed, the success of the Biodiversity Convention should not be evaluated only on the basis of its textual analysis, but also by considering consequent State practice and the activism of the Convention bodies that contribute to achieving and advancing biodiversity conservation.[568] For instance, COP decisions have been essential in strengthening the role of sub-national actors in the conservation and management of biodiversity resources, including in transboundary contexts, despite the absence of explicit references on this issue in the Convention text. By reflecting on the Biodiversity Convention text, both in its declaratory and substantive parts,[569] and selected COP Decisions, this section aims to identify to what extent the concept of decentralised international cooperation can be envisioned in the framework of this Convention.

A few preambular recitals are directly relevant to the subject of this thesis. The Preamble starts by recognising the intrinsic value of biodiversity and spelling out a range of other values that benefit humans and ensure the maintenance of the biosphere. As a common concern of humankind, all States – including non-parties – have a legitimate interest in conserving biodiversity and, at the same time, have a responsibility to achieve this purpose, individually and jointly, including by reflecting upon the progress of other States and asking them to adjust their conduct to this end.[570] Further proof in this sense is provided by the preambular recital that reiterates the sovereign rights of States over their own biological resources together with their responsibility to use these resources sustainably and conserve biodiversity that is

[567] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 617.
[568] ibid 617 and 649.
[569] It has been argued that 'the Convention's preambular declarations are as relevant as the substantive articles', not only because, generally speaking, the preambles clarify the intention of the Parties in adopting certain measures, but also because, in this specific case, some contentious issues were included in the preambular recitals rather than in the substantive provisions, thus being an important instrument for interpreting the latter. See ibid 618–619. For example, the precautionary principle is *de facto* endorsed in the Preamble, although not cited explicitly. Such a principle is not addressed in any substantive provision, even if a precautionary approach emerges through the provisions on environmental impact assessment. ibid 620. Considering preambular recitals together with the text of the Convention is in line with Article 31(2) of the VCLT.
[570] On this point see Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 619.

increasingly affected by human activities.[571] Rights and responsibilities are two sides of the same coin, and connect to the idea that biodiversity is to be protected for its intrinsic value as well as for the benefits it provides to humankind. As already argued, the concept of common concern entails an international obligation to cooperate that, in this context, aims to ensure biodiversity conservation and the sustainable utilisation of its components.[572] Moreover, this common concern has an inter-temporal character by virtue of a direct reference to the benefit of both present and future generations in the Preamble.

Nevertheless, the conservation and management of transboundary resources takes place at multiple governance levels and involve a variety of stakeholders; in this thesis, it is argued that it can be strengthened through decentralised cooperative mechanisms that facilitate the involvement of sub-national actors that are closely connected to these resources – as their direct users or as inhabitants the shared natural space. Arguably, the common concern approach expands the legitimate interest in conserving biodiversity beyond the community of States to the international community more broadly,[573] encompassing international organisations, NGOs, businesses, and people – i.e. humankind – that directly benefit from biodiversity-related values.[574] Nevertheless, this sub-national dimension does not emerge in the main Convention text, but is present in successive COP decisions.

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[571] This is also reiterated in Article 3. It has been pointed out that the formulation of Article 3 retraces Principle 21 of the Stockholm Declaration and lacks the developmental element introduced by Principle 2 of the Rio Declaration. Moreover, the Biodiversity Convention does not elaborate further on the legal implications of this responsibility. See ibid 620. It is worth noting that the second part of Article 3 reiterates the no harm rule and, in this sense, differs from the preambular recital recognising State responsibility for biodiversity conservation and the sustainable use of biological resources.

[572] For further details on common concern regimes refer to Chapter 2, Section 2.5.

[573] On this point see Andreas Paulus, 'International Community' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online ed, 2013).

[574] The UNEP Executive Director stressed the centrality of the common concern principle in the Biodiversity Convention regime in its opening speech during the second session of the Ad hoc Working Group of Legal and Technical Experts on Biological Diversity. According to the Report, he highlighted that '[t]his principle required the participation of all countries and all peoples in a global partnership. It implied intergenerational equity and fair burden sharing. The common concern called for a balance between the sovereign rights of nations to exploit their natural resources and the interests of the international community in global environmental protection'. UNEP, Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity on the work of its 2nd session (7 March 1991) UN Doc. UNEP/Bio.Div/WG.2/2/5, paragraph 17. From this statement emerges that the Biodiversity Convention, as a common concern regime, reflects many of the principles that are going to be included in the Rio Declaration, *in primis*, Principle 27 that promotes cooperation among States and people in good faith and in a spirit of global partnership for the fulfilment of the Rio Principles, hence, the achievement of environmental objectives. According to Sand, Principle 27 does not merely restate previous norms, but provides 'an authentic operational directive for future implementation of the Rio Declaration as a whole'. Sand, 'Cooperation in a Spirit of Global Partnership', *cit.*, (n 254) 618. In this regard, it can be also argued that States are responsible for biodiversity conservation and the sustainable use of its

The Preamble encourages States, intergovernmental organisations and the non-governmental sector to cooperate at the international, regional, and global levels to achieve the objectives of the Convention. This invitation exemplifies the fact that the international community interested and involved in the conservation of biodiversity and the sustainable use of its components is broader than the community of States. From this point it can be further derived that limiting cooperation to the inter-State dimension might not be sufficient or effective. In fact, another preambular recital expresses the desire 'to enhance and complement existing international arrangements for the conservation of biological diversity and sustainable use of its components', which can be implemented at different governance levels and involve all the actors interested in achieving the Convention's objectives. Arguably, the concept of decentralised international cooperation and the mechanisms through which it is operationalised can be used in this sense to advance biodiversity conservation and the sustainable use of biological resources through the involvement of sub-national actors in transboundary contexts.

The Preamble recognises a strong connection between indigenous and local communities embodying traditional lifestyles and biological resources: when using their traditional knowledge, innovation and practices for the conservation and sustainable use of biodiversity and its components, the deriving benefits should be equitably shared with them. Therefore, it can be argued that indigenous and local communities not only have a general legitimate interest in biodiversity conservation and the sustainable use of its components as part of humankind, but, by way of their preferential and characterising relation with nature, have a reinforced interest in and entitlement to contribute to the objectives of the Biodiversity Convention. These objectives are clearly specified in Article 1: 'the conservation of biological diversity,[575] the

components as trustees. On the connection between the concept of common concern of humankind and trusteeship regimes refer to Chapter 2 Section 2.5.

[575] Biological diversity is defined in Article 2 as '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'. Moreover, the same Article defines biological resources as including 'genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity'. Rayfuse focuses on the relationship between biodiversity and biological resources and explains that

sustainable use of its component, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources'.[576]

Moreover, Article 8(j) requires States to acknowledge the role of indigenous and local communities – embodying traditional lifestyles that contribute to biodiversity conservation – in (*in-situ*) conservation and sustainable use of biodiversity components, to respect and preserve their preferential connection with nature in order to perpetuate their traditional knowledge, and to allow their access to connected benefits. This provision is in line with other instruments recognising and promoting the connection between local communities[577] more broadly, and indigenous peoples specifically, the natural environment and sustainable development.[578] Birnie *et al* note that the Biodiversity Convention avoids terms like 'rights' and 'peoples', does not provide any definition of indigenous – or local – communities, and falls short of championing their role in the *in situ* management of wildlife and habitats.[579] Nevertheless, Article 10(c) requires States to enable the customary use of biological resources inspired by traditional cultural practices, and, at its paragraph (d), acknowledges that 'local populations'[580]

biodiversity is an 'attribute' of life since it 'provides an actual or potential source of biological resources, and contributes to the richness of life on Earth as well as to the maintenance of the biosphere in a condition that supports such life.' Biological resources, instead, are the basic ecosystem components and a precondition for biodiversity. In fact, while these resources can exist in biodiversity-poor contexts like monocultures, 'biodiversity cannot exist in the absence of biological resources present in their naturally occurring abundance.' Rayfuse, 'Biological Resources', *cit.*, (n 32) 366. The definition of transboundary natural resources used in this thesis builds on both the definitions of biodiversity and biological resources of the Biodiversity Convention. See also Chapter 1 Section 1.1.1.

[576] Biodiversity Convention, Article 1.

[577] In this thesis 'local communities' is used as an encompassing term to identify the inhabitants of a circumscribed area that share their living space, have access to a common pool of natural resources, and interact with each other. As said, the composition of local communities is context-specific and can include indigenous peoples. Hence, 'local communities' is preferred to alternative expressions. Nevertheless, in the analysis of the biodiversity regime, the language used in the original texts is respected, thus referring to 'indigenous and local communities' or reporting other expressions. For further elaboration on local communities refer to Chapter 1, Section 1.1.4.

[578] In particular, Agenda 21, also adopted at the Rio Conference on Environment and Development, recognises such a preferential relation in Chapter 26. The ILO Convention N. 169 [Convention concerning Indigenous and Tribal Peoples in Independent Countries, C169, 27 June 1989 in force 5 September 1991, 72 ILO Official Bulletin, 28 ILM 1382 (1989)] deals with this aspect in its Part II on Land, and the rights of indigenous peoples to their lands and natural resources as well as to maintain and perpetuate their traditional knowledge in relation to the use of such resources are reiterated in the 2007 UN Declaration on the Rights of Indigenous People. More recently, the Rio+20 outcome document 'The Future We Want' highlights the value of traditional knowledge, innovations and practices of indigenous peoples and local communities for the conservation and sustainable use of biodiversity, and further acknowledges that these communities are harshly affected by biodiversity loss and degradation due to their direct dependence on these resources (at paragraph 197).

[579] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 627–628.

[580] Arguably this expression has a broader scope than the aforementioned 'indigenous and local communities' used in other provisions and can be intended as encompassing indigenous and local communities as well as local authorities that administer the affected areas.

can play a key role in recovering biodiversity-degraded areas with the due support of States.[581] When degraded areas span borders, it can be argued that interested States have to cooperate in carrying out recovery efforts – as a matter of mutual interest – and support the active participation of local populations across borders, which can be conceived as an instance of decentralised international cooperation as proposed in this thesis. Notwithstanding the neutral language used in the Convention, the role of local communities has been advanced through the decisions of its governing body, the CBD COP, and the work of the *ad hoc* open-ended Working Group on Article 8(j) and Related Provisions.[582]

The principle of cooperation is specifically addressed in Article 5, which requires parties to cooperate either directly or through competent international organisations for the conservation and sustainable use of biological diversity in areas beyond national jurisdiction and on other matters of mutual interest. Hence, it can be argued that transboundary natural resources are a matter of mutual interest, thus requiring joint efforts. Moreover, institutionalised mechanisms specifically created for the joint conservation and management of shared natural resources and spaces, like transfrontier conservation areas (TFCAs)[583] and the European Grouping of Territorial Cooperation (EGTCs), can be included in the category of 'international organisations' mentioned in this Article,[584] and, in this sense, cooperation is expanded beyond the inter-State realm. Although the expression 'as far as possible and appropriate' seems to

[581] Biodiversity Convention, Article 10(d).
[582] In this regard see *infra* Section 3.3.2.
[583] In this regard, it is worth noting that 'a system of protected areas' is explicitly foreseen as appropriate to ensure *in situ* conservation in Article 8(a) of the Biodiversity Convention. As said, TFCAs can be defined as a declination of transboundary protected areas in the SADC region.
[584] For instance, the KAZA TFCA is an international organisation according to Article 3 of its founding Treaty. Hence, more generally, it can be argued that TBPAs function as international organisations when are endowed with a well-developed institutional structure apt to perform cooperative activities that enhance biodiversity conservation in the relevant area. A similar reasoning can be applied to EGTCs established for the same purpose, as in the case of the Alpi Marittime Mercantour EGTC. Although an EGTC is not explicitly defined as an international organisation in its foundational document (EGTC Regulation), Article 1 clarifies its nature and objectives that, arguably, conform to those prescribed in Article 5 of the Biodiversity Convention. In fact, an EGTC certainly has a supranational character, its objective is to facilitate and promote territorial cooperation at cross-border, transnational and interregional levels between its members, which can be European Member States as well as regional and local authorities and the other entities specifically mentioned in Article 3(a). Moreover, it has legal personality and 'the most extensive legal capacity' in each Member State, and is endowed with an institutional structure that can be tailored to the needs of the EGTC members and the objectives pursued through it, according to Article 10 of the EGTC Regulation. For further analysis on EGTCs see *infra* Chapters 4 and 5, while on TFCAs see *infra* Chapters 6 and 7.

weaken this call for cooperation, the common concern character that pervades the Biodiversity Convention reduces such a risk, as demonstrated by its practical application. In fact, cooperation cannot be limited to areas beyond national jurisdiction and matters of mutual interest, but should also be directed to promote biodiversity conservation and the sustainable use of those resources located within national jurisdictions which have value for humankind, as is the case of endemic resources. In this sense, cooperation is also promoted by transferring technological and financial resources.[585]

As seen above, the Convention text acknowledges the importance of non-State actors for the conservation of biodiversity and explicitly refers to a few of them, outlining their roles differently. Yet, there is no reference to local authorities, whose role has instead been delineated in COP decisions. Indeed, the analysis of selected decisions, developed in the following sections, is crucial to explain how the biodiversity regime evolved in practice and adapted itself to emerging environmental concerns and new international issues.

3.3.1 CBD COP Decisions

As a framework Convention,[586] the Biodiversity Convention lays the foundations and provides the institutional mechanisms useful to articulate its objectives and main principles generally through COP decisions and supplementary legal instruments.[587] The CBD COP has been operational since 1994 and holds its ordinary meetings every two years.[588] Sands and Peel note that it has addressed almost all aspects of the Convention to clarify its meaning and advance its implementation, including through additional actions and work programmes on major biomes.[589]

[585] In this sense see Articles 16, 18, 19 and 20 of the Biodiversity Convention.
[586] For further details see *supra* Section 3.2.
[587] Biodiversity Convention, Article 23.
[588] From 1994 to 1996 the ordinary meetings were held annually, but this interval was extended to two years in 2000 by changing the rules of procedures. The CBD COP has held twelve ordinary meetings and an extraordinary one from 1994 to 2016. The fourteenth meeting (COP 14) was held in November 2018 in Egypt. Further information on CBD COP meetings available at https://www.cbd.int/cop/ 27 January 2018.
[589] Sands and Peel, *Princ. Int. Environ. Law*, *cit.*, (n 40) 461 ff.

Among the issues addressed by the CBD COP, a few are particularly relevant for the purposes of this thesis: first, the active participation of indigenous and local communities in the conservation and management of biodiversity resources; second, the value of protected areas as an appropriate conservation framework, including in transboundary contexts; and third, the role that local governments play in the conservation and management of biodiversity resources.

3.3.2 Indigenous and Local Communities

Arguably, Article 8(j) represents the starting point to analyse the role of indigenous and local communities in biodiversity conservation, as well as their direct involvement in the work of the Convention.[590] The need to ensure the implementation of this Article and related provisions emerged already at the third meeting of the Parties[591] and, during the fourth meeting, an ad hoc Working group was established to this end.[592] In this context, the direct participation of representatives from indigenous and local communities is encouraged, not only as observers, but also as part of national delegations.[593] This 'unprecedented space for indigenous

[590] In this regard, Schabus considers that 'the CBD has the necessary scope to consider all issues related to biodiversity and Indigenous peoples' and that 'there is no better point to start with, in regard to the implementation of Indigenous Peoples' governance, than the protection of their traditional knowledge and control over access to it'. Nicole Schabus, 'Traditional Knowledge' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017) 276.
[591] CBD COP Decision III/14, 'Implementation of Article 8(j)' (15 November 1996) in UN Doc. UNEP/CBD/COP/3/38.
[592] Hereinafter, Article 8(j) Working Group. See CBD COP Decision IV/9, 'Implementation of Article 8(j) and related provisions' (15 May 1998) in UN Doc. UNEP/CBD/COP/4/27.
[593] CBD COP Decision IV/9, paragraphs 2 and 3. To this scope, a voluntary funding mechanism has been established by CBD COP Decision VII/16, which gives priorities to those communities coming from developing countries, countries with economy in transition, and small island developing States. See CBD COP Decision VII/16, 'Article 8(j) and related provisions' (13 April 2004) UN Doc. UNEP/CBD/COP/DEC/VII/16. It is worth noting that, in occasion of the discussion on the implementation of Article 8(j) and related provisions held at the 11th session (14 May 1998) of Working Group 1 under the chairmanship of Mr. Marcel Vernooy (Netherlands), the chairman introduced an informal paper including a draft decision on that item and indicated the procedure to be followed during the session. He explained that representatives of indigenous and local communities were allowed a limited time for statements on the elements of the draft decision, but could not participate in the negotiation stage that was open only to Parties. In fact, according to the Report X, one Party 'indicated that, as a matter of principle and according to the general practice of the United Nations, decision-making, which included the negotiating process, should be reserved for governmental delegations' (UNEP/CBD/COP/4/27 'Agenda Item 10: Implementation of Article 8(j) and related provisions', at paragraph 132). Concern was expressed by several national representatives for the exclusion of indigenous and local communities from the final discussion session; nevertheless, the draft decision was discussed, orally amended and transmitted to the plenary for adoption. The only country which further clarified its position on this issue during the plenary was Brazil, which explained its difficulty to join the final consensus. For further details see UNEP/CBD/COP/4/27. Arguably, this episode shows the initial reluctance of States to ensure a full and effective participation of indigenous and local communities in the decision-making and implementation process of the Biodiversity Convention; however, this situation has improved over the years thanks to the work of the Ad hoc Working group on Article 8(j) and related provisions and the mechanisms adopted to facilitate the participation of indigenous and local communities in this context as well as in other meetings held under the Convention. Such a participatory approach is said to represent a good practice model for the rest of the UN system. In this regard see https://www.cbd.int/traditional/general.shtml accessed 29 January 2018.

participation' provided by the CBD, 'further strengthened the role of Indigenous Peoples as *actors* or *subjects*, rather than objects, of international law',[594] as claimed in this thesis and supported through the concept of decentralised international cooperation.[595]

The Article 8(j) Working group has a broad mandate in relation to the implementation of Article 8(j) and connected provisions, which includes advising on measures that facilitate the cooperation of indigenous and local communities at the international level and strengthening the mechanisms already available. Arguably, cooperation can be interpreted as facilitating communication among communities located in different regions of the world in order to share experience, information and practices,[596] but can also have a more practical aspect aimed to connect groups that are located in close areas. Such an interpretation is in line with the concept of decentralised international cooperation developed in this thesis.

The Article 8(j) Working group is guided by a specific Programme of work[597] that establishes the general principles guiding the implementation of Article 8(j) and related provisions, foresees three phases to carry out this Programme, and sets the tasks to be achieved in each phase. One of the priorities is the development of appropriate mechanisms, guidelines, legislation and initiatives that ensure the full and effective participation of indigenous and local communities in decision-making related to the use of their traditional knowledge as well as in decision-making, policy planning, development and implementation of the conservation and sustainable use of biodiversity resources at any level of governance (from the local to the international), including access and benefit-sharing and the designation and management of protected areas.[598] Arguably, decentralised cooperative mechanisms that enable the

[594] Schabus, 'Traditional Knowledge', *cit.*, (n 590) 269. (emphasis added)
[595] For further details on the emergence of new actors in international law, including indigenous peoples and local communities, see Chapter 1 Section 1.1.4 and Chapter 2 Section 2.2.2.
[596] In this sense see, for instance, CBD COP Decision V/16, 'Article 8(j) and related provisions', (26 May 2000) in UN Doc. UNEP/CBD/COP/5/23, Annex III, at paragraph 12(d).
[597] The Programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity was adopted with CBD COP Decision V/16. Heirenafter, Programme of work on Traditional Knowledge.
[598] See tasks 1 and 2 of the Programme of work on the implementation of Article 8(j) and related provisions.

participation of local actors in the joint conservation and management of shared natural resources and spaces across borders can be included in the instruments to be developed as a priority in the first phase.

The Programme of work on Traditional Knowledge was reviewed in 2010:[599] a few tasks were retired because completed or superseded, while others, like tasks 1 and 2, were maintained. Moreover, new components were added to the Programme, including one on Article 10 with a focus on Article 10(c). This component builds on the Addis Ababa Principles and Guidelines[600] and, arguably, aims to enhance the participation of indigenous and local communities not only from a formal and decisional point of view, but more directly in the conservation and sustainable use of biodiversity resources through the application of customary practices. The idea is to integrate customary conservation and sustainable use practices within other programmes of work and thematic areas, *in primis* that on protected areas.[601] Moreover, the revised Programme of work on Traditional Knowledge aims to increase the involvement of local communities in accordance with Article 8(j) by convening an *ad hoc* expert group meeting of local-community representatives to address this issue and identify common characteristics to define local communities. What emerges is the ambiguity of this expression, and the need to

[599] CBD COP Decision X/43, 'Multi-year programme of work on the implementation of Article 8(j) and related provisions of the Convention on Biological Diversity' (29 October 2010) UN Doc. UNEP/CBD/COP/DEC/X/43.

[600] The Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity provide a framework useful to all relevant stakeholders (governments, indigenous and local communities, private sector, etc.) to ensure that their uses of biodiversity components are sustainable and do not cause the long-term decline of biodiversity. There are fourteen interdependent practical principles that apply to both consumptive and non-consumptive uses but can be modulated differently depending on the context considered. For instance, Principle 4 invites to practice adaptive management based on both science and traditional local knowledge, in addition to other elements. Principle 12 requires enabling an equitable distribution of the benefits arising from the use of biodiversity resources by considering the needs of indigenous and local communities living with and affected by the use and conservation of such resources, as well as their contribution to their conservation and sustainable use. Other principles that are relevant to the scope of this research are Principles 7, 8 and 9. Principle 7 requires that 'the spatial and temporal scale of management should be compatible with the ecological and socio-economic scales of the use and its impact', which can be connected to the assumptions guiding decentralised international cooperation, since the management unit of transboundary natural resources depends on ecological and socio-economic conditions rather than pure geo-political considerations. Principle 8 invokes the principle of cooperation for transboundary biodiversity resources, and Principle 9 requires the application of an interdisciplinary, participatory approach at the appropriate management and governance levels recognising the importance of social, cultural, political and economic factors and the need to involve indigenous and local communities and any relevant stakeholders at all levels of decision-making. It can be argued that Principles 7, 8 and 9 can all be connected to the concept of decentralised international cooperation. The Addis Ababa Principles and Guidelines were adopted with CBD COP Decision VII/12, 'Sustainable Use (Article 10)' (13 April 2004) UN Doc. UNEP/CBD/COP/DEC/VII/12, paragraph 1. Further details on their drafting history available at https://www.cbd.int/sustainable/process.shtml accessed 30 January 2018.

[601] CBD COP Decision X/43, paragraphs 8-11.

rely on self-identification as the most appropriate way to identify indigenous, local, and/or traditional communities.[602]

Progress on the execution of the Programme of work on Traditional Knowledge has been constantly monitored during the meetings of the Parties, since COP 6. On this occasion, the CBD COP adopted the 'Recommendations for the conduct of cultural, environmental and social impact assessment regarding development proposed to take place on, or which are likely to impact on, sacred sites on lands and waters traditionally occupied by indigenous and local communities', which foresee the full and effective involvement of indigenous and local communities in the assessment process. In this regard, it also requires the Article 8(j) Working group to elaborate guidelines for the conduct of cultural, environmental and social impact assessments.[603] The Akwé: Kon Voluntary Guidelines were formally endorsed at the successive meeting of the Parties (COP 7) with Decision VII/16.[604] This same Decision introduces the elements of a 'Plan of Action for the retention of traditional knowledge, innovations and

[602] In this regard refer to two documents: first, a background paper prepared by the Secretariat of the Permanent Forum on Indigenous Issues on 'The concept of local communities' and circulated through a Note by the Executive Secretary 'Identification of Common Characteristics of Local Communities' (27 June 2011) UN Doc. UNEP/CBE/AHEG/LCR/INF/1 and, second, a guidance document prepared for the Expert group meeting of local community representatives which builds on the aforementioned background paper, 'Guidance for the discussion concerning local communities within the context of the Convention on Biological Diversity' (7 July 2011) UN Doc. UNEP/CBD/AHEG/LCR/1/2 (hereinafter, Guidance for discussion document), both available at https://www.cbd.int/meetings/AHEG-LCR-01 accessed 30 January 2018. It is worth reporting a few paragraphs useful to clarify the definition of local communities, those paragraphs are included in both documents though containing slight differences. First of all, it is underlined that the Biodiversity Convention 'uses the term "indigenous and local communities" with reference to communities that have a long association with, and depend on, the lands and waters that they have traditionally live[d] on or used. Sometimes such communities are also referred to as "traditional communities". Because of this long association and reliance upon local resources, local communities have accumulated knowledge, innovations and practices regarding the sustainable management and development of these territories including useful environmental knowledge. … *Many communities may be considered local and may also be described as traditional communities. Some local communities include peoples of indigenous descent. They are culturally diverse and occur on all inhabited continents.* … However, "Local community" remains, to some extent, an ambiguous term. It can refer to a group of people which have a legal personality and collective legal rights and this is considered a community in the strict sense. Alternatively, a "local community" can refer to a group of individuals with shared interests (but not collective rights) represented by a non-governmental community-based organization (NGO). For example, many traditional communities act through NGOs, which are social rather than community organizations. The issue of cultural identity remains a multidimensional and complex issue. *Self-identification is the most appropriate way to establish who may be indigenous and/or local and/or a traditional community representative*'. Guidance for discussion document, paragraphs 3, 5, 6 and 7. (emphasis added) Arguably, the broad interpretation of the expression 'local communities' provided in these paragraphs is in line with the broad definition developed in this thesis. On this point see Chapter 1, Section 1.1.4.

[603] CBD COP Decision VI/10, 'Article 8(j) and related provisions', (19 April 2002) in UN Doc. UNEP/CBD/COP/6/20, the text of the Recommendations is reported in Annex II.

[604] CBD COP Decision VII/16, F Annex 'Akwé: Kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities'. Hereinafter, Akwé: Kon Voluntary Guidelines.

practices of indigenous and local communities embodying traditional lifestyle relevant for the conservation and sustainable use of biological diversity.[605]

Decision VIII/5 shows how efforts aimed at enhancing the role and involvement of indigenous and local communities in the development and implementation of the biodiversity regime are made on several fronts: the Article 8(j) Working Group is invited to collaborate with the Ad hoc open-ended Working group on Access and Benefit-sharing to provide inputs in the development of an international regime on access and benefit-sharing – later adopted at COP 10 and known as the Nagoya Protocol on Access and Benefit Sharing.[606] Moreover, specific mechanisms are foreseen to facilitate the participation of indigenous and local communities' representatives in CBD meetings, in particular, a voluntary funding mechanism and the launching of the traditional knowledge information portal and pilot projects for the creation of a national clearing-house mechanism useful to provide information to indigenous and local communities.[607] The same decision takes note of the draft elements of an ethical code of conduct to ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant for the conservation and sustainable use of biological diversity,[608] and requires the development of indicators to assess progress towards the 2010 biodiversity target[609] in relation to the status of traditional knowledge, innovations and practices.[610]

At the ninth meeting of the parties, further progress was seen in the development of the guidelines for documenting traditional knowledge, the plan of action for the retention of traditional knowledge, and the code of ethical conduct, now included as a draft in the Annex of

[605] CBD COP Decision VII/16 E Annex. At the eight meeting of the Parties, the COP highlights the progresses made in carrying out the plan of action and requests Parties and governments to take appropriate measures to further advance in executing it. See CBD COP Decision VIII/5, 'Article 8(j) and related provisions', (15 June 2006) UN Doc. UNEP/CBD/COP/DEC/VIII/5 B II, paragraph 9.
[606] CBD COP Decision VIII/5 C. For further details on the Nagoya Protocol see *infra* in this Section.
[607] CBD COP Decision VIII/5 D.
[608] CBD COP Decision VIII/5 F.
[609] In 2002, the Parties adopted the Strategic Plan for the Convention on Biological Diversity aimed to reduce, by 2010, the rate of biodiversity loss at global, regional and national levels. The involvement of indigenous and local communities in the implementation and processes of the Biodiversity Convention is promoted by goal 4.3; moreover, the scarce use of traditional knowledge and its loss are considered as obstacles to the appropriate implementation of the Convention. See CBD COP Decision VI/26 'Strategic Plan for the Convention on Biological Diversity' (19 April 2002) in UN Doc. UNEP/CBD/COP/6/20.
[610] CBD COP Decision VIII/5 G.

Decision IX/13.[611] The tenth meeting of the parties was prolific for advancing the participation of indigenous and local communities[612] and the implementation of Article 8(j). In addition to the revision of the dedicated Programme of work on Traditional Knowledge (Decision X/43), the COP adopts the Tkarihwaié:ri Code[613] and the Strategic Plan for Biodiversity 2011-2020.[614]

The tenth meeting also adopted the Nagoya Protocol.[615] Indigenous and local communities, including those on government delegations, participated in its negotiation. The role of indigenous and local communities and the importance of their traditional knowledge is recognised in both the preambular recitals and in the substantive provisions of the Nagoya Protocol.[616] In particular, obligations relate to traditional knowledge associated to genetic resources: accessing such knowledge is conditioned by the prior informed consent or approval and involvement of the relevant communities based on mutually agreed terms;[617] communities' customary law, community protocols and procedures should be developed and respected by the parties or potential users of traditional knowledge associated with genetic resources.[618] Moreover, parties are required to develop appropriate legislative, administrative and policy

[611] CBD COP Decision IX/13, 'Article 8(j) and related provisions' (9 October 2008) UN Doc. UNEP/CBD/COP/DEC/IX/13. Nevertheless, in this occasion concerns are also raised in relation to the vulnerability of indigenous and local communities and their knowledge to the impacts of climate change, proving the need to adapt to new challenges.

[612] In this regard see CBD COP Decision X/40, 'Mechanisms to promote the effective participation of indigenous and local communities in the work of the Convention' (29 October 2010) UN Doc. UNEP/CBD/COP/DEC/X/40. See also CBD COP Decision X/41, 'Elements of *sui generis* systems for the protection of traditional knowledge' UN Doc. UNEP/CBD/COP/DEC/X/41.

[613] CBD COP Decision X/42, 'The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities' (29 October 2010) UN Doc. UNEP/CBD/COP/DEC/X/42.

[614] CBD COP Decision X/2, 'The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets' (29 October 2010) UN Doc. UNEP/CBD/COP/DEC/X/2. This Plan provides an overarching framework relevant to all biodiversity-related conventions and, more generally, to the UN system and all partners dealing with biodiversity management and policy development. The Plan consists of five strategic goals, which are further articulated in the twenty Aichi Biodiversity Targets for 2015 or 2020. Its implementation relies primarily on activities developed at national and sub-national levels supported at regional and global levels with additional actions. In particular, Strategic Goal E aims to 'enhance implementation through participatory planning, knowledge management and capacity building' and its Target 18 is dedicated to ensuring the effective participation of indigenous and local communities, and respect and use their traditional knowledge, innovations and practices for the implementation of the Convention.

[615] More information on the connection between the Nagoya Protocol and traditional knowledge are available at https://www.cbd.int/traditional/Protocol.shtml accessed 1 February 2018. For a detailed analysis of the Nagoya Protocol see Elisa Morgera, Elsa Tsioumani and Matthias Buck, *Unraveling the Nagoya Protocol: A Commentary on the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity* (Brill 2014).

[616] Morgera affirms that the Nagoya Protocol is 'the first multilateral environmental agreement containing substantive provisions on environmental human right', while Schabus maintains that this Protocol introduces also indigenous rights. See, respectively, Elisa Morgera, 'Against All Odds: The Contribution of the Convention on Biological Diversity to International Human Rights Law' in Denis Alland and others (eds), *Unité et Diversité du Droit International / Unity and Diversity of International Law* (Brill Nijhoff 2014) 986; Schabus, 'Traditional Knowledge', *cit.*, (n 590) 271.

[617] Nagoya Protocol, Article 7.

[618] Nagoya Protocol, Article 12.

measures to ensure that traditional knowledge associated with genetic resources has been accessed in accordance with prior informed consent, approval or involvement of the relevant communities and following the establishment of mutually agreed terms, and to address situations of non-compliance.[619] When genetic resources are found *in situ* within the territories of two or more parties, or the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several parties, 'those parties shall endeavor to cooperate, as appropriate, with the involvement of the indigenous and local communities concerned, with a view to implementing the objective of this Protocol'.[620] Arguably, this last provision can be connected to the concept of decentralised international cooperation developed in this thesis.

To conclude, Article 8(j) and its associated provisions[621] acknowledge that indigenous peoples and local communities have the interest, knowledge and capabilities to participate in the conservation and sustainable use of natural resources as well as in sharing the benefits deriving from such use. Participation has to be ensured in decision-making processes as well as in practice, that is the governance of natural resources, and at all appropriate levels – local, domestic, and international.[622] This participatory dimension has been enhanced through dedicated CBD COP decisions and made more explicit in the Nagoya Protocol. A more proactive role for indigenous peoples and local communities in biodiversity governance can be ensured in the framework of specific conservation initiatives, such as protected areas, as explained below. Arguably, the normative and practical components of indigenous and local communities' participation in biodiversity governance under the biodiversity regime are in line with the primary role of sub-national actors in decentralised international cooperation.

[619] Nagoya Protocol, Article 16.
[620] Nagoya Protocol, Article 11.
[621] In particular, Articles 10(c), 17(2), and 18(4).
[622] For a detailed analysis of how indigenous peoples and local communities' participation is conceived and developed under the Biodiversity Convention refer to Parks and Schröder, 'What We Talk about When We Talk about "Local" Participation: Indigenous Peoples and Local Communities' Participation under the Convention on Biological Diversity', *cit.*, (n 421).

3.3.3 Protected areas

Article 2 of the Biodiversity Convention defines protected areas as geographically defined areas 'designated or regulated and managed to achieve specific conservation objectives'. Their importance for biodiversity conservation is reiterated in Article 8, which identifies them as the main framework to achieve *in situ* conservation.[623]

The destiny of many indigenous and local communities has been strongly influenced by the establishment of protected areas, which were originally conceived as conservation 'fortresses' and resulted in the displacement of communities, regardless of the fact that they had inhabited or used certain territories for centuries. This perception evolved over the course of time thanks to lessons learned from the field as well as the emergence of the concept of sustainable development, and the advancement of international environmental law spurred by the global environmental conferences held in Stockholm and Rio. Protected areas have since became a framework useful to encompass conservation and socio-economic developmental objectives through the sustainable use of natural resources, including by engaging with indigenous peoples and local communities. [624]

Protected areas guiding documents aim to consider and ensure this preferential relation between communities and natural resources, as exemplified by both the Programme of Work on Traditional Knowledge[625] and the PoWPA. In particular, Task 2 of the Programme of Work on Traditional Knowledge requires Parties

> 'to develop appropriate mechanisms, guidelines, legislation or other initiatives to foster and promote the *effective participation of indigenous and local communities* in decision-making, policy planning and development and implementation of the conservation and sustainable use of biological diversity at international, regional, subregional, national and

[623] CBD, Articles 8 (a) to (e). The Biodiversity Convention has been focusing its attention on the proper implementation of Article 8 since its second meeting of the Parties, in this regard see CBD COP Decision II/7, 'Consideration of Article 6 and 8 of the Convention' (8 November 1995) in UN Doc. UNEP/CBD/COP/2/19 and Decision III/9, 'Implementation of Articles 6 and 8 of the Convention' (15 November 1996) in UN Doc. UNEP/CBD/COP/3/38. See also the Introduction of the CBD Programme of Work on Protected Areas (PoWPA) included in CBD COP Decision VII/28.
[624] In this regard see Chapter 2 Section 2.8.1.
[625] Adopted with CBD COP Decision V/16 and revised according to CBD COP Decision X/43. See *supra* Section 3.3.2.

> local levels, including access and benefit-sharing and *the designation and management of protected areas*, taking into account the ecosystem approach'.[626]

Moreover, Element D of the Plan of action for the retention of traditional knowledge calls for the effective involvement of indigenous and local communities in the management of protected areas, and highlights that due respect should be given to the rights of the relevant communities when establishing new protected areas.[627]

Similar obligations are foreseen in CBD COP Decision VII/28, which adopts the PoWPA.[628] Element 2 focuses on governance, participation, equity and benefit sharing, which are also promoted by engaging directly with indigenous and local communities through specific mechanisms.[629] Moreover, Goal 2.2 requires 'to enhance and secure involvement of indigenous and local communities and relevant stakeholders' and aims at their full and effective participation, 'in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations' together with the participation of any relevant stakeholder in establishing and managing (also existing) protected areas.[630] States are encouraged to develop appropriate legislation and policies, foresee capacity building activities, and devote specific financial resources to this end.[631] Moreover, nature conservation must be integrated with socio-economic and cultural considerations since any resettlement

[626] (emphasis added)
[627] CBD COP Decision VII/16 E Annex. On the participation of local communities in protected areas see Chapter 2 Section 2.8.1.
[628] CBD COP Decision VII/28, paragraph 22; see also paragraph 29(c). At its paragraph 31, this decision underlies the importance of having a single international classification system for protected areas, especially for comparability purposes. Such a system has been developed by the IUCN World Commission on Protected Areas as explained *infra* Section 3.6.
[629] PoWPA, paragraph 2.1.3. See also CBD COP Decision VII/28 paragraph 22 that recalls Article 8(j) of the Biodiversity Convention and adds that 'the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of indigenous and local communities consistent with national law applicable international obligations'. Successive decisions also stress the value of having mechanisms and processes that enable the full and effective participation of indigenous and local communities, as in CBD COP Decision X/31, 'Protected Areas' (29 October 2010) UN Doc. UNEP/CBD/COP/DEC/X/31, paragraph 31(a).
[630] In addition, the effective participation of indigenous and local communities is also encouraged through activities suggested in relation to Goal 1.1 that foresees the establishment and strengthening of national and regional systems of protected areas integrated into a global network as a contribution to globally agreed goals. See, in particular, paragraphs 1.1.4 and 1.1.7 of the PoWPA.
[631] PoWPA, paragraph 2.2.4.

deriving from the establishment or management of protected areas requires the prior informed consent of the affected communities.[632]

The PoWPA formally recognises the existence of Indigenous peoples' and communities conserved territories and areas (ICCAs),[633] which are included among the innovative types of governance of protected areas[634] and praised for their potential for achieving biodiversity conservation goals.[635] ICCAs can be described as 'natural and/or modified ecosystems containing significant biodiversity values, ecological benefits and cultural values, voluntarily conserved by indigenous peoples and local communities, both sedentary and mobile, through customary law or other effective means'.[636] They can be found in both terrestrial and marine areas and can be of different types,[637] but they are all characterised by three essential elements. First, the relevant indigenous peoples or local communities have a close and profound relation with the site (territory, area or habitat) due to cultural, identity, livelihood or well-being reasons. Second, these indigenous peoples or local communities have a predominant or exclusive control and management of the site, thus holding the decision-making power as well as the capacity to develop and enforce regulations *de facto* and/or *de jure*. Third, the decisions and efforts of these indigenous peoples or local communities result in the conservation of biodiversity, ecological services, and associated cultural values (regardless of their original objectives).[638]

ICCAs do not belong to the formal protected area system, but exist independently of it; however, they can fit the protected areas definition and become part of the formal protected

[632] PoWPA, paragraph 2.2.5.
[633] The existence of ICCAs was acknowledged for the first time in occasion of the IUCN 5th World Park Congress (Durban 2003), for further information see https://www.iccaconsortium.org/index.php/2003/12/31/the-durban-accord-from-the-5th-world-parks-congress-wpc-durban-south-africa-2003/ accessed 19 November 2018.
[634] PoWPA, paragraph 1.1.4.
[635] PoWPA, paragraph 2.1.2.
[636] Borrini-Feyerabend and others, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation*, *cit.*, (n 45) 51; Grazia Borrini-Feyerabend and others, *Governance of Protected Areas: From Understanding to Action* (IUCN, Gland 2013) 40.
[637] In this regard see Ashish Kothari, 'Community Conserved Areas: Towards Ecological and Livelihood Security' (2006) 16 Parks 3, 3–4.
[638] In this regard see Borrini-Feyerabend and others, *Governance of Protected Areas: From Understanding to Action*, *cit.*, (n 636) 40; Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 85; Holly C Jonas, 'Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs): Evolution in International Biodiversity Law' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017) 147.

areas system upon an agreement between the State and the relevant communities.[639] Since ICCAs effectively contribute to conservation, their legal recognition and establishment should be promoted.[640] The normative and structural independence of ICCAs is reiterated in Decision XII/12, which affirms that '*[c]ustomary sustainable use* of biological diversity and *traditional knowledge* can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas *or through indigenous and communities conserved territories and areas*'.[641] Although the application of ICCAs is currently discussed only at the local and national levels, there is no reason why their operativity cannot expand across borders when indigenous peoples and local communities govern their land, territories and resources contiguously but in different States.[642] A transboundary dimension of ICCAs can also be foreseen in connection to mobile communities moving across borders.[643] As such ICCAs can be considered as decentralised cooperative mechanisms. This cross-border perspective could enhance research on and support for this phenomenon. In fact, ICCAs do not find much recognition outside the biodiversity regime and the IUCN protected areas framework, despite their potential as a mechanism to further

[639] On this pointe see Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 81. In this regard, see the distinction between ICCAs (that can be included in IUCN Governance Type D – governance by indigenous peoples and local communities) and protected areas governed by local authorities (belonging to IUCN Governance Type A – governance by government) traced by Borrini-Feyerabend and others, *Governance of Protected Areas: From Understanding to Action*, *cit.*, (n 636) 40–41. Before this governance dimension was developed by IUCN, Kothari shows that ICCAs (then called CCAs) could anyway fit into the six existing IUCN protected areas categories. Kothari, 'Community Conserved Areas: Towards Ecological and Livelihood Security', *cit.*, (n 637) 5, Table 1. For further details on ICCAs see *infra* Section 3.6.

[640] PoWPA, paragraphs 2.1.3 and 2.2.4.

[641] CBD COP Decision XII/12, 'Article 8(j) and related provisions' (13 October 2014) UN Doc. UNEP/CBD/COP/DEC/XII/12, Annex IV, paragraph 9. (emphasis added) On this point see also Jonas, 'Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs): Evolution in International Biodiversity Law', *cit.*, (n 638) 152.

[642] Nothing emerges in this sense from the analysis of IUCN Protected Areas Guidelines and related books. What is more, the IUCN protected areas management categories and governance type are said to apply to TBPAs, according to Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 270. This arguably confirms the possibility to have transboundary ICCAs.

[643] Kothari discusses the potentiality of ICCAs as World Heritage sites, especially if relevant communities could directly apply for their recognition by UNESCO, in the case of transboundary areas inhabited by mobile pastoral people. See Kothari, 'Community Conserved Areas: Towards Ecological and Livelihood Security', *cit.*, (n 637) 12. More generally, on the link between protected areas and mobile peoples see Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 83.

international human rights and secure indigenous peoples and local communities' land tenure, and their rights – and responsibilities – to use their ancestral land and resources.[644]

Framing biodiversity conservation through protected areas promotes the ecosystem approach since, to cover the relevant ecosystems, protected areas can extend beyond national borders as well as beyond the limits of national jurisdiction in the case of marine areas.[645] Indeed, the establishment and strengthening of national and regional systems of protected areas integrated into a global network is pursued through Goal 1.1 of the PoWPA, which, among its suggested activities, promotes the use of existing and potential forms of conservation, 'including innovative types of governance for protected areas that need to be recognized and promoted through legal, policy, financial institutional and community mechanisms'.[646] Among these innovative type of governance, it is possible to include decentralised cooperative mechanisms that enhance the involvement of indigenous and local communities, including across borders.

Cooperation for conservation is explicitly promoted through Goal 1.3 of the PoWPA, which calls for the establishment and strengthening of regional networks, transboundary protected areas and collaboration between neighbouring protected areas across national boundaries. The involvement of indigenous and local communities is also reiterated in this context,[647] since participatory decision-making and decentralisation are among the governance principles that should guide parties in setting policies, institutional and socio-economic conditions supportive to the effective establishment and management of protected areas.[648]

[644] On the challenges and opportunities to explore further the role of ICCAs in international law see Jonas, 'Indigenous Peoples' and Community Conserved Territories and Areas (ICCAs): Evolution in International Biodiversity Law', *cit.*, (n 638) 154–157.
[645] In this regard see Section II of the PoWPA focusing on its overall purpose and scope, which clarifies that 'the ecosystem approach is the primary framework for action under the [Biodiversity] Convention'.
[646] PoWPA suggested activity 1.1.4.
[647] PoWPA, paragraph 1.4.1.
[648] PoWPA, Goal 3.1 and paragraph 3.1.4.

The implementation of the PoWPA is strengthened through the mobilisation of dedicated financial resources,[649] in particular to support developing countries. These funds are meant to improve mechanisms for the effective consultation of relevant stakeholders, including indigenous and local communities; to design toolkits for the identification, management, monitoring and evaluation of national and regional systems of protected areas; and to reinforce cooperation for the establishment of transboundary protected areas in both terrestrial and marine environments as well as marine protected areas beyond the limits of national jurisdiction given the ecological pressures threatening marine ecosystems and biodiversity.[650]

CBD COP Decision X/31 further reflects on the strategies for strengthening the implementation of the PoWPA at national, regional, and global levels. It reiterates the importance of the ecosystem approach – which aims to integrate protected areas into the broader land and seascapes for the effective conservation of biodiversity – and the involvement of all relevant stakeholders. In addition, it promotes the creation of transboundary protected areas and the strengthening of cooperation to this end. It also focuses on specific issues to be considered in the implementation of the PoWPA, including effective management, restoration of ecosystem and habitats, mechanisms to improve participation, equity and benefit sharing. The implementation of the PoWPA is functional to achieving the Aichi Biodiversity Targets,[651] thus confirming that protected areas are key to biodiversity conservation in different contexts.

According to the analysis above, the concept of decentralised international cooperation can find support in COP decisions on protected areas that require the involvement of local and indigenous communities to conserve biodiversity across national boundaries and promote the establishment of appropriate governance mechanisms and procedures to this end. Arguably,

[649] For instance, specific funding mechanisms should be foreseen to support indigenous and local communities conserved areas. See CBD COP Decision VIII/24 'Protected Areas' (15 June 2006) UN Doc. UNEP/CBD/COP/DEC/VIII/24, paragraph 19(f)(vii).
[650] CBD COP Decision VIII/24 and CBD COP Decision IX/18 'Protected areas' (9 October 2008) UN Doc. UNEP/CBD/COP/DEC/IX/18.
[651] In particular, Target 11 calls for expanding the system of terrestrial and marine protected areas as a contribution to Strategic Goal C 'To improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity'.

ICCAs have the potential to acquire a transboundary dimension and, as such, be characterised as decentralised cooperative mechanisms.

3.3.4 Local authorities

The engagement of cities and local authorities in the implementation of the Biodiversity Convention is based on Chapter 28 of Agenda 21 and is motivated by their potential to directly influence biodiversity and users at the local level, thus multiplying the opportunities to conserve biodiversity and manage resources effectively and contributing to national, regional, and global efforts to this end.[652] Their role and operational capacity is defined through a dedicated Plan of Action,[653] which invites parties to engage with these authorities and seeks their support, especially for the implementation of national biodiversity strategies and action plans. Moreover, mutual learning and cooperation among these authorities are encouraged; in particular, State Parties should

> 'encourage, promote and support, as appropriate and through policy tools, guidelines and programmes, *direct decentralised cooperation on biodiversity and development between local authorities* at national, regional and global levels'[654] and 'support the development of *landscape-level and ecosystem-based partnerships between subnational governments and local authorities* on conservation corridors and sustainable land-use mosaics *at national and transboundary levels* … '.[655]

Arguably, when these activities engage sub-national authorities across borders, they prove the existence of decentralised international cooperation as proposed in this thesis.

The importance of engaging sub-national authorities and other stakeholders, like children and youth, and major civil society groups, was reiterated at successive Meetings of the Parties.[656]

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[652] CBD COP Decision IX/28, 'Promoting engagement of cities and local authorities' (9 October 2008) UN Doc. UNEP/CBD/COP/DEC/IX/28. It is worth mentioning that this Decision clarifies that 'responsibilities for implementation rest primarily with the Parties', at its second recital.
[653] CBD COP Decision X/22, 'Plan of Action on Subnational Governments, Cities and Other Local Authorities for Biodiversity' (29 October 2010) UN Doc. UNEP/CBD/COP/DEC/X/22. Hereinafter, Plan of Action on Subnational Governments.
[654] Plan of Action on Subnational Governments, D paragraph 5(g). (emphasis added)
[655] Plan of Action on Subnational Governments, D paragraph 5(i).
[656] CBD COP Decision XI/8, 'Engagement of other stakeholders, major groups and subnational authorities' (5 December 2012) UN Doc. UNEP/CBD/COP/DEC/XI/8 and Decision XII/9, 'Engagement with subnational and local governments' (17 October 2014) UN Doc. UNEP/CBD/COP/DEC/XII/9.

As seen, the CBD COP has strengthened the role of sub-national actors – i.e., indigenous and local communities as well as local authorities – by calling for their direct involvement in the conservation and management of biodiversity resources, including in transboundary contexts and in the framework of (transboundary) protected areas. Such an attitude favours the concept of decentralised international cooperation. The involvement of sub-national actors is not only encouraged formally, but finds its practical application through the development of innovative governance mechanisms such as the decentralised cooperative mechanisms presented in the case studies in this thesis.

3.4 Convention of Wetlands of International Importance its thematic handbooks

The Ramsar Convention delineates a conservation regime for wetland ecosystems[657] and fosters their wise use at local, national, and international levels.[658] This Convention was originally motivated by the need to halt the progressive encroachment on and loss of wetlands, especially waterfowl habitats,[659] due to the widespread lack of awareness of the functions, values, goods and services they provide.[660] Its scope of implementation has been widened to cover all aspects of wetland ecosystems thanks to the activity of the Conference of the Parties (Ramsar COP) and the activism of the Ramsar Bureau (Secretariat), which have advanced the development of

[657] Article 1(1) defines wetlands broadly 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'. In addition, Article 2(1) extends the mandate of the Convention further by stating that the List of Wetlands of International Importance (Ramsar List) 'may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands'. Moreover, lakes and rivers are also included in the definition of wetlands in their entirety and regardless of their depth, see Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands' (7th ed, 2016) 10. Available at https://www.ramsar.org/sites/default/files/documents/library/handbook1_5ed_introductiontoconvention_final_e.pdf accessed 11 February 2018. Previous versions of this publication were known as The Ramsar Convention Manual. A detailed analysis of the definition of wetland is provided in Dupuy and Viñuales, *Int. Environ. Law*, *cit.*, (n 286) 173–175.

[658] The 4th Strategic Plan 2016-2024 affirms that its mission is 'conservation and wise use of all wetlands through local and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world'. This Plan is accessible at https://www.ramsar.org/sites/default/files/documents/library/4th_strategic_plan_2016_2024_e.pdf accessed 11 February 2018.

[659] The special attention paid to wetlands as habitat for waterbirds emerges from the title of the Convention.

[660] In this sense, Bowman underlies its 'educative role'. Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 506.

the wetland regime – in particular, by developing thematic handbooks[661] and clarifying the interpretation of the original text.[662]

The Ramsar Convention is innovative: it was the first multilateral environmental agreement focusing on the conservation and sustainable use of natural resources and aiming at global participation; moreover, it foresaw commitments at the site level, but also required 'a combination of "far-sighted national policies" and "coordinated international action"'.[663] The work of the Convention is organised around three pillars: first, the wise use of all wetlands; second, the designation and sustainable management of suitable sites included in the List of Wetlands of International Importance (the List); and third, international cooperation, especially on transboundary wetlands, shared water systems, and shared species.[664]

Article 3 binds States to the wise use of all wetlands in their territories.[665] The Convention text does not define 'wise use', hence, the Ramsar COP has worked to develop this concept since its first meeting in Cagliari[666] and has refined it over time, interpreting it as synonymous with sustainable use.[667] According to the most recent definition, 'wise use of wetlands is the maintenance of their ecological character, achieved through the implementation of ecosystem

[661] They have been adopted by the Ramsar COP to provide scientific, technical and policy guidance to assist the Parties in implementing the Convention. A complete list of the Ramsar Handbooks is available at https://www.ramsar.org/resources/ramsar-handbooks accessed 14 February 2018.

[662] In this regard see Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 676; Ong, 'International Environmental Law Governing Threats to Biological Diversity', *cit.*, (n 565) 530–532; Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 8. Several authors underline that a major weakness of this Convention is the lack of an amendment procedure, which has been later introduced by the Ramsar COP together with the creation of the Ramsar Bureau, with a primary role in the Monitoring Procedure. See Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 676; Ong, 'International Environmental Law Governing Threats to Biological Diversity', *cit.*, (n 565) 532.

[663] In this regard see Bowman citing the Preamble of the Convention, Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 506. See also Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 673; Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 8.

[664] See Punta del Este Conference (2015), Resolution XII.2 adopting the 4th Strategic Plan of the Ramsar Convention 2016-2024, paragraph 1. Available at https://www.ramsar.org/sites/default/files/documents/library/4th_strategic_plan_2016_2024_e.pdf accessed 14 February 2018.

[665] Ramsar Convention, Article 3. See Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 14.

[666] Recommendation 1.5 clarifies that 'wise use of wetlands involves maintenance of their ecological character, as a basis not only for nature conservation, but for sustainable development', Cagliari Conference (1980), Recommendation 1.5 'National Wetland Inventories'. Available at http://archive.ramsar.org/cda/en/ramsar-documents-recom-recommendation-1-5/main/ramsar/1-31-110%5E23007_4000_0__ accessed 13 February 2018.

[667] On this point see Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 14. In this regard see also Maffei, 'La Protezione Delle Specie, Degli Habitat e Della Biodiversità', *cit.*, (n 291) 274.

approaches, within the context of sustainable development'.[668] According to Bowman, regardless of the original intention reflected in the Convention text and the dilemma over conservation and wise use as a dual standard of site management, the practice of the parties shows that wise use has become the 'dominant theme of the Convention in relation to *all* wetlands, whether listed or not'.[669] Nevertheless, it has been argued that the Convention ultimately determines a major difference between listed and unlisted sites: 'whereas the duties imposed upon parties with regards to wetlands generally are expressed to apply only to those "in their territory", the obligations undertaken with respect to designated sites are applicable more generally to those "included in the List" implying a clear element of *collective* responsibility for these sites of international importance'.[670] Arguably, this recalls the rationale behind common concern regimes.

The List is the central element of the Convention. Upon joining, each Party has to designate at least one wetland to be included in the List based on the significance of the site in terms of ecology, botany, zoology, limnology, or hydrology.[671] Beyond this, each Party is free to define,

[668] Kampala Conference (2005), Resolution IX.1, 'Wetlands and water: supporting life, sustaining livelihoods', Annex A, paragraph 22. Available at https://www.ramsar.org/sites/default/files/documents/pdf/res/key_res_ix_01_annexa_e.pdf accessed 13 February 2018.

[669] Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 507. Along the same lines, Birnie *et al* note that the refined definition of wise use and the connection to the ecosystem approach aims to 'reflect the practice of the Biodiversity Convention, with recent Ramsar resolutions appearing to treat "conservation" and "wise use" as "a sort of composite concept" without clear distinction between them'. Birnie, Boyle and Redgwell, *International Law and the Environment, cit.*, (n 6) 674–675. For further discussions on the definition of wise use see also Sands and Peel, *Princ. Int. Environ. Law, cit.*, (n 40) 493; Ong, 'International Environmental Law Governing Threats to Biological Diversity', *cit.*, (n 565) 532.

[670] Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 509. Similarly, Dupuy and Viñuales maintain that '[t]he requirements are more demanding, however, with respect to the sites that qualify as "wetlands of international importance" and are included in the List. On the one hand, the obligation of the wise use has a broader scope, insofar as it does not concern just States where the wetland is located, but also other State Parties. On the other hand, inclusion in the List entails additional monitoring and reporting obligations'. Dupuy and Viñuales, *Int. Environ. Law*, *cit.*, (n 286) 176. A different perspective is provided by Birnie *et al* that, while commenting on the problematic interpretation of the Convention text and the weakness of its obligations, note '[i]t was not clear, for example, whether Parties had an obligation to promote conservation of listed sites in all State Parties or only of their own sites'. Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 673.

[671] Ramsar Convention, Articles 2(2) and (4). Other factors relevant for the characterisation of a wetland as one of international importance are included in the Preamble. Recommendation IV.2 identifies the criteria relevant for such an identification and provides guidelines for their application. There are three main criteria: the first for representative or unique wetlands, the second based on plants or animals, and the third based on waterfowls. It is worth noting that 'a wetland could be considered of international importance under Criterion 1 if, because of its outstanding role in natural, biological, ecological or hydrological systems, it is of substantial value in supporting *human communities* dependent on wetland'. Montreux Conference (1990), Recommendation IV.2 'Criteria for Identifying Wetlands of International Importance', Annex 1, 2-3. (emphasis added)

extend the previous definition of listed wetlands, and designate additional sites to be added.[672] Inclusion 'does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated';[673] however, by joining the Convention and accepting its obligations on listed – as well as unlisted[674] – wetlands, States are *de facto* limiting their exclusive sovereignty. In fact, States are not only bound to conserve and wisely use wetlands, at least those listed, but need to justify any decision that entails less protection for listed sites (both in the case of delisting or reduction of the designated area) and submit their national conservation efforts to the direct international scrutiny of the Ramsar Bureau.[675] For Bowman these are some of the aspects that characterise this Convention as a common concern regime, despite preceding this concept.[676] He stresses that the Convention focuses on wetlands of international importance, which implicitly suggests that their conservation and wise use benefits the international community as a whole.[677] Moreover, it has been noted that listing a site contributes to raise its profile at international level, enhance its protection, and attract funding from different sources,[678] which arguably generate a positive chain in the implementation of the Ramsar regime.

Conservation and wise use can be ensured by establishing nature reserves on wetlands, regardless of their inclusion in the List, and through the promotion of training in the fields of

[672] Ramsar Convention, Articles 2(1) and (5).
[673] Ramsar Convention, Articles 2(3).
[674] For instance, the commitments included in Article 4 apply to both listed and unlisted sites; while, in other cases, requirements related to listed sites are more demanding, as those foreseen in Article 3(1). On this point see also Dupuy and Viñuales, *Int. Environ. Law*, *cit.*, (n 286) 176.
[675] In this regard refer to ibid 176–177; Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 508; Ong, 'International Environmental Law Governing Threats to Biological Diversity', *cit.*, (n 565) 531.
[676] Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 506 ff.
[677] Other elements that characterise it as a common concern regime are: the substantive duties relating to the conservation of listed and unlisted wetlands; the international scrutiny and political pressures deriving from a diminution or degradation of Ramsar sites; the active role of the Ramsar COP in advancing the regime; the collective responsibility for listed sites of international importance; the emphasis on cooperation especially on transboundary wetlands and shared water systems; the efforts to strengthen the effectiveness of this regime by providing financial assistance to developing countries and transitional economies through the Ramsar Small Grants Fund; and the active role of NGOs both in negotiating this instrument and in its implementation. ibid.
[678] On this point see ibid 510; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 675. For further information on financial mechanisms aimed to strengthen the wetland conservation and enhance the implementation of this Convention see Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 54–56. See also Handbook 20, 29 ff.

wetland research, management, and wardening.[679] As Birnie *et al* clarify, the relation between listing a site and establishing a nature reserve on it is not automatic, in fact some wetlands are already protected under national law before being listed, while others become so after listing.[680] Although conservation and the establishment of nature reserves are merely promoted by Article 4(1), any change in the site's ecological status must be communicated to the Ramsar Bureau and alternative measures adopted to compensate any loss in this sense.[681] Hence, the unilateral power of state Parties to decide on listing and delisting is practically constrained.

A similar rationale has inspired the creation of the Montreux Record,[682] which works as an inventory of listed sites 'where an adverse change in ecological character has occurred, is occurring or is likely to occur, and which are therefore in need of priority conservation attention'.[683] Again, the inclusion of a site in the Record relies on the consent of the Party in whose territory the site at risk is located. However, once a site has been included, the Party concerned has to provide updated information on its conservation status and can trigger further assistance to address ecological problems on site, including through the Ramsar Advisory Mission.[684] Notwithstanding the political sensitivity of such a process, it has proved successful

[679] Ramsar Convention, Article 4. See Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 14.
[680] Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 675.
[681] Ramsar Convention, Article 4(2).
[682] Montreux Conference (1990), Recommendation IV.8 'Change in ecological character of Ramsar sites'. Available at http://archive.ramsar.org/cda/en/ramsar-documents-cops-cop4-recommendation-4-8/main/ramsar/1-31-58-131%5E23105_4000_0__ accessed 13 February 2018. For further information on the Montreux Record refer to Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 48.
[683] Brisbane Conference (1996), Resolution VI.I 'Working definition of ecological character, guidelines for describing and maintaining the ecological character of listed sites, and guidelines for operation of the Montreux Record', Annex, paragraph 3.1. Available at http://archive.ramsar.org/cda/en/ramsar-documents-resol-resolution-vi-1-working/main/ramsar/1-31-107%5E20929_4000_0__ accessed 13 February 2018. In addition, specific guidelines have been developed on this issue, see the so-called Handbook 15, Ramsar Convention Secretariat, *Wetland Inventory: A Ramsar Framework for Wetland Inventory and Ecological Character* (4th ed, 2010). Available at https://www.ramsar.org/sites/default/files/documents/pdf/lib/hbk4-15.pdf accessed 13 February 2018.
[684] This procedure consists in dispatching a small team of experts to the endangered site in order to carry out a careful analysis of the ecological threats and propose solutions to address them effectively. This procedure was initially called Ramsar Monitoring Procedure and was established at the Montreux Conference (1990) with Recommendation IV.7 'Mechanisms for improved application of the Ramsar Convention'. Available at http://archive.ramsar.org/cda/en/ramsar-documents-recom-recommendation-4-7/main/ramsar/1-31-110%5E23111_4000_0__ accessed 13 February 2018. On this point see Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 48–50. See also Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 510.

in enhancing the capacity of States to address ecological challenges and achieve the restoration of several sites.[685]

The Ramsar Convention provides 'the single most important framework for intergovernmental cooperation on wetland issues'[686] and specific guidelines[687] have been developed to assist the parties in implementing their obligation to cooperate. Article 5 binds State Parties to consult with one another about the implementation of the Convention,[688] as well as to coordinate and support wetland conservation measures.[689] These obligations acquire special emphasis in relation to transboundary wetlands, shared water systems, and shared species.[690] The pillar of international cooperation and its operationalisation in the context of the Ramsar Convention are particularly relevant for this thesis.

Inter-State cooperation can take different forms. It is primarily motivated by the fact that unilateral actions are insufficient to ensure the conservation and management of wetlands and watercourses that cross national boundaries, as well as the protection of wetlands migratory species. Cooperation can also be needed to facilitate exchange of experiences and development assistance for wetland conservation in developing countries.[691] Collaborative international management is formalised through the designation of *Transboundary Ramsar Sites*.[692] Such a designation is seen as a useful mechanism to operationalise cooperation at bilateral or

[685] In this regard see Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 508–509.
[686] Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 51.
[687] Such guidelines were adopted at the San José Conference (1999) with Resolution VII.19 'Guidelines for international cooperation under the Ramsar Convention'. Available at http://archive.ramsar.org/cda/en/ramsar-documents-resol-guidelines-for-20768/main/ramsar/1-31-107%5E20768_4000_0__ accessed 14 February 2018. They were later refined and included in a dedicated handbook, see Ramsar Convention Secretariat, *International Cooperation: Guidelines and Other Support for International Cooperation under the Ramsar Convention on Wetlands* (4th ed, 2010). Hereinafter, Handbook 20.
[688] In this regard Handbook 20 clarifies that the duty to consult 'refers to all obligations arising from the Convention text' and provides a non-exhaustive list in this sense. Handbook 20, 8.
[689] In this sense cooperation has a broad scope. See Handbook 20, 8.
[690] It has been specified that Article 5 refers to both wetlands and river basins crossing international borders regardless of their inclusion in the List. Refer to Handbook 20, 8. Regarding cooperation for the protection of migratory waterbirds and other migratory species refer to Handbook 20, 17 ff.
[691] Ramsar Convention Secretariat, 'An Introduction to the Ramsar Convention on Wetlands', *cit.*, (n 657) 51. For further details see Handbook 20, 25 ff.
[692] Refer to Resolution VII.19. A Transboundary Ramsar Site is 'an ecologically coherent wetland [that] extends across national borders and the Ramsar Site authorities on both or all sides of the border have formally agreed to collaborate on its management, and have notified the Secretariat of this intention'. See Handbook 20, 15. A list of Transboundary Ramsar Sites is available at http://archive.ramsar.org/cda/en/ramsar-documents-trss/main/ramsar/1-31-119_4000_0__ accessed 14 February 2018.

multilateral levels[693] by providing the opportunity to develop a joint management plan[694] for the relevant transboundary site. Beyond this, neither the Convention nor the handbooks elaborate on how to structure cooperation over transboundary wetlands in practice, thus relying on other relevant regimes such as arrangements developed in the framework of the UN Watercourses Convention and the Helsinki Water Convention for transboundary basins or the Convention on Migratory Species for transboundary species, or conservation initiatives such as protected areas.[695] In fact, the Handbook on law and institutions clarifies that '[t]he requirement to conserve listed wetlands is an *obligation of result*, [hence,] the Convention does not indicate how this should be done or what legal status should be attributed to listed wetlands'.[696] Such a result can be achieved by designating wetlands as protected areas, ensuring protection under land-use planning rules, promoting voluntary conservation initiatives through incentives, strengthening traditional management approaches where these exist,[697] or designating 'no use' zones where it is strictly necessary to preserve pristine or overexploited ecosystems.[698] Arguably, the fact that Article 4(1) mentions the establishment of natural reserves as the primary measure to ensure conservation suggests that protected areas or similar initiatives were viewed as the most appropriate framework to this end, including in a transboundary context. Indeed, the concept of 'wise use' matches the evolved perception of protected areas, which integrates conservationist and sustainable development objectives. In this context, the

[693] 4th Strategic Action Plan 2016-2024, 8.
[694] The purpose and benefits of a wetland management planning process and a management plan are explained in Ramsar Convention Secretariat, *Managing Wetlands: Frameworks for Managinf Wetlands of International Importance and Other Wetland Sites* (4th ed, 2010) 22 ff. Hereinafter, Handbook 18.
[695] Indeed, Handbook 20 encourages Parties 'to identify all their shared wetland systems and cooperate in their management with the adjoining jurisdiction(s), through actions such as formal joint management arrangements or collaboration in the development and implementation of bi- or multilateral management plans for such sites'. Handbook 20, 14. It is worth noting that by merely referring to adjoining jurisdiction(s), it can be argued that cooperation has to encompass all governance levels and involve national and sub-national jurisdictions resting on the relevant site. The Ramsar Convention predates the UN Watercourses Convention, the Helsinki Water Convention, and the Convention on Migratory Species, but aligns with all of them. In relation to transboundary river basins, Handbook 20 encourages cooperation through the creation of multi-State or river basin management commissions, or equivalent cooperative mechanisms. While, in relation to species, it highlights that wetlands are important for shared species in general, not only waterbirds, and both migratory and non-migratory given their limited range. See Handbook 20, 11 and 15-16 respectively.
[696] Ramsar Convention Secretariat, *Laws and Institutions: Reviewing Laws and Institutions to Promote the Conservation and Wise Use of Wetlands* (4th ed, 2010) 24. Hereinafter, Handbook 3.
[697] Ramsar COP Resolution VII.8, paragraph 4.
[698] Handbook 3, 25.

involvement of local communities emerges as an important factor for the effective implementation of the Convention,[699] as emphasised in the Handbook on Participatory Skills.[700]

This Handbook explains that such involvement encompasses participation in decision-making as well as in managing wetlands:[701] participatory management regimes need to be tailored to the specific wetland and context considered,[702] and to be culturally appropriate.[703] Although nothing is said on Transboundary Ramsar Sites, it can be argued that the rationale for involving local stakeholders and developing participatory management schemes remains the same for transboundary contexts, since their contribution is meaningful at site level rather than at the international level.[704]

Hence, Handbook 7 delineates the aspects of participation and decentralisation in the context of the Ramsar regime. The role of local authorities is less explicit than those of local communities, but is in any case important and can be indirectly deduced by the fact that the Ramsar regime is intended to operate at different governance levels: fostering, first, specific measures on wetland sites, second, national legislation and policies that ensure wetland conservation and wise use, and third, international cooperative efforts aimed at specific transboundary sites as well as for the exchange of knowledge and practices relevant for the conservation and wise use of wetlands. Therefore, while Article 5 and Handbook 20 provide the basis for the development of an intergovernmental cooperative framework, Handbook 7 as

[699] In this regard see Ramsar COP Resolution VII.8, paragraph 7.
[700] Ramsar Convention Secretariat, *Participatory Skills: Establishing and Strengthening Local Communities' and Indigenous People's Participation in the Management of Wetlands* (4th ed, 2010). Hereinafter, Handbook 7. This Handbook has been compiled on the basis of Ramsar COP Resolutions VII.8 and VIII.36 (2002) 'Participatory Environmental Management (PEM) as a tool for management and wise use of wetlands'; available at https://www.ramsar.org/sites/default/files/documents/library/key_res_vii.08e.pdf accessed 15 February 2018. The main purpose of Handbook 7 is to 'assist Contracting Parties in involving local and indigenous people in wetland management in a manner that furthers the wise use objective of the Convention', as clarified in its Introduction, at 8. It is further explained that, based on experience, management regimes involving local residents and indigenous communities 'tend to be more sustainable than those which are developed in the absence of local involvement', at 25.
[701] See Handbook 7, 8-9 and its Section II on Participatory Environmental Management, 22-24. Refer also to Resolution VII.8, paragraph 15.
[702] Handbook 7, 11 and 13. On flexibility see also at 36-39. Participatory management agreements are needed to reinforce trust among the stakeholders involved and clarify their functions, rights and responsibilities. Handbook 7, 18.
[703] Handbook 7, 15 and 17.
[704] Connection among communities are also encouraged to share experiences, hence, their connection is justified even more in a transboundary wetland. See Handbook 7, 17.

well as other guidelines included in Handbooks 1[705] and 3 – dealing with the wise use and the development of appropriate law and institutions – provide the foundations for decentralised cooperative mechanisms such as those studied in this thesis.

3.5 The World Heritage Convention and its Operational Guidelines[706]

This Convention focuses on the cultural[707] and natural[708] heritage with outstanding universal value which, though located in the territory of one or more States, require protection in the interests of all humanity, including future generations. Since the spatial dimension prevails, the conservation of wildlife can only be derived indirectly from the protection of specific habitats.[709]

The Preamble refers to these as 'world heritage of the mankind as a whole': this formulation resembles the concept of common heritage, but only in its wording, since the world heritage regime is more similar to that of common concern of humankind.[710] Differently from the moon and its natural resources as well as the seabed and ocean floor beyond the limits of national jurisdiction, the sites included in the World Heritage List remain under the sovereignty of the States where they are located, are not subject to a common international authority, and are not used to the benefit of mankind.[711] Instead, a similarity with the common concern regimes

[705] Ramsar Convention Secretariat, *Wise Use of Wetlands: Concepts and Approaches for the Wise Use of Wetlands* (4th ed, 2010). Hereinafter, Handbook 1.
[706] UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, 'Operational Guidelines for the Implementation of the World Heritage Convention' (12 July 2017), available at http://whc.unesco.org/en/guidelines/ accessed 18 February 2018. Hereinafter, Operational Guidelines.
[707] Article 1 of the World Heritage Convention clarifies what can be considered as 'cultural heritage'.
[708] The characterisation of 'natural heritage' is provided by Article 2 of the World Heritage Convention. Nevertheless, Birnie *et al* highlight the 'cultural bias of the List' since the number of cultural sites outweighs that of natural sites listed. Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 679.
[709] On this point refer to Dupuy and Viñuales, *Int. Environ. Law*, *cit.*, (n 286) 178; Birnie, Boyle and Redgwell, *International Law and the Environment*, *cit.*, (n 6) 678. See also the Operational Guidelines that, at paragraph 48, exclude the possibility to list movable heritage.
[710] In this regard see Bowman, 'Environmental Protection and the Concept of Common Concern of Mankind', *cit.*, (n 194) 504; Brunnée, 'Common Areas, Common Heritage and Common Concern', *cit.*, (n 99) 565. Arguably, the World Heritage Convention website confirms this interpretation by stating 'Heritage is our legacy from the past, what we live with today, and what we pass on to future generations. Our cultural and natural heritage are both irreplaceable sources of life and inspiration. Places as unique and diverse as the wilds of East Africa's Serengeti, the Pyramids of Egypt, the Great Barrier Reef in Australia and the Baroque cathedrals of Latin America make up our world's heritage. What makes the concept of World Heritage exceptional is its universal application. *World Heritage sites belong to all the peoples of the world, irrespective of the territory on which they are located*'. Available at http://whc.unesco.org/en/about/ accessed 20 February 2018. (emphasis added)
[711] For further details on the common heritage regime see *supra* Chapter 2, Section 2.5.

emerges, *in primis*, from the definition of 'outstanding universal value', which is not included in the Convention text, but clarified in the Operational Guidelines as 'cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity'.[712] Arguably, the reference to future generations represents a strong hook for the common concern argument.[713] Moreover, the outstanding universal value triggers cooperation in the international community for the protection of those sites included in the World Heritage List as additional to actions taken by the States where the sites are located.[714]

Since cooperation is crucial for the successful implementation of this Convention, both the concerned States – where the sites are located – and the international community as a whole are bound to protect World Heritage sites by specific provisions. In particular, each State Party is responsible for identifying and delineating the cultural and natural heritage located on its territory,[715] but their listing is subjected to the approval of the World Heritage Committee.[716] Article 4 requires each State Party to ensure the identification, conservation, protection and transmission to future generations of the cultural and natural heritage on its territory. To this end, measures have to be taken both at the national and site levels.[717]

According to Article 6, the international community has the duty to cooperate for the protection of World Heritage by fully respecting the sovereignty of the State on whose territory the cultural and natural heritage is located and without prejudicing property rights as provided

[712] Operational Guidelines, paragraph 49. While the criteria useful at assessing the outstanding universal value of a property are identified in paragraph 77.
[713] In this regard refer to Chapter 2 Section 2.5 on common concern regimes and Section 2.9 on future generations.
[714] More precisely, the Preamble calls for the 'collective assistance' of the international community to the concerned State and calls for the establishment of 'an effective system of collective protection of the cultural and natural heritage'.
[715] World Heritage Convention, Article 3. Differently from the Ramsar Convention, which requires the listing of at least one wetland of international importance upon ratification, the World Heritage Convention does not pose any similar condition. In this respect see Maffei, 'La Protezione Delle Specie, Degli Habitat e Della Biodiversità', *cit.*, (n 291) 276.
[716] Article 8 deals with the establishment of the 'Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Value', better known as the World Heritage Committee. While Article 11 describes the functions of this Committee, especially in relation to the 'List of World Heritage' and the 'List of World Heritage in Danger'. Article 11(4) clarifies that the latter list includes sites threatened by 'serious and specific dangers' and 'for the conservation of which major operations are necessary and for which assistance has been requested under this Convention'.
[717] World Heritage Convention, Article 5.

by national legislation. Such cooperation has both positive and negative components: on the one hand, State Parties should assist concerned States in identifying, protecting, conserving and presenting cultural and natural heritage, if so required;[718] on the other, they have to refrain from any action that could directly or indirectly damage the heritage.[719] Article 7 reinforces the cooperative approach by clarifying that the international protection of the world's cultural and natural heritage entails the establishment of a system of international cooperation and assistance aimed at supporting State Parties in conserving and identifying such heritage. It can be argued that both Articles 6 and 7 extend the duty of cooperation beyond States to other actors operating at the international level, but also having a connection – physical, geographical, cultural, economic, environmental, etc. – with the heritage protected under the Convention.[720]

This interpretation can be confirmed by the advisory role awarded to specific organisations[721] in the framework of the World Heritage Committee, which can invite public and private organisations or individuals to its meetings to consult them on specific issues.[722] This kind of support is foreseen not only in the deliberative phase, but also in the practical implementation of programmes and projects developed for the protection of World Heritage in the framework of this Convention.[723] Such extended cooperation is in line with the emergence of new actors in the field of international environmental law, especially through the international environmental conferences and their outcome documents.[724] Moreover, this collective responsibility has a strong practical component in the case of protecting world

[718] World Heritage Convention, Article 6(2).
[719] World Heritage Convention, Article 6(3).
[720] In particular, Article 6(1) specifies that 'it is the duty of the international community as a whole to co-operate'.
[721] According to Article 9(3) of the World Heritage Convention, a representative of the International Centre for the Study of the Preservation and Restoration of Cultural Property (Rome Centre, also known as ICCROM), one of the International Council of Monuments and Sites (ICOMOS), and one of the International Union for conservation of Nature (IUCN) can attend meetings of the World Heritage Committee in an advisory capacity. In this regard see also the Operational Guidelines, paragraphs 30 ff.
[722] World Heritage Convention, Article 10(2).
[723] World Heritage Convention, Article 13(7).
[724] For instance, Principle 27 of the Rio Declaration calls for cooperation in a spirit of global partnership. For further elaboration on this principle refer to Sand, 'Cooperation in a Spirit of Global Partnership', *cit.*, (n 254). See also Chapter 2 Section 2.5. Agenda 21 promotes the role of major groups in achieving environmental goals as well. See Chapter 2 Section 2.2.2.

cultural and natural heritage given the negative impact that certain activities[725] or omissions[726] can have on their conservation. In this sense, the polluter pays principle or emerging international standards for international civil liability and corporate environmental accountability can be effective deterrent against private actors.[727] This cooperative approach can be interpreted in an extensive way as covering any cultural and natural heritage of outstanding universal value regardless of its inclusion in the World Heritage List or the List of World Heritage in Danger.[728]

Furthermore, cooperation is essential in the case of Transboundary World Heritage Sites, for which a joint nomination procedure in line with Article 11(3) and the establishment of a joint management committee for effective and coordinated management is recommended.[729] As of February 2018, there are 37 transboundary properties: nineteen are cultural, sixteen are natural, and two sites have a mixed character.[730] In addition, there are another sixteen transnational or transboundary sites that are included in the Tentative List,[731] which are new sites or extensions of already listed sites across borders.[732]

While the duty of cooperation permeates the World Heritage regime and emerges directly from the Convention text – also in its extensive interpretation – the participatory approach does not find space.[733] A participatory approach has however been developed in the Operational

[725] Like in the case of unsustainable tourism patterns, pollution, or hazardous industrial activities.
[726] For example, the absence of restoration measures for the maintenance of monuments, or the lack of adaptive and mitigating actions to counteract climate change effects.
[727] In this regard see Morgera, *Corporate Accountability in International Environmental Law*, *cit.*, (n 139).
[728] World Heritage Convention, Article 12. In this sense see Dupuy and Viñuales, *Int. Environ. Law*, *cit.*, (n 286) 180. As for the List of World Heritage in Danger, it is worth noting that, while the inclusion in the World Heritage List must proceed with the consent of the State(s) where the site is located; the World Heritage Committee can proceed to including a site in the List of World Heritage in Danger without such a consent in conformity with Article 11(4), even if consultation should be carried out in order to avoid tensions with the concerned State(s). In this regard see ibid.
[729] Transboundary properties are regulated by the Operational Guidelines, paragraphs 134-136.
[730] Further information available at the World Heritage Convention dedicated webpage http://whc.unesco.org/en/list/?&transboundary=1 accessed 16 November 2018. It is worth noting that only one of these transboundary sites is also listed as in danger.
[731] This is 'an inventory of those properties situated on its territory which each State Party considers suitable for nomination to the World Heritage List' as provided by the Operational Guidelines, paragraph 62.
[732] The Tentative List of transnational or transboundary sites is available at http://whc.unesco.org/en/tentativelists/?action=listtentative&pattern=&state=&theme=&criteria_restrication=&transboundary transnational=1&date_start=&date_end=&order= accessed 16 November 2018.
[733] Possibly, the only indirect reference to the interests of local stakeholders can be derived from Article 5(a) of the World Heritage Convention when affirming that State Parties should adopt a national policy which enhances the function of the

Guidelines and recognised as essential in the identification, nomination and actual protection of World Heritage sites. Local and regional governments, and local communities – which can be interpreted as encompassing indigenous peoples – are specifically mentioned among the relevant stakeholders to be involved for the successful conservation of these sites.[734] Their role is reiterated at each step: in the preparation of the Tentative List,[735] in the preparation of the nomination process,[736] in the protection, conservation and sustainable use of World Heritage sites.[737] In particular, a 2011 Decision of the World Heritage Committee reiterates that State Parties to the World Heritage Convention have specific obligations: they are encouraged to involve indigenous peoples and local communities in decision-making, monitoring and evaluation of the state of conservation of World Heritage sites, and are to respect the rights of indigenous peoples when nominating, managing and reporting on World Heritage sites in the territories of these communities.[738] The traditional connection between a site and local communities, generally speaking, is also identified among the criteria useful in assessing the outstanding universal value of the sites considered.[739] Arguably, these participatory conditions established in the Operational Guidelines apply to both national and transnational/transboundary sites since no distinction or restriction is provided in this sense.

cultural and natural heritage in the life of the community. This is particularly important when these sites have a traditional value for the relevant communities.

[734] Operational Guidelines, paragraph 12. In this regard, Marsden notes that '[c]learly, there is a need for those most affected by these decisions, the traditional owners of the land, to be directly involved in these fundamental determinations'. Simon Marsden, 'The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?' (2015) VI The Yearbook of Polar Law 226, 233.

[735] Operational Guidelines, paragraph 64.

[736] Operational Guidelines, paragraph 123. In this instance, it is specified that the free, prior and informed consent should be obtained by several measures, like making the nominations publicly available in appropriate language and holding public consultations and hearings.

[737] Operational Guidelines, paragraphs 40, 119 and 211. Moreover, paragraph 110 adds that that management systems vary according to cultural perspectives, resources available and other factors, and can incorporate traditional practices.

[738] Decision 35 COM 12 E (2011), 'Global state of conservation challenges of World Heritage Properties', paragraphs 15(e) and (f). Available at http://whc.unesco.org/en/decisions/4406 accessed 20 February 2018.

[739] In particular, see criteria (iii), (v) and (vi) in the Operational Guidelines, paragraph 77. For instance, information relating to traditional knowledge provided by indigenous and local communities are relevant for evaluating the authenticity of cultural heritage and are collected to this end. The use of different information sources is foreseen in the Operational Guidelines, paragraph 84. See Marsden, 'The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?', *cit.*, (n 734) 234.

Green maintains that one of the main benefits deriving from World Heritage status is that 'people living in or close to the protected sites have the possibility of enjoying a stronger position vis-à-vis national and regional authorities, a position that they often have not had before', thus providing 'the shared collective responsibility of the inscribed property and the direct link between the local and the global arenas'.[740] Moreover, it enables 'new *trans-local* connections occurring between different World Heritage sites, and between specific groups within different World Heritage sites', as in the case of Laponia, Australia, and New Zealand.[741]

Nevertheless, it has been noted that the participation of indigenous communities is still understated in the Operational Guidelines and in the actual implementation of the World Heritage Convention, and should be advanced to ensure consistency with international human rights norms, in particular the UN Declaration on the Rights of Indigenous Peoples, and international participatory standards such as those provided in the Aarhus Convention.[742] This rationale could be extended to the participation of local communities more generally, regardless of their specific constituency, and is also relevant in transboundary contexts, as shown by Marsden in the case of the Laponian Area.[743] This latter case deserves a more detailed analysis to illustrate the functionality of the concept of decentralised international cooperation in the framework of the World Heritage regime.

The Laponian Area in northern Sweden was included in the List in 1996 as a mixed property.[744] The area has been inhabited for 6,000-7,000 years and is the home of the Saami people who practice pastoral transhumance. This is an ancestral way of life consisting in seasonal movement of livestock – reindeer herds in this case – which was common throughout

[740] Carina Green, *Manging Laponia: A World Heritage Site as Arena for Sami Ethno-Politics in Sweden*, vol 47 (Acta Universitatis Upsaliensis 2009) 84.
[741] ibid.
[742] On this point refer to Simon Marsden, 'The World Heritage Convention: Compliance, Public Participation and the Rights of Indigenous People' (2015) 32 Environmental and Planning Law Journal 534; Marsden, 'The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?', *cit.*, (n 734) 245–248. In this regard see also Chapter 2 Section 2.8 ff.
[743] Marsden, 'The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?', *cit.*, (n 734).
[744] A detailed description of this World Heritage site is available http://whc.unesco.org/en/list/774 at accessed 20 February 2018. This description constitutes the main source for the information provided in this Section.

the northern hemisphere, but survived in only a few areas of the world. Moreover, the Laponian area contains all processes associated with glacial activity and records the interaction between the Saami culture and the surrounding environment characterised by natural elements of outstanding beauty. The property is almost entirely State-owned and legally protected to ensure a strict level of wilderness protection without compromising the rights of the native people. In fact, although its integrity is challenged by reindeer husbandry, this practice is guaranteed to the Saami together with other traditional rights relating to pasture, felling, fishing, hunting and the introduction of dogs into protected areas. Other problems derive from overstocking practices and the shift towards modern technologies, thus reflecting the antagonism between the two protection purposes (culture and nature).[745]

In 2011 an *ad hoc* organisation[746] was created for the joint management of the property. It includes representatives from all concerned parties, in particular to ensure that Saami people are directly involved in decision-making at all stages.[747] This is a non-profit, locally based association called 'Laponiatjuottjudus Association' and has a Saami majority. It includes representatives from two municipalities, nine Saami communities, the Norrbotten County Administrative Board (a government authority)[748] and the Swedish Environmental Protection Agency, which is responsible for natural heritage. Hence, this association includes representatives from indigenous/local communities, local governments and governmental authorities. In addition, a regulatory framework focusing on local development and a management plan for the entire area have been adopted.

[745] On this point see Ween cited in Marsden, 'The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?', *cit.*, (n 734) 244.
[746] For further information on the establishment of this association see Green, *Manging Laponia: A World Heritage Site as Arena for Sami Ethno-Politics in Sweden*, *cit.*, (n 740) 207 ff.
[747] This process has been praised by the UN Special Rapporteur on the Rights of Indigenous Peoples as a positive example, as reported by Marsden, 'The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?', *cit.*, (n 734) 247.
[748] For further information visit http://www.lansstyrelsen.se/Norrbotten/En/Pages/default.aspx accessed 20 February 2018.

The Swedish Laponian Area World Heritage Site could be extended across the border to Norway by adjoining the Tysfjord/Hellemo fjord landscape that is home to the Lule Sami population, a minority among the Norwegian Sami people with close relations across the border given their Sweden origin.[749] Such an extension would lead to the creation of a transboundary property and (re)connect the Saami communities across the borders. The Tysfjord/Hellemo fjord landscape has been included on the Norwegian Tentative List since 2002, but, according to Marsden, any attempt to advance with the World Heritage nomination process has been resisted by the Lule Sami, who are concerned that the establishment of a national park in this area would prioritise nature conservation over reindeer herding as a traditional industry.[750]

Notwithstanding the fact that a Swedish-Norwegian transboundary World Heritage site in the Laponian Area does not exist at the time of writing, the prospect of establishing such a property provides the opportunity to argue for the application of the concept of decentralised international cooperation within the framework of the World Heritage regime. In fact, the establishment of a transboundary property would require the creation of a joint management body and the elaboration of a joint management plan with the direct involvement of the Lule Sami, similarly to the Swedish case. The membership of the 'Laponiatjuottjudus Association' could be opened up to representatives of all relevant Norwegian stakeholders, thus building on an existing institutional structure, which would work as a decentralised cooperative mechanism. The 'direct link between the local and the global arenas', praised by Green,[751] would acquire a new localised transnational dimension and facilitate the emergence of local communities, generally speaking, and local governments at the international level. Their direct involvement would also strengthen, where relevant, the application of traditional practices in the conservation and sustainable use of natural resources. As this example shows, the concept of

[749] Further information available at http://whc.unesco.org/en/tentativelists/1750/ accessed 20 February 2018.
[750] Marsden, 'The World Heritage Convention in the Arctic and Indigenous People: Time to Reform?', *cit.*, (n 734) 243–244.)
[751] Green, *Manging Laponia: A World Heritage Site as Arena for Sami Ethno-Politics in Sweden*, *cit.*, (n 740) 84.

decentralised international cooperation can be not only envisioned, but also applied in the context of the World Heritage Convention.

3.6 Conservation initiatives: protected areas[752] and biosphere reserves

Since the beginning of the Twentieth Century, the protection of endangered wildlife and ecologically important areas has been ensured through the creation of conservation-dedicated areas such as nature reserves, national parks, strict wilderness reserves and other similar protective measures. Since the 1960s, protected areas have been increasingly used as an effective tool to enhance nature and biodiversity conservation in terrestrial and marine areas of ecological significance.

There is no specific regime dedicated to protected areas, but there are several global and regional treaties related to environmental conservation that are relevant, including the Biodiversity Convention, the World Heritage Convention, and the Ramsar Convention, already described in previous sections.[753] In addition, international organisations including the IUCN have played a primary role in advancing the conceptual development and practice of (transboundary) protected areas.[754]

As already noted, the Biodiversity Convention defines a protected area as 'a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives'[755] and identifies it as the primary measure to ensure *in situ* conservation.[756] The IUCN has built on this definition by providing that '[a] protected area is a clearly defined geographical space recognized, dedicated and managed, through legal and other effective

[752] This conservation framework has been already introduced and partially discussed in previous sections of this thesis, primarily in Chapter 2 in Sections 2.8.1 and 2.8.2. The present Section aims to complement what has been already said by providing a more comprehensive view of the protected area regime.
[753] In this regard refer to Chapter 3. Lausche offers a detailed overview of the global and regional conventions as well as international policy and guidance documents useful to this end. See Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 47–73.
[754] For this reason, IUCN publications on protected areas constitute the backbone of the present section.
[755] Biodiversity Convention, Article 2. It is worth clarifying that the CBD COP has elaborated on this definition, provided guidelines and established activities aimed to foster the establishment and effective functioning of protected areas.
[756] Biodiversity Convention, Article 8(a).

means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'.[757] Hence, it clarifies the unlimited temporal scope of conservation objectives, foresees the formalisation of this commitment through legal or other effective means, and recognises both the ecological and cultural benefits connected to nature conservation.[758]

The concept of protected areas has evolved over time. They were originally intended as conservation 'fortresses', but since the World Commission on Environment and Development elaborated the concept of sustainable development (1987), conservation has acquired a people-oriented connotation and protected areas were meant to encompass strict nature reserves as well as sustainable resource use areas, thus pursuing socio-economic and conservation objectives at the same time.[759] This understanding is reflected in the management and governance principles identified as necessary to ensure successful long-term results.

First of all, protected areas need to be integrated within the surrounding environment and linked to each other via the development of an appropriate *system plan*. This large-scale perspective enables the adoption of an *ecosystem approach*, which requires the integrated management of natural resources (land, water and living resources) and recognises the benefits of conservation in terms of ecologically functioning spaces – both terrestrial and marine – regardless of national boundaries. In this context, *buffer zones* and *connectivity corridors* ensure the achievement of conservation objectives that spatially expand the benefits of conservation projects, maintain the viability of ecological processes and species habitats, and mitigate the impact of human activities on core conservation areas.[760] Although the priority goal is nature conservation, each protected area has its own objectives that should guide site-specific planning

[757] Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 8.
[758] A detailed explanation of the terms used in this definition is provided by Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 13. She further clarifies that this definition applies to protected areas 'across biomes, ownership and governance types, motivations, management objectives, and jurisdictional levels' and includes 'sacred sites and areas voluntarily conserved by communities and indigenous or traditional peoples' as well as the core zones of biosphere reserves under the UNESCO MAB Programme. ibid 14.
[759] In this regard see Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 16–17.
[760] For further details refer to ibid 19–25.

and actions.[761] In this context, *protected area management categories* provide a reference framework useful to translate conservation objectives into management actions. In fact, the IUCN elaborated these categories based on different management objectives and advanced their conceptualisation in 2008 by providing guidelines for their application.[762] The CBD COP has formally recognised the importance of these categories by highlighting 'the value of a single international classification system for protected areas and the benefit of providing information that is comparable across countries and regions'.[763] Moreover, the IUCN categories are being used to shape national protected areas law and policy.[764]

There are six IUCN protected areas categories as reported in the figure below adapted from Lausche.

Category	Definition by management objectives
Category I a: Strict nature reserve	Strictly protected areas set aside to protect biodiversity and also possibly geological or landform features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of conservation values. Such protected areas may serve as indispensable reference areas for scientific research and monitoring.
Category I b: Wilderness area	Protected areas are usually large unmodified or slightly modified areas, retaining their natural character and influence without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition.
Category II: National park	Protected areas are large natural or near-natural areas, set aside to protect large-scale ecological processes along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible spiritual, scientific, educational, recreational and visitor opportunities.
Category III: Natural monument or feature	Protected areas are set aside to protect a specific natural monument, which can be a landform, sea mount, submarine cavern, geological feature such as a cave or even a living feature such as an ancient grove. They are generally quite small protected areas and often have high visitor value.
Category IV: Habitat/ species management area	Protected areas aim to protect particular species or habitats, and management reflects this priority. Many category IV protected areas will need regular, active interventions to address the requirements of particular species or to maintain habitats, but this is not a requirement of the category.
Category V: Protected landscape/ seascape	A protected area where the interaction of people and nature over time has produced an area of distinct character with significant ecological, biological, cultural and scenic value, and where safeguarding the integrity of this interaction is vital to protecting and sustaining the area and its associated nature conservation and other values.
Category VI: Protected area with sustainable use of natural resources	Protected areas that conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area.

Figure 1: IUCN protected areas categories[765]

[761] ibid 25.
[762] To consult these guidelines see Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31).
[763] CBD COP Decision VII/28, *cit*., paragraph 31.
[764] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 26.
[765] See ibid 27. For a detailed overview of the IUCN protected areas categories refer to Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 13–23.

Each protected area should be covered by a *management plan* based on its specific conservation objectives; this plan should be feasible and flexible in order to *adapt* to day-to-day needs and unplanned circumstances, but also to respond to more gradual environmental changes caused by human or natural factors, including climate change.[766] The establishment and management of a protected area should also be guided by the *precautionary approach*,[767] address issues relating to *invasive alien species*[768] and *climate change*,[769] and rely on *regional and international cooperation* in order to enhance transboundary ecological processes such as species migration or the control of invasive alien species, thus strengthening biodiversity conservation at the global level.[770]

Decision-making and management in protected areas should be performed in accordance with *good governance principles*[771] to ensure that the general public and interested stakeholders can *access* relevant *information* and *effectively participate* at all stages of the process,[772] in line with the principles of *social equity and justice*.[773] Indeed, the concept of governance has a twofold interpretation: on the one hand, it refers to the process of decision making and the quality of governance, while, on the other hand, it relates to who makes decisions and is responsible for the overall management of a protected area.[774] This latter aspect is reflected in the governance approaches, which IUCN has grouped into four main types:[775]

(A) Governance by government (at federal/State/sub-national or municipal level)

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[766] To learn about the key elements for developing a management plan and explore further the concept of adaptive management refer to Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 29–33.
[767] ibid 33–34.
[768] ibid 34–36.
[769] ibid 37–39.
[770] ibid 39.
[771] Lausche lists nine principles for good governance in protected areas, namely: legitimacy and voice; subsidiarity; fairness; do no harm; direction; performance; accountability; transparency; and human rights. See ibid 43.
[772] ibid 43–46. In this regard see also Chapter 2 Section 2.8.1.
[773] For Lausche social equity and justice entails that those stakeholders that hold or claim rights over land, sea or resources 'should be respected and engaged in protected area design, establishment and management, and should have legal recourses if their rights are violated'. Moreover, there should be a 'fair and equitable distribution of costs and benefits among the social groups and individuals involved in or affected by' protected areas. ibid 47–48.
[774] ibid 75.
[775] For further details see Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 26 ff.; Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 77 ff.

(B) Shared governance

(C) Private governance

(D) Governance by indigenous and local communities

Type A is the classic approach which includes State-owned and State-controlled protected areas. However, Dudley explains that not only government bodies, but also sub-national and municipal jurisdictions can be in charge of managing the protected area and performing all the activities connected to it.[776] Type B results from the collaboration of multiple stakeholders and the integration of different cooperative mechanisms that range from consultative agreements to co-management; it may also be given the result of any combination of the other three governance approaches. It is a complex though flexible approach in which the balance of power is determined by who possesses substantive decision-making authority.[777] Types C and D are new typologies of governance, both identifiable as voluntary conserved areas. Nevertheless, many of these sites do not qualify as formal protected areas as they do not meet the required definition and legal standards,[778] especially in the case of ICCAs that correspond to Type D. ICCAs are further articulated in two sub-sets: (1) indigenous peoples' areas established and run by indigenous peoples; and (2) community conserved areas established and run by other local communities.[779] The key element of ICCAs, as for any Type D protected area, is that 'the management authority and responsibility rest with indigenous peoples and/or local communities through various forms of customary or legal, formal or informal, institutions and rules'[780]

[776] Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 26.
[777] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 90.
[778] Lausche explains 'While there is no single approach to voluntary conservation, some legal considerations are common across all such initiatives when they are being considered for recognition as part of the formal protected areas system. These relate to ensuring, first, that the site meets the definition and standards to qualify as a protected area that is part of the formal system. Other important legal considerations involve preserving the primary conservation objectives of a site once it is included in the protected areas system, creating certainty as to the basic rights and responsibilities of all Parties by formal agreement, identifying indicators to measure performance and accountability, providing for scientific monitoring, and including mechanisms to rectify breach of concluded agreements or malfeasance'. ibid 80.
[779] ibid 81. ICCAs are also discussed in the framework of the Biodiversity Convention and its PoWPA. See *supra* Section 3.3.3.
[780] See Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 26. Also reported in Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 84.

The four governance types are not meant to be fixed or exclusive since 'governance is dynamic and site-specific' and can adapt to new biophysical and social conditions.[781] Hence, specific governance arrangements can build on several of these types, but have to be shaped by the legal/customary, socio-economic, and ecological factors characterising the relevant protected area.[782] Such flexibility responds to the concept of decentralised international cooperation over transboundary natural resources that is meant to provide governance solutions – i.e., decentralised cooperative mechanisms – tailored to the cross-border localised resources/spaces and needs considered. In this sense, the value of combining different governance approaches is evident in the case of TBPAs.

3.6.1 Governing shared resources through transboundary protected areas

Cross-border cooperation over transboundary natural resources is not automatically connected to specific institutional and normative frameworks; rather, it can acquire a multiplicity of forms with different degrees of formality and institutional complexity. Regardless of the resource considered, however, there are a few elements that are common to many existing regimes.[783] First, a specific ecological unit is identified as the main focus of cooperation (e.g., a water basin, a mountain chain, or a migratory species). Second, an integrated approach is adopted not only in ecological terms – under the guise of the ecosystem approach – but also for political reasons, to reconcile competing demands and interests among sharing States. Third, the creation of joint management and monitoring mechanisms and institutions provides the opportunity to make

[781] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 78.
[782] For this reason, Paterson is critical on the practical applicability of the IUCN governance typology given that protected area governance is so varied that any attempt of categorising it is extremely challenging. Paterson, 'Protected Areas Governance in a Southern African Transfrontier Context', *cit.*, (n 30).
[783] For instance, Lim identifies twelve criteria useful to shape an effective governance framework for transboundary resources management, while Sánchez Castillo singles out four basic principles regulating inter-State relations when sharing natural resources. Shelton derives common features from the holistic management of large transboundary ecosystems, such as the polar regions, mountain ecosystems, coastal and marine ecosystems. See, respectively, Michelle Lim, 'Is Water Different from Biodiversity? Governance Criteria for the Effective Management of Transboundary Resources' (2014) 23 Review of European, Comparative & International Environmental Law 96; Sánchez Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers', *cit.*, (n 37); Shelton, 'International Cooperation on Shared Natural Resources', *cit.*, (n 37).

cooperation effective and put it into practice. TBPAs have provided such a scheme and have been increasingly used to structure intergovernmental conservation efforts.

TBPAs are usually created by adjoining existing national (terrestrial and marine) protected areas across international borders.[784] They can be used for different purposes: from shaping intergovernmental cooperation to attaining peace objectives (peace parks) and reconnecting communities divided by externally imposed political boundaries. They have the potential to include different natural spaces and interconnected ecosystems that have to be governed through the integrated management of natural resources and the ecosystem approach, as in the case of water basins, forests, wetlands, and mountain ranges.

TBPAs are flexible schemes since, by construction, they result from the combination of multiple legal frameworks and different governance regimes. In fact, they are subject to integrated legal frameworks that range from international conventions and negotiated agreements (bilateral or multilateral), to law and regulations applicable at the national and sub-national levels, to traditional law or customs. Moreover, the multidimensional character of cooperation in TBPAs is further advanced by the need to consider international conventions and programmes that contribute to the attainment of conservation objectives, as noted for protected areas more generally.

On the governance aspect, Dudley confirms that '[o]ne particular form of shared governance relates to transboundary protected areas, which involve at least two or more governments and possibly other local actors'.[785] Decentralised forms of governance, shared responsibility and the involvement of local communities[786] make nature conservation more sustainable and long-lasting. However, it is crucial to establish common objectives that are

[784] TBPAs can also consist in a cluster of protected areas and the intervening land; a cluster of separated protected areas without intervening land; a transborder area including proposed protected areas; a protected area in one country aided by sympathetic use over the border. On this point see Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 269.
[785] Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 26.
[786] The involvement of local communities in the governance of protected areas has been already discussed in Chapter 2 Section 2.8.1.

achievable since '[w]orking across national borders poses an additional layer of complexity in terms of establishing co-management arrangements. As such, informal transboundary agreements can often be more effective and much easier to achieve'.[787]

Despite the extensive use of cross-border conservation efforts labelled as TBPAs, there is no single internationally accepted typology. Rather they fit different approaches and arrangements. In 2007, the latest inventory performed by the United Nations Environment Programme (UNEP) World Conservation Monitoring Centre (WCMC) identified 227 TBPA complexes that include both sites in which cooperative efforts have been developed and formally recognised, fitting the 1994 IUCN definition of protected areas,[788] and other 'geo-referenced entities' which could potentially evolve into proper TBPAs.[789] Notwithstanding their differences, there are a few key management principles that apply to all TBPA experiences and have to be considered when concluding a transboundary cooperative agreement or other legal/administrative arrangements to this purpose. In particular:

(1) TBPAs should fit the general IUCN definition of protected areas and be characterised in accordance with the IUCN system of protected areas management categories;

(2) the existence of a transboundary resource recognised as a 'common natural value' fosters cooperation in its management and that of the surrounding/functional area;[790]

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[787] Maja Vasilijević, 'Transboundary Conservation: An Emerging Concept in Environmental Governance' in Boris Erg, Maja Vasilijević and Mattew McKinney (eds), *Initiating effective transboundary conservation: A practitioner's guideline based on the experience from the Dinaric Arc* (IUCN 2012) 7.

[788] The 1994 definition of a TBPA reads as follows: 'an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means'; however, it has been updated in 2008. IUCN CNPPA with the assistance of the WCMC, *Guidelines for Protected Area Management Categories* (IUCN 1994).

[789] Lausche explains: 'To qualify for inclusion in the UNEP-WCMC 2007 list, the protected area had to: (a) conform to the IUCN definition of a protected area (IUCN, 1994) and be designated either under national legislation or international or regional conventions or initiatives such as the Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) (1972), and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Man and the Biosphere (MAB) Programme; (b) be included in the WDPA [World Database on Protected Areas] as a geo-referenced entity; and [1] be adjacent to an international boundary and adjacent to a protected area in a neighbouring country, or [2] be directly adjacent to, or overlap partially or entirely with, an area qualifying under (a), or [3] be contained within an area qualifying under (b). In addition, for the 2007 inventory, a number of non-adjacent pairs or groups of sites that had been identified in earlier years but not yet geo-referenced were re-evaluated on a case-by-case basis. These sites were added if they qualified'. Lausche, *Guidelines for Protected Areas Legislation, cit.*, (n 30) 267.

[790] This is the case of the Agreement on the Conservation of Gorillas and their Habitats [(Paris) 26 October 2007, in force 1 June 2008, ECOLEX TRE-144926] developed under the framework of the Convention on Migratory Species and dedicated to conserving transboundary gorilla populations and their habitats across all ten Range States in the Central Africa. Improving habitat protection and corridor development is among the objectives foreseen in the Action Plans; successful conservation

(3) ecosystem maintenance and connectivity are enhanced in larger contiguous TBPAs through the adoption of the ecosystem approach;

(4) adjoining protected areas placed on either side of the border between countries is the easiest approach for the establishment of a TBPA;

(5) coordinating conservation objectives and any activity implemented across the borders through early integrated planning prevents the risk of fragmented unilateral interventions;

(6) reuniting communities that have been artificially divided by political borders has direct benefits for the joint management of the shared ecosystem, especially where those people are highly dependent on it;

(7) engaging with local communities located in TBPAs and ensuring their participation in decision-making and management of the area enhances their livelihoods, but also conservation efforts through the application of traditional management practices;

(8) TBPAs contribute to biodiversity conservation at the global scale in response to the increasing challenges posed by climate change and other environmental threats;

(9) the harmonisation of national legal frameworks for protected areas as well as the circulation and adoption of sound management programmes across countries facilitates cooperation in TBPAs.[791]

Initially, a TBPA was considered as a special type of protected area, and defined accordingly as:

> 'an area of land and/or sea that straddles one or more boundaries between States, sub-national units such as provinces and regions, autonomous areas and/or areas beyond the limits of national sovereignty or jurisdiction [i.e. high seas], whose constituent parts are especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resource, and *managed cooperatively through legal or other effective means'*.[792]

measures dedicated to its achievement are indirectly reinforcing the protection of other species of animals and plants which share the same habitat. Moreover, joint conservation efforts implemented by Rwanda, Uganda and DRC have a beneficial impact on their relations and might lead to the establishment of a regional cooperation framework, including through the creation of a transfrontier park. Further information available at http://www.cms.int/gorilla/en accessed 17 March 2018.

[791] For further details on these key management principles see Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 270–271.

[792] Sandwith and others, *Transboundary Protected Areas for Peace and Co-Operation*, *cit.*, (n 449) 3. (emphasis added) According to the IUCN definition, *cooperative management* is the qualifying element for the existence of a TBPA, while other

This definition was reviewed in 2015 and a TBPA is now conceived as:

> 'a clearly defined geographical space that includes protected areas that are ecologically connected across one or more international boundaries and involve some form of cooperation'.[793]

Although this latter version adds valuable elements, it has some shortcomings in relation to the research problem addressed in this thesis. On the bright side, attention is paid to ecological links extending across borders, and connecting areas regardless of their contiguity responds to ecological and ecosystem dynamics rather than merely reflecting (potentially inappropriate) land use planning in adjoining countries. Such an approach enables the creation of a TBPA even where areas are not formally protected and/or are subject to different land uses. Moreover, by explicitly including protected areas in the text, it is possible to refer to the new definition[794] without the need of redundant repetition. Therefore, pursuing long-term conservation objectives, ensuring the provision of ecosystem services, and preserving the cultural values connected to the shared natural spaces emerge as implicit TBPA purposes.

The 2015 definition of TBPAs seems to depart from the previous one (as well as from that of protected areas) by referring to 'some form of cooperation' instead of requiring 'legal or other effective means' to make cooperation explicit. In reality, both expressions convey the same message: that cooperative processes can be modelled differently depending on context, and vary over time. In addition, the 2015 definition highlights that the foundational element is

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definitions do not find it essential. Vasilijević stresses on this difference by mentioning the definitions adopted by EUROPARC and that used by the Peace Parks Foundation of South Africa. The former is the one included in the Protocol on Conservation and Sustainable Use of Biological and Landscape Diversity to the Framework Convention on the Protection and Sustainable Development of the Carpathians. It affirms that a TBPA 'is an area composed of two or more protected areas located within the territories of two or more Parties, adjacent to the State border, each remaining under the jurisdiction of respective Party'. The latter is contained in the SADC Protocol on Wildlife Conservation and Law Enforcement of 1999 and defines a Transfrontier Conservation Area (TFCA) or a Peace Park as 'the area or component of a large ecological region that straddles the boundaries of two or more countries, encompassing one or more protected areas as well as multiple resource use areas'. See Vasilijević, 'Transboundary Conservation: An Emerging Concept in Environmental Governance', *cit.*, (n 787) 9–10. For further details on EUROPARC Federation and on the Peace Park Foundation visit their websites http://www.europarc.org/ and http://www.peaceparks.org/ respectively.

[793] Vasilijević and others, *Transboundary Conservation: A Systematic and Integrated Approach*, *cit.*, (n 443) 8. Hereinafter, IUCN 2015 Guidelines.

[794] In 2008, IUCN adopted a new definition of a protected area that is 'a clearly defined geographical space, recognised, dedicated and managed through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'. Dudley, *Guidelines for Applying Protected Area Management Categories*, *cit.*, (n 31) 8.

the will to connect and work together regardless of the degree of formality through which this is expressed.

The 2015 definition is simplified, and hence more inclusive than that of 2001. However, by only mentioning cooperation at the international level – i.e., across boundaries between sovereign States – it excludes instances of cooperation across boundaries between sovereign States and involving intermediate jurisdictions or local communities that pursue joint conservation objectives with limited participation of central governments,[795] labelled here as decentralised international cooperation. This decision has several consequences: first, it seems to recognise intergovernmental cooperation as the unique viable option in accordance with a traditional international law approach. In this sense, the 2015 definition seems to consider governmental authorities as the only valuable actors at the international level and, consequently, to deny the possibility that transboundary cooperative experiences generated at non-State level acquire a formalised structure. Second, the 2015 definition does not acknowledge the existence of transboundary cooperation involving sub-national actors, which is already formalised in some regions of the world, as is the case of the EGTC in the EU. Third, the 2015 definition seems to miss the point that a focus on international boundaries does not automatically exclude the involvement of sub-national components of the countries sharing transboundary natural resources. Although it is true that 'working across international boundaries is qualitatively different from working at sub-national level'[796] – i.e., within countries – decentralised international cooperation is not qualitatively different from traditional international cooperation at the intergovernmental level: both dynamics develop across boundaries between sovereign States.

[795] This restrictive view is confirmed in several paragraphs of the 2015 book on transboundary cooperation, for instance, see Vasilijević and others, *Transboundary Conservation: A Systematic and Integrated Approach*, *cit.*, (n 443) 7, 8, 9.
[796] ibid 7.

To exemplify this last point, it is useful to refer to the Maritime Alps-Mercantour Park, which is presented as a TBPA in the IUCN 2015 Guidelines.[797] The Maritime Alps-Mercantour is a transboundary natural space shared by France and Italy located in the Italian Region of Piedmont and in the French Region of Provence-Alpes-Côte d'Azur. The long-lasting collaboration between the Italian Parco Naturale Alpi Marittime and the French Parc National du Mercantour has resulted in a TBPA with a joint operative structure: an EGTC created by the two parks and managed through an Integrated Transboundary Plan based on shared decisions taken by the two parks and other relevant territorial actors, such as local authorities and communities.[798]

As this case shows, the characterising element of borderland ecosystems is not the fact that they are shared among two or more countries and divided by international boundaries, but the fact that they constitute unitary natural spaces for the populations inhabiting these areas and the authorities that govern them, regardless of the presence of international borders. Therefore, sub-national boundaries and sub-State actors are not only relevant within countries, but also in transfrontier contexts, and the appropriate conservation and management of borderland ecosystems cannot disregard their role. Sharing States are endowed with formalised instruments to frame their cooperation that are not available to sub-national actors, yet these subjects actually govern and manage transboundary natural resources day-to-day. Therefore, restricting TBPAs to spaces ecologically connected across or politically divided by international boundaries is arguably reductive, if not unrealistic. In TBPAs, cooperation has to be international in its essence, and it has to be cross-border, but it is not limited to

[797] The Maritime Alps-Mercantour Park is included in the IUCN 2015 Guidelines as a case study, see ibid 68.
[798] The EGTC and the Marittime Alps-Mercantour European Park will be further analysed in Chapter 5.

intergovernmental agreements;[799]the role of local communities and decentralised authorities is crucial for the achievement of multiple and coordinated conservation objectives.[800]

Therefore, it can be argued that TBPAs provide a macro-cooperative framework for governing transboundary natural resources that enable decentralised international cooperation. For this reason, they deserve preferential treatment in this thesis.

TBPAs are defined and labelled differently in different regions of the world, for example as TFCAs in the SADC region[801] or transboundary biosphere reserves. It is worth noting that in the case studies selected for this thesis, conservation objectives are pursued through the creation of a TBPA-like framework. In particular, the Alpi Marittime – Mercantour EGTC, also defined as a 'European Park', joins a national park and a regional park across the Italian-Franch border. The ZASNET EGTC encompasses a transboundary biosphere reserve, the Meseta Ibèrica, which has a core conservation area. The SADC case studies deal with two TFCAs, namely, the Great Limpopo and the Kavango Zambezi. Hence, the case studies analysed in this thesis show that decentralised international cooperation can be conceived in any TBPA-like framework.

3.6.2 UNESCO's Man and the Biosphere Programme (MAB)

Conservation initiatives can also be articulated through (transboundary) biosphere reserves. These have supplementary features with respect to protected areas for both their purposes and

[799] Sandwith et al. stress that the transboundary character might be given by the presence of cooperative agreements between neighbouring sub-national jurisdictions (such as regions or provinces). Sandwith and others, *Transboundary Protected Areas for Peace and Co-Operation*, *cit.*, (n 449) 3.

[800] The importance of TBPAs has been praised in transboundary biodiversity conservation literature both focusing on general cooperative criteria and on specific examples. See Sandwith and others, *Transboundary Protected Areas for Peace and Co-Operation*, *cit.*, (n 449). Salit Kark and others, 'Cross-Boundary Collaboration: Key to the Conservation Puzzle' (2015) 12 Current Opinion in Environmental Sustainability 12. Hsiao (n 10). McPherson and Boyer (n 7). Adrian Martin and others, 'Understanding the Co-Existence of Conflict and Cooperation: Transboundary Ecosystem Management in the Virunga Massif' (2011) 48 Journal of Peace Research 621. The CBD PoWPA itself stresses the importance of transboundary conservation and the role of TBPAs. Goal 1.3 of the CBD PoWPA is specifically dedicated to it, for further details visit the dedicated webpage www.cbd.int/protected/pow/learnmore/goal13/ accessed 16 October 2015. However, some projects have been also criticised for being driven by political and economic interests, as in William Wolmer, 'Transboundary Conservation: The Politics of Ecological Integrity in the Great Limpopo Transfrontier Park' (2003) 29 Journal of Southern African Studies 261; Brian King and Sharon Wilcox, 'Peace Parks and Jaguar Trails: Transboundary Conservation in a Globalizing World' (2008) 71 GeoJournal 221.

[801] See *infra* Chapters 6 and 7.

spatial structure.[802] They are defined as 'areas of terrestrial and coastal/marine ecosystems or a combination thereof, which are internationally recognized within the framework of UNESCO's programme on Man and the Biosphere'.[803] Once designated as such, they become part of the World Network of Biosphere Reserves,[804] which, as of November 2018, counts 686 sites in 122 countries, including 20 transboundary sites.[805]

Biosphere reserves need to satisfy three functions – conservation, development, and logistical support[806] – which are spatially reflected in the three interrelated zones that compose each biosphere: the core area(s), the buffer zone(s), and the transition area.[807] The core area(s) needs to be 'legally constituted' and 'devoted to long-term protection';[808] therefore, it can correspond to a protected area.[809] Indeed, biosphere reserves can encompass areas protected as national parks and nature reserves as well as other internationally recognised sites like those under the Ramsar or World Heritage regimes.[810]

Article 4 identifies all the criteria valuable to designate an area as a biosphere reserve.[811] Based on these, national governments can forward nominations for potential sites that are verified by the Secretariat and the Advisory Committee for Biosphere Reserves, before reaching the final step of formal designation by the International Co-ordinating Council.[812] Once designated, individual biospheres remain under the sovereign jurisdiction of the States where

[802] Biosphere reserve are regulated under the MAB Programme. This is an Intergovernmental Scientific Programme that combines natural and social sciences to study how to improve the relationship between people and their environments to foster the conservation and sustainable use of biosphere resources. It was launched in 1971 and its main legal framework is provided by the Statutory Framework of the World Network of Biosphere Reserves. UNESCO MAB, *Seville Strategy and Statutory Framework of the World Network of Biosphere Reserves*, 1995. Available at http://unesdoc.unesco.org/images/0010/001038/103849Eb.pdf accessed 19 March 2018.
[803] Statutory Framework, Article 1.
[804] Statutory Framework, Article 2.
[805] Further information available at http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/man-and-biosphere-programme/ accessed 17 November 2018.
[806] Statutory Framework, Article 3.
[807] Statutory Framework, Article 4(5).
[808] Statutory Framework, Article 4(5)(a).
[809] In this regard see Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 66.
[810] In this regard see the Seville Strategy, 4.
[811] In this regard see what UNESCO identifies as the main characteristics of biosphere reserves at http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/main-characteristics/ accessed 19 March 2018.
[812] Statutory Framework, Article 5.

they are located,[813]and are thus subject to national legislation; however, their designation and inclusion in the World Network entails specific obligations for hosting States.[814] Moreover, this status is periodically reviewed (every ten years) in order to ensure the persistence of the criteria indicated in Article 4.[815] Lausche notes that the establishment of biosphere reserves is voluntary, but their designation has incentives for hosting States in terms of international recognition, technical assistance, and donor support.[816]

MAB develops periodic strategies and action plans to guide the MAB Programme and the World Network of Biosphere Reserves by identifying specific objectives and new lines of action. The latest Strategy was adopted in Lima in 2016 at the Fourth World Congress of Biosphere Reserves and is valid for the period 2015-2025.[817]

Biosphere reserves have emerged as a valuable tool for integrating protected areas within a wider landscape and their inclusion in national legislation is encouraged by the protected area community.[818] They represent a relevant conservation framework for this thesis since they can also expand across borders and be designated as transboundary biosphere reserves.[819] Moreover, the involvement of local communities is a central component of the biosphere reserve approach,[820] which counts on traditional and local knowledge in ecosystem management for attaining its objectives.[821] Their characteristics and inherent vocation – improving the relations between people and their surrounding environments, including in transboundary contexts – favour the application of the concept of decentralised international

[813] Statutory Framework, Article 2(3).
[814] Statutory Framework, Articles 5(2), 6, 7, and 8.
[815] Statutory Framework, Article 9.
[816] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 65.
[817] UNESCO MAB, *A New Roadmap for the Man and the Biosphere Programme and is World Network of Biosphere Reserves*, 2016. Available at http://unesdoc.unesco.org/images/0024/002474/247418E.pdf accessed 19 March 2018. Hereinafter, Lima Roadmap.
[818] Lausche, *Guidelines for Protected Areas Legislation*, *cit.*, (n 30) 65–66.
[819] In this case the nomination process requires additional documents, as clarified in the nomination form for transboundary sites available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/TBR_Nomination_Form_en.pdf accessed 19 March 2018.
[820] In this regard see the Seville Strategy, 3. Such an involvement is included among the main characteristics of biosphere reserves, see http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/main-characteristics/ accessed 19 March 2018.
[821] In this regard see the Lima Roadmap, 12.

cooperation. This is already evident in the Meseta Ibérica Transboundary Biosphere Reserve, which expands across Portugal and Spain and is administered through the ZASNET EGTC,[822] as explained further in Chapter 5.

3.7 Elements conducive to the concept of decentralised international cooperation

As seen in this chapter, the role of sub-national actors in conserving and sustainably using natural resources, including across borders, also emerge from the study of three main regimes: that on biodiversity, that for the protection of wetlands of international importance, and that governing world cultural and natural heritage. Moreover, their involvement has become a central component in the establishment and management of any conservation initiative, *in primis* (transboundary) protected areas and biosphere reserves.

The analysis developed in chapters 2 and 3 shows that the conservation and management of transboundary natural resources entails regulatory problems with ecological significance that transcends inter-State boundaries, and requires the involvement of sub-national actors and the development of decentralised cooperative solutions. The concept of decentralised international cooperation proposed in this thesis is applied in practice and corroborated by the regional case studies presented in the following chapters. To this end, several elements can be distilled from the analysis above to suggest the applicability of this concept in any relevant context. These are: biodiversity conservation; sustainable development; inter-State cooperation over shared natural resources; socio-economic development; involvement of local communities; traditional knowledge and conservation practices; the role of sub-national authorities; joint institutional mechanisms; and TBPA-like frameworks.

Biodiversity conservation is a priority objective for all decentralised cooperative experiences. In fact, the presence of transboundary natural resources and the need to conserve

[822] See http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/europe-north-america/portugalspain/meseta-iberica/ accessed 19 March 2018.

them represents the engine of cooperation. This first element is usually paired with a second one, sustainable development that requires the attainment of developmental objectives to the benefit of people, but without compromising natural resources. Local authorities and communities should be the primary recipients of these benefits given their direct connection to natural resources.

Inter-State cooperation over shared natural resources signals the existence of intergovernmental agreements that structure cooperation over transboundary resources. Their presence reveals that sharing States acknowledge the importance of transboundary resources/spaces and commit to their joint and long-term governance, which can facilitate the establishment of decentralised cooperative mechanisms at a lower governance level.

Socio-economic development usually aims to benefit less privileged categories, which often include indigenous and local communities. Hence, objectives in this direction are often meant to improve the quality of life of these communities and to strengthen their participation in public life, including decision-making on and management of natural resources. Principles and mechanisms that enable the involvement of local communities are the practical manifestation of State commitments to pursue sustainable development and socio-economic development objectives. Such involvement can also be necessary in transboundary contexts, thus linking communities across international borders.

Local communities can meaningfully contribute to biodiversity conservation or other environmental objectives through their traditional knowledge and conservation practices. For instance, the Paris Agreement formally recognises the importance of 'traditional knowledge, knowledge of indigenous peoples and local knowledge systems' in adaptation to climate change.[823] In turn, any effort which aims to value, strengthen, and preserve such knowledge and

[823] Paris Agreement, Article 7(5). To strengthen the role of indigenous and local communities in fighting climate change, it was proposed to create an *ad hoc* platform, see UNFCCC Subsidiary Body for Scientific and Technological Advice, 'Local communities and indigenous peoples platform: proposal on operationalization based on the open multi-stakeholder dialogue and submissions' (25 August 2017) UN Doc. FCCC/SBSTA/2017/6.

practices reinforces the involvement of indigenous and local communities in natural resources governance at all levels (from the local to the international). Sub-national authorities are also meaningful actors in natural resource governance since they are the closest administrative level to these resources, including in transboundary contexts.

The establishment of joint institutional mechanisms operationalises State commitments to cooperate over shared resources. These mechanisms can be structured in response to the specific needs and ecosystemic characteristics of the resources or sites they focus on, and require the participation of interested stakeholders. The establishment of TBPA-like frameworks exemplifies the will to purse cross-border conservation objectives, thus structuring cooperation for environmental purposes.

These nine elements can be seen as conducive to the concept of decentralised international cooperation since they contribute to its achievement as different pieces of the same puzzle. These elements can also be identified in regional law and policy instruments to signal favour towards decentralised international cooperation in regional contexts, as explained in the following chapters.

Chapter 4. Decentralised international cooperation in Europe

4.1 Introduction

Issues surrounding transboundary conservation and the sustainable management of natural resources have a long history in Europe. Despite its great variation in animal species, ecosystems, and natural landscapes, the relationship between man and the natural environment has had a major impact on the evolution of European biodiversity over time, especially as a consequence of cultivation and grazing, urbanisation, and pollution.[824] Human pressures have accelerated habitat loss and species extinction by fragmenting ecosystems that were already threatened by the existence of interstate borders.

In the nineteenth century, nature conservation was associated with untouched and remote areas such as mountains, and conceived of in anthropocentric terms as seen in the establishment of national parks aimed at protecting wildlife and habitats but for the enjoyment of people.[825] This concept was then exported to colonial territories, where the designation of protected areas often resulted in the forced removal of indigenous peoples from their homelands.[826] Indeed, early nature conservation conventions focused on colonial territories,[827] while the need to ensure conservation in the Western Hemisphere emerged only later.[828] In the latter, conservation, if pursued, and the use of natural resources were considered in a purely national dimension and based on the principles of sovereignty and territorial integrity. After the Second World War, international debate focused on the connection between natural resources and economic development.[829] This trend was reversed by the Stockholm Conference on the Human

[824] Nicolas de Sadeleer, 'European Union' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017) 416.
[825] Kees Bastmeijer, 'Introduction: An International History of Wilderness Protection and the Centreal Aim of This Book' in Kees Bastmeijer (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press 2016) 10.
[826] On this point see Chapter 6 Sections 6.2 ff. on the history of conservation in the southern African region.
[827] This is the case of the 1900 London Convention for the Preservation of Wild Animals, Birds and Fish in Africa, which never entered in force and was replaced in 1933 by the London Convention, which has been indicated as one of the precursors of CITES, see 'CITES World: Official Newsletter of the Parties - 30th Anniversary' <https://cites.org/sites/default/files/eng/news/world/30special.pdf> accessed 12 November 2016.
[828] The 'Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere' was adopted in Washington on the 12 October 1940 and entered into force on 1 May 1942, 161 UNTS 193.
[829] In this regard see Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, *cit.*, (n 11) 82 ff.

Environment (1972) and increasing awareness of human impacts on the Earth's ecosystem.[830] This new environmental consciousness prompted the adoption of major international environmental treaties, laying the basis for a stronger conservation of species, habitats and, consequently, biodiversity both globally and regionally.

Biodiversity conservation in Europe relies on regional instruments[831] as well as legislation and policies adopted within the framework of the European Union (EU). This variety of instruments available does not however ensure comprehensive results in terms of conservation objectives and geographical spaces,[832] and often leads to fragmented responses. This situation is exacerbated by the geopolitical composition of the European continent, which is divided into medium to small States. Arguably, the transboundary dimension of biodiversity conservation can be addressed more effectively in the context of the EU. Here, environmental protection is ensured not only by the fact that EU law is binding in all its Member States, but also thanks to the enforcement powers of the EU Commission and the active role of the European Court of Justice (ECJ) in ruling on nature protection matters. Moreover, within the EU, local governments and local communities – both as groups and as individuals – can also advance nature conservation, including across national borders, via a variety of instruments available to them and on the basis of EU principles that acquire particular force at this level. For instance, local governments can rely on the subsidiarity principle to demand a stronger role in the conservation and sustainable management of natural resources and spaces under their administration, while local communities can invoke the rights to public participation in environmental matters and be actively involved in decision-making and the implementation of decisions relevant to them. These elements suggest the potential for applying the concept of decentralised international cooperation in the European context.

[830] Environmental consciousness raised also in the context of the Cold War, especially as a response of the anti-nuclear movement. The 1975 Helsinki Accords and the end of the Cold War favoured the proliferation of environmental agreements.
[831] In particular the CoE's Convention on the Conservation of European Wildlife and Natural Habitats (Bern) 9 September 1979, in force 1 June 1982, 1284 UNTS 209. Hereinafter, Bern Convention.
[832] de Sadeleer, 'European Union', *cit.*, (n 824) 414.

To this end, this chapter provides first a brief overview of the normative and policy instruments relevant for transboundary biodiversity conservation in Europe.[833] The review is by no means exhaustive; rather it sets the scene for the analysis carried out in the second part of the chapter, which describes the regional mechanisms that enable decentralised international cooperation in the European context. This ties in to the main argument of this thesis, which deals with cross-border cooperation over shared natural resources and spaces involving sub-national actors – i.e., local authorities and local communities.

4.2 The transboundary dimension of biodiversity governance

Transboundary biodiversity conservation in Europe relies on an extensive and complex legal framework with a multi-level character, yet gaps persist. The framework relies first on the main global treaties governing biodiversity to which most of the European States are Parties. These are the Ramsar Convention, the World Heritage Convention,[834] CITES,[835] the Convention on Migratory Species, and the Biodiversity Convention.[836] International obligations under these treaties inform the application of regional instruments,[837] especially when considering 'mixed agreements' to which both the EU and its Member States are Parties.

In mixed agreements, both the EU and its Member States participate in the Conferences of the Parties and decision-making process; nevertheless, the latter are bound by the duty of loyal cooperation[838] and their range of action is limited.[839] Moreover, both the EU and its Member

[833] It is worth clarifying that any reference to Europe in general encompasses also the EU.
[834] For instance, Marsden discusses the contribution of this Convention to protecting wilderness in Europe. Simon Marsden, 'Wilderness Protection in Europe and the Relevance of the World Heritage Convention' in Kees Bastmeijer (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press 2016).
[835] Although the EU is not a Party to this Convention, it has applied it and even broadened its scope within the EU legal order, for example, by forbidding the trade in certain large mammal species like whales, baby seals and furs of major predators. On this point see de Sadeleer, 'European Union', *cit.*, (n 824) 424.
[836] For a more extensive discussion of the Biodiversity Convention, the World Heritage Convention, and the Ramsar Convention refer to relevant sections in Chapter 3.
[837] Floor Fleurke and Arie Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats' in Louis J Kotzé and Thilo Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill Nijhoff 2014) 129.
[838] Consolidated version of the Treaty of the European Union, 26 October 2012, OJEU C 326/13, Article 4(3). Hereinafter, TEU.
[839] de Sadeleer, 'European Union', *cit.*, (n 824) 420.

States are jointly responsible for complying with these agreements, and a violation by a Member State can trigger the responsibility of the EU.[840] Once ratified by the EU, mixed agreements are automatically integrated into the EU legal order; hence, they have a direct effect at national level to the extent that they are clear, precise and unconditional, or if they are framed in such terms by the Community secondary legislation.[841]

The Treaty establishing the European Economic Community (ECC) did not include any specific legal bases for the protection of the environment; nevertheless, EU environmental law and policy has developed widely and pervasively, and has been mainstreamed into other EU policy areas. Environmental protection is now a key area of EU internal and external action. Article 2(3) of the TEU affirms that 'a high level of protection and improvement of the quality of the environment' is functional to pursuing the sustainable development of the Union.[842] In addition, Article 21(f) of the TEU promotes external environmental action in similar terms. Indeed, the EU has acquired an increasing role in international environmental policy in different ways. First of all, the EU participates directly in the negotiation and adoption of international environmental agreements. Second, it has become a party to those agreements and has widened their scope of application within the EU legal order, by adopting EU legislation to comply with

[840] ibid 421.

[841] For instance, the Biodiversity Convention is a mixed agreement, but it has not been transposed into EU law by a specific legislative instrument, which, according to Kramer, has weakened its application at EU level. Ludwig Kramer, 'The Protection of Biodiversity and Ecological Connevtivity in the EU' in Mariachiara Alberton (ed), *Toward the Protection of Biodiversity and Ecological Connectivity in Multi-Layered Systems* (Nomos 2013) 29–30. However, since the 1998 the EU has developed strategies dedicated to biodiversity, the latest was adopted in 2011, 'Our life insurance, our natural capital: an EU biodiversity strategy to 2020' (European Commission, COM/2011/0244/final), which defines 6 targets and 20 actions to prevent further biodiversity loss and ensure the maintenance of ecosystem service in the EU by 2020. The 6 targets are: 1) protect species and habitats; 2) maintain and restore ecosystems; 3) achieve more sustainable agriculture and forestry; 4) make fishing more sustainable and seas healthier; 5) combat invasive alien species; and 6) help stop the loss of global biodiversity. This Strategy was subjected to the mid-term review of the Commission in 2015. In this regard, see European Commission, COM (2015) 478 final. For further details refer to the dedicated webpage http://ec.europa.eu/environment/nature/biodiversity/strategy/index_en.htm accessed 12 June 2018. Further efforts in this direction are also included in the 7th Environmental Action Programme 'Living well, within the limits of our planet'. This Programme recognises that biodiversity loss and ecosystem degradation have not only environmental, but also socio-economic implication, and affect both present and future generations, as set in its Preamble. Moreover, as its first priority objective, Article 2 of the Programme spells out 'to protect, conserve and enhance the Union's natural capital' by 2020. See Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJEU 28 December 2013 L 354/171.

[842] Environmental protection is also pursued by Article 37 of the Charter of Fundamental Rights of the European Union, 26 October 2012, OJEU C 326/391.

international obligations.[843] Third, the EU has also integrated environmental concerns and objectives into other EU policies and actions[844] as well as in its external relations. Lastly, it adopts internal environmental standards that can lead to regulatory reforms at the global level via international environmental trade.[845]

Article 4 of the TFEU includes the environment among the competences that are shared with the Member States. In addition, Article 191 TFEU defines the objectives to be pursued by the Union policy on the environment. Hence, the EU has the power to legislate in this area and enact legally binding instruments (directives and regulations); the exercise of such power prevents Member States from legislating on the same matters, except to enact more stringent national standards than those laid down in the EU acts.[846] In so doing, the EU sets common minimum environmental standards, but allows for differentiation and flexibility[847] in line with its principle of subsidiarity. This principle affirms that, where the EU does not enjoy exclusive competence, it can intervene 'only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [at central, regional or local levels, but] better achieved at Union level'.[848] Hence, the subsidiarity principle enables the establishment of EU-wide environmental norms that bind both national and sub-national authorities within EU Member States. Nevertheless, sub-national authorities can take advantage of EU environmental norms and objectives by directly strengthening their application in their territories, or by objecting to violations of these norms perpetrated by EU Member States.

[843] de Sadeleer notes that the EU adopted this attitude even in the case of the CITES Convention, despite not being able to ratify it. de Sadeleer, 'European Union', *cit.*, (n 824) 424.
[844] Indeed, this integration is required by Article 11 of the Consolidated version of the Treaty on the Functioning of the European Union, 26 October 2012, OJEU C 326/47. Hereinafter, TFEU. On this point see ibid 425.
[845] On this last point refer to Jonathan Verschuuren, 'From North to South: Legal Pathways to Stimulate Biodiversity Conservation in Developing Countries Trough Transboundary Trade in Biodiversity Resources' in Louis J Kotzé and Thilo Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill Nijhoff 2014). In general on the influence of EU environmental policy on global environmental governance see Emanuela Orlando, 'The Evolution of EU Policy and Law in the Environmental Field: Achievement and Current Challenges' in Christine Bakker and Francesco Francioni (eds), *The EU, the US and Global Climate Governance* (Ashgate 2014).
[846] TFEU, Article 193.
[847] On this point see Orlando, 'The Evolution of EU Policy and Law in the Environmental Field: Achievement and Current Challenges', *cit.*, (n 845) 8.
[848] TEU, Article 5(3).

It can be argued that within the framework of the EU the subsidiarity principle, as applied to environmental protection, legitimises the idea of decentralised international cooperation: the EU sets the overall cooperative framework – in terms of principles and objectives, laws and policies, and institutional mechanisms – that can be better articulated at a more localised cross-border level depending on the natural resource or space considered and the actors relevant in the specific context. Species and ecosystems are oblivious to geopolitical barriers and often extend across countries, thus requiring States to cooperate for their protection and sustainable management. The European continent is no an exception: indeed the limited size of most European States and the extended urbanization of this region make cooperation for environmental protection, in general, and for biodiversity conservation, in particular, a priority. In this context, the transboundary dimension of biodiversity governance can be addressed by specific mechanisms that facilitate cooperation at both intergovernmental and sub-national levels with the aim of involving intermediate authorities, entities in charge of nature conservation, local communities and interested non-State actors (like NGOs or civil society associations dealing with nature-related issues such as hunting, fishing, the protection of specific habitats or species, etc.).

This chapter does not aim to address the application of global conventions in Europe and the EU specifically; rather, it looks at the main regional instruments relevant for ensuring transboundary biodiversity conservation in Europe: in particular, the 1979 Bern Convention and secondary EU legislation in this field, namely the Habitats and Birds Directives.[849] Moreover, in the European region, the transboundary dimension of biodiversity conservation clearly emerges in the protection of mountain areas such as the Alps and the Carpathians. The cooperative agreements dedicated to these mountain ranges are relevant to the concept of

[849] Council Directive 92/43/EEC of 21 May 1992 on the Conservation of natural habitats and of wild fauna and flora, OJEU L 206/7; hereinafter, Habitats Directive. Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version), OJEU L 20/7; hereinafter, Birds Directive.

decentralised international cooperation for two main reasons. The first is their focus, the protection of a unique (mountain) ecosystem extending across several States. The second relates to the attention reserved to local actors and needs in specific Protocols.

4.2.1 The Bern Convention

The conservation and sustainable management of transboundary species and habitats in Europe is covered by the Bern Convention, which was adopted within the framework of the Council of Europe and has been in force since June 1982. This Convention is relevant for the purpose of this thesis for two main reasons: first, it enhances nature conservation across national borders by promoting cooperation regardless of membership in the Council of Europe and the Convention itself, as well as through the establishment of a transboundary ecological network called the 'Emerald Network'. Second, it advances the role of non-State actors – in particular NGOs and, to a minor extent, individuals – at the international level by enabling their participation in the development, implementation and monitoring of the Convention regime. The transboundary dimension of nature conservation and the active involvement of sub-national actors form the two pillars of the concept of decentralised international cooperation developed in this thesis.

This Convention *de facto* addresses biodiversity conservation, anticipating the Biodiversity Convention[850] and many of the principles included in successive global environmental instruments.[851] Its integrated approach to nature conservation reflects the innovative character of this instrument,[852] which is arguably enhanced by a forward-looking

[850] For further information on the Biodiversity Convention and its relevance for the concept of decentralised international cooperation refer to Chapter 3 Section 3.3 ff.
[851] For instance, those of precaution, integration, participation and cooperation. Carolina Lasén Díaz, 'The Bern Convention: 30 Years of Nature Conservation in Europe' (2010) 19 Review of European Community and International Environmental Law 185, 186.
[852] On this point ibid 185. This author praises the importance of the Bern Convention by defining it as 'the only regional convention of its kind worldwide'.

attitude ensured through the work of its Standing Committee, the active involvement of experts and NGOs, its flexible structure, and its monitoring mechanisms.

The Preamble foreshadows this cooperative attitude by emphasising the 'wish of the Council of Europe to co-operate with other States in the field of nature conservation', pursued by opening the Convention to global membership.[853] This approach is motivated by the fact that '[t]he species of wildlife found in Europe have in many cases a range that extends well beyond the confines of the membership of the Council of Europe'.[854] In fact, the Convention counts 51 Parties, including all EU Member States, the EU itself and four African countries.

Cooperation[855] is both functional to achieving the conservation of wild flora and fauna and their natural habitats, '*especially those species and habitats whose conservation requires the co-operation of several States',* and an objective in itself.[856] Such an emphasis is further strengthened by the specific attention reserved to migratory species[857] and habitats located in border zones,[858] as well as by the general requirement to cooperate to enhance 'the effectiveness of measures taken under other articles of this Convention'.[859]

The aim of the Convention is primarily pursued through a general obligation to conserve *all* wild fauna and flora and their natural habitats, as stipulated in Article 2.[860] Article 3 requires the adoption of national conservation policies, 'with particular attention to endangered and vulnerable species, especially endemic ones, and endangered habitats'.[861] Nature conservation

[853] In this regard see the Council of Europe, *Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats* (19 September 1979), available at https://rm.coe.int/16800ca431 accessed 16 June 2018. At paragraph 9, the Explanatory Report explains that the negotiated text aims to 'improve the minimum level of nature conservation in Europe and enable the maximum number of States to become Contracting Parties'.
[854] Explanatory Report, paragraph 11. Lasén Díaz notes that, back in the 1980s, most Central and Eastern European Countries Parties to this Convention were not Parties to the Council of Europe. Lasén Díaz, 'The Bern Convention: 30 Years of Nature Conservation in Europe', *cit.,* (n 851) 186.
[855] According to Fleurke and Trouwborst, cooperation, strict obligations, and a well-functioning institutional mechanism are the three elements that feature the Bern Convention as a successful conservation regime compared to other international instruments in the same field. Fleurke and Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats', *cit.,* (n 837) 131.
[856] Bern Convention, Article 1(1). Emphasis added.
[857] Bern Convention, Article 1(2) and Article 10.
[858] Bern Convention, Article 4(4).
[859] Bern Convention, Article 11(1).
[860] This provision requires to maintain wildlife population to 'a level corresponding to ecological, scientific and cultural requirements'; nevertheless, such a level is not defined in the Convention nor in the Explanatory Report.
[861] Bern Convention, Article 3(1).

also has to be considered when adopting planning and development policies as well as measures against pollution.[862] Specific obligations are detailed for the protection of habitats and species, especially those listed in Appendices I, II, and III.[863] Furthermore, Parties are encouraged to reintroduce native species of wild flora and fauna where this contributes to the conservation of an endangered species;[864] while the introduction of non-native species is discouraged and subjected to strict control.[865]

The flexibility of this Convention is particularly important in connection to the concept developed in this thesis. As explained, decentralised international cooperation deals with cooperative efforts pursued in relation to shared natural resources and natural spaces that involve relevant sub-national actors at a cross-border level. Despite the fact that the Convention only promotes intergovernmental cooperation for the conservation of wildlife species and habitats, a spatially decentralised approach to cooperation emerges unambiguously from the fact that the Convention is clear in establishing its purpose and tools, but also has a dynamic character and can be adapted to different contexts and changing circumstances.[866] It is this flexibility that enables cooperation and enhances transboundary biodiversity conservation since range States have to provide a minimum standard of protection, but can articulate national measures – and thus meet the Convention's obligations – depending on their specific context, and taking advantage of exceptions if needed.[867]

The Standing Committee is the governing body of the Bern Convention. It comprises all of the Parties as well as Observer States and organisations, including NGOs, operating at the national and international levels.[868] It meets annually in Strasbourg, at the Council of Europe

[862] Bern Convention, Article 3(2).
[863] In particular, Articles 4 to 8 detail the measures required and activities prohibited for the protection of wildlife. Nevertheless, exceptions are provided in Article 9. Appendix I deals with 'strictly protected flora species', while Appendix II lists 'strictly protected fauna species', and Appendix III 'protected fauna species'.
[864] Bern Convention, Article 11(2)(a).
[865] Bern Convention, Article 11(2)(b).
[866] Lasén Díaz, 'The Bern Convention: 30 Years of Nature Conservation in Europe', *cit.*, (n 851) 187–188.
[867] A similar logic is pursued by the opportunity to make reservations regarding certain species included in the Appendices foreseen in Article 22. This provision prohibits reservations of general nature.
[868] Bern Convention, Article 13.

premises, to monitor the implementation of the Convention, foster its development and improve its effectiveness by providing guidance to Parties and observers, and adopting recommendations to this end.[869] The Standing Committee is supported by the Bureau, which deals with administrative and organisational issues in between meetings of the Standing Committee, and Groups of Experts, which are set up by the Committee to address issues that require specific expertise.[870] These Groups of Experts usually include or are run by NGOs. The Secretariat of the Convention is provided by the Council of Europe to support the Standing Committee on administrative and other matters, and is responsible for convening meetings and preparing background materials.[871]

It is worth underlining that NGOs with observer status can actively participate in the meetings of the Standing Committee and the Groups of Experts[872] by asking for the floor and making interventions, or by submitting reports on issues on the agenda that consequently become official meeting documents.[873] Arguably, in this context, NGOs can promote conservation interests that are locally-relevant and indirectly represent and voice instances advanced by local authorities and local communities.

Similarly to Conferences of the Parties in other multilateral environmental treaties, the Standing Committee has a key role in the evolution of this Convention.[874] In fact, it has improved and provided detail on the Convention regimes through its non-legally binding – yet authoritative – decisions. This is the case of Article 4 and its habitat conservation obligations,

[869] Its broad responsibilities are established by Article 14 of the Bern Convention.
[870] Bern Convention, Article 14(2).
[871] See the Rules of Procedure of the Standing Committee (T-PVS/Inf (2013) available at https://rm.coe.int/16807461e7 accessed 18 June 2018), Rule n. 20. See also Article 13(4). For further information on the institutional framework of the Bern Convention refer to the dedicated page https://www.coe.int/en/web/bern-convention/institutions accessed 18 June 2018.
[872] Bern Convention, Article 13(3).
[873] See Rules of Procedure of the Standing Committee, Rule n. 9.
[874] In this sense, Fleurke and Trowborst praise its 'active and progressive approach', which has contributed to keep the treaty 'alive', Fleurke and Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats', *cit.*, (n 837) 137.

which provide the basis for the concept of Areas of Special Conservation Interest (ASCIs) and criteria useful for their identification.[875]

Arguably, the conditions useful in identifying an ASCI focus on its biodiversity value, thus anticipating, in relation to State Parties, a conservation approach later developed in the Biodiversity Convention. In this sense, the latter reinforces the soft law requirements laid down by the Standing Committee in relation to ASCIs through binding provisions, thus enhancing the legal force of the conservation regime developed under the Bern Convention. On the other hand, pursuing the objectives of the Bern Convention and meeting its obligations contributes to the implementation of the Biodiversity Convention in those countries that are Parties to both, especially in relation to ASCIs that benefit from reinforced conservation measures.[876]

The ecological connectivity and ecosystem integrity of the ASCIs are ensured by their integration into the pan-European 'Emerald Network' mentioned earlier and set up by the Standing Committee in 1996.[877] The transboundary attitude of the Bern regime is confirmed by the fact that this network is open to both Contracting Parties and Observer States.[878] In this sense, it can be argued that the Convention pursues the aspiration to conserve and sustainably manage wildlife across international borders and beyond the territories of those States that are members of the Council of Europe and Parties to the Convention, as expressed in the Preamble and in the Explanatory Note.

The Emerald Network is made up of both land and sea areas[879] designated by governments on the advice of the Standing Committee[880] by depositing a form with the Secretariat.[881] Once designated as such, ASCIs benefit from reinforced conservation and are subject to the

[875] Standing Committee, Recommendation n. 16 (1989) on areas of special conservation interest, 9 June 1989.
[876] Standing Committee, Recommendation n. 16 (1989), Article 3, 4 and 5.
[877] Standing Committee, Resolution n. 3 (1996) concerning the setting up of a pan-European Ecological Network, 26 January 1996.
[878] Standing Committee, Resolution n. 3 (1996), Articles 3 and 4.
[879] Standing Committee, Resolution n. 5 (1998) concerning the rules for the Network of Areas of Special Conservation Interest (Emerald Network), 4 December 1998, Article 1.
[880] Standing Committee, Resolution n. 5 (1998), Article 2.
[881] Standing Committee, Resolution n. 5 (1998), Article 3.

surveillance of the responsible government.[882] Hence, they remain under the sovereignty and responsibility of the State in which they are located, but also benefit from reinforced reporting obligations and monitoring scrutiny from the other Parties and non-State actors.

In fact, the State hosting the ASCI has to inform the Secretariat of any change that is likely to impact on the ecological character of the area or affect the conditions that led to its designation.[883] Any such change may also come to light through a case-file system established by the Standing Committee to address complaints and alerts on potential breaches of the Convention within the territories of State Parties.[884] These complaints can be submitted by NGOs or even private citizens; they are usually processed by the Secretariat, but the Bureau and the Standing Committee can intervene at this early stage if required.[885] When further information – additional to that included in the case filed – is needed, the Standing Committee can arrange an 'on-the-spot enquiry' carried out by independent experts upon agreement with the relevant State party.[886] Based on the information in the file and the experts' written report, the Standing Committee can adopt general or specific recommendations: the former are directed to all Parties and deal with broader issues, while the latter are targeted at a particular country (or a group of countries) or subject(s).[887] This monitoring tool is additional to the reporting system set up under the Bern Convention.[888] Its success has been demonstrated by numerous complaints presented over the years,[889] and can be explained by the flexibility of the procedural

[882] Standing Committee, Resolution n. 5 (1998). Article 4(1).
[883] Standing Committee, Resolution n. 5 (1998), Article 4(2).
[884] This case-file system is not foreseen in the Convention and is based on a set of rules developed by the Standing Committee, see Standing Committee, Summary of case files and complaints – Reminder on the processing of complaints and new on-line form, T-PVS (2008)7, 25 August 2008. See also https://www.coe.int/en/web/bern-convention/monitoring accessed 19 June 2018.
[885] In this regard refer to T-PVS (2008)7, 3-6.
[886] For the rules applicable in this context refer to the Rules of Procedure of the Standing Committee, T-PVS/Inf (2013) 6, Appendix I.
[887] In this regard refer to T-PVS (2008)7, 6.
[888] For further information on the different types of reporting see Lasén Díaz, 'The Bern Convention: 30 Years of Nature Conservation in Europe', *cit.*, (n 851) 193–194. See also https://www.coe.int/en/web/bern-convention/monitoring accessed 19 June 2018. It is worth noting that only the biennial reports are compulsory under Article 9 of the Bern Convention.
[889] For a list of the complaints presented until December 2017 refer to https://rm.coe.int/1680746773 accessed 19 June 2018.

rules and the will of the Parties to cooperate.[890] State Parties have not so far resorted to arbitration.[891]

Therefore, it can be argued that some characteristics of the Bern Convention hint at the concept of decentralised international cooperation developed in this thesis. First, this Convention has a strong cooperative attitude aimed at strengthening nature conservation across borders based on ecological connections, as for example in the case of migratory birds, and prefers an ecosystem logic to a geopolitical one. To this end, cooperation is fostered among State Parties and non-parties, both in Europe and outside. This attitude has been operationalised, in spatial terms, through the Emerald Network, which has to be set at national level by each Contracting Party, but *de facto* connects ASCIs in different countries and has the potential to enhance transboundary biodiversity.[892] In EU Member States, the Emerald Network overlaps with the EU Natura 2000 Network established by the Habitats Directive. Indeed, the Habitats and Birds Directives represent the main instruments for implementing the Bern Convention at EU level.[893]

Although the Convention does not foresee any direct role for sub-national actors in conserving and sustainably managing wildlife species and habitats – whether local authorities or communities –, they can participate in the development of this regime both indirectly via NGOs and the powers connected to their observer status, and directly through the case-file system. This monitoring tool is particularly interesting in relation to the subject of this thesis, since it can be applied in transboundary contexts and enables the participation of non-State actors – which arguably include local communities – in fostering the implementation of the Bern Convention with positive repercussions in terms of biodiversity conservation. In addition,

[890] Lasén Díaz, 'The Bern Convention: 30 Years of Nature Conservation in Europe', *cit.*, (n 851) 194–195.
[891] This is foreseen in Article 18 of the Bern Convention as a final resort dispute settlement mechanism.
[892] For further information refer to the dedicated webpage https://www.coe.int/en/web/bern-convention/emerald-network accessed 19 June 2018.
[893] On this point see Fleurke and Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats', *cit.*, (n 837) 139.

in the case of EU Member State Parties to the Bern Convention, sub-national actors – including both local authorities and communities – can resort to monitoring and judicial mechanisms provided by EU law to enhance the implementation of this regime. Using these mechanisms is strengthened if we consider that the EU is also a party to the Bern Convention. Sub-national actors can also strengthen transboundary nature conservation at EU level by referring to the obligations foreseen by the Bern Convention, or by triggering the case-file system to denounce violations within the EU by both State Parties or ineffective Community provisions.

4.2.2 The Habitat and Birds Directives and the Natura 2000 Network

The EU's aspiration to transboundary conservation has been evident since its first piece of legislation in this sector. In fact, the Birds Directive, despite adopting a 'piecemeal approach',[894] claims that '[migratory] species constitute a common heritage and effective bird protection is typically a *trans-frontier problem* entailing common responsibilities'.[895] The limitation inherent in the Birds Directive and the need to ensure the transboundary conservation of biodiversity more broadly led to the adoption of the Habitats Directive in 1992.[896] The latter proclaims to pursue 'an essential objective of general interest'[897] since threats to natural habitats and species found in the territories of EU Member States 'are often of a *transboundary nature*, [and make] necessary to take measures at Community level in order to conserve them'.[898] Hence, the Birds and Habitats Directives, and the 'Natura 2000' transboundary conservation network they rely on, provide the opportunity to discuss the concept of decentralised international cooperation in the context of the EU. For this reason, they deserve extra attention.

[894] de Sadeleer, 'European Union', *cit.*, (n 824) 421.
[895] Birds Directive, Preamble, paragraph 4. (emphasis added)
[896] In fact, the Preamble of the Habitats Directive refers to the Birds Directive and clarifies that 'a general system of protection is required for certain species of fauna and flora to complement Directive 79/409/ECC [on the conservation of wild birds]'. Habitats Directive, Preamble, paragraph 15.
[897] Habitats Directive, Preamble, paragraph 1.
[898] Habitats Directive, Preamble, paragraph 1. (emphasis added)

Both Directives aim to strengthen biodiversity: the Birds Directive applies to all species of birds naturally occurring in the territories of EU Member States,[899] while the Habitats Directive covers natural habitats and species of wild fauna and flora located in the European territories of the Member States,[900] and defines when the conservation status of a natural habitat or a species qualifies as favourable.[901]

As in the case of the Bern Convention, these Directives integrate general obligations and specific duties. The Birds Directive establishes a general system of protection for *all* species of wild birds by prohibiting specific activities.[902] States are generally required to take the necessary measures to maintain the population of all wild bird species,[903] and to 'preserve, maintain or re-establish a sufficient diversity and area of habitats', including by creating protected areas and biotopes, re-establishing destroyed biotopes, and upkeeping and managing habitats according to their ecological needs both inside and outside protected zones,[904] identified as 'special protection areas' (SPAs).[905] Special conservation measures must be taken in relation to the species listed in Annex I as well as non-listed migratory species that regularly occur in the territory of EU Member States.[906] The survival and reproduction of these species is also ensured through the establishment of SPAs. The Directive allows for some flexibility by enabling exceptions under specific circumstances, as in Article 7[907] and 9, or by allowing individual States to introduce stricter protective measures, as under Article 14.

[899] Birds Directive, Article 1(1). Paragraph 2 of the same article further clarifies that the conservation obligations foreseen in this Directive extend to the eggs, nests and habitats of all wild bird species.
[900] Habitats Directive, Article 2(1).
[901] In particular, Article 1(e) refers to the favourable conservation status of a natural habitat, while Article 1(i) deals with that of species.
[902] In this regard refer to Article 5 and 6 of the Habitats Directive.
[903] Habitats Directive, Article 2.
[904] Habitats Directive, Article 3.
[905] In particular, SPAs are selected based on the distribution of listed species and migratory species in those sites, and for the importance of certain natural habitats for such species. Member States have a limited margin of discretion in defining the criteria guiding the identification of SPAs. In this regard, see Kees Bastmeijer, 'Natura 2000 and the Protection of Wilderness in Europe' in Kees Bastmeijer (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press 2016) 183.
[906] Habitats Directive, Article 4(1) and (2).
[907] In particular, according to Article 7, individual States can regulate the hunting of certain species as detailed in Annex II.

In regard to the Habitats Directive, it has been argued that the general obligation to ensure the conservation of natural habitats and species has a limited scope, not only due to the reference to habitats and species of Community interest only,[908] but also because clear obligations are only defined in relation to those sites classified as SPAs and SACs, and hence included in the Natura 2000 Network.[909] Special conservation measures are required in relation to natural habitat types listed in Annex I, and species listed in Annex II.[910] Sites hosting these habitats and species have to be designated as 'special areas of conservation' (SACs), which, together with SPAs, have to form 'a coherent European ecological network' – the Natura 2000 Network – integrated in turn into the wider Bern Convention Emerald Network.[911] SACs are subject to reinforced conservation requirements, which partly extend also to SPAs.[912] In particular, with regard to SACs, States are required to take all necessary conservation measures in line with the ecological requirements of the natural habitats and species considered.[913] In both SACs and SPAs, States have to avoid the deterioration of listed habitats and the disturbance of listed species;[914] any project or plan that might affect the conservation objectives of these sites is subject to a restrictive authorisation scheme.[915] Stricter conservation measures are required for fauna and flora species listed in Annex IV.[916]

Bastemeijer praises the 'strictness' of the Natura 2000 Network compared to other regimes regulating the creation of conservation areas.[917] First, the selection and designation of both SPAs and SACs is mandatory[918] and based upon ecological criteria alone.[919] Article 6 of the Habitats Directive sets precise obligations and requires Member States to take the necessary

[908] Habitats Directive, Article 2(2).
[909] On this point see Kramer, 'The Protection of Biodiversity and Ecological Connevtivity in the EU', *cit.*, (n 841) 33.
[910] Habitats Directive, Article 4.
[911] Habitats Directive, Article 3.
[912] Habitats Directive, Article 7.
[913] Habitats Directive, Article 6(1).
[914] Habitats Directive, Article 6(2).
[915] Habitats Directive, Article 6(3) and (4).
[916] See Habitats Directive, Articles 12 and 13 respectively.
[917] Bastmeijer, 'Natura 2000 and the Protection of Wilderness in Europe', *cit.*, (n 905) 179 ff.
[918] Habitats Directive, Article 3(2). See also Article 4, which sets the details for the selection and designation of SACs.
[919] Regarding the criteria for selecting SACs, refer to Annex III of the Habitat Directive. See also Bastmeijer, 'Natura 2000 and the Protection of Wilderness in Europe', *cit.*, (n 83) on the selection of SPAs, at 182-182, and of SACs, at 184-185.

measures to conserve these sites in line with the principles of prevention and precaution.[920] Moreover, the EU compliance system has the potential to increase the effectiveness of the Natura 2000 network thanks to the watchdog-role carried out by the Commission and the contribution of non-State actors in collecting relevant information and challenging non-compliant Member States in national courts.[921]

From this brief analysis it emerges that, although a transboundary dimension is asserted in the Preambles of both Directives, the conservation duties that stem from them are addressed to Member States individually, with none expressing a duty for transboundary cooperation similar to that of the Bern Convention.[922] Nevertheless, the transboundary dimension is *de facto* present, and a duty to cooperate can be derived in several ways, first and foremost by the objectives of these Directives. Enhancing biodiversity conservation in the EU requires the efforts of all EU Member States, which have to ensure that a favourable conservation status is achieved for species and habitats at the national level at least,[923] and thus requires the setting of minimum environmental standards valid across the region. Second, the establishment of the Natura 2000 Network and the ecological connectivity it aims to ensure implies that States coordinate their measures to meet the obligations set in the Directives, especially in the case of protected sites extending across borders, and for migratory species and those with cross-border ranges, as is the case of large carnivores such as wolves and bears. Indeed, Annex III of the Habitats Directive, in defining the criteria for the identification of sites of Community importance, explicitly refers to the 'geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both

[920] ibid 179–180.
[921] ibid 180–181.
[922] On this point see Fleurke and Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats', *cit.*, (n 837) 144.
[923] In this regard, Trouwborst discusses the benefit of achieving such a favourable status also at the level of individual protected areas in Arie Trouwborst, 'Managing the Carnivore Comeback: International and EU Species Protection Law and the Return of Lynx, Wolf and Bear to Western Europe' (2010) 22 Journal of Environmental Law 347.

sides of one or more internal Community frontiers'.[924] Therefore, it can be argued that the conservation obligations stemming from the Habitat Directive have an explicitly individual character, but inherent collective implications. Third, the explicit duty of transboundary cooperation enshrined in Articles 10 and 11 of the Bern Convention can be extended to the Habitats and Birds Directives, which implement the Convention at EU level. Similarly, the obligation to cooperate can be derived from other environmental treaties and EU instruments.[925]

Moreover, it can be argued that the obligation to ensure biodiversity conservation also binds sub-national governments to the extent that wild birds, natural habitats and species of Community importance – hence, SPAs and SACs – are found in the territories they govern, and their competences and actions are relevant or required to ensure this objective. Indeed, national legislation transposing these Directives can transfer specific duties or competences to sub-national governments and conservation entities in line with the principle of subsidiarity and loyal cooperation. On the other hand, the conservation obligations set by the two Directives limit sub-national governments in the exercise of their competences regardless of their transposition at national level to the extent that they are unconditional and sufficiently precise, as seen for example in the case of authorising plans and projects likely to affect a protected site.

Another aspect relevant for the main purpose of this thesis is the role that non-State actors can play in ensuring the effective implementation of the Directives. Based on the direct effect doctrine, individuals can, under certain conditions, invoke EU environmental directives in national courts where their implementation is missing or inappropriate. In so doing, they can strengthen the effective application of EU law and provide legal protection to biodiversity

[924] Habitats Directive, Annex III, Stage 2(2)(b).
[925] On this point see Fleurke and Trouwborst that respectively refer to the Ramsar Convention and the Marine Strategy Framework Convention. Fleurke and Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats', *cit.*, (n 837) 145.

conservation which would otherwise go unrepresented. In this context, any national court of the EU Member States has to apply the directives and set aside conflicting national law.[926]

Alternatively, when the doctrine of direct effect cannot be applied, the full effectiveness of EU law can be guaranteed through the doctrine of indirect effect. This allows national courts to interpret the national legislation of EU Member States in light of a directive once the deadline for its transposition has expired. Hence, even if the Birds and Habitats Directives are inappropriately transposed, implementing acts and, as far as possible, all national law, have to be interpreted in line with them.[927] As a last resort and under certain conditions, citizens can hold their EU Member State government liable for damages deriving from the incorrect application of EU environmental law.[928]

Moreover, individuals and NGOs are key in providing information regarding non-compliance to the Commission, which may then initiate an infringement procedure.[929] Despite its role as 'environmental watchdog of the EU', the Commission lacks investigative powers and can only rely on State reports to monitor the implementation of environmental directives. Therefore, additional information provided by individuals and NGOs can be essential to identify punctual or persistent breaches of EU environmental law. Nevertheless, Fleurke and Trouwborst highlight that the infringement procedure as such is unable to deal with the enforcement of systematic breaches in a transboundary network area such as Natura 2000, which led the ECJ to develop the 'General and Persistent' case law.[930] This approach has the

[926] In this regards refer to ibid 149–150. These authors clarify that, since directives are addressed to States, they can be invoked only in vertical relationships (citizen versus State) and do not have horizontal directive effects (citizen versus citizen), as expressed by the ECJ in several cases.
[927] On see ibid 151.
[928] See *ibid*.
[929] This procedure is regulated by Article 258 TFEU. This is a lengthy procedure aimed to ascertain a breach of EU law and enable the relevant Member State to comply with it. It combines a prejudicial phase in which the Commission dialogues with the non-complying Member State, and a potential judicial phase, which is considered to be a last resort. In this regard, Fleurke and Trouwborst provide a detailed discussion at ibid 153–158.
[930] On this refer to ibid 158.

potential to enhance the enforcement of EU biodiversity law and ensure the integrity of European biodiversity as a transboundary network.[931]

Furthermore, individuals and NGOs can indirectly address the activities of private operators in the framework of Directive 2004/35/EC on the Prevention and Remedying of Environmental Damage.[932] This Directive requires national authorities to ensure that operators that have caused or are likely to cause environmental damage by breaching the Directives listed in its Annex III – which includes the Birds and Habitats Directives – take preventive or reparatory measures. It defines environmental damage in Article 2(1) as encompassing damage to: the favourable conservation status of protected species and habitats covered by the Birds and Habitats Directives; the ecological, chemical and/or quantitative status and/or ecological potential of water resources, as foreseen in the Water Framework Directive;[933] and land contamination creating significant risk to human health.[934] The Environmental Liability Directive, together with Directive 2008/99/EC on the Protection of the Environment through Criminal Law,[935] contributes to the conservation of European biodiversity by complementing the existing enforcement regime.[936]

Lastly, the enforcement of EU environmental law and its uniform interpretation across all EU Member States can also be strengthened by national courts themselves, through the preliminary procedure set up by Article 267 of the TFEU.[937]

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[931] *ibid*.
[932] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. OJEU L 143/56. Hereinafter, Environmental Liability Directive.
[933] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy. OJEU L 327/1.
[934] Regarding the Environmental Liability Directive and its contribution to the conservation of EU biodiversity see Fleurke and Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats', *cit.*, (n 837) 159.
[935] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJEU L 328/28.
[936] In this regard refer to the discussion developed by Fleurke and Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats', *cit.*, (n 837) 158–161.
[937] Regarding the preliminary reference procedure and its relevance for the enforcement of EU environmental law, refer to the dedicated section in ibid 151–153.

Arguably, the supervisory powers accorded by the ECJ to individuals and NGOs have strengthened their role at the European and, thus, wider international level. This attitude is functional to the concept of decentralised international cooperation, which calls for the increasing involvement of local actors in cross-border agreements for the governance of transboundary biodiversity resources. In the context of the EU, local communities can advance their interests for (transboundary) biodiversity conservation directly before national courts, but also through participatory processes in the framework of decentralised agreements focusing on specific ecosystems or enabling cross-border cooperation among local authorities, as explained in the following sections.

4.2.3 Sub-regional conservation in mountain areas

The concept of decentralised international cooperation fits well with the cross-border conservation of mountain areas in Europe, directly ensured through two sub-regional agreements: the Convention for the Protection of the Alps,[938] and the Framework Convention on the Protection and Sustainable Development of the Carpathians.[939] The peculiarity of mountain areas lies in both their ecological and socio-cultural value. Mountains are extremely rich in biodiversity, host a great variety of species of flora and fauna, have high levels of endemism, and host pristine ecosystems. Their cultural, spiritual, and recreational value

[938] Convention on the Protection of the Alps (Salzburg) 7 November 1991 in force 6 March 1995, 1917 UNTS 135. Hereinafter, Alpine Convention. This Convention has nine members, eight Alpine States (Austria, France, Germany, Italy, Liechtenstein, Monaco, Slovenia and Switzerland) and the EU. For a critical assessment of this Convention see Marco Onida, 'The Protection of Biodiversity and Ecological Connectivity in the Alpine Convention' in Mariachiara Alberton (ed), *Toward the Protection of Biodiversity and Ecological Connectivity in Multi-Layered Systems* (Nomos 2013); Laura Pineschi, 'The Convention for the Protection of the Alps and Its Protocols: Evaluation and Expectations' in Tullio Treves, Laura Pineschi and Alessandro Fodella (eds), *Sustainable Development of Mountain Areas: Legal Perspectives beyond Rio and Johannesburg* (Giuffrè Editore 2004).
[939] Framework Convention on the Protection and Sustainable Development of the Carpathians (Kiev) 27 May 2003, in force 4 January 2006, available http://www.carpathianconvention.org/text-of-the-convention.html accessed 9 July 2018. Hereinafter, Carpathian Convention. It has seven State Parties: Czech Republic, Hungary, Poland, Romania, Serbia, Slovak Republic, and Ukraine. This agreement was designed on the basis of the Alpine Convention. For a critical assessment of this Convention see Harald Egerer, Klaudia Kuras and Giacomo Luciani, 'The Protection of Biodiversity and Ecological Connectivity in the Carpathian Convention' in Mariachiara Alberton (ed), *Toward the Protection of Biodiversity and Ecological Connectivity in Multi-Layered Systems* (Nomos 2013).

emerges primarily from the traditional knowledge and lifestyle of local mountain communities.[940]

The two aforementioned conventions apply to mountain ranges that cross several countries but have localised relevance since their territorial scope does not coincide with the territories of the State Parties, only a portion of their territory. Hence, an ecological element – the mountain range – defines the space of cooperation and, within this space, sub-national entities and local communities can formalise their connections and acquire a stronger role.

Although the Alpine and Carpathian Conventions belong to the 'hard law' realm, they apply to a space – that of mountain regions – in which the law is subject to a transformative process influenced by interaction between the sub-national, national and international levels including the effects of the EU legal order.[941] In this context, cooperation is carried out at the intergovernmental level, but unfolds in a decentralised manner at a local scale with the spatial extent of the mountain range in question. Therefore, the normative, spatial, and governance dimensions do not interact in the ways usually seen in traditional intergovernmental agreements.

Both the Alpine and the Carpathian Conventions are framework conventions:[942] they set broad conservation objectives and principles as well as creating institutions, but are integrated by *ad hoc* Protocols on specific issues. The Alpine Convention lists the main areas of cooperation in its Article 2(2), thus laying the basis for the negotiations of specific Protocols.[943]

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[940] For a general overview on the protection of biodiversity in mountain areas refer to Alessandro Fodella, 'Mountain Biodiversity' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar 2017); Alessandro Fodella and Laura Pineschi, 'Environmental Protection and Sustainable Development of Mountain Areas' in Tullio Treves, Laura Pineschi and Alessandro Fodella (eds), *International Law and the Protection of Mountain Areas* (Giuffrè Editore 2002). In addition, the interaction among the ecological, social, economic and governance dimensions are addressed in Dinah Shelton, 'International Agreements and the Protection of Mountain Areas: Overlappings and Co-Ordination' in Tullio Treves, Laura Pineschi and Alessandro Fodella (eds), *Sustainable Development of Mountain Areas: Legal Perspectives beyond Rio and Johannesburg* (Giuffrè Editore 2004).

[941] In this regard refer to the concept of melting law developed in Benjamin Perrier and Nicolas Levrat, 'Melting Law: Learning from Practice in Transboundary Mountain Regions' (2015) 49 Environmental Science & Policy 32.

[942] Regarding framework conventions and their characteristics refer to Chapter 3 Section 3.2.

[943] As of July 2018, the Alpine Convention has ten Protocols on the following subjects: Spatial planning and sustainable development; Nature protection and landscape conservation; Mountain farming; Mountain forests; Tourism; Energy; Soil conservation; Transport; Solution of litigations; and Adherence of the Principality of Monaco to the Alpine Convention. In

The Carpathian Convention, on the other hand, addresses its main areas of cooperation in single provisions from Articles 3 to 13.[944] It is worth noting that the areas of cooperation covered by these two Conventions and their Protocols are similar and include biodiversity conservation, mountain forests, agricultural activities, tourism, and transport. This similarity provides further proof of the uniqueness of mountain regions and the fragility of their ecosystems,[945] and the peculiarity of socio-economic activities developed in these areas such as farming or tourism, which can provide benefits to local populations, but, at the same time, can affect mountain biodiversity.

The aim of protecting mountain biodiversity across borders is also fostered through the creation of a transboundary ecological network of protected areas in both Conventions.[946] ALPARC was created under the Alpine Convention in 1995 under an initiative of the French Government; while the Carpathian Network of Protected Areas (CNPA) is foreseen in Article 14 of the Carpathian Biodiversity Protocol and has the institutional status of a full body of the Convention.[947] ALPARC and the CNPA have similar objectives and activities, which is not surprising given the strong relations between the two Conventions and the level of collaboration between their organs made official in a Memorandum of Understanding.[948] Cross-border

addition, there are two Ministerial declarations: one on population and culture, and the other on climate change. Both Protocols and Declarations are available at http://www.alpconv.org/en/convention/protocols/default.html accessed 9 July 2018.

[944] To the present date (July 2018), five Protocols have been adopted on: Conservation and sustainable use of biological and landscape diversity (Biodiversity Protocol); Sustainable forest management (Forest Protocol); Sustainable tourism; Sustainable transport; and Sustainable agriculture and rural development. The Protocols are available at http://www.carpathianconvention.org/protocols-to-the-convention.html accessed 9 July 2018.

[945] In this regard, it is worth exploring the issue of wilderness protection in the context of both the Alpine and Carpathian Conventions referring respectively to Volker Mauerhofer, Ewald Galle and Marco Onida, 'The Alpine Convention and Wilderness Protection' in Kees Bastmeijer (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press 2016); Harald Egerer and others, 'Wilderness Protection under the Carpathian Convention' in Kees Bastmeijer (ed), *Wilderness Protection in Europe: The Role of International, European and National Law* (Cambridge University Press 2016).

[946] See Article 12 of the Protocol on Nature Protection of the Alpine Convention and Article 9 of the Biodiversity Protocol of the Carpathian Convention. By reading the two provisions, it is easy to note that the one of the Carpathian Biodiversity Protocol is more recent since it is more detailed and builds also on the concept of connectivity. Moreover, this objective is indirectly pursued also through Article 11 of the Carpathian Forest Protocol, which requires Parties to include protected areas, where forest management is carried out, into Natura 2000 sites.

[947] On this point Fodella, 'Mountain Biodiversity', *cit.*, (n 940) 169; Egerer and others, 'Wilderness Protection under the Carpathian Convention', *cit.*, (n 945) 236.

[948] For further details on ALPARC and CNPA see Martin F Price, 'Transnational Governance in Mountain Regions: Progress and Prospects' (2015) 49 Environmental Science & Policy 95, 97 ff. In 2006, at the IX Alpine Conference, the Ecological Network Platform was set up to develop common strategies for the preservation of Alpine biodiversity by tackling connectivity challenges. This Platform supports also the Carpathian Convention and the Biodiversity Convention based on the MoUs

conservation and connectivity is also ensured through specific projects and measures,[949] including the connection of the two mountain ranges, as in the case of the Austria-Slovakia European Cross-Border Alpine-Carpathians Corridor.[950] The objective of transboundary conservation is enhanced through the application of regional instruments in both mountain ranges, as in the case of the EU Natura 2000 Network,[951] and international instruments, like the Biodiversity Convention and its Programme of Work on Protected Areas.[952]

The natural environment shapes and influences the lifestyles and livelihoods of populations, and this is particularly evident in mountain regions. People living in mountain areas usually dealing with harsh socio-economic, geographic, and climate conditions. Moreover, mountain ranges are often located in border regions and thus perceived as marginal areas as well as defining political borders between neighbouring States. Nonetheless, local communities inhabiting areas crossing these boundaries are alike, and often share a cultural, spiritual and linguistic heritage, face the same problems and have similar needs, all of which motivates them and their territorial authorities to cooperate. The Alpine and Carpathian Conventions acknowledge all these dimensions and adopt a comprehensive approach: they focus not only on environmental protection, but also aim to contribute to the sustainable development of these mountain regions by improving the socio-economic conditions of local communities and preserving their culture and traditional uses.[953] In this context, it is possible

between the Alpine Convention and these other treaties. Further information available at http://www.alpconv.org/en/organization/groups/WGEcologicalNetwork/default.html accessed 11 July 2018.

[949] Like ECONNECT and GreenAlps for the Alps and BIOREGIO Carpathians for the Carpathian. In this regard refer, for the Alps to Mauerhofer, Galle and Onida, 'The Alpine Convention and Wilderness Protection', *cit.*, (n 945) 216 ff. While, for the Carpathians see Egerer and others, 'Wilderness Protection under the Carpathian Convention', *cit.*, (n 945) 237.

[950] On this point Egerer, Kuras and Luciani, 'The Protection of Biodiversity and Ecological Connectivity in the Carpathian Convention', *cit.*, (n 939) 97. See also http://ec.europa.eu/regional_policy/en/projects/austria/innovative-alps-carpathians-corridor-re-establishes-a-major-migration-route-for-wild-animals accessed 11 July 2018.

[951] On the transboundary dimension of the Natura 2000 network see *supra* Section 4.2.2.

[952] The CBD PoWPA is discussed in Chapter 3, Section 3.3.3.

[953] This is expressly mentioned in the opening preambular recital of the Alpine Convention, which recognises the Alps as 'one of the largest continuous unspoilt natural areas in Europe, which, with their outstanding unique and diverse natural habitat, culture and history, constitute an economic, cultural, recreational and living environment in the heart of Europe, shared by numerous peoples and countries'. The Carpathian Convention echoes the Alpine one by opening its Preamble in a similar way. See also Pineschi, 'The Convention for the Protection of the Alps and Its Protocols: Evaluation and Expectations', *cit.*, (n 938) 191; Harald Egerer, 'The Carpathian Convention. Partnership for Protection and Sustainable Mountain Development' in Tullio Treves, Laura Pineschi and Alessandro Fodella (eds), *Sustainable Development of Mountain Areas: Legal Perspectives beyond Rio and Johannesburg* (Giuffrè Editore 2004) 245–246.

to argue that the two Conventions hint at or even advance the concept of decentralised international cooperation.

The Alpine Convention lists 'population and culture' as its first priority in Article 2 by requiring Parties to take measures that 'respect, preserve and promote the cultural and social independence of the indigenous population and to guarantee the basis for their living standards, … and promote mutual understanding and cooperation between Alpine and extra Alpine populations', thus encouraging cross-border cooperation between local communities. Based on this Article the Parties signed a Ministerial Declaration on Population and Culture in 2006, which further promotes cooperation between local communities and different linguistic groups within and outside the Alpine areas. This Declaration also aims to strengthen transparency and participation; recognises the cultural and linguistic diversity of local communities, and their artistic creativity; and fosters the maintenance of local architecture. It promotes the improvement of the quality of life, services and opportunities for these communities, both from a social and an economic perspective; and highlights the importance of rural areas and the need to improve connections and interactions with urban hubs.[954] In addition, the Declaration identifies measures useful in achieving the aforementioned objectives. In particular, it promotes the development of partnerships between local and regional authorities in the Alps for community awareness and identity purposes, as well as cross-border and inter-regional cooperation networks within Alpine and non-Alpine areas.[955] These measures constitute decentralised cooperative mechanisms that formalise cross-border relations among sub-national authorities and communities, and, in so doing, operationalise the concept of decentralised international cooperation in the Alpine region. Nevertheless, by relegating cooperative

[954] The Declaration on Population and Culture (November 2006) is available at http://www.alpconv.org/en/convention/protocols/Documents/PopCult_en.pdf accessed 10 July 2018.
[955] Declaration on Population and Culture, Annex.

objectives on populations and culture to a Declaration instead of a Protocol,[956] State Parties seem to be downplaying the importance of local interests and needs.[957] The preference for a non-binding instrument – similarly to the declaration – demonstrates the sensitivity of this issue and the will to adopt a cautious, or perhaps incremental, approach.[958]

A more supportive attitude towards local communities is adopted in the Protocols,[959] which highlight their contributions to the conservation and sustainable management of mountain biodiversity by providing the possibility to compensate them for the services they provide, thus hinting at the concept of payments for ecosystem services.[960] However, in this context, communities are beneficiaries and do not need to undertake any additional action at the cross-border level other than maintaining their traditional practices. This appears as if State Parties are sceptical about acknowledging a formal role for local communities at cross-border level; rather, they enable their participation indirectly, through the representation of their interests and needs by local authorities.

In fact, several Protocols explicitly foresee the participation of local authorities in decision-making processes[961] and encourage their cooperation at cross-border level.[962] In this regard, the Protocol on Spatial Planning requires State Parties 'to eliminate any obstacle to international cooperation between the local and regional Alpine authorities, and to promote the solution to mutual problems by means of the best collaboration at territorial level'.[963] It further asks States

[956] In this regard, Pineschi deals with the possibility to have a Protocol on Population and Culture in a 2004 article, so before the adoption of the 2006 Declaration. Pineschi, 'The Convention for the Protection of the Alps and Its Protocols: Evaluation and Expectations', *cit.*, (n 938) 196 ff.
[957] On this point see Fodella, 'Mountain Biodiversity', *cit.*, (n 940) 168.
[958] For instance, issues relating to cultural and linguistic minorities and their rights belong to this area of cooperation, and can be regulated differently in the State Parties. This element motivates such a cautious approach.
[959] In particular, Protocol on Nature Protection, Article 11(4); Protocol on Spatial Planning, Article 11; and Protocol on Mountain Forest, Article 11.
[960] On this point refer to Fodella, 'Mountain Biodiversity', *cit.*, (n 940) 168. More generally on ecosystem services see Millennium Ecosystem Assessment, *Ecosystem and Human Well-Being: Synthesis*, *cit.*, (n 14).
[961] In particular, Protocol on Soil Protection, Article 3; Protocol on Spatial Planning, Article 7; and Protocol on Mountain Forest, Article 3.
[962] In particular, Protocol on Spatial Planning, Article 8; and Protocol on Mountain Forest, Article 4.
[963] Protocol on Spatial Planning, Article 4(1).

to allow local and regional authorities to represent the interests of local communities when adopting measures of national or international competence.[964]

The Protocol on Mountain Forests also focuses on the participation of regional and local authorities, this time in the various stages of preparation and implementation of relevant policies and measures,[965] and demands States 'to ensure the achievement of the aims and measures [for the preservation and sustainable development of mountain forest systems] by means of cross-border cooperation between all the competent authorities, particularly between the regional and local authorities'.[966] Therefore, it can be argued that the Alpine Convention enables decentralised international cooperation for the conservation and sustainable management of shared natural resources and spaces, but, while the role of local authorities at cross-border level is legitimised, the role of local communities is to be mediated via territorial authorities.

In the context of the Carpathian Convention, Article 11 frames the discussion of decentralised international cooperation. This provision requires Parties to pursue policies for the 'preservation and promotion of the cultural heritage and of traditional knowledge of the local people, crafting and marketing of local goods, arts and handicrafts … the traditional architecture, land-use patterns, local breeds of domestic animals and cultivated plants varieties, and sustainable use of wild plants …'.[967] The same Convention's Biodiversity Protocol[968] and Forest Protocol,[969] with identical provisions, require Parties to 'facilitate the cooperation between regional and local authorities in the Carpathians at the international level, and seek solutions to shared problems at the most suitable level'.[970] Based on this, the Strategic Action Plan for the implementation of the Biodiversity Protocol requires States to facilitate

[964] Protocol on Spatial Planning, Article 4(3).
[965] Protocol on Mountain Forests, Article 3.
[966] Protocol on Mountain Forests, Article 4(b).
[967] Carpathian Convention, Article 11.
[968] At Article 7(2).
[969] At Article 5(2).
[970] Instead, the Protocol on Sustainable Agriculture and Rural Development remains vague and encourages 'active cooperation among competent institutions and organizations at international level', without explicitly referring to local and regional authorities in its Article 7.

'international cooperation between regional and local authorities in the Carpathians, in particular in border areas and transboundary protected areas' including through specific agreements in the framework of the European Outline Convention on Transfrontier Co-operation between the Territorial Communities and Authorities.[971]

The involvement of 'other stakeholders' in addition to regional and local authorities is also foreseen in these Protocols and, arguably, this term encompasses local communities.[972] A more punctual reference to local communities can be derived from those provisions referring to traditional knowledge and practices contained in the Biodiversity Protocol,[973] the Forest Protocol,[974] and the Protocol on Sustainable Agriculture and Rural Development.[975] The latter explicitly identifies local farmers among the interested stakeholders to be involved in developing and implementing policies on agriculture and rural areas.[976] Article 9 of the Forest Protocol, on the other hand, provides for the development and use of systems of payment for ecosystem services to the benefit of forest owners and managers. In this case too, local communities are seen as the beneficiaries of cross-border cooperative initiatives carried out by their representative territorial authorities.

This analysis has demonstrated that both Conventions are among those legislative instruments designed 'to combat barriers to ecological connectivity, in particular through transboundary cooperation'.[977] They aim to overcome state borders, administrative borders between territorial units within and across States, and borders between sectoral policies.[978] They

[971] Strategic Action Plan for the Implementation of the Protocol on Conservation and Sustainable Use of Biological and Landscape diversity to the Framework Convention on the Protection and Sustainable Development of the Carpathians, Objective 13, Action 13.2.
[972] It is worth mentioning that NGOs played a primary role in the development of both the Alpine and Carpathians Conventions and are also contributing to their implementation to different extents. In this regard, for the Alps see Andreas Götz, 'The Alpine Convention as an Example of the Role of Non-Governmental Organisations (NGOs) in the Adoption of an International Agreement' in Tullio Treves, Laura Pineschi and Alessandro Fodella (eds), *Sustainable Development of Mountain Areas: Legal Perspectives beyond Rio and Johannesburg* (Giuffrè Editore 2004). For the Carpathians refer to Egerer, 'The Carpathian Convention. Partnership for Protection and Sustainable Mountain Development', *cit.*, (n 953).
[973] At Article 23.
[974] At Article 15(3).
[975] At Article 12.
[976] At Article 6.
[977] Onida, 'The Protection of Biodiversity and Ecological Connectivity in the Alpine Convention', *cit.*, (n 938) 74.
[978] ibid 74 ff.

provide a multilevel-governance platform to address problems that have a territorial and localised relevance, and, in so doing, they connect not only central authority – which might be oblivious or unaware of such problems – to the local authorities and communities that govern and inhabit those territories, but also reinforce cross-border connections among sub-national actors themselves. In this sense, they apply and advance the concept of decentralised international cooperation proposed in this thesis.

In both cases, the formal participation of local communities across borders is mediated by representative authorities. Arguably, the rationale for this lies in the fact that, in the European context, territorial authorities belonging to different States dispose of several mechanisms for formalising their cooperation across borders.

4.3 Regional instruments framing decentralised cooperation

Decentralised international cooperation over shared natural resources and spaces took place long before being recognised and formalised through *ad hoc* legal instruments. This process unfolded in the European context thanks to the contribution of the Council of Europe and the EU, building on the experience of existing mechanisms that enable cooperation among the territorial authorities of neighbouring States, such as working communities or euroregions.

Working communities lack a precise definition. Perrier and Levrat describe them as 'one form adopted by territorial authorities to materialise projects or actions of cross-border co-operation amongst each other'.[979] They have non-binding legal bases and their territorial scope usually coincides with a broad area characterised by a particular geographical feature, like a mountain range. Working communities are usually composed of numerous regional authorities, none of which transfer any decision-making power to the joint body.[980] Euroregions also group

[979] Perrier and Levrat, 'Melting Law: Learning from Practice in Transboundary Mountain Regions', *cit.*, (n 941) 38.
[980] On this point see European Commission - DG for Regional and Urban Policy, *Territorial Cooperation in Europe - A Historical Perspective* (2015) 24.

local authorities belonging to different States, but aim to establish a cross-border area via a more binding cooperation framework that enables the creation and execution of joint policies and projects.[981]

The following sections introduce the two main legal instruments, and related mechanisms, that enable cross-border cooperation among territorial authorities in the European context.

4.3.1 The Council of Europe and the promotion of territorial cooperation

One of the areas in which the Council of Europe is particularly active is the promotion of effective local democracy, including by facilitating cooperation between local and regional authorities across political and geographical boundaries. To this end, it adopted the European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities (Madrid Convention) and its three Protocols, which encourage the conclusion of cross-border agreements between the territorial communities and authorities of different Member States. Agreements can cover any area of cooperation, including environmental protection,[982] provided that territorial communities and authorities act within the scope of their respective powers. It can be argued that the Madrid Convention promotes decentralised international cooperation and that the agreements adopted within this framework are useful schemes for operationalising the concept proposed in this thesis. Therefore, the goal of transfrontier cooperation mentioned in this regime can be easily replaced with that of decentralised international cooperation.

The Preamble of the Madrid Convention reiterates that the aim of the Council of Europe is to foster unity and cooperation among its members, including through the participation of territorial communities or authorities, since past experience demonstrates that cooperation at

[981] ibid 25.
[982] Environmental protection is explicitly mentioned in the Preamble as a primary area of cooperation between territorial communities or authorities.

this level 'makes it easier for them to carry out their tasks effectively and contributed to the improvement and development of *frontier regions*'.[983] Hence, in setting the frame for decentralised international cooperation, the Preamble calls attention to the fact that decentralised cooperation is particularly beneficial for marginal areas of neighbouring States and is useful to achieve environmental protection objectives.

Transfrontier cooperation is defined as any action aimed at reinforcing and fostering neighbourly relations between the territorial communities and authorities of State Parties, and the conclusion of any agreement and arrangement useful to this purpose and in the framework of their powers, as defined in domestic law.[984] Moreover, the term 'territorial communities or authorities' means 'communities, authorities or bodies exercising local and regional functions and regarded as such under the domestic law of each State'.[985] Hence, the meaning of the term 'communities' in the Madrid Convention differs from the general definition of local communities provided in this thesis,[986] and coincides with that of sub-national administrative entities.[987]

State Parties are required to facilitate and foster transfrontier cooperation between sub-national authorities by promoting the conclusion of appropriate agreements or arrangements with due regard to the different constitutional provisions of each party.[988] To facilitate this, model and outline agreements are provided for guidance, though they do not prevent the adoption of different forms of arrangements or invalidate existing cooperative agreements.[989] The aspiration to facilitate and reinforce transfrontier cooperation in the field of environmental

[983] Madrid Convention, Preamble. (emphasis added)
[984] Madrid Convention, Article 2(1).
[985] Madrid Convention, Article 2(2).
[986] In this thesis, the term 'local community' identifies a group of people that inhabit a circumscribed area and share their living space, thus interacting with each other. For further details see Chapter 1, Section 1.1.4.
[987] Hence, for the sake of clarity, territorial communities and authorities, as intended in this Convention, are here identified as sub-national authorities; while, local communities maintain the general meaning provided in this thesis.
[988] Madrid Convention, Article 1.
[989] Madrid Convention, Article 3.

protection is confirmed by the inclusion of a model agreement on the creation and management of transfrontier parks and a model agreement for transfrontier rural parks.[990]

States have to address any legal, administrative or technical obstacles to transfrontier cooperation,[991] and to grant sub-national authorities 'the same facilities as if they were co-operating at national level':[992] in other words, geopolitical boundaries are to vanish, which is arguably an objective of decentralised international cooperation. Moreover, States should promote transfrontier cooperation by informing sub-national authorities of the means of action at their disposal under this Convention.[993]

The 1995 Additional Protocol[994] reiterates the commitment of State Parties to promote and facilitate transfrontier cooperation by empowering sub-national authorities to this end,[995] and provides further details on the content and legal consequences of transfrontier cooperation agreements. It specifies that, as a general rule, the decisions taken under these agreements are implemented by the sub-national authorities parties to it, and thus have the same legal force and effects as measures adopted within national legal systems.[996] Nevertheless, sub-national authorities can decide to set up a transfrontier cooperation body, which may have legal personality,[997] be a public entity,[998] and perform the responsibilities assigned to it in its foundational agreement, in accordance with its purpose and in respect of the national law by which is governed: that of its headquarters' State.[999] Hence, this Protocol aims to advance the potential of a transfrontier cooperation agreement through the creation of a supranational body, which can act alone, on behalf of its members, and pursues specific objectives. Arguably,

[990] Model inter-State agreements are available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680078b0a accessed 12 July 2018.
[991] Madrid Convention, Article 4.
[992] Madrid Convention, Article 5.
[993] Madrid Convention, Article 7.
[994] Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (Strasbourg) 9 November 1995, in force 1 December 1998, ETS 159. Hereinafter, Additional Protocol.
[995] Additional Protocol, Article 1.
[996] Additional Protocol, Article 2. See also Article 5(2).
[997] Additional Protocol, Article 3.
[998] Additional Protocol, Article 5(1).
[999] Additional Protocol, Article 4.

setting up an *ad hoc* institutional mechanism makes transfrontier cooperation more effective and reduces the risk of fragmented and incoherent implementation.

Protocol No. 2 to the Madrid Convention[1000] aims to expand cooperation between non-neighbouring sub-national authorities which have common interests, thus providing an international legal framework to what it identifies as 'interterritorial cooperation'.[1001] In so doing, the provisions, processes and mechanisms applicable to transfrontier cooperation are applied *mutatis mutandis* to interterritorial cooperation.[1002] Interterritorial cooperation agreements can also be relevant for the focus of this thesis, since decentralised international cooperation applies to shared natural resources and spaces – that inevitably entail neighbourliness – as well as to natural resources that are ecologically connected yet lack the vicinity feature, as in the case of migratory species.

Protocol No. 3[1003] attempts to overcome the political and administrative barriers inherent to inter-State cooperation by designing a transfrontier cooperation body called a 'Euroregional Cooperation Grouping' (ECC).[1004] These bodies have legal personality,[1005] the capacity to act on behalf of members,[1006] and are governed by a founding agreement and statute.[1007] ECGs are identical to the European Grouping of Territorial Cooperation, a EU decentralised cooperative scheme introduced in 2006.[1008] In fact, the Preamble of Protocol No. 3 explicitly recognises that 'for a number of Member States framework legislation may be sufficient… [since their national law] includes the relevant provisions of European Community law…',[1009] which

[1000] Protocol No. 2 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning interterritorial co-operation (Strasbourg) 05 May 1998, in force 1 February 2001, ETS 169. Hereinafter, Protocol No. 2.
[1001] Protocol No. 2, Preamble and Article 1.
[1002] Protocol No. 2, Articles 3, 4, and 5.
[1003] Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs) (Utrecht) 16 November 2009, in force 1 March 2013, ETS 206. Hereinafter, Protocol No. 3.
[1004] Protocol No. 3, Preamble and Article 1(1).
[1005] Protocol No. 3, Article 2.
[1006] Protocol No. 3, Article 7. As for its membership refer to Article 3.
[1007] Protocol No. 3, Articles 4 and 5.
[1008] This mechanism is described thoroughly in the following Section (4.3.2).
[1009] Protocol No. 3, Preamble.

arguably includes the EGTC Regulation. Therefore, it can be argued that, based on the positive resonance of the EGTC introduced at EU level, Protocol No. 3 aims to provide a similar mechanism to facilitate decentralised international cooperation among States that are members of the Council of Europe, regardless of their membership to the EU.

Despite the foresight of the Council of Europe in promoting decentralised international cooperation, the dedicated regime has not spread as expected, as demonstrated by the limited number of agreements concluded under this regime[1010] and the fact that the number of ratifications and accessions has decreased with each Protocol.[1011] Protocol No. 3 on ECGs has only been ratified by seven countries, which confirms the preference for the equivalent EU mechanism: the EGTC. Arguably, this preference is motivated by the fact that the EGTC mechanism was better designed from the outset, is easier to implement for EU Member States – and has hence spread quickly – and can rely on a comprehensive set of enforcement tools available in the EU system. In 2009, the Council of Europe designed the ECGs in order to supplement decentralised international cooperation outside the EU context, or between EU and non-EU Member States. Nevertheless, the amendments introduced to the EGTC in 2013 widened its membership to sub-national authorities and other entities of non-EU Member States, thus making ECGs redundant.

Notwithstanding the fact that the Council of Europe regime on transfrontier cooperation is less widely applied than the EGTC, its existence reinforces the claim that decentralised international cooperation is needed to address cross-border localised interests, including the

[1010] On this point, it is difficult to provide precise figures given the absence of a registry or platform of existing transfrontier cooperation agreements, interterritorial agreements or ECGs concluded in the framework of the Madrid Convention and its Protocols.

[1011] In fact, the Madrid Convention counts 39 ratifications/accessions and 2 signatures not followed by ratifications, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/106/signatures?p_auth=zy8BmAdo accessed 12 July 2018; while the Additional Protocol has 24 ratifications/accessions and 5 signatures not followed by ratifications, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/159/signatures?p_auth=zy8BmAdo accessed 12 July 2018; Protocol No. 2 counts 23 ratifications/accessions and 4 signatures not followed by ratifications, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/169/signatures?p_auth=zy8BmAdo accessed 12 July 2018; and Protocol No. 3 has 7 ratifications/accessions and 6 signatures not followed by ratifications, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/206/signatures?p_auth=zy8BmAdo accessed 12 July 2018.

conservation and management of transboundary natural resources and spaces, and that sub-national actors have a role to play in this context. Hence, this regime is in line with a more generalised international trend that recognises an increasing role for sub-national actors and aims to foster their participation at the international level. Nevertheless, in this case too, the involvement of local communities across borders is mediated by their corresponding administrative authorities.

4.3.2 The European Grouping of Territorial Cooperation

The EGTC is an EU legal instrument that enables decentralised international cooperation for the joint conservation and sustainable management of transboundary natural resources and spaces.[1012] It was specifically created to facilitate and promote territorial cooperation between sub-national authorities or other entities of different States across international borders,[1013] primarily in the EU.[1014]

This instrument was introduced by Regulation (EC) 1082/2006 to promote territorial cooperation and contribute to social and economic cohesion among EU Member States by enhancing synergistic connections between similar territories, especially in frontier regions.[1015] It was successively amended by Regulation (EU) 1302/2013[1016] and is widely used in the EU context.

The EGTC institutionalises and legitimises the participation of sub-national entities at the EU level, regulates and systemises spontaneous cooperative experiences – often based on

[1012] Regarding the utilisation of the EGTCs for environmental cooperation see Emma Mitrotta, 'Il Gruppo Europeo Di Cooperazione Territoriale (GECT) e La Sua Funzionalità Come Strumento Di Cooperazione Transfrontaliera in Materia Ambientale' (2016) 2 Rivista giuridica dell'ambiente 385.
[1013] EGTC Regulation, Article 1(2).
[1014] In fact, an amendment introduced with Article 3 bis has enabled the accession of members from third States or overseas countries or territories.
[1015] In the context of the EU, territorial cooperation is categorised as cross-border, transfrontier and interregional depending on the geographical proximity of the entities participating in these agreements. Such differences are not relevant for the purpose of this thesis that focuses on cooperation between sub-national actors across borders for environmental conservation purposes. For further details refer to http://ec.europa.eu/regional_policy/en/policy/cooperation/european-territorial/ accessed 13 July 2018.
[1016] The Regulation (EC) 1082/2006 is here mentioned as EGTC Regulation. Any amendment introduced by Regulation (EU) 1302/2013 is specified.

historical and cultural ties – and arguably reflects the functional character of decentralised international cooperation, which is set up according to the needs and the will of the EGTC's members and the territorial specificities.[1017]

It can be established on a voluntary basis[1018] and is not meant to replace existing cooperative instruments – like those regulated under the regime of the Council of Europe[1019] – nor is it intended to be the sole mechanism regulating territorial cooperation within the EU.[1020] The EGTC can act on behalf of its members[1021] since it has legal capacity,[1022] acquired on the day of registration or publication of its convention and statutes.[1023] Moreover, it is endowed with the most extensive legal capacity under the national law of each Member State, with the possibility to acquire or dispose of movable and immovable property, employ staff, and be a party to legal proceedings.[1024]

The EGTC is flexible in its composition, tasks, institutional structure, and applicable law. Its members can belong to any of the categories listed in Article 3(1) of the EGTC Regulation.[1025] Its members agree on the tasks it can perform, which can be specific or more general – as long as they can be connected to social, economic and territorial cohesion and do not necessarily depend on EU funds.[1026] Regarding its institutional structure, the Regulation requires the presence of an assembly, composed of representatives of members, and a director, who represents the EGTC and can act on its behalf. Beyond that, the EGTC's members can decide how to design its organisational structure.[1027] Moreover, members can decide where to

[1017] In this regard see European Commission - DG for Regional and Urban Policy, *Territorial Cooperation in Europe - A Historical Perspective*, *cit.*, (n 980) 63.
[1018] EGTC Regulation, preambular recital 8 and Article 4(1).
[1019] Regarding the Council of Europe regime on transfrontier cooperation see *supra* Section 4.3.1. Moreover, for a comparison between the EGTCs and the Euroregions established by the Council of Europe see Enrique J Martínez Pérrez, 'Las Agrupaciones Europeas de Cooperación Territorial (Unión Europea) Frente a Las Agrupaciones Eurorregionales de Cooperación (Consejo de Europa): ¿Competencia o Complementariedad?' (2010) 56 Revista de Estudios Europeos 109.
[1020] EGTC Regulation, preambular recital 5.
[1021] EGTC Regulation, preambular recital 9.
[1022] EGTC Regulation, Article 1(3).
[1023] EGTC Regulation, Article 5(1).
[1024] EGTC Regulation, Article 1(4).
[1025] As amended by Regulation EU 1302/2013.
[1026] EGTC Regulation, Article 7 as amended by Regulation EU 1302/2013.
[1027] EGTC Regulation, Article 10.

locate the EGTC's registered office, thus determining part of the applicable legal framework. Indeed, the EGTC is seen as an 'integrated legal instrument'[1028] since it results from the interaction of EU, national and sub-national law.[1029] The decision to opt for a Regulation on the EGTC matches the flexible nature of this instrument: it establishes a general instrument to strengthen territorial cooperation, defines its essential aspects and determines a uniform legal framework applicable in all EU Member States, but allows the EGTC members to decide on its structure and operational capacity in each specific case.[1030]

The flexibility of this cooperative structure is not limited to its composition and institutional architecture: it also flows from the promotion of a wide variety of goals and the attainment of unforeseen objectives, such as the protection of ethnolinguistic minorities inhabiting frontier regions.[1031] Similarly, the EGTC can improve the joint management of transboundary natural resources and spaces, strengthen their conservation, and enable the direct involvement of sub-national authorities and local communities, thus operationalising the concept of decentralised international cooperation, as intended in this thesis, in the EU.

The EGTC is meant to be a dynamic instrument, able to adapt to the evolution of the specific cooperative projects as well as Community objectives more generally. To this end, Article 17 of the EGTC Regulation introduced a report and review clause to adjust the instrument to the reform of the cohesion policy for 2014-2020. The amendments introduced with Regulation EU 1302/2013 stem from the trial phase of the first EGTCs, the Commission report on the application of the Regulation in the EU Member States,[1032] and the contribution

[1028] Francesco Palermo, 'Conclusioni: Cooperazione Transfrontaliera e Sviluppo Dello Spazio Giuridico Integrato in Europa' (2012) 3 Informator 76, 76.
[1029] EGTC Regulation, Article 2 as amended by Regulation EU 1302/2013.
[1030] On this point see Alice Engl, 'Functional and More? - A Conclusion' in Alice Engl and Carolin Zwilling (eds), *Functional and More? New Potential for the European Grouping of Territorial Cooperation - EGTC* (Eurac Research 2014).
[1031] In this regard, Palermo highlights the presence of more than thirty EGTCs in ethnically sensitive regions. Palermo, 'Conclusioni: Cooperazione Transfrontaliera e Sviluppo Dello Spazio Giuridico Integrato in Europa', *cit.*, (n 1028) 144. On the EGTC as a space for minorities see Alice Engl and Johanna Mitterhofer, 'Bridging National and Ethnic Borders: The European Grouping of Territorial Cooperation as a Space for Minorities' (2015) 12 European Yearbook of Minority Issues Online 1.
[1032] Report from the Commission to the European Parliament and the Council on the application of the Regulation (EC) No 1082/2006 on a European Grouping of Territorial Cooperation (EGTC). COM/2011//0462/final.

of the Committee of the Regions.[1033] In particular, the provisions on the nature of the EGTC and the applicable law have been perfected;[1034] new categories of entities can become members, including private bodies entrusted with delivering services of general economic interest;[1035] membership is now also open to entities from third countries or overseas countries or territories.[1036] The procedure for establishing the EGTC has been simplified and clarified, particularly vis-à-vis the *ex ante* approval of the EU Member States whose entities compose the EGTC.[1037] Other amendments relate to the content of the convention and statutes,[1038] including a clarification of the rules applicable to EGTC staff,[1039] and issues of liability, which can be 'limited'.[1040] The amendments do not affect existing EGTCs, nor those under constitution while Regulation EU 1302/2013 was being adopted.[1041]

The EGTC is a strong mechanism for decentralised international cooperation. Its operational capacity *de facto* supersedes some of the restrictions imposed by the Regulation. For instance, the tasks that an EGTC can carry out are limited *latu sensu* since they are connected to the Community objectives of economic, social and territorial cohesion, which have broad scope.[1042] Although the EGTC should act within the confines of the tasks falling within the competence of every member – as provided under the national law of each Member State involved – its establishment results in the creation of a system of integrated competences that is wider than those traditionally exercised by its members: through the EGTC the

[1033] Regarding the role of the Committee of the Region in connection to the EGTC and territorial cooperation more generally see Christian Gsodam and Alfonso Alcolea Martínez, 'New EU Rules for the EGTC: How the Committee of the Regions Shapes Territorial Cooperation in Europe' in Alice Engl and Carolin Zwilling (eds), *Functional and More? New Potential for the European Grouping of Territorial Cooperation - EGTC* (Eurac Research 2014).
[1034] See Articles 1 and 2 of the EGTC Regulation as amended by Regulation EU 1302/2013.
[1035] See Article 3 of the EGTC Regulation as amended by Regulation EU 1302/2013.
[1036] Article 3(a) introduced by Regulation EU 1302/2013.
[1037] Article 4 of the EGTC Regulation as amended by Regulation EU 1302/2013.
[1038] See Articles 8 and 9 of the EGTC Regulation as amended by Regulation EU 1302/2013.
[1039] See Article 8(k) introduced by Regulation EU 1302/2013.
[1040] Article 12 of the EGTC Regulation as amended by Regulation EU 1302/2013. For a detailed analysis on the amendments introduced with Regulation EU 1302/2013 refer to Alfonso Alcolea Martínez, 'Towards a New Generation of European Groupings of Territorial Cooperation' 89.
[1041] Article 2 of Regulation EU 1302/2013.
[1042] On this point see Walter Obwexer, 'Il GECT Come Nuovo Strumento Di Cooperazione Territoriale Del Diritto Dell'Unione Europea' (2012) 3 Informator 35, 38.

competence of sub-national authorities can expand and elude the constitutional limits set within the States that are Parties to it.[1043] Hence, the structure and operational capacity of the EGTC enables the achievement of transboundary, but localised, objectives.

It can be argued that EGTCs are apt for ensuring environmental conservation and management. First of all, they provide an institutional infrastructure useful to govern transboundary natural spaces in a unitary way. Moreover, in this context, they reserve a primary role to sub-national authorities and, through them, promote the interests of local communities - one of the main features of decentralised cooperative schemes. Indeed, the participatory character of EGTCs is ensured by the institutional and territorial vicinity to the interests they represent. Moreover, they contribute to meeting multilateral environmental obligations and goals by facilitating the respect of international treaties in specific areas that belong to their territorial scope.

The environmental vocation of EGTCs is increasingly manifested through cooperative instruments established to this end,[1044] as in the case of the Parco Europeo – Parc Europèen Alpi Marittime – Mercantour and the ZASNET analysed in detail in the following chapters. These two EGTCs are presented as examples of decentralised international cooperation over transboundary natural resources and spaces in the EU.

4.4 Preliminary conclusions

The conservation and sustainable management of transboundary natural resources and spaces in Europe are governed by a complex normative and policy framework, developed at both the international and regional levels, especially in the context of the EU.

[1043] On this point see Palermo, 'Conclusioni: Cooperazione Transfrontaliera e Sviluppo Dello Spazio Giuridico Integrato in Europa', *cit.*, (n 1028) 77.
[1044] In this regard see the examples included in Sabine Zillmer and others, 'EGTC Good Practice Booklet' (2018) 21 ff. This booklet was sponsored by the European Committee of the Regions and is available at https://cor.europa.eu/en/engage/brochures/Documents/EGTC%20Good%20Practice%20Booklet/EGTC-book-LR.pdf accessed 26 December 2018.

It can be argued that the concept of decentralised international cooperation proposed in this thesis is fully promoted in this region. Here, inter-State cooperation over shared resources is complemented by specific mechanisms that enable cross-border agreements between sub-national entities belonging to different States (like the Council of Europe's ECGs and the EU EGTCs). Based on the analysis developed in this chapter, it is possible to highlight several elements that facilitate the application of the concept of decentralised international cooperation in this region, especially in the context of the EU.

First of all, inter-State cooperation for the conservation and sustainable management of shared resources and ecosystems is motivated by the relatively small size of European States and the significant impact that human activities have had on the natural environment. Indeed, the establishment of transboundary ecological networks like the Emerald Network and Natura 2000 demonstrate the intention to ensure environmental protection across borders.

Second, cross-border cooperation in Europe has also been developed at sub-national level, especially in frontier regions with similar environmental conditions. For instance, in mountain areas, local mountain communities have similar traditions and ways of life – and often ethnolinguistic and socio-economic connections – regardless of geopolitical divisions. As seen, the Alpine and Carpathian Conventions foster cross-border cooperation between local mountain communities, value their contributions to the conservation and management of natural resources, and pay attention to their traditional knowledge and practices. Both Conventions pursue conservation as well as developmental objectives by regulating economic activities peculiar to mountain regions (including forestry, farming and tourism) that are likely to impact on environmental protection, but are key to the livelihoods of local inhabitants. In this respect, it can be argued that decentralised cooperative mechanisms merge conservation and developmental objectives by focusing on cross-border localised needs both in terms of environmental governance and local livelihoods.

Despite the recognition of local communities and the roles they fulfil in conservation, their participation in environmental governance, in Europe, is usually mediated by local authorities. These authorities are the result of political processes that do not automatically reflect the composition of the communities they represent, for example in terms of language, ethnicity or gender. Although this is usual in representative democratic mechanisms, equitable representation of local actors can be argued to be crucial when dealing with issues of specific local environmental governance. This would be the logical conclusion following from the environmental law approaches that underpin decentralized international cooperation as discussed earlier in this thesis. Equitable representation would require participatory approaches that differ from the logic of an electoral mandate, and rather adapt over time to appropriately reflect the composition of the relevant community and its consensus about how to govern. In this sense, it would be useful to foresee transparent participatory processes that enable the direct participation of community representatives together with local authorities. The identification of who is entitled to participate in a given process – in this case, the governance of transboundary natural resources and spaces – also has clear implications in terms of democracy. This aspect goes beyond the scope of this thesis and would benefit from adopting an interdisciplinary perspective.[1045]

Another aspect, one peculiar to the European context, is the presence of macro-cooperative frameworks that recognise and enable spontaneous forms of cross-border cooperation set up at sub-national level. Decentralised international cooperation is thus not only formalised, but also put into practice through the establishment of joint institutional mechanisms that act as a permanent operative structure. In Europe this phenomenon is acknowledged at different levels, as demonstrated by the Council of Europe regime on transfrontier cooperation, and the

[1045] Issues of complex environmental governance and popular sovereignty belong to civic environmentalism. For instance, in relation to climate governance see Karin Bäckstrand and Eva Lövebrand, 'The Road to Paris: Contending Climate Governance Discourses in the Post-Copenhagen Era' [2106] Journal of Environmental Policy & Planning 10–12.

development of dedicated cooperative instruments such as, *in primis*, the EGTC within the framework of the EU. The EGTC can be characterised as a decentralised cooperative mechanism and deserves further attention due to its potential for governing shared natural resources and spaces, as described in the case studies presented in the next chapter.

Chapter 5. Decentralised international cooperation in the EGTCs: the ZASNET and the Alpi Marittime – Mercantour European Park

5.1 Introduction

The previous chapter highlighted that the EU is pursuing legal harmonisation among its Member States in the field of environmental protection and aims to promote biodiversity conservation across national boundaries. This objective is reflected in the provisions of the Birds and Habitats Directives and exemplified through the Natura 2000 Network.[1046] Nonetheless, the joint conservation and management of transboundary natural resources have to be contextualised and require the coordination of all relevant actors operating in the cross-border space in question, primarily those with a direct connection to and interests in the resources, such as sub-national authorities and local communities.

The natural features of lands shape the lifestyles and opportunities of the people inhabiting them, as seen in the last chapter for mountain regions, which are often located near national borders in Europe. In sharing a territory, local populations share similar living conditions, problems, and needs: they are alike despite being separated by national boundaries. In this context, the EGTC is a useful cooperative mechanism to address territorial peculiarities and enable cross-border cooperation between sub-national actors, that is to say decentralised international cooperation.

Since its creation, the EGTC has proven useful for tackling interests with a transboundary character[1047] but localised relevance by formalising spontaneous cooperation between local entities and neighbouring communities. The EGTCs are laboratories for multilevel governance

[1046] For further details see Chapter 4 Section 4.2.2.

[1047] In this respect, it is worth reflecting on the tension between the transboundary/international and localised character of the issues addressed by the EGTC. Article 1(2) of the EGTC Regulation (as amended by Regulation EU 1302/2013) explains that the EGTC facilitates and promotes 'cross-border, transnational and interregional strands of cooperation between its members'. Therefore, by establishing an EGTC, its members – mainly sub-national authorities – aim to tackle issues that have a local character, but are relevant across borders and, in this sense, are international. Instead, it would be misleading to characterise these issues as supranational, since this term implicitly locates these issues above the State level. Nevertheless, the EGTC itself, as an entity, does have supranational force since its legal basis belongs to a Community act that is placed above the State level.

and enable the continuous interaction of multiple actors across different institutional levels.[1048] Moreover, they contribute to revitalise frontier regions with positive repercussions for these areas and their populations. This decentralised cooperative mechanism is apt for achieving any objective, including the conservation and management of transboundary natural resources and spaces. In fact, the objective and institutional structure of an EGTC can be designed in line with natural territorial features and to address specific ecosystemic needs. The creation of a joint – and supranational – operational structure ensures the pursuit of common objectives, coherent territorial development programmes and action plans, and the joint management of financial resources. In this context, the transboundary space becomes the new reference unit.

Some existing EGTCs institutionalise decentralised international cooperation between sub-national entities in the pursuit of multiple objectives, including environmental ones.[1049] In the ZASNET EGTC, environmental objectives have become predominant, especially after the designation of the Meseta Ibérica as a transboundary biosphere reserve by UNESCO. Other EGTCs are purposely created to structure decentralised international cooperation on transboundary natural spaces. This is the case of the Parco Europeo – Parc Europèen Alpi Marittime – Mercantour EGTC.[1050] These two 'environmental' EGTCs are analysed below to understand how the concept of decentralised international cooperation is put in practice in the EU.[1051]

[1048] On this point see Gianluca Spinaci and Gracia Vara Arribas, 'The European Grouping of Territorial Cooperation (EGTC): New Spaces and Contracts for European Integration?' (2009) 2 EIPAScope 5.

[1049] This is the case of the European Region Tyrol - South Tyrol - Trentino, which expressly refers to the mountain economy and natural environment as specific cooperation areas.

[1050] These two EGTCs are presented as good practices for cross-border nature protection and environmental preservation in Zillmer and others, 'EGTC Good Practice Booklet', *cit.*, (n 1044) 21 ff.

[1051] This chapter is mainly based on the legislative and policy documents relating to the two EGTCs (on file with the author) as well as on the information collected through the interviews with two key actors: for the ZASNET EGTC, Joana Branco, Coordinator for the Portuguese territories of the Transboundary Biosphere Reserve (TBR) Meseta Ibérica, on 05 June 2018 (Interview 10 in Annex I; hereinafter, Joana Branco, 05 June 2018); and for the Parco Europeo – Parc Europèen Alpi Marittime – Mercantour EGTC, Giuseppe Canavese, Director of the Alpi Marittime Natural Park and Deputy Director of the Alpi Marittime – Mercantour EGTC, on 26 June 2018 (Interview 11 in Annex I; hereinafter, Giuseppe Canavese, 26 June 2018). For this reason, the information included in this chapter is up to date until June 2018.

5.2 The ZASNET EGTC – Case Study 1

The ZASNET EGTC was established in 2010 and extends over an area of around 29,907 square kilometres[1052] located near the Spanish (Castilla y León) border with Portugal (North-East frontier).[1053] The area is predominantly rural and characterised by an ageing population, migratory trends, and scarce development opportunities, especially in the North of Portugal. The ZASNET transboundary space is homogenous both from a geographical point of view and as regards the socio-economic conditions characterising the Spanish and Portuguese regions it includes, making cooperation useful for addressing common challenges. The landscape, historical, cultural, and natural features outlining these territories have the potential to boost local development, as emphasised in the cooperative project.[1054]

The ZASNET EGTC has its headquarters in Bragança (Portugal)[1055] and is made up of intermediate authorities belonging to the aforementioned Countries: the Provincial Council of Salamanca, the Provincial Council of Zamora, and the Municipal Council of Zamora on the Spanish side; while, on the Portuguese side, the members are the Association of municipalities of Terra Fria do Nordeste Transmontana, the Association of the municipalities of Terra Quente Transmontana, and the Municipal Council of Bragança, which replaced the Association of Municipalities of the Duero Superior in 2017.[1056]

[1052] ZASNET EGTC description at https://portal.cor.europa.eu/egtc/CoRActivities/Pages/zasnet1.aspx accessed 12 August 2018.

[1053] The geographical extension of this EGTC is clarified both in its founding Convention, 5th clause (c), and in the Statutes, Article 3. Both the ZASNET Convention (Convenio de la Agrupación Europea de Cooperación Territorial entre las Asociaciones de los Municipios de Terra Fria del Nordeste Transmontano, Terra Quente Transmontana y Duero Superior y las Diputaciones Provinciales de Zamora, Salamanca y el Ayuntamiento de Zamora) and the ZASNET Statutes (Estatutos de la Agrupación Europea de Cooperación Territorial entre las Asociaciones de los Municipios de Terra Fria del Nordeste Transmontano, Terra Quente Transmontana y Duero Superior y las Diputaciones Provinciales de Zamora, Salamanca y el Ayuntamiento de Zamora) were provided by the Coordinator for the Portuguese territories of the TBR Meseta Ibérica in their Spanish version; these documents are in file with the author. Both the ZASNET Convention and Statutes were signed in Bragança on 13 October 2010.

[1054] A brief description of the geographical and socio-economic conditions of the ZASNET space is provided by the ZASNET-Meseta Ibérica Project Sheet provided by the Coordinator for the Portuguese territories of the TBR Meseta Ibérica, in file with the author.

[1055] ZASNET Convention, 5th clause (b) and ZASNET Statutes, Article 2(1). Moreover, Article 2(2) of the Statutes foresees the possibility to create delegations if necessary to achieve the objectives and executing the action plans of this EGTC.

[1056] ZASNET Convention, 5th clause (o). This change in the membership was mentioned by the Coordinator for the Portuguese territories of the TBR Meseta Ibérica, during her interview on 05 June 2018.

The EGTC builds upon existing cooperative structures such us the Working Community of Bragança-Zamora and the Cooperative Territorial Community of the Duero Superior-Salamanca, established in the early 2000s to carry out transboundary initiatives on common problems and to contribute to the social and economic development of this shared space as regards the environmental, tourism, and cultural sectors.[1057] It is worth stressing that, unlike the working communities that lack a precise legal basis, the EGTC provides a stronger and formal cooperative mechanism with a supranational body with legal personality and a Community legal basis. Hence, the creation of the ZASNET, which is intended to be unlimited in duration,[1058] has *de facto* taken the place of these previous cooperative structures.[1059]

The ZASNET Convention clarifies that the primary goal of cooperation is to reinforce social and economic cohesion,[1060] as foreseen in the EGTC Regulation.[1061] This goal is articulated in specific objectives, namely: managing the shared space and reinforcing transboundary relations among the members of ZASNET in the environmental, tourism, cultural, and local entrepreneurial sectors; collaborating with existing working communities and other territorial entities for the execution of cooperative projects; carrying out transboundary territorial cooperation through the local policies of its members to foster development in the whole ZASNET space; promoting the ZASNET space and its potential abroad; and supporting local populations and investing to attract new inhabitants in order to decrease depopulation trends.[1062]

The institutional structure is defined in the ZASNET Statues and consists of a General Assembly, which includes the representatives of its members, a Director acting as the legal

[1057] ZASNET Convention, opening paragraphs, and ZASNET Statutes, Article 1(2).
[1058] ZASNET Convention, 5th clause (k).
[1059] Joana Branco, 5 June 2018.
[1060] ZASNET Convention, 2nd clause.
[1061] A detailed analysis of the EGTC Regulation is provided in Chapter 4 Section 4.3.2.
[1062] ZASNET Convention, 5th clause (e). Further cooperative objectives are defined in the following provisions, namely 5th clause (f), (g), (h), (i), and (j). The cooperative objectives are also specified in the ZASNET Statutes, Article 4.

representative of the ZASNET EGTC, and a Supervisory Board with auditing competences.[1063] The ZASNET Statutes detail the composition, tasks, and operation of the aforementioned organs,[1064] and provides that the decisions they adopt are legally binding on the members of the EGTC.[1065] Provided that the ZASNET organs act within the limits of the administrative competences and territorial jurisdiction of its members,[1066] and given that their decisions and actions have a legal basis in EU law – and primarily in the EGTC Regulation – it can be argued that their decisions and actions are also binding on the EU Member States in question, Spain and Portugal in this case.

The equal positions of the Spanish and Portuguese members is reflected in the principle of luso-hispanic equality, in the rule of consensus for joint decision-making, and in the recognition of both Spanish and Portuguese as working languages.[1067]

In line with the EGTC Regulation, the ZASNET Statues regulate the functioning of this EGTC in detail, including matters such as the selection and management of personnel,[1068] members' financial contributions and liability,[1069] internal and external auditing,[1070] amendment procedures,[1071] and arrangements in case of the dissolution of the EGTC and liquidation.[1072]

Article 31 of the Statutes reiterates that the ZASNET EGTC can act within the confines of the tasks accorded to it and within the competences of its members, regardless of financial support from the EU. Nevertheless, its tasks include the implementation of cooperation

[1063] ZASNET Statutes, Article 5.
[1064] ZASNET Statutes, Articles 6 to 14.
[1065] ZASNET Statutes, Article 15.
[1066] This is made explicit in the ZASNET Convention, 5th clause (c) and Statutes, Articles 3(1) and 31. These provisions are based on Article 7(2) of the EGTC Regulation, which has been modified by Regulation 1302/2013 and extended the scope of action of an EGTC even further by providing that '[a]n EGTC shall act within the confines of the tasks given to it … Each task shall be determined by its members as falling within the competence of every member, unless the Member State or third country approves the participation of a member established under its national law even where that member is not competent for all the tasks specified in the convention'.
[1067] ZASNET Statutes, Article 16.
[1068] ZASNET Statutes, Articles 17-21.
[1069] ZASNET Statutes, Articles 22-25 and 28.
[1070] ZASNET Statutes, Articles 26-27 and 29.
[1071] ZASNET Statutes, Article 30.
[1072] ZASNET Statutes, Articles 33-35.

programmes or actions supported by the EU through the European Regional Development Fund (ERDF), the European Social Fund and/or the Cohesion Fund. Indeed, the 'ZASNET-Meseta Ibérica' is one of this ECTC's main projects and is co-funded through the ERDF in the framework of the INTERREG V-A Spain-Portugal (POCTEP) 2014-2020.

The recognition of the Transboundary Biosphere Reserve Meseta Ibérica can be understood as the most successful result of the ZASNET EGTC, and arguably confirms the environmental vocation of this cooperative mechanism.

5.2.1 Cooperation over shared natural resources: the TBR Meseta Ibérica

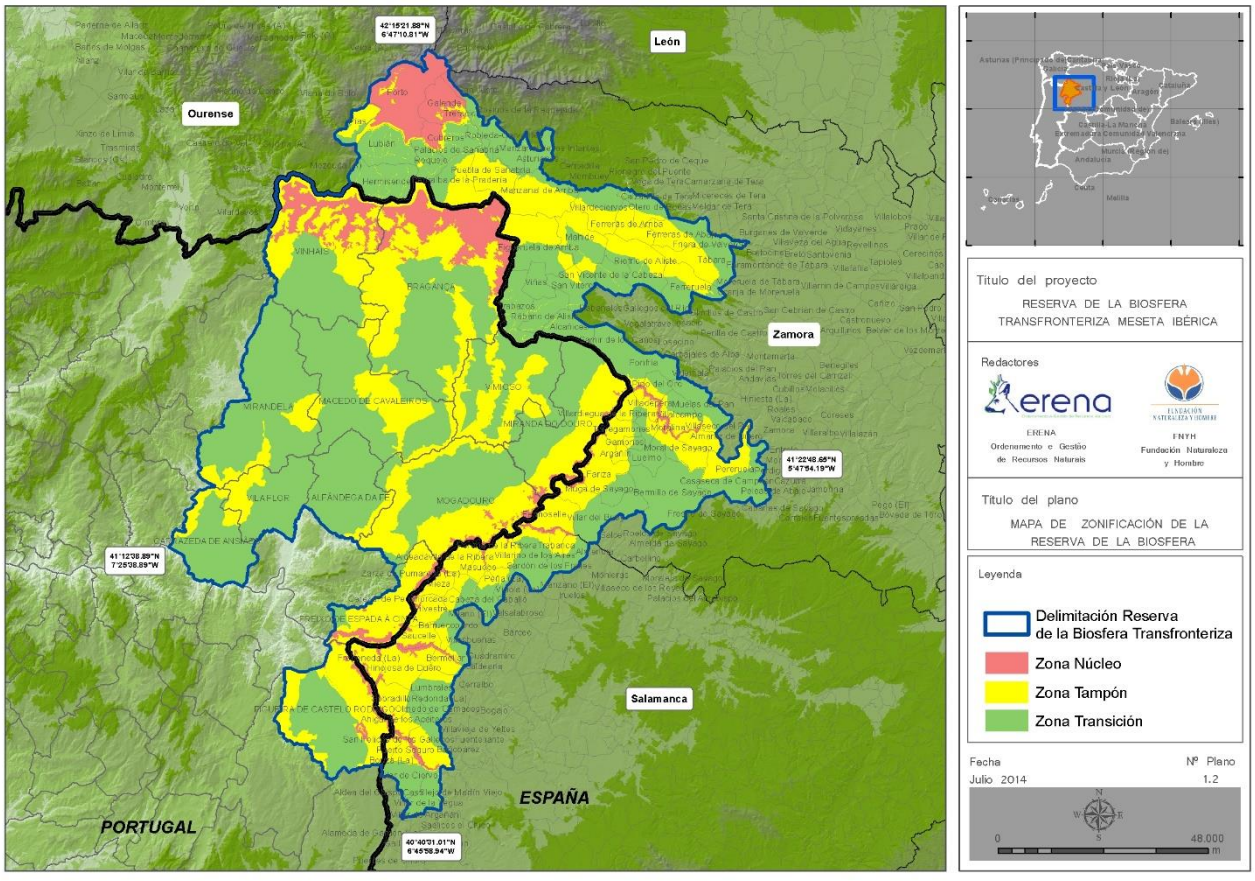

Figure 2: The TBR Meseta Ibérica[1073]

Transboundary cooperation in the ZASNET space has a clear environmental character indicated by the presence of natural parks and protected sites included in the Natura 2000

[1073] Map developed by ERENA and FNYH, provided by Joana Branco, Coordinator for the Portuguese territories of the TBR Meseta Ibérica.

Network located both in Spain and Portugal. This shared natural space has become known as Meseta Ibérica and, in 2015, was designated as a transboundary biosphere reserve within the framework of the UNESCO Man and Biosphere (MAB) Programme following a joint application presented by the ZASNET EGTC.[1074]

The territorial scope of the Transboundary Biosphere Reserve (TBR) Meseta Ibérica does not correspond to the ZASNET EGTC. Although this mismatch has not altered the territorial extension or the membership of the ZASNET EGTC, it did lead to the conclusion of specific agreements with municipalities located within the TBR space[1075] – especially on the Portuguese side – in order to facilitate their participation in the TBR's organs and in the joint management of shared natural resources.[1076]

The designation of the TBR Meseta Ibérica catalysed attention to the ZASNET EGTC, which is formally recognised as its administrative authority.[1077] The TBR project is only one of the initiatives carried out within the framework of the ZASNET EGTC;[1078] nonetheless, it has been considered a priority since 2014. The TBR Meseta Ibérica Action Plan was formulated in line with the objectives and development strategies of the ZASNET EGTC.[1079] Moreover, this Action Plan covers a ten year period (2015-2025)[1080] due to the time-limited designation of the Meseta Ibérica as a TBR, and thus subject to renewal after ten years depending on the continued

[1074] For further information on the joint application to the UNESCO MAB Programme visit http://www.biosfera-mesetaiberica.com/es/es/candidatura accessed 05 September 2018.
[1075] Eighty-seven municipalities are located within the TBR space, twelve on the Portuguese side and the remaining ones are in Spain: forty-eight in the Province of Zamora and twenty-seven in the Province of Salamanca. For further information see the description and maps provided in the TBR dedicated website http://www.biosfera-mesetaiberica.com/es/es/territorio accessed 9 October 2018.
[1076] Joana Branco, 5 June 2018.
[1077] This is explicitly mentioned in the dedicated UNESCO MAB webpage: http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/europe-north-america/portugalspain/meseta-iberica/ accessed 05 September 2018.
[1078] This concept was stressed several times by the Coordinator for the Portuguese territories of the TBR Meseta Ibérica, during her interview on 05 June 2018
[1079] The Meseta Ibérica Action Plan was provided by Joana Branco, Coordinator for the Portuguese territories of the TBR Meseta Ibérica. The document is in file with the author.
[1080] Meseta Ibérica Action Plan, 10.

presence of the necessary ecological and socio-economic characteristics. The TBR relies also on annual action plans to detail the activities to be carried out within each specific year.[1081]

The establishment of the TBR pursues three main goals expressly identified in its Action Plan: first, biodiversity conservation and the preservation of cultural knowledge and heritage; second, economic and human development that is socially, culturally and ecologically sustainable; and third, what is termed 'logistical support', referring to projects promoting environmental education and training, biodiversity conservation and sustainable development and displaying the results achieved in the TBR as a pilot case.[1082] The Action Plan further identifies specific objectives and actions, grouped according to broader focuses[1083] including nature conservation[1084] and local participation.[1085]

The concept of decentralised international cooperation permeates the TBR project, which adopts a management system that is *joint* and *participative*.[1086] Moreover, this concept emerges clearly from some of the objectives of the Action Plan. In particular, objective 1 asks for the initiation of at least one transboundary cooperation programme for nature conservation that brings economic benefits to local populations. Objective 3 supports the joint management of the protected areas included within the TBR.[1087] Objective 6 promotes the differentiation, development and qualification of the TBR space through those cultural elements that are common to the whole space – regardless of international boundaries – and relate to the natural environment. Objective 8 foresees the creation of mechanisms for the effective participation of all interested stakeholders and the local population in the management of the TBR. Lastly,

[1081] Joana Branco, 5 June 2018.
[1082] Meseta Ibérica Action Plan, 8.
[1083] Meseta Ibérica Action Plan, 24 ff. From a methodological point of view, the Action Plan is divided into 'focuses' (*ejes*), 'objectives', and 'actions'. The focuses are meant to provide coherence among the actions that are conceptually connected with each other, and are also linked to the same financial mechanisms. The objectives are those pursued within and through the TBR; while the actions are needed for meeting the objectives concretely. See Meseta Ibérica Action Plan, 19.
[1084] See Focus 1 in the Meseta Ibérica Action Plan, 25 and 28 ff.
[1085] See Focus 5 in the Meseta Ibérica Action Plan, 27 and 41 ff.
[1086] Meseta Ibérica Action Plan, 44.
[1087] In this regard see also action 1.3 in the Meseta Ibérica Action Plan, 31-32.

objective 10[1088] requires the delineation of a management model that is flexible and capable of promoting the participation of and connections with national and sub-national authorities.[1089] Arguably, these objectives highlight the transboundary character of this natural space, the community of interests – and the challenges – that exist in this space and require joint actions and solutions and, finally, the importance of engaging with and benefitting local actors.

The TBR is instrumental in reinforcing the collective perception of the transboundary space[1090] and a unitary approach to its conservation and management.[1091] It is also useful for achieving wider objectives within the framework of the ZASNET EGTC.[1092] For instance, current activities focus on depopulation, one of the main challenges in the TBR space[1093] and in the territories of the ZASNET EGTC more generally. Similarly, other activities carried out within the framework of the 'ZASNET-Meseta Ibérica' Project are conceptually structured around the TBR, but beneficial for and applicable to the whole ZASNET EGTC.[1094] This is the case for the quality brand TBR Meseta Ibérica, created to identify products and tourism experiences from the area,[1095] the promotion of a ZASNET Cultural Agenda connected to the concept and objectives pursued in the TBR,[1096] and the obtainment of a 'Biosphere Certificate' from the Responsible Tourism Institute. Hence, the TBR is seen as an opportunity for enhancing sustainable tourism, creating job opportunities,[1097] and contributing to the sustainable economic development of the ZASNET space more broadly.[1098] Furthermore, the TBR label facilitates the promotion of the ZASNET EGTC natural environment and the achievement of conservation and sustainable development objectives in this transboundary space.

[1088] Objectives 8 and 10 can be connected to the actions included in Focus 5. See Meseta Ibérica Action Plan, 41 ff.
[1089] Meseta Ibérica Action Plan, 10-11.
[1090] In this sense refer to the description of Focus 5 in the Meseta Ibérica Action Plan, 27.
[1091] Action 1.3 of the Meseta Ibérica Action Plan, 31.
[1092] Joana Branco, 5 June 2018.
[1093] The TBR has a total area of 1,132,607 ha and a population density of 14 inhabitants per square kilometre, according to http://www.biosfera-mesetaiberica.com/es/es/territorio accessed 9 October 2018.
[1094] Joana Branco, 5 June 2018.
[1095] In this regard see Action 3.1 of the Meseta Ibérica Action Plan, 35.
[1096] See Action 3.3 of the Meseta Ibérica Action Plan, 37.
[1097] Training activities are foreseen in the context of Focus 4 of the Meseta Ibérica Action Plan, 38 ff.
[1098] This aspiration is present in the Meseta Ibérica Action Plan, for instance in Focus 3 (p. 26), and emerged during her interview.

The TBR Meseta Ibérica has its own organs,[1099] which are separate from those of the ZASNET EGTC but necessarily connected to them, since the TBR exists within the framework of this EGTC.

Specifically, there is a *Deliberative Body* composed of the representatives of the local authorities of the territories within the territorial scope of the TBR. Hence, its composition is identical to that of the ZASNET Assembly with the exception of the Municipality of Zamora, which is not part of the TBR, and the participation of other municipalities located in the Portuguese portion of the TBR. Arguably, this body enables decentralised international cooperation by gathering all the relevant local authorities of the TBR space across borders to decide on the management of the shared natural space.

The *Executive Body* is responsible for implementing the decisions of the Assembly and supervising their effective implementation on the ground. It is composed of three individuals: the Director of the ZASNET EGTC, a Coordinator for the Spanish territories included in the TBR Meseta Ibérica (Spanish Coordinator), and a Coordinator for the Portuguese territories included in the TBR (Portuguese Coordinator).[1100]

In addition, there is an *Advisory Board* comprising researchers, experts and practitioners from different fields to provide insights on the management of the TBR. This interdisciplinary technical body includes individuals belonging to universities, research centres, and technical staff from the local authorities administering the TBR and ZASNET territories more generally, including the Municipality of Zamora. The Advisory Board was formed along the same lines

[1099] It is worth noting that the TBR institutional structure described in this section does not coincide with that presented in the Meseta Ibérica Action Plan, but it evolved after its adoption as explained by Joana Branco, 5 June 2018.
[1100] As of June 2018, this position is hold by Joana Branco, interviewed by the author in order to collect first-hand information on the functioning of the ZASNET EGTC and the TBR Meseta Ibérica.

as the 'Mixed Commission' created to prepare the application to the UNESCO MAB Committee.[1101] The first meeting of this organ should be convened in July 2018.[1102]

The *Participatory Body* is foreseen to represent civil society, comprising associations and economic sectors operating in the TBR space. During the interview with Joana Branco, it emerged that this organ has not yet been convened and its rules of procedure remain unclear. Its sessions are expected to be public to ensure the participation of any citizen who wants to be informed about the activities of the TBR. The Participatory Body will work thematically, hence, its composition will vary according to the priorities and activities to be discussed. This body is intended to be the engine of transboundary cooperation: it will be the source of ideas which will be proposed here and discussed in their early stages, then presented to the Advisory Board, which, on this basis, will draft proposals that will be passed to the Deliberative Body for a final decision. The creation of the Participatory Body and its flexibility in terms of composition and functioning responds to some of the objectives identified in the Action Plan.[1103] In particular, the TBR Participatory Body will provide local communities with the opportunity to be actively involved in the governance of the transboundary natural space of the Meseta Ibérica. Arguably, it will work in tandem with the Deliberative Body, which enables the participation of local authorities across borders. In this sense, both organs will contribute to the practical application of decentralised international cooperation as conceived in this thesis.

The establishment and functioning of all these organs is taking time, especially due to their transboundary character.[1104] The current intention is that the Participatory Body will meet by the end of 2018 for organisational purposes, *in primis* to clarify the procedure for identifying local representatives participating in the meetings. The idea is to have thematic sessions in order

[1101] The 'Mixed Commission' was composed of the members of a Permanent working team (including the representatives of the ZASNET EGTC members and its Director) together with the representatives of conservation authorities from Spain and Portugal, and the luso-hispanic consortium responsible for submitting the application for the creation of the TBR to the UNESCO MAB Committee. See the Meseta Ibérica Action Plan, 16.
[1102] Joana Branco, 5 June 2018.
[1103] In particular, objectives 8 and 10. See the Meseta Ibérica Action Plan, 11.
[1104] Joana Branco, 5 June 2018.

to favour the participation of relevant stakeholders. Hence, depending on the thematic session(s) to be held, the Executive Body will convene a stakeholder meeting with the local actors potentially interested – local communities, associations, etc. – to select their representatives for one specific session or a series of thematic sessions during a given period of time. Neither the Executive Body nor the other organs will have any power over this selection, which is left completely to local actors participating in the stakeholder meeting. The designation and term lengths of the representatives will be specified in an *ad hoc* agreement between the TBR Executive Body and the local actors participating in the stakeholder meeting. The thematic sessions of the Participatory Body will be publicly advertised to enable other individuals, groups or associations not involved in the stakeholder meetings but interested in the session to learn about it and request to participate as well. The representatives and actors that make up the Participatory Body should be able to identify local priorities and needs to guide the activities of the TBR. In so doing, the decisions and proposals conceived within the Participatory Body should not be influenced by the other bodies, but result from a bottom-up process.[1105]

The difficulty in making the Participatory Body operational and ensuring an equitable and democratic representation of local actors reflects the fact that civil society participation in environmental governance cannot automatically be resolved through the mediation of local authorities.[1106]

5.2.2 The EGTC and the TBR: a new dimension for transboundary cooperation

Decentralised international cooperation lies at the heart of the ZASNET EGTC, and is materialising through the positive results that this cooperative mechanism is bringing in terms of governance, transboundary environmental protection, and legislative development at national level. The establishment of the EGTC afforded the opportunity to reinforce and legally

[1105] Joana Branco, 5 June 2018.
[1106] This point was raised, more generally, in Chapter 4 Section 4.4.

formalise cross-border cooperation among local actors and to address common challenges jointly. In this regard, the efforts to engage with civil society through the Participatory Body and its procedures are taking time but seem to be on the right track. The EGTC constitutes the reference framework for the establishment and functioning of the TBR Meseta Ibérica. Moreover, this cooperative mechanism has prompted Portugal to enhance parts of its environmental legislation in order to align with the Spanish regime and to address issues that have emerging as a consequence of the TBR, *in primis* nature conservation and forest management.[1107]

The ZASNET EGTC builds on preceding cooperative arrangements, but as an EGTC is a supranational body with legal personality and an operational capacity that the aforementioned arrangements did not possess.[1108] Arguably, its position and scope for action are stronger than those of its original members, especially if considered in relation to the objectives that the ZASNET EGTC aims to achieve.

In Spain, woodlands and forestry and environmental protection matters are devolved to the Self-governing Communities (Comunidades Autónomas),[1109] which are responsible for declaring and determining the management system of protected areas located within their jurisdictions.[1110] The Portuguese Constitution, on the other hand, lists the defence of nature and the environment and the preservation of natural resources as fundamental tasks of the State.[1111] Furthermore, Article 66(2) of the Portuguese Constitution provides, at its paragraph (c), that the State is responsible for the creation of natural reserves and parks, the classification

[1107] In fact, the Portuguese law on nature conservation and biodiversity was revised in 2015 to frame biosphere reserves in the national system of protected areas. In this regard see http://www2.icnf.pt/portal/pn/biodiversidade/ei/MaB accessed on 26 December 2018. See also *infra* in this Section for further detail.
[1108] On this point, refer to the ZASNET Convention, 3rd clause.
[1109] 1978 Spanish Constitution, Article 148 (8) and (9). The English version is available at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf accessed 14 September 2018.
[1110] Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad, published in Boletín Oficial del Estado (BOE) n. 209, de 14/12/2007. Available at https://www.boe.es/boe/dias/2007/12/14/pdfs/A51275-51327.pdf accessed 14 September 2018. See Article 36(1).
[1111] 1976 Portuguese Constitution, Article 9(e). The English version is available at http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf at accessed 14 September 2018.

and protection of landscapes and places in order to guarantee the conservation of nature and the preservation of cultural values and assets of historical or artistic interest; and at paragraph (d), requires the State to promote the rational use of natural resources, safeguard their ability for renewal and ensure ecological stability. The creation of a network of protected areas is considered a key measure to halt biodiversity loss and preserve natural habitats and the flora and fauna located therein.[1112]

Hence, there is a clear mismatch relating to environmental competences in Spain and Portugal: while in the former these competences are decentralised and devolved to the Self-governing Communities, in the latter they are centralised and entrusted to the Agência Portuguesa do Ambiente.[1113] Arguably, the ZASNET EGTC contributes to smooth over this mismatch. As said, once created, the EGTC is a supranational body that acquires the competences and powers of its members and can exercise them within the EGTC transboundary space[1114] to achieve its objectives and carry out its tasks. Therefore, in pursuing its environmental objectives, the ZASNET EGTC can implement cross-border actions that are decided and carried out at the sub-national governance level, *de facto* cracking the Portuguese constitutional division of competences. This consequence might be characterised as unforeseen, but is far from being negative since, in so doing, environmental protection and management now respond to a transboundary but localised reality that did not fit well with the previous fragmented governance scheme. The establishment of the TBR Meseta Ibérica enhances this process, as it further legitimates the method of dealing with a transboundary natural space as a single unit, which responds to and operationalises the concept of decentralised international cooperation.

[1112] Lei 19/2014, de 14 de abril, Define as bases da política de ambiente, published in the Diário da República n. 73/2014, Série I de 2014-04-14. Available at https://dre.pt/pesquisa/-/search/25344037/details/maximized accessed 14 September 2018. See Article 10(d). In Portugal, the creation and classification of protected areas are regulated by law (Decreto-Lei n. 142/2008 de 24 de julho); for further information refer to http://www2.icnf.pt/portal/ap/rnap accessed 14 September 2018.
[1113] For further information visit its website http://www.apambiente.pt/index.php accessed 14 September 2018.
[1114] Indeed, the actions of the EGTC can have consequences also outside its territorial scope.

The motto of the TBR Meseta Ibérica is 'nature without borders',[1115] and the TBR institutions, *in primis* the Director and the national TBR Coordinators – who together form the Executive Body – promote this motto in the external actions of the Meseta Ibérica and behave accordingly when representing it. For instance, at the meetings of the MAB national committees in Spain and Portugal, the TBR Meseta Ibérica participates as a single actor but can be represented by both of the national TBR Coordinators, regardless of the MAB national committee holding the meeting. This is not the case for the other two transboundary biosphere reserves established between Spain and Portugal, namely Geres-Xures and Tejo/Tajo Internacional,[1116] which are represented by their Spanish delegate at the MAB Spanish Committee and by the Portuguese delegate at the MAB Portuguese Committee.[1117] Hopefully, the practice of the Meseta Ibérica will be adopted by the other TBRs in the near future.

It can be argued that the establishment of a TBR has several implications, both tangible and intangible. Its tangible implications are in the institutional framework set up to allow the TBR to function, which guides cooperation, favours joint decisions, and requires the execution of joint actions across borders, in line with the prescriptions of the MAB Programme. Intangible implications include strengthening the environmental, historical, and cultural identity of a certain space and ensuring its integrity. Governance implications lie half way between the tangible and intangible since they not only imply the active participation of local actors that are usually disregarded in international processes, but also create an effective decisional and management system tailored to a transboundary space. [1118]

The presence of a permanent cooperative institutional framework facilitates the execution of joint actions on a stable basis within the transboundary space at any time this is needed. For

[1115] In Spanish the motto is 'naturaleza sin fronteras'. Joana Branco, 05 June 2018.
[1116] These two TBRs have been established in 2009 and 2016, respectively. To date, there are 20 transboundary biosphere reserves in 31 countries. A complete list is available at http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/transboundary-biosphere-reserves/ accessed 14 September 2018.
[1117] Joana Branco, 05 June 2018.
[1118] These implications emerge, *mutatis mutandis*, from any decentralised cooperative mechanism and can build on the concept of decentralised international cooperation.

instance, in the Duero area,[1119] Portugal and Castilla León have carried out bilateral actions in the field of nature conservation in neighbouring protected areas.[1120] Nevertheless, park authorities, especially in Portugal, have limited autonomy and depend on the instructions provided by central conservation authorities. Bilateral actions can now be carried out through the TBR Meseta Ibérica which, operating through a common institutional structure and in the framework of the ZASNET EGTC, has more autonomy and operational capacity, and can serve as a platform where national and local authorities work together to solve local problems.[1121]

Joint actions are also foreseen in the area of fire prevention, which is a major challenge in the TBR space, exacerbated by inappropriate forest management and inadequate adaptation to climate change.[1122] Portugal and Spain already collaborate in the area of fire prevention on the basis of a dedicated agreement, which also applies to the TBR space. Hence, a TBR can be a useful mechanism to address fire prevention due to the nature management practices this requires. Portugal has recently revised its nature conservation and biodiversity law, [1123] in order to align with the Spanish legislation[1124] and advance collaboration in this sector. Soon, Portugal might also draft a law on biosphere reserves and explore the connection between biosphere reserves and fire prevention in dedicated provisions.[1125] The TBR Meseta Ibérica has also

[1119] It encompasses protected areas in both countries: in Spain, the Arribes del Duero Natural Park; and in Portugal, the Douro International Natural Park, and the Special Protection Area 'Douro Internacional e Vale do Rio Águeda'. For further information on these protected areas visit the respective webpages, https://www.losarribesdelduero.com/; http://www.icnf.pt/portal/ap/p-nat/pndi; and http://www2.icnf.pt/portal/pn/biodiversidade/rn2000/resource/doc/zpe-cont/dourointvagu all accessed 14 September 2018.

[1120] Spain and Portugal signed also a bilateral agreement in 1998 for the conservation and use of the Duero transboundary basin, the Albufeira Convention, which builds on previous agreements. For further information refer to http://www.chduero.es/Default.aspx?TabId=87&SkinSrc=%5BG%5DSkins%5Cchd-imprimible%5Cskin accessed 14 September 2018.

[1121] Joana Branco, on 05 June 2018.

[1122] For further information on forest fires in border areas between Spain and Portugal refer to the WWF 2018 report 'El polverín de noroeste: Propuesta ibérica de WWF España y ANP/WWF Portugal para la prevención de incendios', available at http://awsassets.wwf.es/downloads/informe_incendios_forestales_wwf_2018.pdf?_ga=2.111814022.344395562.1537458804-1694523630.1536939373 accessed 20 September 2018.

[1123] Decreto-Lei 242/2015, de 15 de outubro, Procede à primeira alteração ao Decreto-Lei 142/2008, de 24 de julho, que aprova o regime jurídico da conservação da natureza e da biodiversidade. Available at https://dre.pt/home/-/dre/70693924/details/maximized?p_auth=CujwoW3f accessed 26 December 2018.

Lei 19/2014, de 14 de abril, Define as bases da política de ambiente, published in the Diário da República n. 73/2014, Série I de 2014-04-14. Available at

[1124] For further information refer to http://rerb.oapn.es/documentacion-y-difusion/normativa accessed 23 September 2018. The Spanish network of biosphere reserves is regulated under Ley 42/2007, Título IV, Capítulo I.

[1125] Joana Branco, 05 June 2018.

boosted the creation of both a National MAB Committee and a National Network of Biosphere Reserves in Portugal.[1126] Arguably, the TBR Meseta Ibérica provides a new dimension for nature conservation and management and is re-organising them according to the MAB Strategy (2015-2025) and the Lima Action Plan.[1127]

Indeed, the ZASNET EGTC and, consequently, the TBR Meseta Ibérica, provide new dimensions for cooperation and alert central governments about the problems and needs of areas far from national capitals.[1128] These transboundary governance mechanisms can influence decisions at the national level, and fill gaps that exist between local realities and central authorities.[1129]

[1126] Joana Branco, on 05 June 2018. Further details on the current regulation of biosphere reserves in the Portuguese law, the Portuguese MAB Committee and the Portuguese network of biosphere reserves available at http://www2.icnf.pt/portal/pn/biodiversidade/ei/MaB accessed 9 October 2018.
[1127] UNESCO MAB Programme, A new Roadmap for the Man and the Biosphere (MAB) Programme and its World Network of Biosphere Reserves: MAB Strategy (2015-2025), Lima Action Plan (2016-2025) and Lima Declaration. Available at http://unesdoc.unesco.org/images/0024/002474/247418E.pdf accessed 14 September 2018.
[1128] Joana Branco, 05 June 2018.
[1129] Joana Branco, 05 June 2018.

5.3 The Alpi Marittime - Mercantour EGTC – Case Study 2

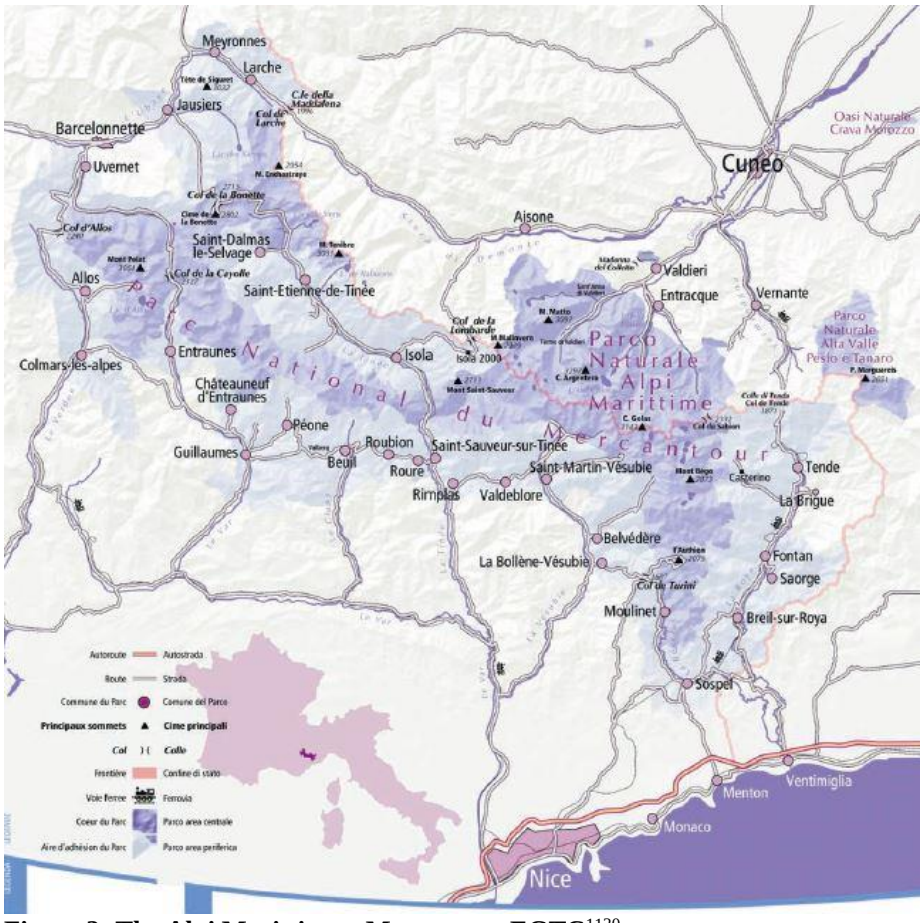

Figure 3: The Alpi Marittime – Mercantour EGTC[1130]

Nature conservation in the area of the Argentera-Mercantour massif has a long history starting from 1857 with the establishment of a royal hunting reserve by Vittorio Emanuele II, King of Sardinia and after 1861 the first King of Italy, who chose the areas for the abundant presence of chamois and wildlife in general. Part of this territory was later ceded to France after the Second World War, but collaboration between the Italian and French authorities continued and was first recognition in 1987 with a twinning agreement signed between the Parc national du Mercantour (on the French side) and the Parco naturale dell'Argentera (on the Italian side). The latter was merged with the Riserva del Bosco e dei Laghi di Palanfré in 1995 to establish the Alpi Marittime Natural Park. Since then, the cooperation between the two parks, Alpi Marittime and Mercantour, has been reinforced via the agreement of a shared mission for the

[1130] Map adapted from the flyer 'Parchi senza frontiere', available at http://it.marittimemercantour.eu/media/10c86f78.pdf accessed 26 December 2018.

protection of biodiversity[1131] as well as the valorisation of shared cultural and historical heritage.[1132] In fact, the Alpi Marittime and Mercantour Parks share a 35 km border and jointly cover an area of 96,50 hectares (ha): 28,000 ha are located in Italy and extend over three valleys and four municipalities, while 68,500 ha are in France and, in the core protection area, encompass six valleys and twenty-eight municipalities.[1133] Therefore, it can be argued that the concept of decentralised international cooperation is at work in the Alpi Marittime – Mercantour space, which has a unitary identity from a naturalistic, socio-economic, cultural, and historical point of view. Indeed, decentralised international cooperation aims to make explicit and formalise the fact that local actors are entitled to operate across borders, based on the fact that they share a territory regardless of international boundaries.

Stronger collaboration between the two parks took place thanks to three main elements: first, the approval of the first common action plan for the period 2007-2013; second, the execution of joint actions, like a Generalised Biological Inventory, funded through the INTERREG ALCOTRA 2007-2013;[1134] and third, the joint renewal of the European Charter for Sustainable Tourism[1135] in 2012. The establishment of the Parc européen/Parco europeo Alpi Marittime - Mercantour EGTC[1136] in 2013 formalised this partnership and provided a new reference framework: the European Park.[1137] As such, it can be argued that the EGTC led to a

[1131] For further information on the natural characteristics of these territories visit http://it.marittimemercantour.eu/territorio/natura accessed 28 September 2018.
[1132] The shared cultural and historical heritage are further described at http://it.marittimemercantour.eu/territorio/cultura accessed 28 September 2018. The introductory paragraph is based on the information provided by the Alpi Marittime-Mercantour dedicated website, see in particular http://it.marittimemercantour.eu/territorio and http://it.marittimemercantour.eu/media/10c86f78.pdf accessed 28 September 2018.
[1133] Refer to the factsheet 'Parks without borders' available at http://it.marittimemercantour.eu/media/10c86f78.pdf accessed 28 October 2018.
[1134] The INTERREG ALCOTRA (Alpes Latines COopération TRAnsfrontalière) is a European cross-border cooperation programme that covers the Alpine territory between France and Italy. It was established in 1990 and it is now in its fifth programming period (2014-2020). This programme has co-financed about 600 projects for 550 million euro coming from the ERDF. ALCOTRA projects aim to improve the sustainable development of this Alpine area and the quality of life of its resident as well as cross-border economic and social relations. For further information visit http://www.interreg-alcotra.eu/it accessed 28 September 2018.
[1135] This Charter promotes the creation of a sustainable tourism strategy and action plan in protected areas to benefit the environment and all local interested parties. Further information at https://www.europarc.org/library/europarc-events-and-programmes/european-charter-for-sustainable-tourism/ accessed 28 September 2018.
[1136] Hereinafter, Alpi Marittime – Mercantour EGTC or European Park.
[1137] See http://it.marittimemercantour.eu/progetti/come-nasce-la-collaborazione accessed 28 September 2018.

new juridical structure that enables coordination between the two parks on a permanent basis for all issues with cross-border dimensions in the interests and within the territorial limits of the transboundary space, whose territorial scope is defined in the 2013 Convention and Statute.[1138]

The Alpi Marittime - Mercantour EGTC is composed of a network of protected areas that are highly biodiverse, host a variety of ecosystems and are subject to the climate of the Mediterranean Sea.[1139] The founding and sole members of this EGTC are the Mercantour National Park (Parc national du Mercantour), which is a French national public entity, and the Alpi Marittime Natural Park (Parco naturale Alpi Marittime), which is an Italian regional public entity.[1140] Local authorities are not direct members as in other EGTCs – such as the ZASNET – but they can be involved when needed. In other words, the territorial extension of the two parks defines the spatial scope of the Alpi Marittime - Mercantour EGTC. Nevertheless, it can also carry out actions in the surrounding areas subject to the agreement of relevant local authorities (especially municipalities).[1141] Indeed, Article 3 of the Convention has been used several times to create partnerships that operate in the context of INTERREG ALCOTRA-financed projects. These partnerships between the EGTC and local entities and stakeholders can be wider or narrower depending on the project considered, its objectives and the area where it applies. Through these partnerships local actors devolve project-specific management competences to the EGTC, which operates as a unitary and transboundary subject.[1142] Arguably, decentralised international cooperation is thus also underway in the context of this EGTC, even if the parks – rather than local actors – are the main drivers.

[1138] See Article 3 of both the Convention and Statute.
[1139] Further information on the climatic conditions of this area available at http://it.marittimemercantour.eu/territorio/natura/43 accessed 28 September 2018.
[1140] Alpi Marittime – Mercantour EGTC Convention, Article 1. The Convention, Statute and Internal Regulation of the Alpi Marittime – Mercantour EGTC are all available at http://it.marittimemercantour.eu/gect/statuto-e-altri-documenti accessed 28 September 2018.
[1141] Alpi Marittime – Mercantour EGTC Convention, Article 3.
[1142] Giuseppe Canavese, 26 June 2018.

As for any other Group, the founding Convention reiterates that the Alpi Marittime – Mercantour EGTC has legal personality and is independent from its members.[1143] Its headquarters is located in France,[1144] which determines that, in addition to the EGTC Regulation, this Group and its activities are regulated by French law.[1145] Nevertheless, the two members are explicitly recognised as equal and are granted respect for bilingualism;[1146] in fact, both French and Italian are declared as official languages.[1147]

The Alpi Marittime – Mercantour can be defined as a purely 'environmental' EGTC since it has only one objective: to facilitate, promote and pursue cross-border cooperation between its members – two parks devoted to nature conservation – on their territories.[1148] To this end, it acquires the competences of its two members and can carry out actions and projects aimed to strengthen the unitary identity of this transboundary space. In fact, while the two parks remain responsible for those decisions that have a national and territorial dimension, the decision-making powers of the EGTC relate to policies and programmes with a transboundary character.[1149] In particular, this Group deals with monitoring and protecting biodiversity, restoring and valuing the natural and cultural landscapes, promoting environmental education, bilingualism, sustainable mobility, agriculture, and sustainable tourism.[1150]

A Common Action Plan is approved every five years to guide the actions of the Alpi Marittime – Mercantour EGTC. In this context and within the limits of its competences, the EGTC enables territorial and functional connections among local stakeholders to promote

[1143] Alpi Marittime – Mercantour EGTC Convention, Article 1.
[1144] Alpi Marittime – Mercantour EGTC Convention, Article 2.
[1145] Alpi Marittime – Mercantour EGTC Convention, Article 7(1). This provision deals also with the administrative, accounting and financial control of the activities of the Group differentiating between its normal operations in France, those carried out in Italy, and those co-financed through Community funds. As for dispute resolution, Article 9 also prescribes the application of Community law and, with a supplemental role, of French law.
[1146] Equality and bilingualism are the general principles guiding the functioning of this Group according to Article 5(2).
[1147] Alpi Marittime – Mercantour EGTC Statute, Article 19.
[1148] Alpi Marittime – Mercantour EGTC Convention, Article 4(1).
[1149] LinkPAs Draft Scientific Report, 106. Available at https://www.espon.eu/sites/default/files/attachments/LinkPAs_DraftScientificReport_28_3_2018.pdf accessed 1 October 2018.
[1150] Alpi Marittime – Mercantour EGTC Convention, Article 4(2).

sustainable development and the achievement of its objective,[1151] and seeks public, private and Community funds for the realisation of territorial cooperation projects within its territory.[1152] One of the main activities explicitly authorised by its Convention is a joint application for the inclusion of the Alpi Marittime and Mercantour Parks in the UNESCO World Heritage List.[1153] The application was submitted in January 2017, but has a wider territorial extension than the EGTC under discussion and relates to an area identified as the 'Mediterranean Alps'.[1154]

The duration of the Alpi Marittime – Mercantour EGTC is fixed at fifty years, with the possibility to tacitly renew it or to activate a procedure to dissolve it.[1155] Moreover, the Convention contains the option to open membership to other actors, subject to the agreement of the founding members.[1156] Indeed, this possibility is currently being considered in connection to the potential inclusion of the Mediterranean Alps in the UNESCO World Heritage List.[1157]

As well as restating the provisions of the Convention, the Statute details the institutional structure of the Group and its functioning; in so doing, it is supplemented by the EGTC's Internal Regulation. The organs foreseen in the Statute are an Assembly, a President, and a Director. In addition, technical committees and working groups can be set up to assist the Assembly on specific issues.[1158]

The Assembly is composed of three representatives for each of the members who remain in office for three years.[1159] This is the main organ of the Group since it has deliberative functions and decides on general strategies as well as activities to be implemented in the transboundary space.[1160] It meets at least once a year, and its sessions are public, except in

[1151] Alpi Marittime – Mercantour EGTC Convention, Article 4(3).
[1152] Alpi Marittime – Mercantour EGTC Convention, Article 4(6).
[1153] Alpi Marittime – Mercantour EGTC Convention, Article 4(5).
[1154] Further info on this site at https://whc.unesco.org/en/tentativelists/6181/ accessed 1 October 2018. For further information on this application see *infra* Section 5.3.2.
[1155] Alpi Marittime – Mercantour EGTC Convention, Article 6(1) and (3).
[1156] Alpi Marittime – Mercantour EGTC Convention, Article 6(2).
[1157] This information emerged during the interview with Giuseppe Canavese, 26 June 2018.
[1158] Alpi Marittime – Mercantour EGTC Statute, Article 10. On the working groups see also Article 18, while consultative committees are regulated by the Internal Regulation, Articles 16 to 18.
[1159] Alpi Marittime – Mercantour EGTC Statute, Article 11.
[1160] Alpi Marittime – Mercantour EGTC Statute, Article 12.

specific cases.[1161] The public can attend the sessions of the Assembly, but cannot intervene, except when specific associations are invited to take part in the discussion due to the topic addressed.[1162] Invitations can also be issued to individuals able to provide technical or political support on specific issues.[1163] The deliberations of the Assembly, which decides by absolute majority votes and drafts its acts in both French and Italian, are also publicly accessible.[1164]

The presidency of the Assembly rotates among the members every three years. It is exercised either by the President of the Directing Board of the Public Entity Alpi Marittime Natural Park or by the President of the Directing Board of the Public Entity Mercantour National Park. The President of the EGTC carries out several functions, including convening and chairing the meetings of the Assembly; setting the agenda of the meetings upon consultation with the EGTC Director; proposing the general policies and strategies of the Group; and ensuring the respect of the Statute and the functioning of the Group.[1165]

The direction of the Group also rotates among its members every three years and is held by the Directors of the Parks. However, the direction and presidency of the Group alternate and cannot be held by representatives of the same park at the same time.[1166] For instance, in the current period 2017-2019, the Presidency belongs to the Alpi Marittime Natural Park, while the Director belongs to the Mercantour National Park. The Director represents the EGTC and acts on its behalf, guides its ordinary management, and can adopt any measure useful for the functioning of the EGTC and the implementation of the deliberations of the Assembly.[1167]

[1161] For the organization and functioning of the sessions of the Assembly, refer to the Alpi Marittime – Mercantour EGTC Internal Regulations Articles 1 to 15.
[1162] Giuseppe Canavese, 26 June 2018.
[1163] Giuseppe Canavese, 26 June 2018.
[1164] Alpi Marittime – Mercantour EGTC Statute, Articles 15 and 16.
[1165] Alpi Marittime – Mercantour EGTC Statute, Article 14.
[1166] Alpi Marittime – Mercantour EGTC Statute, Article 17(1), (2) and (3).
[1167] Alpi Marittime – Mercantour EGTC Statute, Article 17(4) ff.

The personnel available in the EGTC are either employed by its members, the two parks, or are hired directly by the EGTC itself. The minimum personnel required is two employees, one from the Alpi Marittime Natural Park and one from the Mercantour National Park.[1168]

The Statute requires that both members participate equally in funding the EGTC, which can also benefit from additional sources from a variety of actors, including the EU, States, territorial entities, public administrations, associations, citizens, and private donations.[1169] The financial operation of the EGTC is based on an annual budget approved by the Assembly.[1170]

In addition to the organs set up by the Statute, the Internal Regulation establishes a Technical Committee that assists the Assembly in its decisions by providing technical advice. This is composed of the Director of the EGTC and the Director of the other park, the heads of services and technical personnel as agreed by the two parks.[1171] Thematic committees or working groups are instead composed of members of the Assembly and open to other entities and experts. Their composition, tasks, and functioning are defined by the Assembly on an *ad hoc* basis. They must report to the Assembly on their meetings, outline programmes of action and projects, and facilitate their execution.[1172] For instance, the Action Plan has established internal working groups to deal with specific themes like communication and patrolling, and additional organs have also been created to draft the joint application of the Mediterranean Alps to the UNESCO World Heritage List.[1173] Both thematic committees and working groups play a supportive role: while working groups seem to function as operative structures within the permanent institutional architecture of the EGTC, thematic committees have a purely consultative function. They do not participate directly in sessions of the Assembly, rather, their positions on specific issues are reported during these sessions by those members of the

[1168] Alpi Marittime – Mercantour EGTC Statute, Article 21. The organisation of the personnel is further articulated in the Internal Regulation, Articles 19 ff.
[1169] Alpi Marittime – Mercantour EGTC Statute, Articles 22 and 23.
[1170] Alpi Marittime – Mercantour EGTC Statute, Article 24.
[1171] Alpi Marittime – Mercantour EGTC Internal Regulation, Article 16.
[1172] Alpi Marittime – Mercantour EGTC Internal regulation, Article 17.
[1173] Giuseppe Canavese, 26 June 2018.

Assembly that are also members of the committees.[1174] Arguably, working groups and, even more so, thematic committees can play a primary role in advancing decentralised international cooperation in the context of the Alpi Marittime – Mercantour. The former, at least in the operative form described above, bring together personnel from the two parks to perform activities and achieve objectives that are more meaningful if carried out in a transboundary perspective, and could not be achieved if pursued independently within the territorial and functional limits of each parks. The latter, though created by the Assembly, enable the participation and consultation of local stakeholders and territorial entities more directly on specific aspects of the ECTC's activities. Hence, thanks to the thematic committees, local participation acquires a transboundary dimension. In fact, the two parks ensure local participation through dedicated organs, but with a limited national scope. In particular, the Alpi Marittime Natural Park is endowed with the Protected Areas Community and the Board for territorial promotion in the Protected Area of the Alpi Marittime. While, in the Mercantour National Park, local instances are primarily promoted through local representatives participating to the Administrative Council of the Park.[1175] Perhaps a focused analysis on thematic committees, their representative practices, working procedures, and the consequences of their consultations for the decisions taken by the Assembly could indicate to what extent local participation in the environmental governance of this EGTC is transparent and democratic.

5.3.1 The Action Plan of the European Park

The collaboration between the Alpi Marittime and Mercantour Parks was initially motivated by the need to jointly manage cross-border wildlife species. Nevertheless, the creation of the EGTC as a European Park required the development of a shared vision going beyond a pure

[1174] Giuseppe Canavese, 26 June 2018.
[1175] For further information on these organs refer respectively to http://www.areeprotettealpimarittime.it/ente-di-gestione-aree-protette-alpi-marittime/organi-istituzionali and http://www.mercantour-parcnational.fr/fr/le-parc-national-du-mercantour/letablissement-public accessed 1 October 2018.

conservationist approach - one able to promote a sustainable future for the transboundary space and its inhabitants. To this end, the current Action Plan (2016-2020) identifies six strategic axes with related actions and common objectives, each assigned a timeline for completion. The Plan also specifies the feasibility of each action in financial, technical and territorial terms.[1176] The Action Plan foresees the direct involvement of park authorities, municipalities, and local stakeholders, thus providing an effective instrument to put decentralised international cooperation into practice.

The six strategic axes identified in the Action Plan are: 1) natural resources; 2) landscape; 3) sensitisation and education; 4) coordination and patrolling; 5) sustainable tourism; and 6) communication. Axis n. 1 aims to improve the shared knowledge and coordinated management of the transboundary protected area and natural resources based on the assertion that 'fauna and flora do not recognise borders'.[1177] The specific actions foreseen are: merging data on taxonomic groups to develop conservation strategies at transboundary level; updating and integrating databases on wildlife species of major importance; improving the Generalised Biological Inventory; monitoring the transboundary population of certain wildlife species (like alpine galliformes and wolves) to understand their evolution, enhancing transboundary conservation strategies and detecting sanitary emergencies; and analysing climate change challenges in the transboundary space to define management strategies to tackle them.[1178]

Axis n. 2 deals with territorial development and the preservation of the socio-cultural identity that characterises the transboundary space, building on the support of local actors. Specific actions include adherence to the transboundary mountain network Tramontana;[1179] the creation of a transboundary local network of museums and eco-museums with the aim of

[1176] A copy of the Action Plan 'Marittime Mercantour 2016-2020' was provided by Giuseppe Canavese, Director of the Alpi Marittime Natural Park and Deputy Director of the Alpi Marittime – Mercantour EGTC. This document is in file with the author.
[1177] Literal translation from the Action Plan 'Marittime Mercantour 2016-2020', 5.
[1178] Action Plan 'Marittime Mercantour 2016-2020', 8 ff.
[1179] This network seeks to preserve and value mountain culture, especially in rural areas affected by depopulation trends. Further information on this project at http://www.re-tramontana.org/it/ accessed 2 October 2018.

reorganising these structures that are spread around the EGTC space and, possibly, creating a common brand. The establishment of a joint landscape observatory is also foreseen by joining the European Landscape Convention[1180] in order to facilitate transboundary landscape management at all relevant governance levels. Finally, community maps are to be created where local residents will have the possibility to represent their heritage, landscape and knowledge as they perceive and want to transmit them to future generations. This exercise aims at beginning a reflection on the relation between man and nature, and favours dialogue between local residents and the parks about shared objectives for the sustainable development of local communities.[1181] Arguably, the actions foreseen in Axis n. 2 – and community maps in particular – are valuable instruments for decentralised international cooperation since they facilitate the direct involvement of local actors (stakeholders and residents) and integrate their inputs and vision for the development of the transboundary space.

Axis n. 3 also focuses on local actors, and aims to reinforce their awareness and dynamism within the European Park. By enhancing their sense of belonging to the protected space and their transboundary identity, the hope is that local actors will contribute more actively to preserving and conserving the natural, cultural and landscape value of their shared territories, and addressing common local challenges. In this framework, schools are targeted with specific didactic activities.[1182]

Axis n. 4 deals with patrolling activities and the daily coordination of the parks' personnel. To this end, coordinated patrols and personnel exchanges are organised between the Alpi Marittime and Mercantour Parks. An *ad hoc* transboundary working group[1183] has been established on patrolling and monitoring in order to strengthen coordination between the French and Italian teams of Park guards. Moreover, the personnel of both parks are informed of the

[1180] European Landscape Convention (Florence) 20 October 2000, in force 01 March 2004, ETS 176.
[1181] Action Plan 'Marittime Mercantour 2016-2020', 19 ff.
[1182] Action Plan 'Marittime Mercantour 2016-2020', 27 ff.
[1183] In line with Article 18 of the Alpi Marittime – Mercantour EGTC Convention.

environmental legislation applicable within the European Park and across the French and Italian borders. Joint training sessions are also foreseen in order to enhance transboundary synergies among the park guard teams and to prepare them to address violations of both French and Italian law perpetrated within the European Park.[1184] Although Axis n. 4 does not foresee the actual creation of a European Park guard team, it arguably moves in this direction and, as in the case of local residents, aims to instil a transboundary sense of belonging and professional allegiance to the European Park.

Axis n. 5 relates to sustainable tourism and aims to promote the European Park as a transboundary, sustainable destination that values the natural and cultural heritage of the shared space. The two parks have a long-lasting partnership in this sector, and have already worked on the restoration of mountain trails, the joint promotion of the transboundary space, the establishment of a network among tour operators, and the analysis of tourism flows. The actions foreseen in this axis include: planning and implementing a joint tourism strategy in the framework of the European Charter for Sustainable Tourism –awarded to the two parks following a joint application; rethinking tourist information in a transboundary perspective, promoting the idea that the parks are in fact a unique transboundary destination and proposing tourism across borders; encouraging tour operators to develop a sense of belonging to the European Park and facilitating exchanges among them; and developing a quality brand for the territories throughout the EGTC that reflects the transboundary identity of the European Park.[1185]

Axis n. 6 focuses on communication, both internal and external. Internally, exchanges between the personnel of the two parks aim to strengthen their relations and improve their collaboration on a continuous basis. Externally, the development of communication tools connected to the Alpi Marittime - Mercanotur space, and hence common to the two parks and

[1184] Action Plan 'Marittime Mercantour 2016-2020', 31 ff.
[1185] Action Plan 'Marittime Mercantour 2016-2020', 36 ff.

bilingual, are planned. In this context, communication can contribute to strengthen territorial cohesion within the European Park and to reinforce the sense of belonging to a common space.[1186]

It can be argued that the Action Plan reflects the will to match the unitary reality of the transboundary natural space with actions on the ground, including by involving local residents and stakeholders and by conveying the impression of being in a transboundary but unique space to external actors. Indeed, the activities designed and performed within and through the Alpi Marittime - Mercantour EGTC are intended to have positive effects for the protected areas and their surroundings, and also to benefit local stakeholders.[1187] This attitude has characterised the partnership between the two parks since its inception, as demonstrated by the numerous projects (about twenty-five) carried out in the conservation, scientific, cultural and education sectors.[1188]

Nevertheless, relations between the EGTC and local stakeholders are not always easy. For instance, mayors have shown ambivalence towards the Group. On the one hand, they want to be more involved in the EGTC, seeing it as an opportunity to boost territorial development, and, possibly, aspire to membership status for their municipalities in order to have stronger decision-making power. On the other hand, they oppose the EGTC and fear the restriction of existing rights for local residents.[1189] These tensions can be lessened by highlighting the positive impacts that transboundary cooperation can bring and does bring in terms of sustainable development and access to additional funding, like those secured through the INTERREG ALCOTRA instrument.[1190]

[1186] Action Plan 'Marittime Mercantour 2016-2020', 46 ff.
[1187] Giuseppe Canavese, 26 June 2018.
[1188] Giuseppe Canavese, 26 June 2018.
[1189] Giuseppe Canavese, 26 June 2018. In this regard see also LinkPAs Draft Main Report, 24-25. Available at https://www.espon.eu/sites/default/files/attachments/LinkPAs_DraftMainReport_28_3_2018.pdf accessed 3 October 2018.
[1190] In this regard see http://www.interreg-alcotra.eu/it/scopri-alcotra/presentazione-del-programma accessed 3 October 2018 and refer also to the LinkPas Draft Scientific Report, 107.

Arguably, stronger cooperation with municipalities and local stakeholders[1191] is also ensured through specific activities under the Action Plan, which contributes to increase a sense of as well as actual engagement in this transboundary project, thus strengthening decentralised international cooperation. For instance, territorial entities and businesses played a primary role in the award of the European Charter for Sustainable Tourism and its joint renewal in 2017.[1192] On the Italian side, this multi-stakeholder cooperation is ensured through the Association 'Ecoturismo in Marittime', whose members include municipalities as well as private businesses operating in the tourism industry (hotels, restaurants, alpine huts, local and souvenir shops, tourist guides, etc.).[1193] A similar association exists on the French side, 'Mercantour écotourisme'.[1194] The strength of the EGTC is to facilitate the collaboration of these national multi-stakeholder associations and enable their operation at transboundary level in an effective way; for example, the involvement of these associations is explicitly foreseen in the Action Plan, Axis n. 6 – Action n. 3.[1195] Arguably, the EGTC can facilitate multi-stakeholder cooperation across borders in any sector relevant for the achievement of the objectives foreseen in the Action Plan and, more generally, for those contained in the EGTC's founding Convention. In this sense, the EGTC boosts decentralised international cooperation by serving as a platform for these purposes. Along the same lines, it has been argued that the capacity to hold multi-stakeholder meetings is a strength of the Alpi Marittime – Mercantour EGTC,[1196] which transformed a pure transboundary conservation project into a platform devoted to regional development in which local actors and park authorities are actively involved and keen to share their territories.[1197]

[1191] It is worth highlighting that issues relating to the democratic nature of the involvement of municipalities and local stakeholders in this EGTC would require further research and interviews with local stakeholders. In fact, this thesis focuses on the mechanisms in place favouring decentralised international cooperation, rather than on their democratic nature.
[1192] In this regard see http://www.areeprotettealpimarittime.it/ente-di-gestione-aree-protette-alpi-marittime/riconoscimenti accessed 3 October 2018.
[1193] For further information visit their website http://www.ecoturismoinmarittime.it/ accessed 3 October 2018.
[1194] See http://www.mercantourecotourisme.eu/en/who-are-we accessed 3 October 2018.
[1195] Action Plan 'Marittime Mercantour 2016-2020', 39.
[1196] LinkPAs Draft Main Report, 26.
[1197] LinkPAs Draft Scientific Report, 108.

The empowerment of local stakeholders in a transboundary natural space, geared towards shared conservation and sustainable management, is at the heart of decentralised international cooperation as intended in this thesis.

5.3.2 The Mediterranean Alps as a UNESCO World Heritage Site

The multi-stakeholder approach adopted in the Action Plan also characterises the joint application presented by France, Italy and the Principality of Monaco for the addition of the Mediterranean Alps to the UNESCO World Heritage List.[1198] The dossier and all the relevant documents were submitted on 31 January 2017, and the site is currently in the Tentative Lists of the three aforementioned Countries. At the time of writing, the application is under consideration, and a decision is expected in 2019.[1199]

The area of the Mediterranean Alps is much larger than the EGTC space, extending over an area of 211,577 ha, both terrestrial and marine. It encompasses eight components, including the Argentera-Mercantour (zone 1), which substantially corresponds with the EGTC transboundary space.[1200] The 'outstanding universal value' of the Mediterranean Alps lies in its unique geological character and the high natural value of the areas, especially the mountains which are sparsely inhabited and have little infrastructure. In fact, the application is based on criterion (viii),[1201] which refers to natural criteria. Since its inception, the application has presented the Mediterranean Alps as a transboundary site and explains that it is composed of distinct elements that are nevertheless connected to form a unique entity.[1202]

[1198] On the World Heritage Convention and its relevance for decentralised international cooperation refer to Chapter 3, Section 3.5.
[1199] Giuseppe Canavese, 26 June 2018.
[1200] For a detailed description of the eight components see the joint application submitted on 31 January 2017 and available at https://whc.unesco.org/en/tentativelists/6181/ accessed 4 October 2018.
[1201] 'To be outstanding examples representing major stages of earth's history, including the record of life, significant on-going geological processes in the development of landforms, or significant geomorphic or physiographic features', see the criteria for selection at https://whc.unesco.org/en/criteria/ accessed 4 October 2018.
[1202] Refer to the joint application for the Mediterranean Alps, in its section 'Statement of authenticity and/or integrity'.

The addition of the Alpi Marittime – Mercantour transboundary space to the UNESCO World Heritage List is identified as a specific objective of this EGTC in Article 4(5) of its founding Convention. Indeed, the Group has worked towards this objective continuously by concluding partnership agreements with other entities holding jurisdiction over the territories included in the territorial scope of the candidate transboundary site: the Mediterranean Alps. The first agreement was signed on 15 May 2004 between the EGTC and the Marguareis Natural Park, the Alpi Liguri Park, the Regional Protected Area Giardini Botanici Hanbury and the Province of Imperia.[1203] A second agreement was signed between the EGTC and the Département des Alpes-Maritimes (a French Department of the Region Provence-Alpes-Cote d'Azure) on 27 November 2015;[1204] and a third was concluded with the Principality of Monaco, which had to institute a national UNESCO Tentative List in order to be able to participate in the process.[1205] In the partnership agreements the parties recognise the need to cooperate and harmonise their decisions for the protection and joint management of the shared natural space as well as for the preservation of their shared natural, cultural and landscape heritage for both present and future generations. They contain the rules agreed on the functioning of the partnerships, and set up an institutional structure to draft the dossier for the application and follow the process.[1206] Moreover, the 2014 and 2015 partnership agreements remain in force until the conclusion of a new agreement dealing with the governance of the Mediterranean Alps transboundary site, which should accompany and complement the management plan.[1207]

The organs created to this end are a Steering Committee, a Technical Committee, a Transboundary Assembly, a Transboundary Scientific Board, and a Supporting Committee. In

[1203] This partnership agreement is available at http://it.marittimemercantour.eu/media/1d588419.pdf accessed 4 October 2018. Hereinafter, 2014 Partnership Agreement.
[1204] The text is available at http://it.marittimemercantour.eu/media/23b37684.pdf accessed 4 October 2018. Hereinafter, 2015 Partnership Agreement.
[1205] Giuseppe Canavese, 26 June 2018. The text of the partnership agreement between the EGTC and the Principality of Monaco is not available online.
[1206] Refer to both the 2014 and 2015 Partnership Agreements available online at http://it.marittimemercantour.eu/gect/statuto-e-altri-documenti (accessed 4 October 2018) and cited above.
[1207] 2014 and 2015 Partnership Agreements, Article 7.

particular, the Steering Committee (Comité de pilotage – COPIL) is composed of the President and Deputy President of the EGTC (or their representatives), the Presidents (or their representatives) of the Marguareis Natural Park, the Alpi Liguri Park, the Regional Protected Area Giardini Botanici Hanbury, the Province of Imperia,[1208] and the Département des Alpes-Maritimes.[1209] The COPIL defines the operational strategies and actions for the application procedure, and adopts all decisions to this end. In this context, the EGTC is identified as the leader of the decision-making process, and its President also heads the COPIL.[1210] Arguably, the leading position entrusted to the EGTC in this process confirms its entitlement to decide on transboundary issues and ensure the unitary management of the transboundary space, replacing the fragmented approach followed by the individual parks and administrative authorities.

The Technical Committee includes the directors (or their representatives) of the parties to the partnership agreements, and deals with the technical aspects deriving from the decisions of the COPIL. Hence, it executes the decisions of the COPIL and organises technical and financial cooperation between the EGTC and the other parties. It also prepares and participates in the sessions of the COPIL, serving as a Secretariat.[1211]

The Transboundary Assembly is supposed to represent and combine the interests, proposals and strategic orientations of local and institutional actors. It encompasses the members of the COPIL, the representatives of territorial institutions and communities, as well as qualified professionals, experts and representatives of associations identified by the COPIL, which is also responsible for coordinating its sessions. The Assembly can work through thematic committees.[1212] Arguably, this organ reflects both a multi-stakeholder approach and the intention to facilitate a bottom-up process and, in so doing, has the potential to reinforce the

[1208] See the 2014 Partnership Agreement, Article 4.
[1209] See the 2015 Partnership Agreement, Article 4. Probably, the COPIL and the other organs integrate also representatives of the institutions and local actors of the Principality of Monaco; however, this speculation cannot be confirmed due to unavailability of the related partnership agreement.
[1210] 2014 and 2015 Partnership Agreements, Article 4.
[1211] 2014 and 2015 Partnership Agreements, Article 4.
[1212] 2014 and 2015 Partnership Agreements, Article 4.

practice of decentralised international cooperation already underway in this transboundary natural space through the Alpi Marittime – Mercantour EGTC.

The Transboundary Scientific Council is instead composed of experts nominated by the parties to the partnership agreement, and deals with the technical aspects of the application dossier. It works in collaboration with the Technical Committee and submits its proposals to the COPIL for a final decision.[1213]

According to the Partnership Agreements, a Supporting Committee should gather all the actors and users interested in and supporting the addition of the Mediterranean Alps to the UNESCO World Heritage List.[1214] The Agreements do not provide further details on the membership, nor is any other information available online. It is possible that this Committee should include the municipalities as well as local stakeholders and actors that are not directly represented in the other organs. For instance, seventy-nine municipalities are located within the territorial scope of the Mediterranean Alps proposed site, but they are not directly involved in partnership agreements with the EGTC.[1215] Possibly, these municipalities could be involved in the Supporting Committee.

As already highlighted, the relation between the EGTC and the municipalities located within its transboundary space is a challenging one, especially because the latter feel excluded from the decision-making process within the Alpi Marittime – Mercantour European Park. Processes in the park do indeed build on the direct conservationist experience of its members, that is the two parks. In this context, the UNESCO World Heritage List application may provide an opportunity to rethink the transboundary institutional architecture, including by reforming that of the EGTC, to respond to changed circumstances and address cooperative challenges. The two parks are reluctant to open up EGTC membership to local authorities, but willing to

[1213] 2014 and 2015 Partnership Agreements, Article 4.
[1214] 2014 and 2015 Partnership Agreements, Article 4.
[1215] Giuseppe Canavese, 26 June 2018.

strengthen collaboration with them on a permanent basis – rather than on specific actions as foreseen in the Action Plan – and outline more direct participation in line with the obligations that the legal status of a UNESCO listed site requires. [1216]

The potential status of a UNESCO listed site also poses other challenges besides the participation of municipalities. This Group was proposed as the managing authority of the Mediterranean Alps site, but, based on its founding Convention and Statute, it arguably lacks the legitimacy to govern a wider transboundary space, as well as the technical knowledge of these territories (in terms of wildlife species, ecosystems, etc.) that would enable conservation and sustainable management as effective as within the European Park. Furthermore, the Alpi Marittime Mercantour EGTC does not include any representatives from the Principality of Monaco or a Monegasque entity among its members. In terms of funding, UNESCO status might also lead to adjustments in the quotas as well as in the subjects obliged to provide funds.

Moreover, the territorial scope of the Mediterranean Alps site proposed partly overlaps with that covered by the European Economic Interest Group (EEIG) 'EUROCIN Alpi del mare, les Alpes de la mer' that gathers the main economic actors operating in the Italian Regions of Piedmont and Liguria as well as the French Department of Provence Alpes Côte d'Azur. The aim of this EEIG is to build on the common interests of local populations to reinforce their socio-cultural and economic integration and to promote the development of this transboundary space. To this end, strengthening collaboration between the EEIG and the EGTC would be beneficial not only for the economic stakeholders and local residents operating within and outside the European Park, but also in terms of environmental protection of the shared natural space – especially in the areas surrounding the European Park now that fall within the proposed Mediterranean Alps site – by holding territorial actors responsible. In addition, increased dialogue between these two cooperative mechanisms would indirectly reinforce the

[1216] These reflections on the institutional future of the Alpi Marittime – Mercantour EGTC were prompted by the interview and contextual discussion carried out with Giuseppe Canavese, 26 June 2018.

participation of local economic actors and authorities that take part in the EEIG in decentralised international cooperation carried out in the shared natural space.[1217]

Therefore, the addition of the Mediterranean Alps site to the World Heritage List is likely to bring about changes in the Alpi Marittime – Mercantour EGTC as it is now. This change could have positive repercussions in terms of decentralised international cooperation, by enhancing the participation of local actors (economic stakeholders, local residents, territorial authorities and public entities) across borders, and reinforcing their commitment to the preservation of the transboundary natural space.

5.4 The EGTC as a boost for decentralised international cooperation

The case studies presented in this chapter exemplify how decentralised international cooperation is put into practice through the use of two 'environmental' EGTCs that pursue the conservation and sustainable use of transboundary natural resources and spaces. The EGTC is a flexible cooperative mechanism with an 'integrated juridical character'[1218] that results from the interaction of EU, national, and sub-national law.[1219] Its flexibility allows its adaptation to different contexts, as shown through the ZASNET and Alpi Marittime – Mercantour experiences. These vary in terms of membership, duration, applicable law, institutional architecture, and evolution. Nevertheless, in both cases the EGTC demonstrates the strengths linked to being a supranational legal entity, legitimated to govern a transboundary space as defined by the tasks accorded to it by its members, and within their competences, and its ability to coordinate territorial actors to this end.[1220] Therefore, the EGTC is a decentralised cooperative mechanism apt for both enabling the involvement of local actors in the joint

[1217] A stronger cooperation between the Alpi Marittime – Mercantour EGTC and the EEIG EUROCIN Alpi del mare - Les Alps de la mer is also advocated in the LinkPAs Draft Main Report, 25. Along the same line, the LinkPAs Draft Scientific Report maintains that the EEIG can support and enhance the connections between the EGTC/European Park and the other conservation areas included in the Mediterranean Alps site. See the LinkPAs Draft Scientific Report, 106.
[1218] Palermo, 'Conclusioni: Cooperazione Transfrontaliera e Sviluppo Dello Spazio Giuridico Integrato in Europa', *cit.*, (n 1028) 76.
[1219] EGTC Regulation, Article 2.
[1220] On the strengths of an EGTC see also the LinkPAs Draft Scientific Report, 105-108.

conservation and management of shared natural resources and spaces, and for reinforcing the natural integrity and socio-cultural identity of the transboundary space.

Notwithstanding their differences, similar dynamics can be observed in the two case studies. First of all, both the EGTCs formalise long-lasting cross-border cooperation between territorial actors, make the existence of a common and shared natural space explicit, and contribute to strengthening the transboundary identity of this space for external actors as well as aiming to strengthen the sense of belonging to it for local residents and stakeholders operating across international borders. Indeed, both EGTCs promote the idea that nature has no borders: the motto of the TBR Meseta Ibérica is 'nature without borders' and the representatives of the TBR behave accordingly;[1221] a similar logic led to the establishment of the Alpi Marittime - Mercantour European Park and is reflected in specific parts of its Action Plan.[1222]

The transboundary identity of the EGTC natural space is promoted by the EGTC institutions in several ways and finds is externally recognised in international initiatives. For instance, in both cases the establishment of an EGTC increased the awareness of the environmental value of the transboundary space and prompted the parties to apply for international recognition of this value. This has already been achieved in the framework of the ZASNET EGTC with the designation of the Transboundary Biosphere Reserve Meseta Ibérica by the UNESCO MAB Programme. In the case of Alpi Marittime – Mercantour EGTC, the application for the Mediterranean Alps to be added to the UNESCO World Heritage List as a transboundary natural site is underway.

The territorial scopes of the transboundary sites proposed for international recognition do not correspond exactly with those of the EGTCs. This territorial mismatch is minimal between the ZASNET EGTC and the TBR Meseta Ibérica, and more significant between the European

[1221] Joana Branco, 05 June 2018. See *supra* Section 5.2.2.
[1222] In this regard the Alpi Marittime – Mercantour EGTC dedicated website presents its territories as 'parks without borders' at http://it.marittimemercantour.eu/territorio/parchi-senza-frontiere accessed 7 October 2018. Regarding the Action Plan see, for example, strategic axis n. 6 – action 3 aimed to strengthen territorial cohesion and the identification of the European Park as a transboundary common space.

Park and the proposed Mediterranean Alps site. Notwithstanding this mismatch, the EGTCs are proposed as the management authorities for the sites in their entirety, since they embody a transboundary logic that overcomes boundary-dependent reasoning and supports the integrity of the cross-border protected sites. Moreover, the EGTCs – as supranational juridical entities – are legitimated to pursue supranational interests that are in line with those promoted in the framework of the UNESCO MAB Programme and the World Heritage List. Lastly, the EGTCs provide a transboundary institutional structure that serves as a framework for the implementation of the joint actions and strategies required under the aforementioned UNESCO regimes. In both cases, the EGTC structure is complemented with additional organs with specific responsibility for managing the UNESCO protected sites and increasing the participation of local actors in a cross-border context.

Besides confirming the natural value of the protected sites, the UNESCO MAB and World Heritage recognitions modify the legal status of the transboundary sites and oblige all relevant actors to respect certain conservation and management standards that enhance the environmental protection of the sites, thus increasing their attractiveness and their potential to become sustainable tourism destinations. Furthermore, these international recognitions open up new sources of funding.

The two EGTCs are also promoting their transboundary identities through the creation of a quality brand for the shared natural space, its products and services. Such brands should reinforce the identification of the EGTCs as sustainable tourism destinations and spread the news of the international recognitions awarded.

The initiatives carried out within the EGTCs aim not only to strengthen the joint conservation and management of a transboundary natural space – which is their primary aim – but also to benefit local residents and enhance their participation in governance.[1223] This is

[1223] This objective is explicit in the ZASNET EGTC Convention, while is pursued in practice in the Alpi Marittime – Mercantour as explained by Giuseppe Canavese during the interview on 26 June 2018.

suggested by the institutional architecture of the two EGTCs in general and, in particular, by the organs set up for the TBR Meseta Ibérica and the application of the Mediterranean Alps site to the UNESCO World Heritage List: the Participatory Body in the ZASNET[1224] and, potentially, the Transboundary Assembly and the Supporting Committee in the Alpi Marittime – Mercantour.[1225] These organs can also be labelled as decentralised cooperative mechanisms since they have the potential to enable the interaction of local actors in a transboundary dimension, so that their needs and interests are not mediated by national instances that would reiterate a fragmented logic. However, the fact that these organs are in place does not automatically grant the effective participation of local actors. As already noted, participation in environmental governance is a complex issue that goes beyond mere institutional aspects to encompass inclusive representative practices, ownership of decisions, and democratic control over natural, intellectual and financial resources.[1226] In this regard, the concept of decentralised international cooperation should be explored from an interdisciplinary perspective and would benefit from further research and fieldwork to go beyond the scope of this thesis, which aims to discuss the existence of decentralised cooperative mechanisms.

Legal harmonisation is also underway in both examples, albeit different extents. In the case of ZASNET, the establishment of the EGTC and subsequently of the TBR Meseta Ibérica prompted a revision of Portuguese environmental legislation and policies, especially in relation to biodiversity conservation and biosphere reserves, as well as updated park management plans in line with higher environmental protection standards.[1227] These changes were motivated by the need to align with Spanish environmental legislation and policies and, consequently, make coordination more effective in the field. In the Alpi Marittime – Mercantour EGTC, the Action Plan foresees the development of common regulations for the European Park, the coordination

[1224] See *supra* Section 5.2.1.
[1225] In this regard refer to Section 5.3.2.
[1226] Refer to Chapter 4 Section 4.4. This point is also raised in the conclusions, see Chapter 8 Section 8.6.
[1227] Joana Branco, 05 June 2018.

of the two member parks' procedures, and joint training programmes for park personnel on French and Italian environmental law to facilitate their ability to work within the whole transboundary space.[1228]

Arguably, the establishment of an EGTC also expands the competences of its members. For instance, environmental protection in Portugal falls under the responsibility of the central government, while in Spain, it belongs to the Self-governing communities. The ZASNET EGTC is responsible for the conservation and management of its shared natural space by adopting relevant decisions and performing actions of territorial relevance, in accordance with an integrated action plan. In this sense, the ZASNET organs exercise environmental competences that do not belong to their Portuguese members – associations of municipalities – but are useful for the achievement of the EGTC objectives and, though restricted in their territorial scope, elude constitutional limitations. In the Alpi Marittime – Mercantour, the most innovative institutional aspect is arguable that the supranational (EGTC) entity originates from two park entities, one national (the French) and one regional (the Italian), which are fully focused on nature conservation. This circumstance highlights the creative potential of the EGTC in terms of institutional design and as a boost for environmental protection in a perspective of decentralised international cooperation.

Furthermore, the EGTC can effectively contribute to achieving the conservation and sustainable management of transboundary natural resources and spaces as required under international multilateral environmental regimes. Generally speaking, both of the EGTCs analysed in this chapter contribute to the conservation of biodiversity and/or specific ecosystems and sites in line with the Biodiversity Convention, Ramsar Convention, World Heritage Convention and other relevant international Conventions. What is more, EGTCs can be integrated within an intergovernmental cooperative framework and used to meet specific

[1228] Action Plan 'Marittime Mercantour 2016-2020', axis n. 4, 31 ff.

international environmental obligations. For instance, the Alpi Marittime – Mercantour EGTC is located within the territorial scope of the Alpine Convention: its objectives are in line with this Convention and the EGTC itself can implement specific provisions. In fact, the European Park is a cross-border network of protected areas in line with those required by Article 12 of the Protocol relating to nature protection and landscape conservation to the Alpine Convention.[1229] As such, the European Park is part of a wider ecological network for the conservation of alpine biodiversity as foreseen in the Alpine Convention.

As supranational entities, the EGTCs shift cooperation to a different governance level: from an intergovernmental to a transboundary but localised one. They respect the integrity of transboundary natural spaces, enable the participation of local actors (authorities, communities, and other stakeholders) across borders, and facilitate the adoption of measures tailored to their transboundary territorial scope, which nonetheless contribute to the achievement of wider – international – environmental conservation objectives. In this context, the transboundary localised space becomes the new reference unit for governance: this is the essence of decentralised international cooperation.

[1229] For further discussion on this Protocol see Chapter 4 Section 4.2.3.

Chapter 6. Setting the frame for decentralised international cooperation in the southern African region

6.1 Introduction

That natural resources do not respect geopolitical boundaries is evident in the southern African context, where wildlife species move across countries, rivers flow through borders, and key ecosystems are located in borderland areas. Here, transboundary nature conservation is a need due to the conditions on the grounds. In fact, this sub-region[1230] is highly rich in biodiversity resources, it hosts five of the eight hotspots in Africa[1231] and more than 40% of its species are endemic.[1232] Natural resources represent multiple sources of income in southern African countries, are subject to both consumptive (e.g., agriculture and hunting) and non-consumptive uses (e.g., travel photography), and are crucial to attain sustainable development objectives.[1233] Emerging global challenges, such as population growth, inappropriate and unsustainable consumption rates, pollution and climate change-related events are putting pressures on these resources, here as everywhere else in the world. However, the uniqueness of southern Africa biodiversity richness makes conservation and wise utilisation a priority for this region and for the entire world, for it being a common concern of humankind.[1234]

The sustainable use of natural resources and the effective protection of the environment are expressly pursued by Article 5(1)(g) of the SADC Treaty.[1235] To this end, SADC countries

[1230] It is worth acknowledging that southern Africa is the southernmost sub-region of the African continent. Nonetheless, in this thesis, this sub-region is mostly referred as southern African region/context or SADC region/context, due to the regional organisation, and these terms are used as synonyms. Southern Africa encompasses Angola, Botswana, Mozambique, Namibia, South Africa, Zambia, and Zimbabwe. These countries are relevant to this thesis for being Parties to the KAZA and GL TFCAs, the two SADC case studies.

[1231] Willem D Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas' in Louis J. Kotzé and Thilo Marahun (eds), *Transboundary Governance of Biodiversity* (Brill 2014) 204.

[1232] SADC Regional Biodiversity Strategy, iii.

[1233] SAD Regional Biodiversity Strategy, vii.

[1234] The Preamble of the Biodiversity Convention states that the conservation of biodiversity is a common concern of humankind. Common concern regimes are further analysed in Chapter 2 Section 2.5.

[1235] SADC is an international organisation (Article 3 of the SADC Treaty) aiming to achieve economic development, peace and security, growth, poverty alleviation, higher standard and quality of life of the peoples of southern Africa through regional integration based on democratic principles, and equitable and sustainable development. It is composed of southern African countries, namely Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique,

have been adopting legal instruments aimed to design a coherent response to specific transnational biodiversity issues: from forestry to poaching. In this context, TFCAs have been designed as a mechanism to ensure the conservation and management of biodiversity resources that transcend national boundaries, to respect their ecosystem integrity and ecological functioning, to pursue multiple uses in line with the principle of sustainable development, and to heal the wounds of the recent past marked by colonial remnants and civil wars, as exemplified by the idea of 'peace parks'.[1236] Joint conservation efforts have been conceived as the engine to reinforce regional cohesion and propagate cooperation in other sectors.

TFCAs are a valuable tool for pursuing the three objectives of the Biodiversity Convention.[1237] They can be seen as an evolution of protected areas and, as such, they are inherently dedicated to preserving the ecosystems, the flora, and fauna they embrace. TFCAs encompass areas of core protection as well as other areas where sustainable use of natural resources is foreseen and multiple land uses are recognised,[1238] in line with the definition provided by the SADC Protocol on Wildlife Conservation and Law Enforcement.[1239] Socio-economic development and the reduction of poverty are among the objectives pursued through these cooperative mechanisms. Lessons learned on the ground have demonstrated the need to engage with indigenous people and local communities in order to establish successful

Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe. SADC was established by the Declaration and Treaty of the Southern African Development Community signed in Windhoek on 17 August 1992 (SADC Treaty). Regional cooperation is functional to achieve the objectives established in Article 5 and has a multi-sectoral character, as exemplified in Article 21.

[1236] Nelson Mandela has strongly supported the creation of peace parks and is one of the founding patrons of the Peace Park Foundations, together with HRH Prince Bernhard of the Netherlands and Anton Rupert – a South African businessman involved in environmental conservation. Regarding peace parks Mandela said: 'I know of no political movement, no philosophy and no ideology which does not agree with the peace parks concept as we see it going into fruition today. It is a concept that can be embraced by all. In a world beset by conflict and division, peace is one of the cornerstones of the future. Peace parks are building blocks in this process, not only in our region, but potentially the entire world.' See http://www.peaceparks.org/ accessed 11 November 2016.

[1237] These are 'the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources'. Biodiversity Convention, Article 1.

[1238] For instance, the GLTFCA includes the Great Limpopo Transnfrontier Park (GLTP) which results from the integration of the South African Kruger National Park, the Mozambican Limpopo National Park, and the Zimbabwean Gonarezhou National Park. In the GLTP human activities are reduced at the minimum and stricter conservation rules apply; this is one of the reasons why communities living within the Mozambican side of the Transfrontier Park are undergoing a relocation programme.

[1239] SADC Protocol on Wildlife Conservation and Law Enforcement (1999), Article 1.

conservation regimes.[1240] Such an engagement is also aimed to make communities benefit from the creation of a TFCA.[1241]

This chapter aims to show the relevance of decentralised international in the SADC region. The first part reviews the history of conservation in southern Africa. The normative, political, and institutional development of conservation in this region is particularly complex due to the presence of many countries and multiple actors operating in each country (at first colonial powers, local communities, landholders, and later on external donors, private sector, etc.). The historical review is useful to address this complexity. The second part is dedicated to the rise of SADC and the creation of its environmental development framework, including TFCAs. In this context, it is worth exploring if and to what extent the concept of decentralised international cooperation can be envisioned in the existing SADC legal instruments. This chapter sets the frame for the analysis developed in Chapter 7, which moves from conceptual to practical issues and looks at the operationalisation of decentralised international cooperation in two case studies: the Kavango Zambezi (KAZA) and the Great Limpopo (GL) TFCAs. Decentralised cooperative mechanisms are emerging in both contexts as a way to put cooperation into effect through more meaningful governance units: each TFCA is developing its own decentralised solutions and creating distinctive institutional structures and processes.

[1240] Borrini-Feyerabend, 'Indigenous and Local Communities and Protected Areas: Rethinking the Relationship', *cit.*, (n 416).
[1241] The CBD COP has been highlighting the valuable contribution of protected areas in general, and transboundary protected areas in particular, to biodiversity conservation in several decisions. Particularly important is CBD COP Decision X/2 containing the Strategic Plan for Biodiversity 2011-2020 and setting the Aichi Biodiversity Target. In Target 11 'well connected systems of protected areas and other effective area-based conservation measures' are indicated as a tool to achieve the strategic goal C, which is 'improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity'. In addition, the CBD COP has continuously recognised the preferential relation between communities and natural resources and called for their effective involvement in governing protected areas, as exemplified in Goal 2.2 of the PoWPA, included in CoP Decision VII/28. Goal 2.2 requires 'to enhance and secure involvement of indigenous and local communities and relevant stakeholders' and poses as its target 'the full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment of new protected areas'. On the relevance of protected areas for biodiversity conservation and the involvement of indigenous peoples and local communities under the framework of the Biodiversity Convention see also Chapter 3 Section 3.3 ff.

6.2 The history of conservation in the southern African region

The southern African conservation paradigm is peculiar to this region and has evolved differently from the European one presented in Chapter 4. Although colonial administrations have been key players in conservation dynamics, they were influenced more by the context they were living in and concerns for soil erosion and environmental health than by conservation trends in the colonising countries they belonged to, which were dealing with the protection of spectacular landscapes from urbanisation.

Conservation legislation intended to halt the abuse of wildlife perpetuated by white settlers. In the early 19th century, deforestation and soil erosion caused by agricultural expansion led first to legislation for the protection of flora in the Cape Colony (South Africa); this was later extended to wildlife and culminated in the Cape Act for the Preservation of Game[1242] in 1886.[1243] Similar concerns were shared by all the African colonial powers which convened in London to negotiate an international convention to guide the development of game laws across Africa. The 1900 London Convention for the Preservation of Wild Animals, Birds and Fish in Africa never entered into force and was followed by the 1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural Stage. The latter formed the backbone of successive conservation legislation and determined the creation of large areas for game preservation and the establishment of numerous national parks, the rejection of commercial utilisation of wildlife, and the centralization of the control of wildlife.[1244]

The evolution of conservation and related policies in southern Africa has always had a strong regional dimension thanks to the continuous contacts between professionals working in the different countries and the creation of regional learning networks for the discussion of new

[1242] In this chapter, the word 'game' refers to 'wild mammals or birds hunted for sport or food' as defined in the Oxford Dictionary.
[1243] Brian Child, 'Conservation in Transition', *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (2009) 5–6.
[1244] ibid 6.

ideas and relevant scientific progresses as well as for the exchange of best practices. Among these networks the Southern African Regional Commission for the Conservation and Utilization of the Soil and its Standing Committee for Nature Conservation and the Management and Use of Wildlife have been crucial for the development of innovative thinking such as the 'use it or lose it' philosophy and the use of wildlife on private land.[1245]

Moreover, the enlightened vision of some individuals in these countries has contributed to the conceptualisation and application of advanced conservation practices. For instance, in Zimbabwe, Reay Smithers perceived the economic potential of large game animals for developing a prosperous wildlife industry and enhance conservation outside protected areas.[1246] By carrying out a detailed review on the status of national parks and reserves in Angola, B. J. Huntley contributed to the recognition of the importance of wildlife conservation at governmental level soon after Independence.[1247] While, Garth Owen-Smith initiated a community game guard programme lying the foundation for community-based natural resource management in Namibia.[1248]

There are three main trends characterising conservation history in this region: State-led conservation in parks and protected areas, conservation on private land, and community-conservation initiatives. These trends emerged in all southern African countries, although in slightly different periods and with different outcomes depending on the actors involved in each case. Exploring how conservation practices evolved in southern African countries sets the basis to understand the current conservation framework developed by SADC, which constitutes the

[1245] Amos J. Peaslee, *International Governemental Organizations: Constitutional Documents* (Revised th, Martinus Nijhoff Publishers 1979) 423–428. Child, 'Conservation in Transition', *cit.*, (n 1243) 8.
[1246] Graham Child, 'The Emergence of Modern Nature Conservation in Zimbabwe' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 76–77.
[1247] B.J. Huntley, 'Preliminary guide to the national parks and reserves of Angola. Report to Direccao Provincial dos Servicios de Veterinaria, Luanda' (1972); B.J. Huntley, 'Angola: a situation report' (1976) 30(1) African Wildlife 10.
[1248] Garth Owen-Smith, *An Arid Eden: A Personal Account of Conservation in the Kaokoveld* (Jonathan Ball Publisher 2011).

reference framework for applying the concept of decentralised international cooperation in this region.

This chapter focuses on Angola, Botswana, Mozambique, Namibia, South Africa, Zambia, and Zimbabwe that are Parties to the KAZA and GL TFCAs, analysed later as case studies.. The following analysis introduces the three conservation trends referring to the countries that are more representative for each case; scarce information and literature for some countries do not always permit a comprehensive overview.

6.2.1 State-led conservation and national parks

Initially, national parks in southern African countries were established to set aside large areas to protect both wildlife and habitats that had been heavily affected by the abuses of colonizers and agricultural expansion.[1249] Although created to be protected from the white man, these areas soon became a diversion for white tourists and sportsmen. Instead, local communities were perceived as a threat to wildlife and consequently expelled from such protected areas. Their exclusion was often driven by other reasons than conservation (economic gains, discrimination, forced labour,[1250] competition in hunting, etc.) since access to wildlife and hunting was often associated to social and class division, especially in *South Africa*.[1251]

Here, in the early 1920s British administrators created game reserves on 'useless land', that is to say land that could not be devoted to other income generating activities such as agriculture and livestock. Often, the establishment of game reserves resulted in imposing formal State authority in remote areas under the control of local Africans. Some of these reserves were

[1249] Carruthers explains the attitude of white settler in these words: 'immoral and unpatriotic [was] not to exterminate wildlife, because clearing the land in this way encouraged agriculture and expedited the progress of civilization'; Jane Carruthers, *The Kruger National Park: A Social and Political History* (University of Natal Press 1995) 11.
[1250] For instance, Ramutsindela argues that preventing Africans from hunting was an expedient to direct them towards other forms of labour. Maano Ramutsindela, 'Land Reform in South Africa's National Parks: A Catalyst for the Human-Nature Nexus' (2003) 20 Land Use Policy 41, 43.
[1251] Brian Child, 'The Emergence of Parks and Conservation Narratives in Southern Africa' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 21.

merged to form national parks, as for the Kruger National Park. This change in status paved the way to the adoption of a protectionist approach and pursued several objectives. First, it was meant to put the area under State ownership and allow public access, in contrast to closed game reserves that were dedicated to recreational sport hunting with limited access to elites. Second, national protection mechanisms were able to ensure conservation in perpetuity; and third, it reflected the widespread acceptance of wildlife as a legitimate land use option at both governmental and societal levels.[1252]

State-proclaimed national parks are not the only form of protected area in South Africa since nature conservation has always been a competence devolved to provincial governments. Consequently, each province had and has its own nature conservation agency that can establish provincial national parks – this is the case of the Pilanesberg National Park.[1253] In addition, there are many protected areas in the country that have not been legally framed into the national park scheme. This fragmentation in terms of conservation authority and management has been beneficial to South Africa's conservation areas and resulted in the evolution of multiple conservation models.[1254] Several elements had an influence in the evolution of each conservation project: not only park wardens and their personal conservation philosophy, but also the political and social acceptance of such a project.[1255]

The history of State-led conservation in South Africa is also a history of exclusion to the point that national parks have been defined as a 'social invention'.[1256] Local Africans were often

[1252] Carruthers, 'National Parks in South Africa', *cit.*, (n 417).
[1253] As a consequence, there are several conservation authorities: South African National Parks (SANParks) is a parastatal organisation responsible for the management of South Africa's national parks; while, national parks established by provinces are under the control of provincial conservation agencies, and parks in the Kwazulu-Natal Province are under the direct control of Ezemvelo KZN Wildlife, a governmental organisation responsible for maintaining wildlife conservation areas and biodiversity in this province.
[1254] Child, 'The Emergence of Parks and Conservation Narratives in Southern Africa', *cit.*, (n 1251) 23.
[1255] In this regards, Carruthers compares the success of the Kruger National Park with the misfortune of the Dongola Wild Life Sanctuary. While the former was seen as the result of the collaboration between Afrikaners and English-speakers South Africans, thus perceived as a shared national symbol, the latter – that would have been the first transfrontier park in Africa thanks to the cooperation with the Rhodesian government – was meant to be devoted to wilderness and scientific research. For this reason, it was strongly opposed at governmental level as well as at local level by farmers and voters inhabiting this area. Carruthers, 'National Parks in South Africa', *cit.*, (n 417) 41–44.
[1256] James Gordon Nelson, RD Needham and DL Mann, *International Experience with National Parks and Related Reserves* (University of Waterloo, Ontario 1978).

described as having an environmentally destructive attitude[1257] and their eviction from protected areas was accompanied by increasingly restricted African access to land, also outside these areas, on the basis of the Native Lands Act of 1913 and the Native Trust of Land Act of 1936. One of the most known cases is the removal of the Makuleke people from their ancestral land. In fact, they have been the first community succeeding in a Land Claim in the post-apartheid era[1258] and their example has been followed by other communities, but with different results, as demonstrated by the case of the Madimbo corridor.[1259]

Similarly to what happened in South Africa, conservation legislation in *Mozambique* was motivated by the intensive exploitation of natural resources and uncontrolled hunting by

[1257] Farieda describes how the game protectionist movement created a stereotype of black people as 'innately destructive of the environment and its resources'. She further explains that, although conservation was not consciously pursued in the framework of the traditional African way of life, the strict respect of customs and taboos – such as the prohibition to kill totem animals in certain tribes – resulted in actual protection of the environment. Khan Farieda, 'Rewriting South Africa Conservation History - The Role of the Native Farmers Association' (1994) 20 Journal of Southern African Studies 499.

[1258] The Makuleke come from an area between the Luvuvhu and the Limpopo Rivers along the international boundary with Mozambique and Zimbabwe, which had to leave in 1969 for its inclusion within the Kruger National Park. Despite formal conservationist justifications, the forced removal was in line with apartheid policy aimed to acquire the control over both valuable natural resources and local Africans. In 1994, after the election of the democratic government and the approval of the Restitution of Land Rights Act, the Makuleke initiated a land claim before the Land Claims Court and the case was settled in 1998 after a long negotiation with SANPark in which the Makuleke accepted not to return to the land nor use it for unsustainable activities (e.g., agriculture and mining), but maintain its conservation purpose. The Makuleke had to establish a Communal Property Association (CPA) as a legal person able to acquire, hold and manage the common property in accordance with the Communal Property Association Act [22 May 1996, http://www.justice.gov.za/lcc/docs/1996-028.pdf, accessed 15 November 2016]. Hence, ownership and title were returned to the Makuleke CPA which signed a contractual agreement with the Minister of Environmental Affairs and Tourism proclaiming the relevant area as a contractual national park. The Makuleke CPA has exclusive commercial (tourism development) and use rights over the area, while SANParks retains gate fees. A Joint Management Body has been established to manage the so called Makuleke Region according to a Master Plan ('Master Plan for the Conservation and Sustainable Development of the Makuleke Region of the KNP') agreed by the parties. While SANParks carries out conservation functions under the guide of the JMB, the Makuleke CPA deals with all commercial activities and acquires the resulting revenues, provided that those activities respect the Master Plan. The Makuleke agreement has been praised as a valuable and replicable model for co-management. The challenges in its application have been addressed by strengthening community participation (for instance in relation to the Great Limpopo Transfrontier Conservation Area), improving relations between SANPark personnel and community members, and transferring skills to community members through ad hoc trainings. In this process, a key role has been played and it is still payed by NGOs and technical advisor constituting a group called 'Friends of Makuleke'. See David Grossman and Philippa Holden, 'TowardsTransformation: Contractual National Parks in South Africa' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 361–365.

[1259] This corridor covers an area east of the Makuleke land that was strategic for security reasons, thus being expropriated in the 1960s for the deployment of the then-South African Defense Force (SADF) along the border with Zimbabwe to block illegal immigrants and guerrilla soldiers. The relocation affected communities belonging to the Venda clan which lived across the border between South Africa and Zimbabwe: they were moved to different places, with consequences on their social structure, and settled in poor agricultural areas. Local communities from the corridor (Gumbu people and Mutele people) claimed the area in 1998 and, in August 2004, the Limpopo Regional Land Claims Commission recommended to transfer the land and title to the claimants, but such a restitution was never executed. Indeed, the restitution of the Madimbo corridor is still pending due to the complexity of political and administrative interests projected on this area, including its potential inclusion in the GLTFCA. See Webster Whande, 'Windows for Opportunity or Exclusion? Local Communities in the Great Limpopo Transfrontier Conservation Area, South Africa' in Fred Nelson (ed), *Community Rights, Conservation & Contested Land: The Politics of Natural Resources Governance in Africa* (Earthscan 2010); Webster Whande and Helen Suich, 'Trasnfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 384.

Europeans. However, it aimed to wildlife utilisation, especially through food and sport hunting, thus adopting a utilitarian approach rather than a protectionist one.[1260] In fact, the lucrative potential of hunting was exploited through the creation of a licensing system.[1261] Nor the colonial administration nor the Portuguese élite showed any conservation culture; in fact, wildlife populations were perceived as a threat for agriculture and livestock farming that were the cornerstone of economic development.[1262] The creation of protected areas in Mozambique resulted from external pressures, especially coming from the British colonial empire and its conservationist attitude in neighbouring countries.[1263] Differently from South Africa, in Mozambique local communities were not evicted from the newly created parks. Such an evolution did not completely reverse existing trends: government culling schemes were carried on until 1969, the government control of wildlife utilisation was still weak, and poaching of commercial species (like rhinos and elephants) was still happening throughout the country.[1264] After Independence, Mozambique recognised the need to protect its national natural resources[1265] that could be utilised for the achievement of socio-economic objectives, also to the benefit of local communities,[1266] as well as for developing tourism and national economy. Institutional restructuring and the massive culling scheme known as 'Buffalo Operation' constituted the main developments of the pre-civil war period.[1267] When the conflict erupted,

[1260] Child, 'The Emergence of Parks and Conservation Narratives in Southern Africa', *cit.*, (n 1251) 26.
[1261] The first regulation was issued in 1893 for the territories of Manica and Sofala under the control of the Mozambique Company to regulate hunting, avoid the extinction of threatened wildlife species by imposing a licensing system or other restrictions (for instance, hunting bans on cubs), and sanction offenders. Hunting was further regulated in other areas of the country with the Decree of 28 December 1903 (applying to the area of Maputo), which was revised in 1909 and extended to the whole country. Zacarias Alexandre Ombe and Alberto Fungulane, *Alguns Aspectos Da História Da Conservação Da Natureza Em Moçambique* (Editora Escolar 1996) 29–30.
[1262] Bartolomeu Soto, 'Protected Areas in Mozambique' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 87.
[1263] The Decree n. 40:040 of 20 January 1955 (published in the Boletim Oficial de Moçambique n. 8, Iª Série, of 24 February 1955) marked a change in the previous legislation, in line with the 1933 London Convention. It established the Nature Conservation Council (Conselho de Protecção da Natureza) to deal with the protection of soil, flora, and fauna, and foresaw the creation of protected areas to attain conservation goals. These areas could be categorised as: national parks, integral natural reserves, partial reserves, and special reserves. The same Decree led to reviewing the 1909 hunting legislation which was replaced through the Legislative Diploma n. 1982 of 8 July 1960. Ombe and Fungulane, *Alguns Aspectos Da História Da Conservação Da Natureza Em Moçambique*, *cit.*, (n 1261) 32–35.
[1264] Soto, 'Protected Areas in Mozambique', *cit.*, (n 1262) 87–88.
[1265] According to Article 8 of the 1975 Constitution, natural resources were brought under the direct control of the State.
[1266] Local communities created cooperatives in order to organise agrarian activities and obtain hunting licenses for low fees. See Soto, 'Protected Areas in Mozambique', *cit.*, (n 1262) 88.
[1267] Ombe and Fungulane, *Alguns Aspectos Da História Da Conservação Da Natureza Em Moçambique*, *cit.*, (n 1261) 48–49.

the State had not been able to set a proper normative and policy framework in place and wildlife was perceived as a 'free good' and consistently impoverished: the illegal trade of ivory and trophies payed for some of the costs of the war.[1268] The civil war had two main consequences on the environment: on the one hand, the protected area infrastructure was dismantled and destroyed due to the occupation of conserved areas by rebel armed forces; on the other hand, vegetation flourished in many areas that had been abandoned and lightly exploited during these years.[1269] After the war, 'The general guidelines towards policy for wildlife conservation' was the first document recollecting information about the status of wildlife in the country. Although inaccurate, it served as a starting point for the development of a comprehensive forest and wildlife policy framework that involved non-governmental stakeholders and external donors.[1270] This participative management approach has been a characterising trait of more recent conservation legislation in Mozambique,[1271] and informs the 2014 Conservation Law,[1272] which amends part of the Forestry and Wildlife Law.

The emergence of a conservation system in *Botswana*[1273] was facilitated by fortuitous circumstances: it mostly covered unoccupied State land[1274] in order to avoid settlements, and

[1268] Eddie Koch, '"Nature Has the Power to Heal Old Wounds": War, Peace & Changing Patterns of Conservation in Southern Africa' in David Simon (ed), *South Africa in Southern Africa: Reconfiguring the Region* (Ohio University Press 1998) 57–58.
[1269] Soto, 'Protected Areas in Mozambique', *cit.*, (n 1262) 89.
[1270] The 1996 policy integrated both ecological and socio-economic objectives and it has been later crystallised in the Forestry and Wildlife Law (n. 10/99 of 7 July). The engagement with non-State actors emerges from several provisions: for instance, among the main principles, Article 3(b) requires the involvement of local communities, the private sector, and civil society in general in biodiversity conservation for the achievement of sustainable development for current and future generations. The support of the private sector is seen as functional for enhancing the development of local communities (Article 3(f) of Law n.10/99), and multi-stakeholders bodies are created to ensure the participative management of forest and wildlife resources (Art. 31 of Law n. 10/99). The Forestry and Wildlife Law has been later complemented by the associated Regulation (Decree n. 12/2002 of 6 June).
[1271] This approach is reiterated in several legal and policy documents; for instance, the 2006 Principles for Administration of Protected Areas stresses the role of the private sector in participating and investing in protected areas and encourages the creation of public-private partnerships. See Soto, 'Protected Areas in Mozambique', *cit.*, (n 1262) 91. Article 24 of the Land Law n.19/97 recognises the role of local communities in natural resource management.
[1272] Law n. 16/2014 of 20 June. In particular, its Article 7 focuses on participative management and the creation of the Conservation Area Management Council as a consultative body to support the implementation of conservation and management measures in the relevant area. Public-private partnership is included among the general principles in Article 4(g) as well as in Article 9 as a mechanism to administer conservation areas.
[1273] Botswana has been a British Protectorate until the 1966 when it gained independence and became a Republic, being a peaceful and stable country.
[1274] Campbell briefly explains the three legal forms of land ownership in Botswana: 1) State lands, previously known as Crownland; 2) Tribal reserves that are property of individual tribes and represent the most inhabited areas of the countries; 3) Freehold land used for cattle ranching and originally owned by white farmers. Alec Campbell, 'Establishment of Botswana's National Park and Game Reserve System' (2004) 36 Botwswana Notes and Records 55, 55.

passively responded to the relentless advancement of agriculture and cattle farming, which were considered the foundations of economic development.[1275] Wildlife population in the country was abundant and, while its economic value was not significant, it was very important for poor households; hence, unlicensed subsistence hunting was permitted. Tribal Chiefs (*Dikgosi*) had extensive powers on wildlife matters entrenched in the 1925 Game Proclamation: they controlled game hunting on their tribal lands and could declare no-hunting areas on Crownland limited to specific species and a time period. In the 1940s, Chiefs could formally establish Game Reserves. These were the first form of conservation areas foreseen in the legislation[1276] to cover wide, usually unoccupied, areas and protect wild animals, but not plants nor fish. Sanctuaries were also created to protect small areas and certain wildlife species. Eventually, in 1967, the National Parks Act allowed for the upgrade of some game reserves to National Parks.[1277] Again, external pressure (from South Africa) to protect an area bordering the South African Kalahari Gemsbok National Park was crucial for the creation of the Bechuanaland gamer reserve (later re-nominated Gemsbok Game Reserve) and the resettlement of communities living therein. The Botswanan side was also managed by the South African Parks Board (now SANParks), and this area represented *de facto* the first transfrontier park in the southern African region.[1278]

More parks and reserves were created in the 1960s to protect land from agricultural and cattle farming pursuing wildlife conservation as well as the preservation of sites of historic and cultural value. The adoption of the Fauna Conservation Act (amended in 1979 and augmented by the Forest Order in 1981) and the establishment of the Game Department (1961) with

[1275] Campbell, 'Establishment of Botswana's National Park and Game Reserve System', *cit.*, (n 1274); Graham Child, 'The Growth of Park Conservation in Botswana' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009).
[1276] Game Proclamation n. 19. In addition, Campbell explains that, in the Nineteen Century, Chiefs developed the practice of reserving some areas for their exclusive hunting or with invited friends and used to announce such decisions during tribal meetings. These areas could be considered as the predecessor of game reserves. Similarly, the Resident Commissioner (the representative of the Protectorate in the country and dependent on the High Commissioner located in Pretoria) wanted to establish a game reserve in the Chobe District, but the costs and the opposition of the Veterinary Services prevented him to do so, and he could declare a no-hunting area subject to a periodical renewal. Campbell, 'Establishment of Botswana's National Park and Game Reserve System', *cit.*, (n 1274) 55–57.
[1277] Campbell, 'Establishment of Botswana's National Park and Game Reserve System', *cit.*, (n 1274).
[1278] Child, 'The Growth of Park Conservation in Botswana', *cit.*, (n 1275) 56–58; Campbell, 'Establishment of Botswana's National Park and Game Reserve System', *cit.*, (n 1274) 57–58.

specific competence on wildlife (previously belonging to the general administration) were crucial in this process. The department grew rapidly in terms of staff and, in 1967, became the Department of Wildlife and National Parks. A peculiar aspect of its *modus operandi* was the extensive fieldwork and the continuous interaction with local people in order to take their needs into account, and respect traditional practices, including subsistence hunting.[1279] In this regard it is worth mentioning the creation of the Central Kalahari Game Reserve (1957) to protect the environment and the nomadic hunting-gathering lifestyle of the San (or Bushmen) from the spreading of cattle farming. Nevertheless, this situation has recently changed with the eviction of the remaining residents in the early 2000s. Despite the 2006 High Court ruling in favour of the San recognising the eviction as 'unlawful and unconstitutional' and reiterating their right to live on their ancestral land in the reserve,[1280] the situation remains unchanged.[1281]

Local authorities were also encouraged to actively participate in decision making and direct management of protected areas, for instance, a partnership with the district council was experimented in the Moremi Wildlife Reserve.[1282] Moreover, wildlife conservation was perceived as important for diversifying an economy dominated by the livestock industry, and nature-based tourism and hunting safaris were the most developed activities. The National Park Act (1967) reinforced these positive conservation policies.

[1279] Child, 'The Growth of Park Conservation in Botswana', *cit.*, (n 1275) 51–52.

[1280] Sesana and Others v Attorney General, Misca. No. 52/2002, High Court of Botswana at Lobatse, 13 December 2006, available at http://www.saflii.org/bw/cases/BWHC/2006/129.html accessed 26 November 2018.

[1281] For instance, in 2009 a new case was brought in front of the High Court of Botswana by the San Bushmen that were prevented to access water from a borehole at Mothomelo as a means to speed up the relocation process initiated by the government in the early 2000s. In 2010, the High Court of Botswana ruled against the San Bushmen [Matsipane et al v Attorney General, Civil Case No. MAHLB-000393-09 (21 July 2010)], which appealed this decision and was granted the right to water by the Court of Appeal of the Republic of Botswana [Civil Appeal Case No. CACLB-074-10, 27 January 2011, available at https://docs.escr-net.org/usr_doc/bushmen-water-appeal-judgement-jan-2011.pdf accessed 26 November 2018]. Regarding this latest case Jeremy Sarkin and Amelia Cook, 'The Human Rights of the San (Bushmen) of Botswana - the Clash of the Rights of Indigenous Communities and Their Access to Water within the Rights of the State to Environmental Conservation and Mineral Resource Exploitation' 20 Journal of Transnational Law and Policy 1; Nicola Lugaresi, 'The Right to Water and Its Misconceptions, between Developed and Developing Countries' in Michael Kidd and others (eds), *Water and the Law - Towards Sustainability* (Edward Elgar 2014) 337. Further information available online in specialised website, see for instance http://www.achpr.org/press/2010/08/d74/ and https://www.survivalinternational.org/news/6925 both accessed 26 November 2018. A 2017 Reuter's online article confirms that the situation of San in the Central Kalahari Game Reserve has not changed, see https://www.reuters.com/article/us-botswana-landrights-dalailama/bushmen-evicted-from-ancestral-land-appeal-to-dalai-lama-ahead-of-botswana-visit-idUSKBN1AR1MV accessed 26 November 2018. On the situation of the San see also Child, 'The Growth of Park Conservation in Botswana', *cit.*, (n 1275) 58.

[1282] Child, 'The Growth of Park Conservation in Botswana', *cit.*, (n 1275) 58–60.

Botswana, through its wildlife department, was a forerunner in recognising the importance of using wildlife to promote its conservation and make people benefit from it. However, such progresses were hindered by European-driven game laws. These laws were meant to limit the financial potential of wildlife, while promoting national level policies that protected cattle industry and incentivised fencing measures, which provoked huge loss in terms of wildlife species. Other challenges were linked to managing natural resources outside the parks and reserves and the low fees payed by residents in the framework of a public hunting system that undervalued wildlife.

6.2.2 Conservation on private land

In southern African countries, an important contribution to conservation outside protected areas has been provided by the private sector, especially through wildlife ranching and tourism development in countries with extensive privately-owned lands, such as South Africa, Zimbabwe, Namibia, and, to a lesser extent, Botswana and Zambia. Several authors highlight the positive correlation between land used for wildlife and biodiversity conservation.[1283] Beyond the increased number and diversity of mammal species, conservation on private land has benefitted biota and habitats scarcely included in formal protected areas and increased the range of land effectively managed.[1284] In this regard, it is worth noticing that while conservation – through wildlife protection and management – on private or communal properties has the potential to extend over an increasing area, the same is not possible on State land, due to the limited space proportion under this latter tenure.[1285] Moreover, States often lack enough

[1283] Ivan Bond and others, 'Private Land Contribution to Conservation in South Africa' in Brian Child (ed), *Parks in Transition: Biodiversity, Rural Development, and the Bottom Line* (2004); W Krug, 'Private Supply of Protected Land in Southern Africa: A Review of Markets, Approaches, Barriers and Issues' (2001).
[1284] J du P Bothma, Helen Suich and Anna Spenceley, 'Extensive Wildlife Production on Private Land in South Africa' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 149.
[1285] This emerges from the percentages under different land tenures in southern African countries included by Krug in Table 5. Krug, 'Private Supply of Protected Land in Southern Africa: A Review of Markets, Approaches, Barriers and Issues', *cit.*, (n 1283) 19.

resources to manage and protect biodiversity, especially outside protected areas; hence, conservation successes depend on investments of other stakeholders, on private and communal land.[1286]

Several factors facilitated private investments in the wildlife industry and the consequent benefits in terms of biodiversity conservation, *in primis* the economic and ecological comparative advantage of wildlife-related land uses in comparison to traditional ones (agriculture and livestock), and the recognition of some forms of ownership over wildlife resources. Initially, game farming was supplementary to livestock production and developed in marginal areas, but soon became clear that wildlife species were more adaptable to semi-arid rangelands and desert conditions, and had both consumptive and non-consumptive uses.[1287] The growing international demand for trophy hunting and wildlife tourism, in addition to the domestic-driven demand for venison,[1288] was key in this process and led to increased investments in the wildlife sector for the provision of high-quality services and diversification of the entrepreneurial risk.[1289] Additional factors contributed to the shift towards wildlife production, especially the bio-physical properties of the farm (habitats and wildlife species in the property), its location (distance from cities, vicinity to government parks or similar private properties), and the skill of the owners.[1290]

[1286] David HM Cumming, 'Constraints to Conservation and Development Success at the Wildlife-Livestock-Human Interface in Southern African Transfrontier Conservation Areas: A Preliminary Review' (2011) 15.
[1287] The fast expansion of wildlife production over livestock farming was experienced in all the relevant countries, see Jon Barnes and Brian Jones, 'Game Ranching in Namibia' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009); Brian Child, 'Game Ranching in Zimbabwe', *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (2009); Bond and others, 'Private Land Contribution to Conservation in South Africa', *cit.*, (n 1283); Krug, 'Private Supply of Protected Land in Southern Africa: A Review of Markets, Approaches, Barriers and Issues', *cit.*, (n 1283) 21 et seq.
[1288] Krug, 'Private Supply of Protected Land in Southern Africa: A Review of Markets, Approaches, Barriers and Issues', *cit.*, (n 1283) 20. Trophy hunting and wildlife-viewing are strong contributors to South African economy, Bothma, Suich and Spenceley, 'Extensive Wildlife Production on Private Land in South Africa', *cit.*, (n 1284) 154–155.
[1289] Krug, 'Private Supply of Protected Land in Southern Africa: A Review of Markets, Approaches, Barriers and Issues', *cit.*, (n 1283) 34.
[1290] Bond and others, 'Private Land Contribution to Conservation in South Africa', *cit.*, (n 1283) 35; Bothma, Suich and Spenceley, 'Extensive Wildlife Production on Private Land in South Africa', *cit.*, (n 1284) 150.

The realisation that the status of wildlife – in terms of species and habitats – outside protected areas was declining, justified policy and legislative measures aimed to devolve rights over wildlife to landowners in different ways. In *Namibia*, landholders' use of protected species was conditional upon fencing and appropriate permits.[1291] In *South Africa*, ownership of wildlife was recognised to landholders able to adopt measures contrasting its theft, illegal hunting and capture according to the conditions set in the 1991 Game Theft Act,[1292] and was further regulated at provincial level.[1293] In *Zimbabwe*, the 1975 Parks and Wildlife Act revolutionised the previous system and established that wildlife was *res nullius*. In this context, a landholder could claim ownership by controlling, capturing or killing an animal on its territory, but also losing any right when the animal moved on to a neighbouring property.[1294] While the Act was potentially creating a 'common property challenge',[1295] it *de facto* incentivised landowners to get organised at local level through committees for the collective management of wildlife resources.[1296] This solution was facilitated by the existence and successful functioning of co-management mechanisms, namely intensive conservation areas (ICAs), established by the 1941 Natural Resources Act. ICAs were voluntarily created by a group of local farmers and landholders to collectively regulate and restore the shared environment. ICAs could solve disputes over wildlife between landholders, set quotas or impose restriction on use, and sanction those abusing land and natural resources.[1297]

[1291] Bond and others, 'Private Land Contribution to Conservation in South Africa', *cit.*, (n 1283) 39; Barnes and Jones, 'Game Ranching in Namibia', *cit.*, (n 1287) 116–117.
[1292] Bothma, Suich and Spenceley, 'Extensive Wildlife Production on Private Land in South Africa', *cit.*, (n 1284) 148.
[1293] Bond and others, 'Private Land Contribution to Conservation in South Africa', *cit.*, (n 1283) 40.
[1294] Child, 'Game Ranching in Zimbabwe', *cit.*, (n 1287) 132–133. Bond and Cumming highlight the main innovation of the Parks and Wildlife Act: '1) To confer on landholders and occupiers of alienated land the responsibilities for the management and use of wildlife on their land; 2) To extend the definition of wildlife to include all indigenous plants and animals, both vertebrate and invertebrate; 3) To allow landholders and occupiers to invoke legislation to provide additional protection to wildlife on their land; 4) To provide for the creation of special conservation areas outside of the nationally administered parks and wildlife estates.' Ivan Bond and David HM Cumming, 'Wildlife Research and Development' in Mandivamba Rukuni, Patrick Tawonezvi and Mabel Munyuki-hungwe (eds), *Zimbabwe's Agricultural Revolution Revisited* (University of Zimbabwe Publications 2006) 481.
[1295] Child, 'Game Ranching in Zimbabwe', *cit.*, (n 1287) 133.
[1296] Bond and Cumming, 'Wildlife Research and Development', *cit.*, (n 1294) 481.
[1297] Bond and others, 'Private Land Contribution to Conservation in South Africa', *cit.*, (n 1283) 40; Child, 'Game Ranching in Zimbabwe', *cit.*, (n 1287) 133.

The idea to co-manage wildlife resources was not exclusive to Zimbabwe, but in all relevant countries innovative collaborative mechanisms were created to share costs and multiply benefits by applying the concept of the economy of scale: collaborative nature reserves and conservancies are two examples. Collaborative nature reserves are created by adjoining neighbouring private reserves and form larger units of pooled resources that are managed as a single entity, notwithstanding the recognition of individual ownership within the reserves. When located on migration routes, these reserves have facilitated the movement of wild species; they have also developed partnership with bordering government parks extending the conserved area.[1298] While collaborative nature reserves are dedicated to preserve wildlife and natural habitat for wildlife-viewing tourism and have completely abandoned agricultural practices,[1299] conservancies are composed of commercial farms (game farms or game ranches)[1300] combining both farming activities and wildlife conservation. Conservancies are established through binding agreements that regulate joint wildlife management and conservation objectives. A key requirement is the removal of internal fencing, which results in unfragmented wildlife area, large enough to allow the natural movement of wildlife and the reintroduction of certain mammal species (e.g., lions and elephants).[1301]

'The value of wildlife lied in its recreational uses'[1302] and conservation on private land has captured this lesson. It has proven to be successful in terms of employment opportunities since activities like trophy-hunting and wildlife viewing have generated the request for connected services (e.g., hunting or tourist guides, lodges), thus confirming to be more profitable than livestock production. Ecological benefits are also visible in terms of effective wildlife and

[1298] Krug, 'Private Supply of Protected Land in Southern Africa: A Review of Markets, Approaches, Barriers and Issues', *cit.*, (n 1283) 24.
[1299] ibid 29.
[1300] The difference between game farms and game ranches are mainly related to their size and production objectives as explained by Bond and others, 'Private Land Contribution to Conservation in South Africa', *cit.*, (n 1283) 32. They also describe intensive single-species production systems as another category of wildlife production, which consists in the industrial production of single species (like crocodiles or ostriches), thus having important repercussion on the protection of that species and their habitat rather than contributing to the preservation of wildlife habitat in general.
[1301] ibid 33.
[1302] ibid 37.

habitats protection and management on large areas. Hence, conservation on private land represents a valid addition to State protected areas and can provide inspiration to the emerging cooperative management of natural resources across borders within TFCAs.[1303]

6.2.3 Community Conservation

Community conservation[1304] has long been a reality in southern Africa before being recognised as a viable approach to nature conservation under the tag of community-based natural resource management (CBNRM) in the 1980s. That wildlife resources have a comparative advantage over livestock and agriculture resulted from experiences of wildlife ranching on private land and was confirmed by the advent of wildlife tourism, both under the form of wildlife viewing and safari hunting.[1305] P*rima facie* CBNRM emerged as a simple mechanism for the involvement of rural/local communities in enhancing conservation[1306] outside protected areas and private land – on areas under communal tenure regimes, with less valuable land uses or remote regions. Nevertheless, CBNRM is a process of institutional reform aimed to 'shift the benefits, power and responsibility for natural resources … into the hands of rural people living with, and depending upon biodiversity resources'.[1307] Two elements are critical in CBNRM: local proprietorship and a well-crafted institutional set up. The former is realised through an

[1303] ibid 48.
[1304] The role of communities in managing the environment emerges in Arun Agrawal and Clark C Gibson, 'Enchantment and Disenchantment: The Role of Community in Natural Resource Conservation' (1999) 27 World Development 629; Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29).
[1305] Several authors underline that wildlife utilization on private land served as a model for developing CBNRM, among the others, Brian Child and Grenville Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future' (2010) 37 Environmental Conservation 283; Marshall W Murphree, 'Community-Based Conservation: Old Ways, New Myths and Enduring Challenges', *African Wildlife Management in the New Millennium* (2000); Brian Child, 'Community Conservation in Southern Africa: Rights-Based Natural Resources Management' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009).
[1306] Murphree lists conservation as the first objective of CBNRM together with rural development (resulting from poverty alleviation, livelihood enhancement, and economic development) and rural institutional and organisational development. Marshall Murphree, 'Communal Approaches to Natural Resource Management in Africa: From Whence and to Where?' (2004) 7 Journal of International Wildlife Law & Policy 203. Marshall Murphree is recognised among the founding fathers of the theory and practice of community conservation in southern Africa as proved by the commonly referred 'Murphree's laws' that include his main ideas on sustainable use and community conservation. In addition to his articles, see Billy B Mukamuri, Jeanette M Manjengwa and Simon Anstey (eds), *Beyond Propietorship. Murphree's Law on Community-Based Natural Resource Management in Southern Africa* (Weaver Press 2009).
[1307] Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 284.

effective devolution of authority, responsibility, and entitlement to the lowest level possible – ideally the producer communities[1308] so that decisions (e.g., on how to manage resources and how to redistribute or spend revenues) are taken by community members in face-to-face meetings, as instances of participatory democracy.[1309] In fact, Murphree explains that 'people seek to manage the environment when the benefits of management are perceived to exceed its costs';[1310] therefore, the direct involvement of user/producer communities facilitates the advancement of conservation practices more than situations in which management is mediated, with the risk of elite capturing (as in multi-village communities or district councils).[1311] To this end, it is necessary to capacitate and assist communities in developing institutions for collective actions that are integrated into the national legal framework,[1312] but remain autonomous from the local levels of central government institutions.[1313] Indeed, the appropriate institutional development at communal level has influenced the outcomes of CBNRM processes in the different southern African countries.[1314]

Zimbabwe can be considered the forerunner of CBNRM in southern Africa since it was the first country in experimenting with devolved regulation through the creation of Intensive Conservation Areas (ICAs),[1315] which laid the foundation for community conservation. The

[1308] Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 6; Murphree, 'Communal Approaches to Natural Resource Management in Africa: From Whence and to Where?', *cit.*, (n 1306) 206. Child identifies 'genuine local ownership' as one of the main component of community conservation Child, 'Community Conservation in Southern Africa: Rights-Based Natural Resources Management', *cit.*, (n 1305) 189.

[1309] On the link between devolution and democratisation see Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 286; Murphree, 'Communal Approaches to Natural Resource Management in Africa: From Whence and to Where?', *cit.*, (n 1306) 210.

[1310] Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 2.

[1311] In this regard, Murphree maintains that 'resource use without resource management is non-sustainable', ibid 12.

[1312] Murphree, 'Communal Approaches to Natural Resource Management in Africa: From Whence and to Where?', *cit.*, (n 1306) 207–209; Child, 'Community Conservation in Southern Africa: Rights-Based Natural Resources Management', *cit.*, (n 1305).

[1313] Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 12.

[1314] For instance, institution building has been successful in Namibia and, to a significant extent, in Zimbabwe. On the other hand, the project-based nature of CBNRM in Zambia and Mozambique and its short-term perspective prevented the creation of well-functioning communal institutions and successful results in terms of community conservation. In Botswana, CBNRM was not accompanied with a capacity building process and institutional restructuration at local level, natural resource management was entrusted to existing community entities that have proven unfit for this task.

[1315] ICAs were introduced with the Natural Resources Act of 1941 as voluntarily created self-regulating communities for the collective regulation and restoration of a shared environment. ICAs proved successful in managing externalities like soil erosion, deforestation, overgrazing, and, later, wildlife (since 1975 with the Parks and Wildlife Act) through peer pressure and internal regulations. Child, 'Game Ranching in Zimbabwe', *cit.*, (n 1287) 133; Child and Barnes, 'The Conceptual Evolution

1975 Parks and Wildlife Act upheld the existing devolutionary system by designating private landowners or land occupiers as the appropriate authorities for wildlife; hence, with the responsibility of its management, but also as recipients of the deriving benefits. A 1982 amendment recognised similar rights to communal farmers, but designated district councils as the appropriate authority for wildlife on lands under their responsibility.[1316] As Murphree points out, 'in this attenuated devolution the direct links between production and benefit, between authority and responsibility, were broken'.[1317] The CAMPFIRE Programme took advantage of this legislative change to incentivise wildlife as a valuable land use in communal lands. It was designed by the Department of National Parks and Wild Life Management (now Parks and Wildlife Management Authority) as an institutional mechanism that would enable local people to better allocate natural resources to higher-value uses and abandon ineffective or unsustainable practices. Donors' support was not the main driver of CBNRM although it provided additional resources until the mid-2000s.[1318] The success registered in the two pilot district councils (Guruve and Nyaminyami) led to the inclusion of other councils.[1319] In 1991, all the district councils involved formed the national CAMPFIRE Association to promote the interests and role of communal land wildlife producers in the national arena and provide political legitimacy to this programme.[1320]

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and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 285. On this point see also Section 6.2.2 on conservation on private land.

[1316] Russel Taylor, 'The Performance of CAMPFIRE in Zimbabwe: 1989-2006' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 203. According to Child and Barnes, the governmental decision to entrust district councils with rights over wildlife, affected the original intentions of devolving authority directly to 'producer communities'. Nevertheless, Taylor explains that the designation of district council was determined by the absence of any legal person below the district level. This situation was partially redressed by the condition that rights and benefits (at least 50%) had to be devolved to the producer communities. See Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 288; Taylor, 'The Performance of CAMPFIRE in Zimbabwe: 1989-2006', *cit.*, 204–205.

[1317] Murphree, 'Communal Approaches to Natural Resource Management in Africa: From Whence and to Where?', *cit.*, (n 1306) 206.

[1318] Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 288.

[1319] Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 7.

[1320] Taylor, 'The Performance of CAMPFIRE in Zimbabwe: 1989-2006', *cit.*, (n 1316) 205.

In the framework of the CAMPFIRE programme, private sector operators acquire consumptive (in particular, sport hunting) and non-consumptive tourism rights through a lease agreement negotiated with the district councils, with limited involvement of sub-district community representatives (i.e., representatives of producer communities).[1321] According to the guidelines of the CAMPFIRE Association, 50 per cent of the revenues (mainly from lease agreements, but also from other wildlife products like sales of crocodile and ostrich eggs or firewood) should be allocated to the ward level, while the district council can retain up to 35 per cent for wildlife management purposes and no more than 15 per cent as a council levy. Often, the actual allocation of gross wildlife income does not correspond to the aforementioned guidelines, especially in terms of sub-district share.[1322] When household gains are low the link between production and benefits is further weakened, with consequences in terms of communities buy in.[1323] On the other hand, when councils have further delegated proprietorship to local levels, communities demonstrated their capacity to organise themselves and develop effective institutions for natural resources management.[1324]

Several factors have contributed to the success of CAMPFIRE, including a well-defined conceptual framework (CAMPFIRE Guidelines), technical support and capacity building provided by a coalition of support agencies (governmental and non-governmental), and a constant process of cross-community monitoring and peer-reviewing on the allocation of benefits through the CAMPFIRE Association.[1325] Since the early 2000s, its success has been affected by internal policy changes and unfavourable economic conditions. Nevertheless, the

[1321] ibid 206–207.
[1322] ibid 209.
[1323] It is worth clarifying that community revenues have been used for collective community projects like building a school (as in the case of the Kanyurira Community) or a grinding mill (for the Chickwarakwara Community). In the Gairezi project, for example, community members asked for payment in fertiliser due to the difficulties in obtaining and transporting it to their area. Although money is rarely allocated as household dividends, when this happens, its impact is significant in terms of individuals' attitude toward community conservation, but also requires the development of community criteria for identifying who is eligible for such dividends. For more details on these cases see Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 8–11; Taylor, 'The Performance of CAMPFIRE in Zimbabwe: 1989-2006', *cit.*, (n 1316) 217–218.
[1324] On this point see the cases of both the Kanyurira Community and Beit Bridge Community described by Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 8–11.
[1325] Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 288.

empowerment process has been so strong in some cases that prompted communities to fight for a direct payment system from safari operators, as in the case of the Masoka Ward Wildlife Committee.[1326]

CBNRM in *Namibia* was initiated in the 1980s by a dedicated practitioner, Garth Owen-Smith, as a community game guard project for the protection of desert rhinos.[1327] The community approach was soon replicated at governmental level to improve conservation outside protected areas and address natural resource management, economic development, and local participation.[1328] Here, CBNRM builds on the Zimbabwean experience of CAMPFIRE and addresses its main pitfall: devolving authority to the lowest possible unit, which should be the unit of production, management, and benefit.[1329] Indeed, CBNRM is provided with strong policy and legislative foundations by devolving rights over wildlife and tourism to communal area residents that establish a 'conservancy'.[1330] This is an independent structure – independent from local governments[1331] – with a defined membership, precise physical boundaries, an elected represented committee, and a constitution regulating its operational capacity, the appropriate use of shared resources, and the equitable distribution of benefits deriving from

[1326] Taylor, 'The Performance of CAMPFIRE in Zimbabwe: 1989-2006', *cit.*, (n 1316) 215–217.
[1327] Child, 'Community Conservation in Southern Africa: Rights-Based Natural Resources Management', *cit.*, (n 1305) 192; Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 288. See also Brian TB Jones, Richard W Diggle and Chris Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia' in René van der Duim, Jakomijn van Wijk and Machiel Lamers (eds), *Institutional Arrangements for Conservation, Development and Tourism in Eastern and Southern Africa: A Dynamic Perspective* (Springer 2015) 23.
[1328] Brian Jones and L Chris Weaver, 'CBNRM in Namibia: Growth, Trends, Lessons and Constraints' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009). According to Jones et al, community conservation was supported by the post-independent government as a measure to dismantle *apartheid* in Namibia, and represented a response to black communal farmers that were affected by the costs of living with wildlife and asked for the extension of the rights over wildlife recognised to white freehold farmers. Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 23.
[1329] Jones and Weaver, 'CBNRM in Namibia: Growth, Trends, Lessons and Constraints', *cit.*, (n 1328) 224. In this respect, CBNRM in Namibia reflects one of the principles for communal property regimes of natural resource management elaborated by Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 6. It is worth mentioning that wildlife recovery and conservation had been successfully achieved on private land through the recognition of rights over wildlife to white freehold farmers in the 1960s and 1970s. On this point see Barnes and Jones, 'Game Ranching in Namibia', *cit.*, (n 1287).
[1330] The policy framework is delineated in the 'Wildlife Management, Utilisation and Tourism in Communal Area' approved in 1995 and complemented one year later by the 'Nature Conservation Amendment Act'. Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 19.
[1331] Child and Barnes underline that this solution was purposely developed in response to the example of Zimbabwean district councils that captured money and power from producer communities. Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 288.

such use.[1332] Once a conservancy is gazetted and its boundaries are officially declared, a community acquires use rights over the land and resources encompassed by the conservancy; nevertheless, it does not receive land rights and the communal land is held in trust by the State.[1333] Each conservancy usually allocates trophy hunting quotas to professional hunters, while the development of tourism facilities is commissioned to private tourism companies through joint ventures.[1334]

The accountability of a conservancy committee to its membership is a key factor, not only to avoid elite capturing and misuse of revenues, but also to create a mutual feedback process: from the representatives to local residents, about the activities performed in the committee, and from local residents to representatives that have to favour local interest and demands.[1335] The establishment of conservancies has been contributing to wildlife recovery, reintroduction of game species, and conservation of habitats that are not covered by State-protected areas. It has also determined a change in community attitudes towards wildlife and tourism that are perceived as legitimate land uses, and poaching has declined.[1336] Conservancy income is usually used for job creation, which requires the development of new capacities and skills through trainings, and community projects that provide a wide range of social service. However,

[1332] According to Jones et al., the institutional design of conservancies is inspired by Ostrom's 'Governing the Commons' (1990). Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 19. On this point, Jones and Weaver explain 'successful CPR institutions needed to have a defined membership and geographical area (in which the resource is 'owned' and managed), an agreed set of operating and resource use rules, the ability to monitor and enforce these rules, and legitimacy in the eyes of the resource users and the state'. Jones and Weaver, 'CBNRM in Namibia: Growth, Trends, Lessons and Constraints', *cit.*, (n 1328) 224.

[1333] In particular, the conservancy acquires ownership of huntable games and qualifies for use rights over protected species of game that can be hunted under a permitting and quota system, but it does not receive land rights. Therefore, it cannot enforce land use planning and zoning decisions nor prevent other people moving in from outside the conservancy with repercussion on secure group land tenure and tourism investments on communal land. Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 19.

[1334] *ibid*. Tourism rights are not explicitly defined in the 1996 legislation, but ascribed among the rights to non-consumptive uses of wildlife and are supported by several policies, *in primis* the 1995 Policy on the Promotion of Community Based Tourism and the 1998 National Tourism Policy. Community involvement in tourism can follow several models. ibid 20, 24 ff.

[1335] Jones and Weaver, 'CBNRM in Namibia: Growth, Trends, Lessons and Constraints', *cit.*, (n 1328) 235. These authors underline that, often, committees tend to be accountable upwards, to NGOs or entities that provide funding and technical support. The creation of sub-units within each conservancy is seen as a possible solution to this problem ibid 237. Key challenges relate to good governance, see Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 36.

[1336] Jones and Weaver, 'CBNRM in Namibia: Growth, Trends, Lessons and Constraints', *cit.*, (n 1328); Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 34 et seq.

improvements in conservation have also determined an increase in the costs of living with wildlife, thus leading to the adoption of compensation schemes to offset losses of livestock or crops.[1337] In addition to socio-economic benefits, CBNRM brought capacity building at conservancy level, both for the newly created local management institutions and residents. In this sense, the positive performance of conservancies is partly attributable to the support of committed NGOs, gathering in the Namibian Association of Community-based Natural Resource Management Support Organisation (NACSO),[1338] and the Government. Nevertheless, the lack of secure group land tenure on communal land represents the main challenge to investment and prevents communities from maintaining the exclusive control of an area – dedicated to wildlife and tourism – against outsiders.[1339]

In *Botswana*, CBNRM was introduced to both foster sustainable management outside national parks and game reserves and improve the livelihoods of rural communities by delegating resources use rights to community-based organisations (CBOs).[1340] Initially, it was supported by external funds (from USAID), which were soon retracted since Botswana is a middle-income country.[1341] Communities that want to acquire exclusive rights to use an area and the resources therein, need to establish a registered accountable legal entity or a CBO[1342]

[1337] Jones and Weaver, 'CBNRM in Namibia: Growth, Trends, Lessons and Constraints', *cit.*, (n 1328) 230–235; Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 35. For a quick look at income and expenditures of conservancies in 2015, see NACSO, 'The State of Community Conservation in Nambia. A Review of Communal Conservancies Communty Forests and Other CBNRM Initiatives' (2015) 50–51.

[1338] For detailed information on the Association and its activities visit is website http://www.nacso.org.na/ accessed 16 May 2107.

[1339] Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 35.

[1340] The 1996 Community-Based Rural Development Strategy, the 2002 Revised Rural Development Policy, and the 2007 CBNRM Policy compose the policy framework for CBNRM in Botswana. Centre for Applied Research, '2016 Review of CBNRM in Botswana' (2016) 9. See also Nico Rozemeijer, 'CBNRM in Botswana' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 244; Joseph E Mbaiwa, 'Community-Based Natural Resource Management in Botswana' in René van der Duim, Jakomijn van Wijk and Machiel Lamers (eds), *Institutional Arrangements for Conservation, Development and Tourism in Eastern and Southern Africa: A Dynamic Perspective* (Springer 2015) 62.

[1341] Child, 'Community Conservation in Southern Africa: Rights-Based Natural Resources Management', *cit.*, (n 1305) 193.

[1342] According to the 2016 CBNRM Report, there are 147 known CBOs: 94 are registered, 16 are not registered, while the registration status of the remaining 37 is unknown. Centre for Applied Research, '2016 Review of CBNRM in Botswana', *cit.*, (n 1340) 13.

(often a trust) with a constitution[1343] and a land use management plan.[1344] Hence, CBOs can obtain a 'community natural resources management lease' (or 'head lease') from the relevant Land Board for 15 years and, consequently, acquire user rights for tourism activities, game capturing and commercial consumptive use of veld products.[1345] Lately, hunting rights have been affected by the ban on safari hunting imposed by the Botswana Government since January 2014.[1346]

CBOs can then sub-lease their user rights to a joint venture partner for a shorter period (5 years) and receive, in return, benefits as rental income and employment opportunities.[1347] In so doing, tourism development is carried out by experienced companies and this sector provides most of CBNRM revenues.[1348] Employment in the tourism sector is one of the main benefits deriving from CBNRM and strongly contributes to poverty alleviation, since salaries are reinvested to support households. Nevertheless, tourism managerial skills are not transferred from private companies to local communities, thus hampering the development of community-led tourism enterprises.[1349]

CBNRM benefits are usually invested in social services and have contributed substantially to the improvement of local livelihoods.[1350] The 2007 CBNRM Policy created a fund where

[1343] The constitution defines the membership, geographical boundaries, and activities of the CBO and of its governing body, the Board of trustees. The constitution should be designed and approved by all community members since the operating model of CBNRM in Botswana is that of a participatory democracy at village level. On this point see Rozemeijer, 'CBNRM in Botswana', *cit.*, (n 1340) 230. For more information on the functioning of CBOs and the role of BoT see Mbaiwa, 'Community-Based Natural Resource Management in Botswana', *cit.*, (n 1340) 63–64.

[1344] CBOs or community trusts can acquire only temporary user rights over resources since all the natural resources, including wildlife, are owned by the State. Mbaiwa, 'Community-Based Natural Resource Management in Botswana', *cit.*, (n 1340) 70; Rozemeijer, 'CBNRM in Botswana', *cit.*, (n 1340) 245.

[1345] Rozemeijer, 'CBNRM in Botswana', *cit.*, (n 1340) 245. The 2016 Botswana CBNRM Report explains that the 2007 CBNRM Policy broadened the resource base beyond wildlife. Centre for Applied Research, '2016 Review of CBNRM in Botswana', *cit.*, (n 1340) 8.

[1346] Mbaiwa, 'Community-Based Natural Resource Management in Botswana', *cit.*, (n 1340) 62.

[1347] ibid 65–66.

[1348] Centre for Applied Research, '2016 Review of CBNRM in Botswana', *cit.*, (n 1340) 8.

[1349] Mbaiwa, 'Community-Based Natural Resource Management in Botswana', *cit.*, (n 1340).

[1350] Mbaiwa highlights that, for instance, microfinance schemes are foreseen for community members that need a loan for initiating a project, funds and housing opportunities are provided to elderly or disadvantaged people. Through these mechanisms, CBNRM has contributed to transform rural communities reliant on external support 'into productive communities that are moving towards achieving sustainable livelihoods'. CBNRM revenues are also invested in assets like vehicles, computers, and internet access, thus facilitating transportation or accessibility of remote areas and improving the connection of rural communities with the outside world, for example, in terms of information, but also participation to national processes. ibid 71–72.

individual CBOs would deposit 65% of their royalties and resource rents in order to redistribute the benefits among CBOs.[1351] CBNRM is also contributing to enhanced conservation: the attitude towards wildlife has changed, a 'management-oriented monitoring system' has been set up and foresees the participation of community members in the collection of data, and community members are also carrying out policing activities and enforcement of conservation practices.[1352] Similarly to CBNRM institutions in Zimbabwe and Namibia, CBOs have created an association 'BOCOBONET' and can count on the technical and financial support of the government,[1353] NGOs, and international cooperating partners.[1354]

In Mozambique and Zambia, CBNRM was not led by governmental reforms or local demands, but was driven by external actors, *in primis* international NGOs.[1355] It adopted a project-based structure with a pre-packaged set of targets, activities, and timeframe. Therefore, local communities were meant to enthusiastically accept these projects and passively participate to predefined activities that did not necessarily corresponded to local material needs.[1356]

In *Zambia*[1357] CBNRM initiatives did not foster institutional development, but were envisaged within existing structures dominated by chiefs (traditional authorities). Such a set up perpetuated unbalanced power dynamics, facilitated elite capturing, and *de facto* excluded the majority of community members from decisions over resource utilisation, allocation of revenues and access to CBNRM benefits, which furthered social tensions within the

[1351] Centre for Applied Research, '2016 Review of CBNRM in Botswana', *cit.*, (n 1340) 9.
[1352] Mbaiwa, 'Community-Based Natural Resource Management in Botswana', *cit.*, (n 1340) 73–74.
[1353] Nevertheless, the guiding role of the Department of Wildlife and National Parks was reduced with the broadening of the resource base and the 2014 hunting ban. In fact, this Department was responsible for setting annual hunting quotas and distributing them to CBOs.
[1354] Centre for Applied Research, '2016 Review of CBNRM in Botswana', *cit.*, (n 1340) 9.
[1355] External support in Mozambique came for the rehabilitation of natural resources depleted during 16 year of civil war, while in Zambia was motivated by the poor governance of natural resources at central level. See, respectively, Pekka Virtanen, 'Community-Based Natural Resource Management in Mozambique : A Critical Review of the Concept ' s' (2005) 12 1, 3; Andrew Lyons, 'The Rise and Fall of a Second-Generation CBNRM Project in Zambia: Insights from a Project Perspective' (2013) 51 Environmental Management 365, 368.
[1356] Stuart A Marks, 'Back to the Future: Some Unintended Consequences of Zambia's Community-Based Wildlife Program (ADMADE)' (2001) 48 Africa Today 121.
[1357] The most important CBNRM programmes in Zambia are known as ADMADE (Administrative Management Design for Game Management Areas) and CONASA (Community Based Natural Resource Management and Sustainable Agriculture). For further information about those projects see, respectively, *ibid*; Lyons, 'The Rise and Fall of a Second-Generation CBNRM Project in Zambia: Insights from a Project Perspective', *cit.*, (n 1355).

communities.[1358] Moreover, CBNRM has not been accompanied by a serious legislative and institutional reform process, as demonstrated by the poor performance of the newly created 'Community Resource Boards'.[1359]

Mozambique, instead, sought to develop an appropriate legislative and policy framework facilitating community participation to conservation, in particular of forest resources. The 'rights of occupancy' were recognised to subjects that had resided in an area for 10 years or more, and land use rights in perpetuity for local communities obtaining an *ad hoc* certificate (Dereito de Uso e Aproveitamento de Terra, DUAT).[1360] Nevertheless, community land use rights were affected by the fact that, according to the forest and wildlife legislation, the private sector holding equal rights. In addition, the devolution process was not genuine, falling short of the effective empowerment of local communities.[1361] Similarly, the distribution of the 20 per cent community levy[1362] was hampered by bureaucratic difficulties.[1363] As in Zambia, CBNRM projects are externally driven, hence, policies and decisions for community participation are taken elsewhere and are imposed on local beneficiaries.[1364] Furthermore, the absence of a standardised implementation framework created confusions since existing institutions proved unprepared for overseeing CBNRM activities and, at times, new institutions were created under project pressure but did not always succeeded in obtaining a full legal authority over local natural resources.[1365]

[1358] Lyons, 'The Rise and Fall of a Second-Generation CBNRM Project in Zambia: Insights from a Project Perspective', *cit.*, (n 1355) 369; Marks, 'Back to the Future: Some Unintended Consequences of Zambia's Community-Based Wildlife Program (ADMADE)', *cit.*, (n 1356) 130; Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 289.
[1359] Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 289.
[1360] Isilda Nhantumbo and Simon Anstey, 'CBNRM in Mozambique: The Challenges of Sustainability' in Helen Suich, Brian Child and Anna Spenceley (eds), *Evolution and Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* (Earthscan 2009) 258.
[1361] Nhantumbo and Anstey, 'CBNRM in Mozambique: The Challenges of Sustainability', *cit.*, (n 1360).
[1362] According to the forest and wildlife regulations, 20 per cent (as the minimum share) of government revenues from forest and wildlife harvest royalties should be distributed to communities living in the vicinity of these resources.
[1363] Nhantumbo and Anstey, 'CBNRM in Mozambique: The Challenges of Sustainability', *cit.*, (n 1360) 264–265.
[1364] Virtanen, 'Community-Based Natural Resource Management in Mozambique : A Critical Review of the Concept ' s', *cit.*, (n 1355).
[1365] *ibid*; Nhantumbo and Anstey, 'CBNRM in Mozambique: The Challenges of Sustainability', *cit.*, (n 1360).

At the regional level, the commitment of dedicated individuals (academics, government officials, and practitioners) and the network they created were crucial for the development and success of community conservation in southern Africa.[1366] CBNRM brought and is still bringing positive results in terms of local empowerment and improved conservation in those countries that developed it as an endogenous process accompanied by a serious legislative and institutional reform, while it is weak when it is imposed as an exogenous solution. In Zimbabwe, by autonomously deciding on the allocation of revenues, communities set criteria of inclusions and exclusions to identify the beneficiaries of social services and dividends.[1367] Arguably, Namibian conservancies are the most successful CBNRM institution designed in southern Africa with 82 communal conservancies at the end of 2015.[1368] The conservancy is a flexible framework[1369] that enables a community to create a local management institution appropriate to local needs, in spatial and functional terms. Conservancies reflect, more than other CBNRM mechanisms, the idea of decentralised cooperation since they operate as management units within a broader landscape, thus requiring cooperation and joint management for ecological processes or issues straddling their boundaries (e.g., poaching, wildlife monitoring).[1370] NACSO's annual reports highlight that some conservancies are serving as connectivity corridors between protected areas and other conservation areas.[1371] These reports are also documenting the emergence of collaborative conservation mechanisms that encompass not only conservancies, but also other conservation regimes (e.g., national parks).[1372] External donors did not impose a CBNRM agenda, but supported internal efforts initiated by Namibian NGOs

[1366] Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 23.
[1367] Murphree, 'Communities As Resource Management Institutions', *cit.*, (n 29) 8–11.
[1368] NACSO, 'The State of Community Conservation in Nambia. A Review of Communal Conservancies Communty Forests and Other CBNRM Initiatives', *cit.*, (n 1337). See http://www.nacso.org.na/sites/default/files/The%20State%20of%20Community%20Conservation%20book%202015.pdf, accessed 16 May 2017.
[1369] Jones and Weaver, 'CBNRM in Namibia: Growth, Trends, Lessons and Constraints', *cit.*, (n 1328) 236.
[1370] ibid 237.
[1371] NACSO annual reports are available at http://www.nacso.org.na/resources/state-of-community-conservation, accessed 16 May 2017.
[1372] For instance, see NACSO, 'The State of Community Conservation in Nambia. A Review of Communal Conservancies Communty Forests and Other CBNRM Initiatives', *cit.*, (n 1337) 42.

and the government by providing funds for both community engagement in wildlife and tourism activities as well as the establishment and operation of conservancies.[1373]

In Botswana, the poor attention dedicated to both the institutional design of CBNRM and capacity building at community level has compromised the success of CBNRM and the empowerment of communities.[1374] Revenues from the tourism sectors improved the livelihood of rural populations and strengthened their commitment towards wildlife conservation. However, this positive attitude will be probably affected by the 2014 hunting ban, especially in rural communities where non-consumptive tourism is a less competitive land use option.[1375] This ban, in fact, provoked a reorganisation towards agriculture and cultural activities.[1376] CBOs with diversified activities are more resilient[1377] and have higher income that is partly shared with more vulnerable CBOs through a redistributive fund: this is a unique example in the CBNRM systems of southern African countries. In Zambia and Mozambique donors shaped the CBNRM agenda focusing more on wildlife than on local people,[1378] with unsatisfactory outcomes.

In line with CBNRM, current conservation trends are paying increasing attention to community involvement, including inside protected areas, as in the case of contractual parks in South Africa. In addition, sustainable land uses are promoted outside parks to improve the management of natural resources and facilitate ecological processes, like wildlife migration over larger areas. These conservation measures are actually softening jurisdictional divisions and boundaries to promote ecosystem integrity. The tension between expanding conservation over larger areas, including at transboundary level, and improving community involvement can

[1373] Jones, Diggle and Thouless, 'From Exploitation to Ownership: Wildlife-Based Tourism and Communal Area Conservancies in Namibia', *cit.*, (n 1327) 24.
[1374] Child and Barnes, 'The Conceptual Evolution and Practice of Community-Based Natural Resource Management in Southern Africa: Past, Present and Future', *cit.*, (n 1305) 289; Mbaiwa, 'Community-Based Natural Resource Management in Botswana', *cit.*, (n 1340).
[1375] Mbaiwa, 'Community-Based Natural Resource Management in Botswana', *cit.*, (n 1340).
[1376] Centre for Applied Research, '2016 Review of CBNRM in Botswana', *cit.*, (n 1340) 21.
[1377] ibid.
[1378] Marks, 'Back to the Future: Some Unintended Consequences of Zambia's Community-Based Wildlife Program (ADMADE)', *cit.*, (n 1356) 130.

be addressed through decentralised cooperative mechanisms that ensure the achievement of localised interests in the framework of broader conservation objectives. The following sections are meant to explore to what extent the concept of decentralised international cooperation is already captured in SADC environmental instruments.

6.3 The African Union legal and policy framework

The legal and policy framework of the African Union (AU) is relevant to this thesis since it is binding on SADC countries. The concept of decentralised international cooperation can be located within this context, primarily through the Maputo version of the African Convention on the Conservation of Nature and Natural Resources.[1379]

In its Preamble, the African Convention adopts at first a firm anthropocentric stance by declaring that States have the duty to harness natural resources for the advancement of African peoples.[1380] However, it soon mitigates this approach by clarifying that natural resources are to be used according to the carrying capacity of the environment. To this end, States are required to develop an appropriate legislative and policy framework for the conservation and management of natural resources (namely soil, water, flora, and fauna) in accordance with scientific principles and in the best interest of the people.[1381] Therefore, the Convention acknowledges that the dependency of man on nature is not unlimited, but has to respect ecological limits in line with the principle of sustainable development. A reinforced protection is foreseen for endangered species that are endemic to State Parties.[1382] This objective can be effectively pursued through conservation areas[1383] that have to be maintained and extended.[1384]

[1379] The revised text has been adopted in Maputo on 11 July 2003, but it is not yet in force. For simplicity and to avoid confusion, the 1968 Convention will be referred as African Convention, while the revised text will be called Maputo version.
[1380] Despite acknowledging the semantic difference between the singular and plural forms of the term people and the individual and collective dimensions of rights implied, both forms are used in line with the exact text of the legal and policy instruments analysed in this chapter.
[1381] African Convention, Article II.
[1382] African Convention, Article VIII.
[1383] According to Article III of the African Convention '"Conservation areas" means *any protected natural resource area*, whether it be a strict natural reserve, a national park or a special reserve'. (emphasis added)
[1384] African Convention, Article X.

State Parties are explicitly required to cooperate to achieve the objectives of the Convention and where a national measure is likely to have an impact on the environment of neighbouring States.[1385] It can be argue that, by combining these provisions and in line with emerging conservation mechanisms in the southern African region, cooperation can be required to maintain and extend conservation areas beyond national borders as in the case of transboundary protected areas. Such an interpretation echoes a section of the Preamble that asserts the desire of Contracting Parties to act independently and jointly to conserve and manage natural resources for the well-being of present and future generations.[1386] Despite its reference to people, it would be excessive to derive the involvement of sub-national actors in cross-border conservation of natural resources from the 1968 text, thus making a connection with the concept of decentralised international cooperation unlikely.

A more suitable framework for decentralised international cooperation is offered by the revised text adopted in Maputo in 2003, which has not yet entered into force. The new version recalls and broadens the content of the African Convention. In particular, reference to the Stockholm and Rio Declarations are directly and indirectly included in the text.[1387] The Maputo version is more detailed than the 1968 text in clarifying its scope, the objectives to be achieved, and the principles guiding Contracting Parties. Harmonisation and coordination of environmental policies is explicitly mentioned among its objectives, which shows the aspiration of the Parties to work together towards the implementation of the Convention and reflects a regional vision in contrast to the previous individualistic post-colonial perception of newly independent States.

[1385] African Convention, Article XVI (1).
[1386] Intergenerational equity is dealt with in Chapter 2 Section 2.9.
[1387] For instance, the Preamble includes Principle 2 of the Rio Declaration, while Principle 10 is developed in Article XVI on procedural rights.

The right to a satisfactory environment[1388] recalls Article 24 of the African Charter on Human and Peoples' Rights.[1389] This right has to guide State action, together with an expanded conception of sustainable development.[1390] The notion of conservation areas is broadened to embrace all the six IUCN categories of protected areas.[1391] Parties are required to maintain and extend existing conservation areas as well as to establish new ones to strengthen the protection of ecosystems and species, especially those endemic to African countries.[1392]

Particularly important is the provision encouraging the establishment and management of conservation areas by local communities,[1393] since it enables sub-national actors to contribute to the implementation of the Convention and to achieve its objectives. The role of local communities is further strengthened, in general terms, by the prevision of procedural rights[1394] applying to the public – which arguably encompasses local communities – and, more specifically, by the request to enable the effective participation of local communities in environmental issues that affect them directly.[1395] Moreover, States have to respect traditional rights of local communities and indigenous knowledge, ask for their prior informed consent before using their knowledge, and compensate relevant communities appropriately for such use.[1396]

[1388] Maputo version, Article III(1).

[1389] The African Charter is an international human rights instrument aimed to the promotion and protection of human rights and basic freedoms in Africa. The African Commission on Human and Peoples' Rights (African Commission) is responsible for its oversight and interpretation; it was established in 1987 and located in Banjul (Gambia). A successive Protocol (adopted in 1998, but in force since June 2005) established the creation of the African Court on Human and Peoples' Rights (ACHPR). This Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol itself, and any other relevant Human Rights instrument ratified by the State concerned (Article 3 of the Protocol). The Court has both contentious and advisory jurisdictions. As of October 2016, only seven of the thirty State Parties to the Protocol have declared to recognise the competence of the Court to receive cases from NGOs and individuals. For further information visit http://en.african-court.org/, accessed 3 February 2016.

[1390] Maputo version, Article III(3) foresees 'the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner'.

[1391] Maputo version, Article V(6)(a). On protected areas and IUCN management categories see Chapter 3 Section 3.6.

[1392] Maputo version, Article XII(1).

[1393] Maputo version, Article XII(3). Further details on ICCAs are provided in Chapter 3 Sections 3.3.3. and 3.6.

[1394] Maputo version, Article XVI.

[1395] Maputo version, Article XVII(3) says 'The Parties shall take the measures necessary to enable active participation by the local communities in the process of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources'. On the participation of local communities to biodiversity conservation see Chapter 2 Section 2.8 ff.

[1396] Maputo version, Article XVII(1) and (2). The involvement of indigenous and local communities in biodiversity conservation, including in protected areas, and by preserving their traditional knowledge and practice is promoted under the framework of the Biodiversity Convention. In this regard see Chapter 3 Section 3.3.2.

In addition to the purposes foreseen in the 1968 text, cooperation between State Parties aims to enhance the effectiveness of legislative and political measures, and to pursue their harmonisation.[1397] What is more, cooperation is required to conserve and manage transboundary ecosystems and natural resources with the support of *ad hoc* inter-State structures, if needed.[1398]

Arguably, several provisions of the Maputo version of the African Convention hint at the concept of decentralised international cooperation: in particular, its broad conservation objectives that encompass a transboundary dimension, the involvement of local communities and respect for their traditional knowledge, and the call for cooperation over transboundary natural resources. Therefore, its entry into force would support SADC countries in their efforts to design decentralised cooperative mechanisms in TFCAs, and possibly lead other African sub-regions to follow similar developments. Nevertheless, the Maputo version is rapidly being superseded by emerging environmental challenges,[1399] and it is likely to be out-dated even before coming into force.

The concept of decentralised international cooperation can also be connected to the African Charter, though indirectly, through the right to a generally satisfactory environment enshrined in its Article 24.[1400] On this basis, several African countries included a right (or principle)[1401] to a healthy environment into their domestic jurisdictions. The relevance of Article 24 is inferred by the progressive interpretation given by the African Commission in the *SERAC*

[1397] Maputo version, Article XXII(1).
[1398] Maputo version, Article XXII(2)(e).
[1399] For instance, climate change is not addressed in the Maputo version.
[1400] According to Article 24, 'All peoples shall have the right to a general satisfactory environment favourable to their development'.
[1401] Verschuuren offers a clear explication of the difference between rights and principles applied to public participation, but this reasoning can be generalised: 'Rights and principles both are legal norms, but they are fundamentally different. Constitutional or human rights can be considered (fundamental) legal *rules*: they are very much associated with individual persons and can be enforced by individuals against (mostly governmental) authorities; they form the basis of the constitutional democratic State. Environmental legal principles give a general direction to decisions by governmental authorities, judges, and organisations in the field of environmental policy and law, including decisions that may or may not infringe on people's rights. Like other rules, rights, can be influenced by principles, but the main difference is that rights can be directly invoked in court, whereas principles can only play a role in combination with a legal rule.' Verschuuren, 'Public Participation Regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention', *cit.*, (n 439) 30.

case,[1402] which highlights that this provision 'requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources',[1403] thus reading into Article 24 the inclusion of environmental conservation and sustainable development. Moreover, this right has a collective dimension,[1404] hence, it can be argued that both individuals and groups – including indigenous peoples and local communities – are entitled to participatory rights to make the exercise of the right to a healthy environment effective.[1405] In this sense, individuals and groups can contribute to environmental conservation at a decentralised level, including in a transboundary context, in line with the concept of decentralised international cooperation proposed in this thesis.

6.4 The SADC legal and policy framework

The regional dimension of conservation has been always important in southern Africa and characterised by the interaction of professionals across countries and exchange of best practices. The establishment of SADC provided the opportunity to structure cooperation in different areas, including on natural resources and the environment.[1406] The SADC Treaty establishes the objectives to be achieved and the principles guiding SADC States at national and regional level, with the aim of harmonising their socio-economic policies. It sets up an institutional structure[1407] to facilitate regional integration and foresees the possibility to adopt Protocols to

[1402] Social and Economic Rights Action Center for Economic and Social Rights (SERAC) v Nigeria, (2001) AHRLR 60 (ACHPR 2001). Hereinafter, *SERAC* case. Regarding the contribution of the African Commission to the evolution of the African human right system see Frans Viljoen, 'From a Cat into a Lion? An Overview of the Progress and Challenges of the African Human Right System at the African Commission's 25 Year Mark' (2013) 17 Law, Democracy & Development 298.
[1403] *SERAC* case, paragraph 52.
[1404] This aspect is stressed in the *SERAC* case. On the Charter's commitment to collective human rights see Clive Baldwin and Cynthia Morel, 'Group Rights' in Malcom Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (Cambridge University Press 2008).
[1405] In this regard, the *SERAC* case affirms in its paragraph 68: 'Clearly, collective rights, environmental rights and economic social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective'.
[1406] SADC Treaty, Article 21(3)(e).
[1407] SADC Treaty, Articles 9-16.

regulate each area of cooperation in detail.[1408] SADC parties have adopted a few Protocols addressing environmental issues that are relevant to this research.

The following sections analyse the SADC Treaty, its environmental Protocols[1409] and other SADC policy documents[1410] in order to ascertain to what extent the concept of decentralised international cooperation proposed in this thesis can be framed within these instruments and applied in the SADC region, especially in the context of TFCAs.

6.4.1 SADC Treaty

Biodiversity conservation and sustainable development can be derived from Article 5(1)(g) of the SADC Treaty, which includes the sustainable utilisation of natural resources and effective environmental protection among its objectives, together with socio-economic development.[1411] SADC objectives have to be pursued primarily at national level, through adequate measures that ensure the harmonic implementation of programmes and projects developed within the regional framework. It can be argued that the Treaty intends regional development and integration as the result of national development and desire for integration, but it does little to ensure regional cohesion.

Cooperation is seen as incremental: national legal and policy frameworks evolve gradually and get closer whenever partner countries share interests and resources. In this context, natural resources and the environment are identified as one of the areas requiring inter-State cooperation,[1412] which arguably reflects the need to develop a regional approach to their conservation and management even though they are not qualified as 'shared'.

[1408] SADC Treaty, Article 22(1).
[1409] Namely, the Protocol on Wildlife and Law Enforcement, the Protocol on Forestry, the Protocol on Shared Watercourses, and the Protocol on Fisheries.
[1410] These are the SADC Regional Biodiversity Strategy, the SADC Regional Biodiversity Action Plan, the SADC Programme on TFCAs and the SADC Transfrontier Conservation Guidelines.
[1411] In particular, Article 5(1)(a) of the SADC Treaty requires to 'achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration'.
[1412] SADC Treaty, Article 21(3)(e).

Beneficiaries of regional development and integration are not only SADC States, but also the people of southern Africa, who should directly gain from socio-economic development and poverty eradication[1413] and are encouraged to actively participate in the implementation of regional programmes and projects,[1414] together with NGOs.[1415] Based on these provisions, it is possible to argue that the people of southern Africa, including local communities, should be fully involved in the establishment and management of TFCAs, in line with the dedicated SADC programme. The SADC Treaty does not mention traditional knowledge and conservation practices; however, the full involvement of the people of the Region cannot disregard their lifestyle and culture, especially in the case of local communities. Therefore, it can be argued that any initiative involving local communities and contributing to SADC objectives[1416] should be developed in accordance to their traditional knowledge and practices.

The Treaty is silent on the role that local authorities can play in contributing to its objectives. As an international law instrument, the SADC Treaty requires to be ratified and implemented into national legislation first. Hence, any obligation stemming from this Treaty and affecting sub-national authorities has to be articulated in national legislation.

The institutional setup foreseen in the Treaty offers a useful platform to address regional issues, advance cooperation at the formal level and coordinate the actions of SADC countries to this end. Joint institutional mechanisms with operative capacities can be better designed within the specific Protocols or programmes in order to adapt their structure and tasks to the relevant issues.

Therefore, the Treaty includes several elements supporting the concept proposed in this thesis, *in primis* cooperation for the conservation and sustainable utilisation of (shared) natural resources and the involvement of local communities in SADC programmes and projects

[1413] SADC Treaty, Article 5(1)(a).
[1414] SADC Treaty, Article 5(2)(b).
[1415] SADC Treaty, Article 23.
[1416] Both Articles 5(2)(b) and 23 of the SADC Treaty ask to encourage such initiatives.

achieving. Its main shortcoming is that it considers States as the primary actors, which is plausible for it being an instrument of international law and given the legacy of the post-colonial era.

6.4.2 SADC Protocol on Wildlife and Law Enforcement[1417]

This Protocol provides solid bases for the concept of decentralised international cooperation since it encompasses two key issues as primary objectives: the establishment of TFCAs for the conservation of shared wildlife resources,[1418] and the promotion of CBNRM practices to manage wildlife resources.[1419] Apparently, this Protocol has a main shortcoming: its scope is limited to wildlife resources,[1420] which are 'animal and plants species occurring within natural ecosystems and habitats'.[1421] Hence, this definition explicitly excludes forestry and fishery resources, and indirectly ecosystems and resources that can be enclosed in the concept of biodiversity. Nevertheless, '[wildlife] species and their habitats can be classified as "biological resources" which constitute something like single species of a complex "biodiversity puzzle"'.[1422] According to Beyerlin, conservation efforts on wildlife resources can be described as 'transboundary protection of wildlife' (TPW). TPW is a component of 'transboundary protection of biodiversity' (TPB), which is a superior target that concerns the community of States as a whole.[1423] Arguably, neighbouring range States usually engage in TPW, rather than TPB, through bilateral or sub-regional agreements aimed to coordinate or harmonise national protective measures over wildlife species that move across borders. Since TFCAs, among other

[1417] Adopted in Maputo (Mozambique), 18 August 1999, in force 30 November 2003. Available at https://www.sadc.int/files/4813/7042/6186/Wildlife_Conservation.pdf accessed 01 January 2019. Hereinafter, SADC Wildlife Protocol.
[1418] SADC Wildlife Protocol, Article 4(2)(f).
[1419] SADC Wildlife Protocol, Article 4(2)(g).
[1420] SADC Wildlife Protocol, Article 2.
[1421] SADC Wildlife Protocol, Article 1.
[1422] Ulrich Beyerlin, 'Universal Transboundary Protection of Biodiversity and Its Impact on the Low-Level Transboundary Protection of Wildlife' in L Kotze and T Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill 2014) 110. According to Article 2 of the Biodiversity Convention, '"biological resources" includes genetic resources, organisms or parts thereof, population or any other biotic component of ecosystems with actual or potential use or value for humanity'.
[1423] ibid. On biodiversity conservation as a common concern and the deriving obligations see Chapter 2 Section 2.5.

things,[1424] are meant to ensure the conservation of shared wildlife,[1425] that is TPW, they facilitate and contribute to the wider goal of TPB.[1426] Based on this discussion, it is possible to argue that biodiversity conservation is pursued by the Protocol through wildlife conservation.

Inter-State cooperation over shared natural resources is essential for implementing this Protocol and achieving its objectives.[1427] Moreover, the conservation and sustainable use of wildlife are perceived as joint efforts requiring the cooperation of all relevant actors likely to halt positive results: governmental authorities, NGOs, and the private sectors,[1428] in addition to local communities. In fact, the role of local communities in conservation is not only acknowledged,[1429] but pursued as a specific objective.[1430] 'Community-based wildlife management' is defined in Article 1 as 'the management of wildlife by a community or *group of communities* which has the right to manage wildlife and to receive benefits from that management'.[1431] Arguably, Article 1 provides the basis for bringing communities together across borders for the conservation and sustainable use of shared wildlife, which requires cooperative efforts. Furthermore, attention is paid to the beneficial contribution of traditional conservation practices specifically referred as 'indigenous knowledge systems'.[1432] Instead, there is no reference to sub-national authorities, whose position might be clarified in the framework of national laws implementing the Protocol.

The concept of sustainable development is mentioned in the Preamble, but not address in

[1424] The scope of TFCAs is much broader than conservation of shared wildlife.
[1425] SADC Wildlife Protocol, Article 4(2)(f).
[1426] Beyerlin explains that TPB 'as a "common concern of humankind" cannot be achieved unless many individual actions are jointly taken by neighbouring Range States for the purpose of protecting a variety of species of wildlife on their territories', Beyerlin, 'Universal Transboundary Protection of Biodiversity and Its Impact on the Low-Level Transboundary Protection of Wildlife', *cit.*, (n 1422) 110.
[1427] SADC Wildlife Protocol, Articles 3(3)(c), 4(2)(f) and 7(5)(a). It is worth clarifying that, in the original text of the Wildlife Protocol, Article 3 has three paragraphs, but only two of them are numbered. To avoid confusion, I refer to the last paragraph as 3(3).
[1428] SADC Wildlife Protocol, Article 3(2)(a).
[1429] SADC Wildlife Protocol, Article 7(8).
[1430] SADC Wildlife Protocol, Article 4(2)(g) requires to 'facilitate community-based natural resources management practices for management of wildlife resources'.
[1431] This definition recalls IUCN protected areas governance Type D, that is to say governance by indigenous peoples and local communities, also described as ICCAs. In this regard refer to Chapter 3 Sections 3.3.3 and 3.6.
[1432] SADC Wildlife Protocol, Articles 7(4) and 10(2).

substantive provisions.[1433] Economic and social incentives for the conservation and sustainable use of wildlife are encouraged;[1434] however, the benefits arising from virtuous actions are disregarded and no attention is paid to wildlife conservation as an alternative land use and source of income. This shortcoming should be addressed given the benefits that can derive from non-consumptive uses of wildlife resources and the consequent effects in terms of biodiversity conservation.[1435]

From an institutional point of view, the Protocol foresees the establishment of the Wildlife Sector Technical Coordinating Unit to act as a Secretariat and oversee its implementation at the regional level.[1436] In connection to decentralised international cooperation, it is worth mentioning that this Unit has to coordinate State Parties in adopting common approaches to wildlife conservation, harmonising national legislation in this field, and enforcing it,[1437] thus strengthening the macro cooperative framework and enabling the joint governance of wildlife resources. In addition, this Unit is responsible for facilitating the involvement of local communities in conservation efforts promoted by State Parties and NGOs.[1438] Arguably, this element reaffirms the importance of grassroots inclusion for successful conservation practices. Unfortunately, the Protocol does not elaborate further on the composition and functioning of this Unit, and finding evidence of its existence and activity is a challenging, if not an impossible, task.[1439]

The prominence of the Wildlife Protocol, for this thesis, lies in the prevision of TFCAs as a mechanism for the conservation and sustainable use of shared wildlife. Article 1 defines a

[1433] Several provisions refer to sustainable use, but Article 1 defines it as 'use in a way and at a rate that does not lead to the long-term decline of wildlife species', thus having a strict ecological interpretation and not envisioning any connection to additional benefits that can be derived from the environment.
[1434] SADC Wildlife Protocol, Articles 6(2)(g) and 7(6).
[1435] On the comparative advantage of wildlife resources over land uses like livestock and agriculture, see *supra* Sections 6.2.2 and 6.2.3.
[1436] SADC Wildlife Protocol, Article 5(8).
[1437] SADC Wildlife Protocol, Article 5(8)(c).
[1438] SADC Wildlife Protocol, Article 5(8)(d).
[1439] SADC Wildlife Protocol, SADC TC Guidelines 31 and Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas', *cit.*, (n 1231) 224.

TFCA as 'the area or the component of a large ecological region that straddles the boundaries of two or more countries, encompassing one or more protected areas, as well as multiple resources use areas'. This definition hints at expanding conservation beyond protected areas in spatial and socio-economic terms,[1440] but the Protocol fails in providing substantive provisions useful for integrating environmental, social and economic concerns.

On a positive note, the Protocol plants the seeds for conceiving conservation outside the box of national States: on the one hand, the ideas of developing common approaches to wildlife conservation and harmonising national measures, together with the conception of TFCAs, suggest the adoption of a regional vision and the neutralisation of national frontiers for the sake of shared wildlife conservation. On the other hand, the continuous reference to community engagement brings the operationalisation of conservation at the lower governance level possible. All these elements favour the application of the concept of decentralised international cooperation in the SADC region.

6.4.3 SADC Protocol on Forestry[1441]

The significance of forests and forest products in the SADC region emerges already in the Preamble of the Forestry Protocol, which arguably integrates both the eco-centric and anthropocentric approaches. In fact, this Protocol recognises, on the one hand, the intrinsic value of forests and their contribution to the earth's ecological systems, and, on the other, their importance for humanity both in terms of subsistence (e.g., food and energy for local communities) and socio-economic development. Such a potential is reflected in the objectives of the Protocol.

[1440] Regarding TBPAs, more generally, and their contribution to biodiversity conservation see Chapter 3 Section 3.6.1.
[1441] Adopted in Luanda (Angola), 3 August 2002, in force 17 July 2009. Available at https://www.sadc.int/files/9813/5292/8364/Protocol_on_Forestry2002.pdf accessed 01 January 2019. Hereinafter, Forestry Protocol.

Forests and forest (genetic) resources can be classified as biological resources: their development, conservation, sustainable management, and utilisation[1442] are instrumental to effective environmental protection in the interests of both present and future generation.[1443] In line with Beyerlin's argument,[1444] the transboundary protection of biodiversity results from multiple and diverse conservation actions, including those on forests and forest resources. Biodiversity conservation emerges also from other provisions, *in primis* Article 16, which places a duty on States to address both human and natural threats at national and regional level, including the accidental or illegal introduction of alien species. According to Lubbe, the reference to present and future generations expresses the temporal dimension associated with sustainable development in the form of inter- and intragenerational equity relative to ecosystem services.[1445] Indeed, forests provide for a series of ecosystem services[1446] as well as increased economic opportunities and poverty alleviation,[1447] thus contributing to socio-economic development.[1448] The economic potential of forestry is further highlighted in Article 18 that deals with forestry-related industry, trade, and investment.

Inter-State cooperation for the sustainable management of shared forests is explicitly foreseen to achieve the Protocol's objectives.[1449] According to Article 14, specific agreements can be concluded for the integrated management of transboundary forests and protected areas, thus providing a potential legal basis for the establishment of TFCAs. Based on this provision, it is also possible to claim for the development of appropriate institutional mechanisms for the joint management of transboundary forests.

[1442] Forestry Protocol, Article 3(1)(a).
[1443] Forestry Protocol, Article 3(1)(c). The interests if present and future generations are also discussed in Chapter 2 in the framework of common concern regimes and intergenerational equity. See Sections 2.5 and 2.9 respectively.
[1444] On the contribution of transboundary protection of wildlife to transboundary protection of biodiversity, see *supra* Section 6.4.2.
[1445] Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas', *cit.*, (n 1231) 219.
[1446] Ecosystem services can be of different categories: provisioning services, regulating services, habitat or supporting services, and cultural services. Millennium Ecosystem Assessment, *Ecosystem and Human Well-Being: Synthesis*, *cit.*, (n 14) v.
[1447] According to Principle 5 of the Rio Declaration, eradicating poverty is an indispensable requirement for sustainable development.
[1448] Forestry Protocol, Article 3(1)(b).
[1449] Forestry Protocol, Article 3(2)(b).

The Protocol stresses the mutual link between forest and communities already in its Preamble. On the one hand, forests provide sustainable livelihood opportunities for local communities, on the other hand, communities play a key role in ensuring the conservation and sustainable management of forests by way of traditional knowledge and practice. States have to acknowledge and promote the primary role of communities,[1450] especially by adopting appropriate measures that ensure both their effective involvement in forest management and access to connected benefits. Community-based forest management[1451] strongly relies on traditional knowledge and practices that need to be preserved, applied, and shared at the regional level through dedicated guidelines.[1452] The role of communities can be further strengthened through adequate capacity-building programmes[1453] and clear ownership or occupancy rights.[1454]

Arguably, the concept of decentralised international cooperation can be envisioned within this Protocol and connected to its objectives. In particular, the primary role of communities and the value of traditional knowledge and practices are reiterated in several provisions and both elements remain significant in transboundary contexts where States cooperatively manage transboundary forests and protected areas.

6.4.4 SADC Protocol on Shared Watercourses[1455]

Inter-State cooperation over shared resources is at the core of the Revised Protocol of Shared Watercourses whose main objective is to 'foster closer cooperation for judicious, sustainable and coordinated management, protection and utilisation of shared watercourses'.[1456]

[1450] Forestry Protocol, Articles 3(2)(g) and 4(10).
[1451] This is defined as 'the management of forest resources by one or more local communities on the basis of the right to manage or to receive benefits from those forests' in Article 1 of the Forestry Protocol.
[1452] Forestry Protocol, Article 16.
[1453] Forestry Protocol, Article 19(2)(d).
[1454] Forestry Protocol, Article 5.
[1455] Adopted Windhoek (Namibia), 7 August 2000, in force 22 September 2003. Available at https://www.sadc.int/files/3413/6698/6218/Revised_Protocol_on_Shared_Watercourses_-_2000_-_English.pdf accessed 01 January 2019.
[1456] Protocol on Shared Watercourses, Article 2.

Cooperation is motivated by the need to respect the 'unity and coherence of each shared watercourse',[1457] thus responds to ecological criteria rather than national political interests. The Protocol aims to provide effective guidance for a harmonised management of water resources in the SADC region[1458] and elaborates further on how to give effect to this cooperation in specific circumstances.[1459] The establishment of joint management mechanisms, namely Shared Watercourses Institutions (SWIs), is explicitly foreseen to facilitate shared governance.[1460] The term SWIs refers to watercourse commissions, water authorities or boards responsible for the implementation of this Protocol in each case. Hence, the institutional structures and objectives of a SWI result from the specific agreement between Watercourse States.[1461]

Cooperation over shared watercourse can be conducive to cooperation over other natural resources or connected sectors, thus being the first step for the creation of a TFCA. After all, water resources play a key role in the maintenance of ecosystems (e.g., as in the case of wetlands) and the survival of both animal and plant species; therefore, their sustainable management contributes to biodiversity conservation that is an implicit objective of this Protocol. In this regard, Article 3(2) specifies that the utilisation of watercourses include the environmental use which means 'the use of water for the preservation and maintenance of ecosystems';[1462] while Article 4(2), paragraph (a) is dedicated to the protection and preservation of ecosystems, and paragraph (c) to the introduction of alien or new species.

The coordinated governance of shared watercourses is needed to ensure sustainable socio-economic development,[1463] a concept that encompasses both sustainable development and socio-economic development. The importance to balance environmental conservation and

[1457] Protocol on Shared Watercourses, Article 3(1).
[1458] Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas', *cit.*, (n 1231) 221.
[1459] Protocol on Shared Watercourses, Article 4.
[1460] Protocol on Shared Watercourses, Article 4(3)(a).
[1461] Protocol on Shared Watercourses, Article 5(3).
[1462] Protocol on Shared Watercourses, Article 1.
[1463] Protocol on Shared Watercourses, Preamble.

higher standard of living, including in the form of poverty alleviation, emerges from the overall objective stated in Article 2 and among the guiding principles in Article 3(4). The Protocol does not refer directly to communities nor traditional knowledge and practices, but requires to take into consideration the population dependent on shared watercourses when deciding on their equitable and reasonable utilisation.[1464]

The importance of the Protocol on Shared Watercourses lies in the model it provides for governing shared natural resources,[1465] especially considering that the appropriate management and conservation of water resources is key to biodiversity conservation. In many provisions, the Protocol recalls the 1997 UN Watercourses Convention, especially when dealing with the reasonable and equitable use of shared watercourses,[1466] the procedural aspects for planned measures,[1467] and environmental protection and preservation.[1468]

6.4.5 SADC Protocol on Fisheries[1469]

Inter-State cooperation is instrumental to achieving the responsible and sustainable use of aquatic resources and ecosystems[1470] given their unique transboundary character.[1471] Cooperation has to be pursued by harmonising fisheries legislation,[1472] including on traditional resources management systems to maintain indigenous knowledge and practice.[1473] To this end, the Protocol foresees the possibility to establish instruments for a coordinated or integrated management of shared resources[1474] and the development of joint plans.[1475] Cooperation is also

[1464] Protocol on Shared Watercourses, Article 3(8)(ii).
[1465] Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas', *cit.*, (n 1231). In this sense, the Protocol is supplemented by the SADC's Guidelines for Strengthening River Basin Organisations.
[1466] Protocol on Shared Watercourses, Article 3(7) and (8).
[1467] Protocol on Shared Watercourses, Article 4(1).
[1468] Protocol on Shared Watercourses, Article 4(2)(a) protection and preservation of ecosystems; (b) prevention, reduction and control of pollution; (c) introduction of alien or new species; and (d) protection and preservation of the aquatic environment.
[1469] Adopted in Gaborone (Botswana), 14 August 2001, in force 08 August 2003. Available at https://www.sadc.int/files/8214/7306/3295/SADC_Protocol_on_Fisheries.pdf accessed 01 January 2019.
[1470] Protocol on Fisheries, Article 4(1). This is the main objective of the Protocol according to its Article 3.
[1471] Protocol on Fisheries, Preamble.
[1472] Protocol on Fisheries, Article 8.
[1473] Protocol on Fisheries, Article 12(7).
[1474] Protocol on Fisheries, Article 7(4).
[1475] Protocol on Fisheries, Article 7(5).

pursued through collaboration in the field of science and technology,[1476] and facilitated by exchanging information.[1477]

The sustainable use of aquatic resources and ecosystems has to benefit the people of the region, including fishing communities, in terms of socio-economic[1478] and sustainable development.[1479] Such a sustainable use clearly contributes to biodiversity conservation[1480] and can be effectively ensured through the creation of inland and marine protected areas for the preservation of critical habitats and endangered migratory species in transboundary areas,[1481] thus hinting at conservation efforts that are in line with or could be framed within TFCAs.

The provisions devoted to public participation[1482] strengthen the role of fishing communities, that is a more appropriate description for local communities in the case of the Protocol on Fisheries. Specific attention is also dedicated to artisanal and subsistence fishers in Article 12. Arguably, they can be identified as members of fishing communities. Their involvement in transboundary fisheries shall be ensured,[1483] and indigenous knowledge and practices embedded in the legislation on resource management systems shall be harmonised at national level.[1484]

Lubbe describes the practical implications of the Protocol in relation to the establishment of joint instruments for the coordination and management of shared resource by presenting the case of the Benguela Current Commission.[1485] Angola, Namibia, and South Africa created this Commission in 2007 as a multi-sectoral intergovernmental initiative to manage together the shared area of the Benguela Current Marine Ecosystem and the resources therein.[1486] This

[1476] Protocol on Fisheries, Article 17.
[1477] Protocol on Fisheries, Article 18.
[1478] The socio-economic aspects emerge from Article 3(a), (b), and (c) of the Protocol on Fisheries.
[1479] The aspects relating to sustainable development are the temporal element of ensuring that future generations benefit from fishery resources and the objective to alleviate poverty aiming to its eradication, respectively expressed in Article 3(d) and (e).
[1480] Protocol on Fisheries, Article 14 encompasses multiple actions useful to this end.
[1481] Protocol on Fisheries, Article 14(7).
[1482] Protocol on Fisheries, Articles 4(2) and 7(7).
[1483] Protocol on Fisheries, Article 12(8).
[1484] Protocol on Fisheries, Article 12(7).
[1485] Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas', *cit.*, (n 1231) 226.
[1486] http://www.benguelacc.org, accessed 12 February 2017.

successful cooperative experience has led the three countries to sign the Benguela Current Convention,[1487] which is the first treaty adopting the concept of ocean governance. On this basis, resources are managed at the larger ecosystem level and pursue the conciliation of conservative and developmental objectives.

Arguably, the concept of decentralised international cooperation can be located in this Protocol. In particular, inter-State cooperation for the responsible and sustainable use of shared aquatic resources and the involvement of fishing communities can be seen as prerequisites for advancing it within this context.

6.4.6 SADC Regional Biodiversity Strategy

The Regional Biodiversity Strategy (RBS) is the main policy document dealing with biodiversity conservation in SADC. Although not legally binding, it is relevant to this thesis since it provides the reference framework for shaping cooperation over shared biodiversity. In fact, it recognises the regional dimension of biodiversity issues and the need for transboundary cooperation for the successful conservation and sustainable use of regional biological resources.[1488] The rich natural capital represents a primary source of survival for many people in the region, but the inability to transform it into valuable goods and services has been halting sustainable development and poverty alleviation, and has resulted into further environmental deterioration. In fact, natural resources remain 'the last line of defence in the face of calamities'.[1489] While transcending national boundaries, the Strategy promotes decentralised access to and management of biodiversity resources to both strengthen their protection and contribute to social and economic development.[1490] In the absence of any clarification on this

[1487] Signed in Benguela on 18 March 2013, http://www.benguelacc.org/index.php/en/component/docman/doc_download/695-signed-benguela-current-convention-english, accessed 12 February 2017.
[1488] SADC Regional Biodiversity Strategy, iii.
[1489] SADC Regional Biodiversity Strategy, 6.
[1490] SADC Regional Biodiversity Strategy, 1.

point, such decentralisation is arguably referred to local communities for their reliance on natural resources and as the main beneficiaries of socio-economic development.

The Strategy evaluates biodiversity conservation in SADC based on eight major regional constraints that have an impact on 'what people can do, want to do and end up doing'.[1491] These constraints relate to economic, institutional, and technological aspects. They include increased pressures from agriculture due to limited alternative livelihood opportunities, inadequate biodiversity inventory and monitoring systems, low level of awareness and inadequate perception of the value of biodiversity, and weak institutional and legal frameworks to implement biodiversity initiatives, especially at local level. Three strategic areas are proposed to overturn the negative appraisal resulting from the constraint analysis. The first strategic area aims to enhance the region's economic and business base mainly through two mechanisms: first, by raising the value of biological resources and commercialising them on 'green' markets to prevent unsustainable harvesting or overexploitation (i.e., biotrade); and second, by exploring alternative livelihoods opportunities through the expansion and diversification of the region's industrial and manufacturing sectors.[1492] The second strategic area addresses the prevention of the unsustainable use of biological resources. In this process, enhanced economic opportunities and industry diversification are key to establishing well-functioning inventory and monitory mechanisms, and designing effective institutional and legal frameworks, including legislation dedicated to local/traditional knowledge and biopiracy that promote access and benefit sharing principles. Furthermore, they support the development of a regional biodiversity policy and protocol,[1493] and the promotion of partnerships between governments, local communities, and the private sectors based on CBNRM and transboundary natural resources management (TBNRM).[1494] The third strategic area seeks to increase awareness of

[1491] SADC Regional Biodiversity Strategy, 4.
[1492] SADC Regional Biodiversity Strategy, 19.
[1493] Neither of those has been developed up to the present.
[1494] SADC Regional Biodiversity Strategy, 20.

the value of biodiversity through information and capacity building, multiply research and development initiatives, and provide sustainable and innovative funding mechanisms to support biodiversity programmes.[1495]

Although not directly addressed, TFCAs are conceived as a useful framework to facilitate the sustainable use of biodiversity at regional level[1496] and implement TBNRM Programmes.[1497] TBNRM primarily falls under the responsibility of partner countries. It requires similar levels of devolution as well as harmonious policies and legislation across them. It strongly depends on their political will to commit to cooperation over shared natural resources, which often clashes with national sovereignty interests with consequent delays in the implementation of cooperative initiatives.[1498] Concurrently, TBNRM requires the involvement of local communities that are usually disregarded, despite suffering the direct consequences (like displacement) of these initiatives.[1499]

Arguably, TBNRM recalls the concept of decentralised international cooperation by merging the supranational and decentralised dimensions of biodiversity conservation. In so doing, it implicitly reinforces the role of regional mechanisms and sub-national actors in giving execution to the Strategy. However, due to the weak SADC biodiversity legal framework, the implementation of the Strategy relies on National Biodiversity Strategies and Action Plans and uses existing national and regional institutional arrangements. Arguably, this *modus operandi* preserves the prevalence of a political logic over an environmental one and perpetuates the adoption of a sectoral approach that disregards cross-sectoral synergies and contradictions that would be better reflected in the ecosystem approach.[1500]

[1495] SADC Regional Biodiversity Strategy, 20
[1496] Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas', *cit.*, (n 1231) 229.
[1497] SADC Regional Biodiversity Strategy, 64. TBNRM encompasses 'any process of cooperation across boundaries that facilitates or improves the management of natural resources for the benefit of all parties concerned'. SADC Regional Biodiversity Strategy, 13.
[1498] SADC Regional Biodiversity Strategy, 64
[1499] SADC Regional Biodiversity Strategy, 64.
[1500] SADC Regional Biodiversity Strategy, 27.

This brief analysis highlights that the RBS hints at the concept of decentralised international cooperation in several ways. First of all, it explicitly provides a framework for regional biodiversity conservation requiring inter-State cooperation[1501] and aims to promote sustainable and socio-economic development to improve the livelihood of communities.[1502] It also foresees the utility of TFCAs and the need to involve local communities in TBNRM,[1503] including by *sui generis* legislation on local knowledge.[1504] It addresses the weakness of local level institutions and calls for strengthening their capacity.[1505] Nevertheless, the Strategy fails in designing innovative joint institutional mechanisms to frame regional biodiversity conservation, and has little operational value due to its soft law nature. The lack of a Protocol on biodiversity conservation and the absence of a reviewed version of the RBS – supposedly expected every five years[1506]– might be indicative of the reluctance of SADC States to commit to transboundary biodiversity conservation in an integrated way and at a supranational level. Arguably, progress in this direction are ensured by successful cooperative experiences developing in the framework of TFCAs.

6.4.7 SADC Regional Biodiversity Action Plan[1507]

The SADC Regional Biodiversity Action Plan (BAP) was adopted in 2013 to make the RBS operational and address the biodiversity constraints identified therein. This Plan is also instrumental for achieving SADC's commitments in terms of environmental protection and socio-economic development at the regional and international level.[1508] It complements the

[1501] SADC Regional Biodiversity Strategy, 1.
[1502] SADC Regional Biodiversity Strategy, 64.
[1503] SADC Regional Biodiversity Strategy, 64.
[1504] SADC Regional Biodiversity Strategy, 20.
[1505] SADC Regional Biodiversity Strategy, 13.
[1506] SADC Regional Biodiversity Strategy, viii.
[1507] This Plan is not available online. A copy is on file with the author and was provided by Willem Daniel Lubbe (North-West University, South Africa), who as been acting as advisor on this thesis.
[1508] At the regional level, the BAP contributes to meet the goals set in the Regional Indicative Strategic Development Plan, the New Partnership for Africa's Development Environment Action Plan, and the Millennium Development Goals. It is also useful for the implementation of the Biodiversity Convention and its Nagoya and Cartagena Protocols, CITES, the World Heritage Convention, the Ramsar Convention. SADC BAP, 7.

RBS and adds to it by articulating its vision[1509] on the basis of several factors: socio-economic, environmental, governance and technological.[1510] The BAP structures interventions around six strategic areas, three more than those foreseen in the RBS, and details the intervention actions for each of them. It also adopts guiding principles[1511] that ensure better coherence among the sectors – *in primis* the ecosystem approach[1512] – and actors involved – i.e., participatory and iterative approach, transparency, gender equity and gender mainstreaming.

Biodiversity governance is identified as the first strategic area since governance is essential for successful biodiversity conservation and management.[1513] Key interventions in this area consist in improving biodiversity management law and policy and connected institutional frameworks; fostering equity and access to biodiversity resources as well as sharing resulting benefits; ensuring the effective implementation of multilateral environmental agreements and SADC environmental protocols; and improving the governance frameworks of TFCAs.[1514] In relation to the latter, the SADC Secretariat and State Parties – that are the addressees of the BAP[1515] – have to establish and implement effective TFCA structures endowed with multi-stakeholder fora.[1516] In this context, decentralised international cooperation can serve to frame biodiversity conservation and management over a defined transboundary space with the participation of local actors. Inter-State cooperation[1517] is nonetheless essential to provide a broader cooperative framework that facilitates the emergence of decentralised cooperative mechanisms.

[1509] The vision reads as follows 'The people of the SADC region enjoying a healthy environment and enhanced quality of life derived from effective conservation and sustainable use of biodiversity in line with international and regional commitments, while respecting national spiritual and cultural values', SADC BAP, 13.
[1510] On the other hand, the RBS was derived from a constraint analysis based on political, institutional, and technological available instruments, thus having a more limited focus.
[1511] SADC BAP, 29-30.
[1512] The adoption of the ecosystem approach represents a clear progress in comparison to the sectoral approach used in the RBS.
[1513] SADC BAP, 16.
[1514] Ibid.
[1515] SADC BAP, 7.
[1516] SADC BAP, 33.
[1517] In this regard, refer to Beyerlin's argument that biodiversity conservation results from multiple conservative actions on different biological resources *supra* Section 6.4.2.

Biodiversity conservation and socio-economic development emerge from the overall goal of the BAP.[1518] Instead, sustainable development is never mentioned in the document, but its essence can be derived from the same overall goal that sees biodiversity protection as essential to achieving economic growth and poverty reduction, and, in so doing, echoes Principles 4 and 5 of the Rio Declaration.[1519] Local communities are meant to benefit from the interventions foreseen in this Plan[1520] and to actively participate to biodiversity conservation,[1521] including with traditional knowledge and practices.[1522] The Plan makes continuous reference to the need of implementing its actions at all levels – i.e., regional/supranational, national, local and ecosystem – and promotes improved dialogue and coordination between all these levels, which arguably implies enhancing the role of local institutions. To this purpose, the Plan conceives specific coordinating mechanisms that gather the numerous institutions and stakeholders responsible for and interested in the region's biodiversity.[1523] In this context, inter-State cooperation is a prerequisite for the sound implementation of the Plan and the achievement of regional biodiversity conservation.

[1518] The overall goal of the BAP is to 'promote equitable and regulated access to, sharing and enhancement of the benefits from, and responsibilities for protecting biodiversity in order to facilitate economic growth and poverty reduction in the SADC region'. SADC BAP, 14.
[1519] Rio Principle 4 says 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. In the context of the SADC BAP, environmental protection is exemplified by biodiversity protection, while the developmental process is realised to economic growth and poverty reduction. While, Rio Principle 5 affirms that 'All states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world'. Therefore, poverty eradication is a prerequisite for sustainable development and represents the final step of poverty reduction that, in the SADC region, is pursued also through the BAP.
[1520] For instance, Strategic Area 2 'Biodiversity Based Community Livelihoods' addresses the dependence of many people in the region, especially rural communities, from biodiversity and aims to contribute to both reducing poverty and biodiversity loss. SADC BAP, 16-17.
[1521] CBNRM is seen as a useful biodiversity conservation tool to be enhanced in the framework of Strategic Area 4 'Biodiversity Management Systems'. SADC BAP, 18-19
[1522] In particular, the BAP Implementation Plan requires the review and inclusion of traditional knowledge in relation to both the intervention area 'Fostering Equity and Benefit Sharing from Biodiversity' within Strategic Area 1 'Biodiversity Governance' and the intervention area 'Biodiversity Inventory and Monitoring' within Strategic Area 4 'Biodiversity Management Systems'. SADC BAP, 33 and 38.
[1523] SADC BAP, 25.

6.4.8 SADC Programme for Transfrontier Conservation Areas[1524]

The SADC TFCA Programme results from the realisation that the development of TFCAs is not a mere concern of the Member States involved, but has to be supported – in terms of capacities as well as mobilisation of financial and technical resources – and guided by the entire SADC structure with the aim of developing a functional and integrated network of TFCAs in the region.[1525]

SADC provides a platform for the establishment and development of TFCAs and the SADC Secretariat facilitates these efforts.[1526] The TFCA Programme and Guidelines provide directions to shape transboundary conservation initiatives. Furthermore, a network of TFCA practitioners, the SADC TFCA Network, was created to support the process of shared learning, knowledge, management, and collaboration. This process occurs at two levels: at sub-regional level, it characterises all TFCAs and facilitates inter-TFCAs exchange, while, at the level of a single TFCA, allows for inter-State exchange and mutual learning. This Network is guided by a Steering Committee comprising SADC Member States and the Secretariat; interactions among the members of the network happens primarily through a web platform.[1527] Within the SADC structure, the responsible directorate for TFCAs is the Food, Agriculture and Natural Resources Directorate. Hence, the highest authority in each TFCA structure and/or the coordinator of the TFCA initiative have reporting obligations vis-à-vis the SADC Ministers for Natural Resources/Environment.

[1524] Adopted in Gaborone in 2013. Hereinafter, SADC TFCA Programme. Available at https://www.sadc.int/files/4614/2122/3338/SADC_TFCA_Programme_FINAL_doc_Oct_2013.pdf accessed 01 January 2019.
[1525] SADC TFCA Programme, 3-4.
[1526] For further reference see http://www.sadc.int/themes/natural-resources/transfrontier-conservation-areas/, accessed 25 February 2017.
[1527] This platform was officially launched during CITES CoP 17, held in Johannesburg in September 2016. The author participated in this event. See http://www.tfcaportal.org/, accessed 25 February 2017.

This Programme consists of seven component areas[1528] complemented by specific objectives, activities, and outputs. It can be argued that the notion of decentralised international cooperation is entrenched in this Programme and emerges from its conceptual foundations.

TFCAs are conceived as a 'conservation and development model' for inter-State cooperation over shared natural resources contributing to regional integration, the development of rural areas, and the sustainable utilisation of ecological valuable areas.[1529] In providing such a model, TFCAs can be seen as an evolution of traditional protected areas since they do not serve pure conservationist purposes, rather they encompass multiple land uses, integrate environmental, economic and social concerns, and adopt an inclusive approach.[1530] According to the Programme, transboundary natural resources[1531] are shared assets that determine the ecological interdependence of neighbouring States:[1532] TFCAs can ensure the joint management of these resources at the supranational level, thus superseding national conflicting policies and interests.

Joint management within TFCAs presupposes the harmonisation of national policy and legal frameworks, as foreseen in Component 1, and requires joint institutional mechanisms to be operational. However, the Programme is silent on this latter point, possibly because it recognises that TFCAs encompass a wide variety of experiences[1533] and implies that relevant Member States will develop appropriate joint management bodies depending on specific circumstances. Nevertheless, State Parties have disregarded the institutional aspect of TFCAs

[1528] In particular, Component 1: Advocacy and harmonisation, Component 2: Enhancement of financing mechanisms for TFCAs, Component 3: Capacity Building for TFCA stakeholders, Component 4: Establishment of data and knowledge management systems, Component 5: Enhancement of local livelihoods, Component 6 Reducing vulnerability of ecosystems and people to the effect of climate change, and Component 7: Development of TFCAs into marketable regional tourism products.

[1529] SADC TFCA Programme, 7. According to the Programme, TFCAs are founded on the realisation that *natural resources that straddle international boundaries are shared assets* with the potential to meaningfully contribute to conservation of biodiversity and the socio-economic development of rural communities'. (emphasis added) SADC TFCA Programme, 3.

[1530] Protected area initiatives and their application at transboundary level is discussed in Chapter 3 Sections 3.6 and 3.6.1.

[1531] As to say 'natural resources that straddle international boundaries' in SADC TFCA Programme, 3.

[1532] SADC TFCA Programme, 10.

[1533] In particular, the Programme describes three categories of TFCAs depending on their level of development: Category A – Established TFCAs (when they are established through a treaty or other agreement); Category B – Emerging TFCAs (those established on the basis of MOUs that facilitate the negotiation of a treaty); Category C – Conceptual TFCAs (these are potential TFCAs proposed by SADC States, but without a formal mandate from the relevant countries). SADC TFCA Programme, 11.

and this defect has impaired the performance of the cooperative mechanism. In this regard, existing TFCAs are experiencing an institutional reorganisation to improve their functioning, as it is happening in the GL TFCA, while new ones are being endowed with better institutional structures: for example, the KAZA TFCA is the first one having a Secretariat.

It is worth noticing that the objectives pursued through TFCAs – namely, regional integration, the development of rural areas, and the sustainable utilisation of ecological valuable areas – foster benefits at different governance levels – respectively at the regional, local and ecosystem level – but none of them corresponds directly to the national one. While national boundaries dissolve in terms of the objectives pursued, States remain the primary actors since the formal establishment of TFCAs requires their political will. Therefore, the successful operation, or at least formation, of these cooperative mechanisms depends on the same actors on whose sovereignty the cooperative project encroaches. Such a tension is inevitable as long as the establishment of TFCAs counts on the formal recognition of participating countries[1534] and cannot develop as a bottom-up experience.

Biodiversity conservation and socio-economic development are primary and complementary objectives[1535] pursued through TFCAs, they recompose the concept of sustainable development. In this context, local communities should have a privileged position, not only they are entitled to actively participate in the planning and management of natural resources together with other relevant stakeholders (States, private sector, and NGOs), but they should be the main beneficiaries since they bear the cost of living with wildlife.[1536] The focus on local communities emerges from several components: in particular, capacity building efforts

[1534] The SADC TFCAs Guidelines, analysed in the following section, reiterate that, in order to be legally recognised and relevant, TFCAs need to operate within the AU and SADC legal and policy framework, thus dismissing the possibility to put under this label cross-border areas that are informally managed in a collaborative way. SADC TC Guidelines, 27.
[1535] As explained in Chapter 3 Section 3.6.1, for TBPAs more generally, TFCAs serve multiple purposes: they have been praised as a mechanism to foster peace and security, reconnect communities divided by international boundaries, recompose fragmented ecosystems and migration routes, etc.
[1536] SADC TFCA Programme, 3.

should be devoted to local communities within Component 3.[1537] The establishment of data and knowledge management systems, foreseen in Component 4, benefits local communities by enhancing their access to information and consequently improving their knowledge basis for an informed participation to decision-making on TFCA-related issues.[1538] Component 5 focuses on enhancing local livelihoods by strengthening governance capacities of local communities, multiplying economic opportunities, and improving their health conditions.[1539] Component 6 aims to reduce climate change-related impacts on the ecosystem and vulnerable people, and explicitly refers to communities living in and around TFCAs.[1540] Component 7 promotes the development of TFCAs into marketable regional tourism products, including by strengthening the presence of communities in the tourism industry.[1541] Hence, local communities acquire a clear role in the transboundary context, and the cooperative project entitles them to rights and responsibilities that are in line with global obligations to cooperate over transboundary natural resources and conserve biodiversity.[1542]

The Programme does not address sub-national authorities; their role should be outlined in (hopefully harmonised) national legislations.

Since their introduction with the Wildlife Protocol, TFCAs have been developing through attempts and mistakes without a consistent rationale. The SADC Programme for TFCAs has the merit to both address some challenges that emerged in the practice and introduce basic elements that should guide SADC States in the development of TFCAs. Progress in this direction is made with the 2014 SADC TFCAs Guidelines analysed in the following section.

[1537] SADC TFCA Programme, 16-17.
[1538] SADC TFCA Programme, 17
[1539] SADC TFCA Programme, 18-19.
[1540] SADC TFCA Programme, 19.
[1541] SADC TFCA Programme, 19-20.
[1542] Regarding the emergence of sub-national actors at the international level and the deriving rights and obligations also in terms of environmental protection and biodiversity conservation refer to Chapter 2 Sections 2.2.2 and 2.5 ff.

6.4.9 SADC Transfrontier Conservation Guidelines[1543]

The SADC TC Guidelines recollect existing knowledge and best practices relating to transfrontier collaborative[1544] experiences aimed to conserve nature and examine their contribution to socio-economic development and disaster resilience. In this context, it captures progress made at global and regional level, and refers as much as possible to SADC TFCAs as practical examples. The Guidelines are conceived as a frame of reference for TFCA proponents and practitioners. They provide both useful directions for initiating and establishing new TFCAs and a reference point useful to assess and measure the progresses and effectiveness of existing ones.[1545]

The Guidelines are divided into three parts: the first is dedicated to background and contextual information on Transfrontier Conservation initiatives (Sections 1 to 5), the second deals with the activities to be performed during the initiation process (Section 6), and the third addresses the establishment and development phases (Section 7).

The principles inspiring transfrontier conservation initiatives are that of 'benefits beyond boundaries' – that is to say, benefits that are socially and economically relevant beyond the boundaries of protected areas[1546] – and 'sustainable development'. The latter is here articulated in three components: 1) reservation of renewable natural resources, 2) social well-being and economic resilience, and 3) strong governance systems.[1547] Governance is seen as an integrating force among the environmental, social and economic pillars traditionally embraced by the concept of sustainable development. It adds a qualitative dimension to biodiversity conservation and socio-economic development by bringing in new actors, as both active

[1543] Southern African Development Community Conservation Guidelines: The establishment and development of TFCA initiatives between SADC Member States (2014). Hereinafter, SADC TC Guidelines. Their final draft is available at https://tfcaportal.org/sadc-tfca-guidelines-final-draft accessed 01 January 2019.
[1544] The Guidelines replaces the terms 'transboundary' and 'cooperation' with 'transfrontier' and 'collaboration' for semantic reasons and because, in the latter case, collaboration is perceived as implying a stronger commitment than cooperation. SADC TC Guidelines 25. Therefore, this section adopts 'transfrontier' and 'collaboration' for consistence with the document analysed.
[1545] SADC TC Guidelines, 16.
[1546] SADC TC Guidelines, 17.
[1547] SADC TC Guidelines, 18.

participants and beneficiaries, and requirements (e.g., effective law and policy, functioning institutions, transparent processes, and sustainable financial mechanisms). The Guidelines define transboundary conservation governance as 'the interaction among structures, processes and traditions that determine how power, authority and responsibility are exercised and how decisions are taken among actors from two or more countries in a Transboundary Conservation Area'.[1548] Therefore, it can be derived that the joint institutional mechanisms of a TFCA will mirror the governance interface of that area.

The Guidelines stress the important contribution that SADC TFCAs is expected to give to the development agenda, especially in the framework of SDGs.[1549] In this context, the definition of TFCAs and connected terms are updated relying on the latest evolution at the global level.[1550]

It is underlined that, beyond strengthening the conservation of wildlife species, TFCAs benefit SADC States in several ways. In environmental terms, TFCAs enhance ecosystem functionality and climate change resilience. From a socio-cultural perspective, TFCAs can improve social well-being, offer new economic opportunities, and reconnect cultural linkages across borders. Moreover, they contribute to regional integration, and to make day to day management and law enforcement more efficient, by allowing for coordinated research as well as knowledge and skill sharing.[1551]

The Guidelines present two aspects that are indicative of the tension inherent to a TFCA project, which arguably exemplify the value of the concept of decentralised international cooperation proposed in this thesis. On the one hand, the Guidelines highlight the importance of local communities by urging for their inclusion in conceptualisation and operation of TFCAs since the beginning. They also emphasise the strong cultural and spiritual significance of

[1548] SADC TC Guidelines, 78.
[1549] SADC TC Guidelines, 18.
[1550] In particular, the SADC TC Guidelines refer to an advanced draft of the IUCN Transboundary Conservation Best Practice Protected Areas Guidelines published in 2015. Indeed, the definitions included in the SADC TC Guidelines are different from those contained in the published version of the IUCN Transboundary Conservation Guidelines, which is analysed in Chapter 3 Section 3.6.1. See SADC TC Guidelines, 22-26.
[1551] SADC TC Guidelines, 35-43.

protected areas for traditional local communities and the need to build on cultural heritage features that exist across international borders. These cross-border linkages are seen as instrumental to enhancing the motivation and credibility of transfrontier conservation initiatives.[1552] Based on that, it can be argued the Guidelines make the case for involving local communities in transboundary conservation across borders. Moreover, they implicitly recognise the importance of strengthening traditional knowledge and conservation practices, which are a direct reflection of the cultural and spiritual connection between these communities and the surrounding natural environment. On the other hand, inter-State cooperation over shared resources is seen as the primary foundation for TFCAs, since their formal establishment and long-term development depend on the agreement of Partner States.[1553]

Arguably, it can be derived that transfrontier conservation projects result from integrating the inter-State collaborative dimension with other cooperative links that flourish at different governance levels and may relate to a specific territorial portion of the TFCA. The inter-State and local community aspects that characterise TFCA projects are essential components of the concept of decentralised international cooperation proposed in this thesis. Therefore, these Guidelines make the case for applying this concept in the framework of TFCAs.

6.5 Decentralised international cooperation within SADC: a synopsis

The analysis developed in this chapter suggests that the concept of decentralised international cooperation is compatible with the existing SADC legal and policy framework, notwithstanding the unavoidable presence of inter-State cooperation as the primary framework for transboundary biodiversity conservation. Cooperation not only fosters regional integration, but also provides the macro framework for developing decentralised cooperative mechanisms

[1552] SADC TC Guidelines, 39.
[1553] The centrality of States strongly emerges in Part 3 of the Guidelines dealing with the establishment and development processes. SADC TC Guidelines, 67 ff.

to govern shared resources in a cross-border but localised space. Indeed, inter-State cooperation ensures long-term commitments to transboundary biodiversity conservation – which can be pursued under the form of wildlife species, forest resources, shared watercourses, etc. – reliable legal and policy frameworks, technical and financial resources on a regular basis.

Some of the SADC instruments foresee the creation of joint institutional mechanisms to strengthen their effective implementation and operative capacity. TFCAs can be used to shape inter-State cooperation over shared resources and, in this context, joint institutional mechanisms can be created in line with the governance interface of the area. An important feature of TFCAs is that they respond to ecological connections and criteria, thus abandoning the silo-based approach used for the SADC Protocols.

All these instruments analysed urge for the effective involvement of local communities in conservation and sustainable management activities, including by maintaining and preserving their traditional knowledge and practices and due to their strong connection with the surrounding natural environment in terms of livelihood, cultural and spiritual values. Local communities and the people of the region, more generally, should also benefit from socio-economic development and poverty eradication pursued through these instruments. On the contrary, sub-national authorities are never mentioned as key actors in transboundary conservation processes.

In addition, decentralised international cooperation can find application in the SADC region by way of international law through two main mechanisms: first, SADC countries are bound by customary and general international law[1554] as well as by the conventions to which they are Parties. Second, SADC instruments contribute to implementing relevant international conventions.[1555] As explained in Chapters 2 and 3, decentralised international cooperation can

[1554] Article 3(3) of the revised Protocol on Shared Watercourses says 'State Parties undertake to respect the existing rules of customary or general international law relating to the utilisation and management of the resources of shared watercourses'.
[1555] For instance, Article 3(2)(c) of the Wildlife Protocol requires State Parties to 'collaborate to achieve the objectives of international agreements which are applicable to the conservation and sustainable use of wildlife and to which they are party'. See also SADC BAP, 7 analysed in Section 6.4.7.

be envisioned in several principles of international environmental law as well as in environmental regimes dealing with the protection of natural resources and shaping conservation initiatives to this end.

The application of decentralised international cooperation in the SADC region is relevant for several reasons. First, it contributes to achieving SADC objectives[1556] and facilitates cooperation in certain thematic areas.[1557] Second, it strengthens regional biodiversity conservation by empowering sub-national actors across borders and providing a framework for their cooperation. The strong link between local communities and the natural environment emerges from all the SADC instruments analysed in this chapter. Third, decentralised international cooperation is beneficial in ecological, spatial, and governance terms since it is flexible and can be tailored to specific circumstance. In this respect, decentralised cooperative mechanisms can be structured respecting the ecological unit of the natural resources considered, the territorial scope of cooperation can be adapted regardless of political boundaries and internal administrative divisions, and all relevant stakeholders are actively involved in these mechanisms. Lastly, decentralised international cooperation finds application within TFCAs that expand over very large areas but often require to implement solutions at a different spatial scale: decentralised cooperative mechanisms correspond to smaller management units and

[1556] In particular, SADC contributes to socio-economic development, in Article 5(1)(a), by providing a mechanism to enhance participation of the people of Southern Africa, especially relevant local communities, to the governance of shared natural resources with benefits in terms of economic opportunities and reduced social marginalisation. As for the objective stated in Article 5(1)(b), SADC is strongly connected to the existence of common values – more cultural than political, though – and relies on common systems (e.g., knowledge systems, management systems) and institutions (e.g., joint management bodies). SADC is instrumental to the promotion and defence of peace and security pursued in Article 5(1)(c), since it strengthens cross-border connections at the lower level and can decrease competition for natural resources by enhancing conservation. This results in better ecosystem services and resilience vis-à-vis natural disasters. Shared natural resources are a source of ecological interdependence between sharing States, therefore, their effective governance can be beneficial in relation to the objective foreseen in Article 5(1)(d) that promotes self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States. Decentralised international cooperation can lead to achieving complementarity between national and regional strategies and programmes, foreseen in Article 5(1)(e), since the cooperative governance of shared natural resources attains to the regional dimension, but lies on strong national foundations in terms of law and policy as well as voluntary commitments. SADC obviously aims to achieve the sustainable utilisation of natural resources and effective protection of the environment, in Article 5(1)(g), and builds on historical and cultural affinities and links among the people across the borders established in Article 5(1)(h).

[1557] *In primis* natural resources and environment, in Article 21(3)(e), but also in terms of food security, land and agriculture, in Article 21(3)(a).

allow to operate at a cross-border but localised level and in accordance with a broader shared vision, that of the TFCA.

In line with this idea, the following chapter deals with two case studies, the KAZA and GL TFCAs, to examine the emergence of decentralised cooperative mechanisms in each of them. The analysis shows that TFCAs can be seen as laboratories for the development of decentralised cooperative mechanisms. Indeed, they serve to test the functionality of shared legal instruments, usually on a bilateral basis, that transcend national borders[1558] and substantiate regional integration. Although generated on the basis of national commitments and founded on inter-State cooperation, once created, TFCAs get detached from national legal regimes and evolve on the basis of regional and international law.[1559]

[1558] An example is the UNIVISA Programme between Zambia and Zimbabwe.
[1559] Lubbe, 'A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas', *cit.*, (n 1231) 217.

Chapter 7. Decentralised international cooperation in SADC TFCAs: the Kavango Zambezi and the Great Limpopo

7.1 Introduction

This chapter focuses on the application of the concept of decentralised international cooperation to SADC TFCAs. It is mainly based on first-hand information collected during field work conducted from October to December 2016 in the southern African region.[1560]

This thesis argues that cooperation over transboundary natural resources is not limited to traditional inter-State cooperation; rather it involves a larger set of actors, especially at sub-national level, and consequently is *decentralised*. Decentralised cooperative mechanisms do not pertain to the whole territories of the countries sharing natural resources, but encompass a localised cross-border portion of their territories. Moreover, they are heterogeneous in form, and influenced by ecological, cultural, and developmental factors as well as by the patterns of governance of the regions in which they are located. In particular, the presence of a wider cooperative framework can facilitate the emergence of decentralised mechanisms.

The EU, for instance, creates a favourable context by fostering harmonisation in environmental law and by providing a model for territorial cooperation between sub-national authorities and other public and private bodies of different Member States useful for achieving transboundary environmental objectives: the EGTC.[1561]

In SADC, TFCAs have been created to frame cross-border conservation efforts as well as to reconnect communities divided by artificially imposed borders. They often extend over territories that are vast since they ensure large-scale ecological processes, like migration of wildlife species, and biodiversity preservation beyond protected areas that would otherwise be

[1560] The information relating to the GLTFCA was recently updated thanks to a follow-up interview with Piet Theron on 14 December 2018. On the other hand, a more limited update of the KAZA case study is based on the information available online in the institutional website (www.kavangozambezi.org/en/).

[1561] In this regard, refer to Chapter 4 for the legal and policy framework applicable to transboundary conservation and sustainable management of natural resources in Europe and for a detailed description of the EGTC mechanism. For the EGTC case studies see Chapter 5.

patchy and fragmented.[1562] Thus, TFCAs may require the establishment of smaller management units in order to make implementation effective. This is happening in the two TFCAs selected as case studies for the present chapter: the Kavango Zambezi and Great Limpopo. 'Wildlife Dispersal Areas' (WDAs) in KAZA and 'Nodes' in the GL are emerging as decentralised cooperative units: they have a cross-border scope, but are smaller than the whole TFCA, and foresee the active participation of local actors.

Work in the field was essential to capture the state-of-the-art of this rescaling process. Indeed, this chapter is mainly based on the interviews of key actors involved in the development and management of the two TFCAs selected as case studies.[1563] Moreover, work in the field was highly instructive from a visual point of view, especially travelling in the GLTFCA.[1564] The information collected in the field complements legislative and policy documents as well as the secondary literature on conservation in this region analysed in the previous Chapter (6).

After discussing the two case studies, the chapter concludes with a brief comparison of the TFCAs focusing on both the emergence of decentralised cooperative mechanisms and the active role of TFCA-coordinating institutions.

[1562] For further details on TFCAs and their rationale see Chapter 6, especially Sections 6.4.8 and 6.4.9.

[1563] In particular, the interviews with Morris Mtsambiwa (Executive Director of the KAZA TFCA Secretariat until 15 April 2018) and Piet Theron (International Coordinator of the GLTP/GLTFCA) provided useful insights into the creation of decentralised mechanisms as well as the active role that TFCA-coordinating structures (i.e., the KAZA TFCA Secretariat and the GLTP/GLTFCA International Coordinator) are playing to advance a transfrontier logic with respect to a national one. Other actors were interviewed as well, including park authorities, local authorities, local leaders, scholars, and governmental officials. These interviews were useful to improve the understanding of the situation on the ground, the perceptions related to the creation of a TFCA, its value for the stakeholders involved, and the funds allocated to it. The organisation of the interviews was constrained by contingent factors: including time and budget, which limited the duration of the missions in the two TFCAs, geographical accessibility of some areas, availability of the interviewees, and obtainment of research permits in the different countries.

[1564] A two-week mission was organised in the South African and Mozambican components of the Great Limpopo; unfortunately, the Zimbabwean component had to be cut due to the difficulties in obtaining a research permit. Travelling in the Kruger and Limpopo National Parks was a completely different experience. The Kruger has well-developed tourism infrastructure, paved roads, and a wide variety of wildlife, in terms of both species and numbers of animals. Instead, the Limpopo has been affected by severe droughts in recent years and is still paying the consequences of the civil war. In fact, it has fewer animals, an underdeveloped tourism infrastructure, the road system is minimal, and the park is solely accessible by 4x4 vehicles. Nonetheless, in the Limpopo, it was possible to meet park authorities as well as to visit local authorities and local leaders of villages located within the core protected area and in the buffer zones. Fieldwork in the Limpopo was possible thanks to the assistance of the Mozambican National Administration of Conservation Areas (ANAC) that authorised the research trip with short notice. A similar field trip was not possible in the KAZA TFCA since it would have required a lot of time and resources due to the vastness of this TFCA. Nevertheless, it was possible to visit the KAZA Secretariat in Kasane, interview the Executive Director, and meet the rest of the staff.

7.2 The Kavango Zambezi Transfrontier Conservation Area – Case Study 3[1565]

The KAZA TFCA is the largest transfrontier conservation area in the world. It extends over an area of 519,914 square kilometres and embraces five countries: Angola, Botswana, Namibia, Zambia, and Zimbabwe.[1566] A total of 371,394 square kilometres are under some form of wildlife management.[1567] The TFCA encompasses the Okavango and Zambezi river basins and includes internationally well-known destinations and three UNESCO World Heritage Sites.[1568] Its vast territory is characterised by great diversity in landscape. Moreover, it is home to over 3,000 plant species, including a few endemic to the sub-region, and counts the largest contiguous population of African savanna elephants on the continent (around 250,000 animals) as well as other large mammals and threatened species.[1569]

Around 2.7 million people reside within the TFCA in the 29 percent of the land that is not covered by any wildlife protection regime.[1570] The high rate of population growth (2 percent per annum) has led to human encroachment and increased human wildlife conflict especially in areas bordering protected land.[1571] Their subsistence activities include agriculture, pastoralism, fishing, hunting – which is generally not allowed without permits – and harvesting natural resources. Therefore, the resident population relies substantially on the immediate external environment. New employment opportunities are offered in the tourism sector, which is

[1565] This general introduction is based on the information available in the SADC brochure on Transfrontier Conservation Areas 8-9, the KAZA TFCA Master Integrated Development Plan (MIDP) 6-7, and online at http://www.peaceparks.org/tfca.php?pid=19&mid=1008 accessed 20 February 2017. The MIDP is available at https://tfcaportal.org/kaza-tfca-master-idp accessed 20 February 2017.
[1566] More information about the Partner Countries available at https://www.kavangozambezi.org/en/about/partner-countries accessed 3 December 2018. For a time-lapse reconstruction of the KAZA TFCA growth since its inception see https://maps.ppf.org.za/arcgis/apps/webappviewer/index.html?id=3fa4410cc61b466ca5061a9c7ad17d8f accessed 3 December 2018.
[1567] MIDP, x. More precise information on land cover and protection before the establishment of this TFCA in 2005 is possible by using the dedicated interactive map at https://arcg.is/1zjeCK. While, an interactive map of the key conservation areas and natural sites of the KAZA TFCA is available at https://www.kavangozambezi.org/index.php/en/information/maps-and-directions. Both accessed 3 December 2018.
[1568] One of these sites is transboundary, the Mosi-oa-Tunya/Victoria Falls between Zambia and Zimbabwe, the other two are Tsodilo Hills and the Okavango Delta, both located in Botswana.
[1569] For example, the African wild dog, lion, cheetah, buffalo, hippopotamus, lechwe, roan, sable, eland, zebra, wildebeest, waterbuck, puku, and sitatunga. Further information at https://www.kavangozambezi.org/index.php/en/information/kaza-conservation-area accessed 3 December 2018.
[1570] According to the MIDP, the TFCA has a population of 2,677,086 and a population density of 5.15 pp km^2.
[1571] MIDP, 9.

expanding.[1572] Communities are increasingly involved in TFCA-related activities, and conservation is becoming a more viable land-use option.

The creation of the KAZA TFCA has been possible thanks to external funds,[1573] its founding Treaty was signed on 18 August 2011 during the SADC Summit in Luanda, Angola.[1574] KAZA is the first SADC TFCA endowed with a Secretariat with a coordinating role. Although created recently in comparison to other TFCAs, its institutional structure is well developed and fully operational, and a Master Integrated Development Plan (MIDP) is in place.[1575]

7.2.1 The KAZA legal and policy framework

The establishment of the KAZA TFCA arose from the idea that cooperating to jointly manage natural and cultural resources that straddle international boundaries provides benefits and contributes to the social and economic development of Partner Countries.[1576] For this purpose, the primary aim of the KAZA TFCA is to harmonise policies, strategies, and practices for managing transboundary resources shared between the five Partner Countries and deriving equitable socio-economic benefits from their sustainable use.[1577]

The inclination towards decentralised international cooperation is inherent to the KAZA project and emerges already from its Treaty. In fact, the Preamble recognises that local communities, NGOs, the private sector and academia can play a primary role in the

[1572] MIDP, xi.
[1573] For further information see the dedicated page on the KAZA TFCA website https://www.kavangozambezi.org/en/about/donors, accessed 29 November 2018. During the first phase, external funds were meant to support the establishment of this TFCA and its institutional structure, while more recently are focusing on supporting local communities' livelihoods. In this regard see https://www.kavangozambezi.org/en/events-public/item/29-collaborative-partnerships-boosts-conservation-efforts-in-kaza-germany-is-committed-to-providing-financial-and-technical-support-to-kaza accessed 3 December 2018.
[1574] Treaty on the establishment of the Kavango Zambezi Transfrontier Conservation Area (Luanda) 18 August 2011. Available at https://tfcaportal.org/kaza-tfca-treaty accessed 01 January 2019. Hereinafter, KAZA TFCA Treaty. The reconstruction of the key stages of cooperation is based on information available in the KAZA TFCA MIDP.
[1575] Information on the milestones achieved by the KAZA TFCA since its establishment at https://www.kavangozambezi.org/en/about/milestones accessed 3 December 2018.
[1576] KAZA TFCA Treaty, Preamble.
[1577] KAZA TFCA Treaty, Article 2(1).

conservation and management of natural resources. For this reason, Article 5(1)(g) requires the creation of *ad hoc* forums[1578] to strengthen stakeholder participation, especially in the planning phase. The practical implications of this provision emerged during interviews in the field. So-called 'stakeholder forums' aim to formalise existing groups of discussion that gather all relevant actors at grassroots level, including local communities. The KAZA Secretariat is working on the creation of these forums and on effective participative procedures.[1579]

Furthermore, the importance of local communities and their cultural heritage is indirectly recognised and strengthened through Article 5(1)(f), which includes traditional knowledge in the precautionary approach.[1580] This innovative reading of the precautionary approach broadens its scope and might entail the consultation of local communities when decisions are taken.[1581] Arguably, both provisions contribute to enhance the participation of local communities and make it effective within the KAZA TFCA that, by its construction, has a cross-border dimension and is purposely meant to ensure the joint conservation and sustainable management of shared natural resources and spaces.

To understand what 'effective participation' means in the context of KAZA, it is useful referring to the *Endorois* case.[1582] According to this case, the community must be able to influence the outcome of a decision.[1583] To this end, the community must be granted an equal bargaining position that is based on a clear understanding of the issues at stake and the

[1578] The plural form 'forums' is here preferred to 'fora' since it is used in both the KAZA and GL TFCAs.
[1579] Interview with Morris Mtsambiwa, Kasane (Botswana), 11 October 2016. Interview 3 in Annex I; hereinafter, Morris Mtsambiwa, 11 October 2011.
[1580] The precautionary principle is reflected in Principle 15 of the Rio Declaration. For further details on the precautionary principle/approach see Meinhard Schröder, 'Precautionary Approach/Principle', *Max Planck Encyclopedia of Public International Law* (online ed, 2014).
[1581] WD Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC' (Doctoral Dissertation, North-West University 2015) 232.
[1582] For a brief summary of the case, refer to para 1 'The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (G), on behalf of the Endorois Community. … The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.' Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya, ACHPR 276/2003, 25 November 2009, available at http://www.achpr.org/communications/decision/276.03/ accessed 29 November 2018
[1583] In particular, the African Commission maintained that informing the affected community of an impending project as a *fait accompli* does not leave any space for the community to influence the outcome. See *Endorois* case, para 281.

consequences of any decision.[1584] Effective participation corresponds to the State duty to actively consult the community in good faith and through culturally appropriate procedures, that is to say according to their customs and traditions.[1585]

Interestingly, Article 3 clarifies that the KAZA TFCA is an international organisation with legal personality,[1586] thus having the ability to enter into contract, acquire or dispose of property, and sue and be sued. It has been argued that this provision not only creates accountability for the KAZA TFCA, but also – indirectly – for its Member States. On this basis, all interested and affected stakeholders, including local communities, can litigate against the KAZA TFCA to uphold their rights, recognised by this Treaty or their national jurisdictions, against a non-compliant Partner State[1587] or KAZA governance officials.[1588] Arguably, local communities can acquire legal standing towards any KAZA State or body based on this provision, which consequently strengthens their role not only within the KAZA system, but more generally at the international level.[1589]

A privileged focus on cross-border conservation and the role of local communities emerges also from the objectives of the KAZA, which includes the maintenance and management of 'shared natural and cultural heritage resources and biodiversity of the KAZA TFCA to support

[1584] According to the African Commission, illiteracy and a different understanding of property use and ownership affected the position of the Endorois community that failed to grasp the impact of permanent eviction from their land and behaved accordingly. The community attitude demonstrates the inadequacy of the consultation undertaken by the Kenyan State. 'It was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community'. *Endorois* case, para 282.

[1585] The decision does not provide further details on what culturally appropriate procedures means. Accepting and disseminating information, and maintaining constant communication are instrumental to proper consultation. *Endorois* case, para 289. According to Lubbe, this 'unique African interpretation of what effective participation entails' should not only be applied in the KAZA Treaty, but can also serve to define participation in relation to transfrontier biodiversity conservation in other contexts. Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC', *cit.*, (n 1581) 233. The participation of local communities in conservation initiatives is discussed in Chapter 2, including in transboundary context. See Sections 2.8.1 and 2.8.2.

[1586] The legal personality of an international organisation cannot be taken for granted, it has to be expressly recognised in the founding instrument of the relevant organisation or can be derived from its characteristics. On the point see the ICJ Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations (1949), 178-180. This issue is also addressed in Chapter 2 Section 2.2.2.

[1587] KAZA Member States are responsible for the implementation of the provisions of this Treaty (Article 7) as well as for national and local level programmes of the TFCA through National Committees (Article 15(3)(a)).

[1588] On this point see Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC', *cit.*, (n 1581) 230.

[1589] On the *locus standi* of individuals and groups see also the discussion developed in Chapter 2, Sections 2.5 and 2.9.

healthy and viable populations of wildlife species'.[1590] In identifying four different biodiversity components,[1591] the formulation of this objective reflects the fragmentation of existing law and policy instruments. Nevertheless, the TFCA offers a suitable instrument for the integrated governance of all relevant biodiversity components.[1592] In the context of KAZA, connectivity should be promoted by a network of protected areas linked through corridors,[1593] in line with one of the primary aims of transfrontier conservation initiatives, that is to maintain large-scale ecological processes.[1594]

The promotion of tourism across international borders is key in this TFCA[1595] since this sector can offer new economic opportunities through public-private-community partnership, private investments, and regional economic integration. These opportunities are all potentially useful for improving the livelihoods of local communities and contributing to poverty reduction. The empowerment of local stakeholders can be further achieved through capacity building[1596] as well as by sharing experience and expertise across borders: indigenous knowledge is a primary component of this exchange.[1597] The achievement of all these objectives can be facilitated by the harmonisation of legislation and policies relating to the protection and sustainable use of natural resources.[1598] However, the Treaty does not contain any substantive guidance on how to achieve harmonisation in practical terms and a 2013 policy harmonisation review confirmed wide differences in terms of natural resources conservation and management frameworks among the five Partner Countries.[1599]

[1590] KAZA TFCA Treaty, Article 6.
[1591] Namely, natural resources, cultural resources, biodiversity, and wildlife species. In this provision biodiversity is seen as something different from natural resources, while in the definition of natural resources (Article 1) is arguably seen as a part of them.
[1592] Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC', *cit.*, (n 1581) 233.
[1593] KAZA TFCA Treaty, Article 6(1)(b).
[1594] On protected areas and TBPAs, more generally, see Chapter 3 Sections 3.6 and 3.6.1.
[1595] KAZA TFCA Treaty, Article 6(1)(c) and (d).
[1596]KAZA TFCA Treaty, Article 6(1)(i).
[1597] KAZA TFCA Treaty, Article 6(1)(g).
[1598] This objective is foreseen in Article 6(1)(h).
[1599] MIDP, xi.

As showed in Chapter 6, the SADC legal and policy framework is supportive of the concept of decentralised international cooperation, and the TFCA mechanism itself has been conceived within this framework. The connection between SADC and the KAZA TFCA is reiterated in Article 9 affirming that the KAZA TFCA promotes the SADC vision on regional integration and contributes to poverty alleviation and management of transboundary natural resources.[1600] All established TFCAs are recognised at SADC level and based on sub-regional instruments, especially the Wildlife Protocol and TFCAs Programme.[1601] The SADC Technical Advisor for all TFCAs advises the SADC Secretariat on technical and policy matters relating to the SADC TFCA Programme and supports Member States in developing and implementing this Programme.[1602] Arguably, since SADC law and policy are directly relevant to all TFCAs in the sub-region, a functioning feedback mechanism and involvement at grassroots level – primarily through the SADC Food, Agriculture and Natural Resources Directorate – are essential to identify needs and issues to be addressed in legal and policy instruments. For example, the formulation of the SADC TFCAs Programme (2013) resulted from the difficulties and progress observed in the practice of existing TFCAs.[1603]

The MIDP represents the main policy framework for the KAZA TFCA and its Member States for the period 2015-2020. It is based on the five National Integrated Development Plans[1604] and the development needs that emerged in the context of KAZA.[1605] The MIDP aims

[1600] Article 9 foresees an agreement between SADC and the KAZA TFCA on the following points: promoting the KAZA as a legitimate regional development programme, ensuring that activities of KAZA are in line with SADC and international instruments addressing poverty alleviation and community empowerment; promoting political awareness about KAZA, and providing technical and financial assistance for its development programmes; and promoting equality and respect between KAZA countries. The existence of this agreement is uncertain. On this point see Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC', *cit.*, (n 1581) 234.

[1601] Interview with Morris Mtsambiwa, Kasane (Botswana), 12 October 2016. Interview 4 in Annex I; hereinafter, Morris Mtsambiwa, 12 October 2016.

[1602] Morris Mtsambiwa explained that this SADC position is funded by a KAZA TFCA project. Morris Mtsambiwa, 12 October 2016.

[1603] The concept of TFCAs was introduced by the Wildlife Protocol in 1999. That same year a bilateral treaty between Botswana and South Africa created the Kalagadi Transfrontier Park, the first formally established TFCA. The Wildlife Protocol is analysed in Chapter 6 Section 6.4.2.

[1604] Morris Mtsambiwa clarified that the activities that emerged as transfrontier in all the National Integrated Development Plans were later incorporated in the MIDP.

[1605] Development needs pertain to the areas of natural resources management, tourism development, infrastructure development, integrated land use planning, livelihoods enhancement, and transboundary political cooperation. MIDP, x.

to guide the development of the KAZA TFCA at regional level to achieve four main purposes. The first is to enhance sustainable conservation and management of shared natural resources. The second strengthens the first by focusing on the harmonisation[1606] of policies, strategies, and practices of such conservation and management. The third deals with developing infrastructure useful for economic integration, especially through tourism and private investments. The fourth consists in providing benefits to local communities through conservation and tourism activities.[1607] Again, ensuring transboundary conservation and benefiting local communities emerge as two priorities and arguably confirm that this TFCA provides an enabling framework for the application of decentralised international cooperation.

The Plan stresses the value of TFCAs, in general, as conservation initiatives that respond to different interests and needs. They not only provide for the conservation of species and ecosystems in protected areas, but also favour the maintenance of large-scale ecological processes[1608] by operating 'at spatial scales that extend beyond the boundaries of protected areas and international borders'.[1609] In addition, TFCAs contribute to climate change adaptation and mitigate its effects. To confirm that, the MIDP lists the main benefits deriving from TFCAs, which include 'the enhancement of socio-economic development associated with nature-based tourism, the promotion of a culture of peace and regional cooperation, and the linking of fragmented habitats to enhance the conservation of biological diversity'.[1610]

The MIDP reaffirms the KAZA TFCA vision[1611] and mission, which are complementary to that of the SADC's TFCA programme. Conservation and tourism emerge as keywords of the

[1606] The 2013 policy harmonisation review of regional and national policies emphasises the variation among the KAZA partner countries in terms of policies, legislation and practices in several fields, such as conservation and management of natural resources, tourism, conservation status of protected areas, management capacities, and land use practices. MIDP, 15.
[1607] MIDP, 4.
[1608] For example, animal migrations and seasonal movements across habitats, dispersal of plants, the carbon cycle, hydrological functioning of river basins and connected ecosystems.
[1609] MIDP, 1.
[1610] MIDP, 5.
[1611] The KAZA vision is 'To establish a world-class transfrontier conservation area and tourism destination in the Okavango and Zambezi River Basin regions of Angola, Botswana, Namibia, Zambia and Zimbabwe within the context of sustainable development'. MIDP, 3.

KAZA conservation initiative from both of them. For example, the mission statement clearly recalls some of the characterising elements of the Treaty, such as the expanded conservation scope that encompasses both natural (i.e., ecosystem) and cultural resources, the tourism vocation of the KAZA, the promotion of socio-economic development of communities and other stakeholders, and the crucial function that harmonisation can play in realising the KAZA's objectives.[1612] In this regard, the 2013 policy harmonisation review of regional and national policies has led to identifying three focus areas: natural resource management, tourism, and legal aspects dealing with the formal recognition of TFCAs and combating crime throughout the KAZA TFCA.[1613]

The Plan highlights that local communities strongly rely on the surrounding natural environment and proposes alternatives to improve their livelihoods, which are increasingly subjected to multiple threats. To this end, it foresees interventions in several sectors, including conservation agriculture, CBNRM, cultural tourism, and fishery.[1614] Tourism has a high potential, thanks to the World Heritage sites located in the TFCA, but also due to other wildlife-related tourism attractions as well as the cultural and heritage sites that reflect the rich history and diversity of communities inhabiting the KAZA.[1615] Tourism expansion is closely linked to improvements in the infrastructure system, which is patchy, antiquated, and not well maintained.[1616] Limited infrastructure also hampers socio-economic development since many areas remain unconnected and cannot benefit from tourism.

[1612] This statement reads as follows: 'To sustainably manage the Kavango Zambezi ecosystem, its heritage and cultural resources based on best conservation and tourism models for the socio-economic wellbeing of the communities and other stakeholders in and around the eco-region through harmonisation of policies, strategies and practices'. MIDP, 3.
[1613] With regard to natural resources management, harmonisation is required in relation to wildlife corridors, shared watercourses and fisheries, strategies for the conservation and management of single species; with regard to tourism, special attention has to be paid in addressing economic leakages and developing responsible tourism. MIDP, 16.
[1614] MIDP, 11.
[1615] Growth in international tourism has been registered since 1995, even if it varies from country to country, it is highly seasonal and concentrated in some areas more than others due, in part, to inherent limitations connected to the natural cycles of flooding and rainfalls. MIDP, 11.
[1616] MIDP, 13.

The development needs identified in the MIDP depend on projects that can be location specific (Wildlife Dispersal Areas Project) or have a general application within the TFCA (Support Projects).[1617] It is worth stressing that the spatial focus is determined by the realisation that some development needs are geographically specific while others are general and related to the TFCA as a whole. This aspect is particularly relevant in the context of this thesis. In fact, WDAs have been designed within the KAZA TFCA as smaller management units; arguably, they are useful frameworks for applying the concept of decentralised international cooperation.

Arguably, the MIDP is the best instrument for assessing the future trajectory of the KAZA TFCA since it builds on the Treaty and existing policy documents (like the strategic action plan and the operational framework) to transfer cooperation on a more practical level. As the MIDP shows, most of the implementing activities belong to a spatial dimension that is different from the whole KAZA TFCA. Instead, the most appropriate spatial dimension is that of WDAs that, in line with the theoretical conceptualisation of this thesis, can be defined as decentralised cooperative mechanisms.

7.2.2 The KAZA institutional structure and the key role of the Secretariat

The KAZA inclination towards decentralised international cooperation is reinforced by a positive attitude in this direction of its coordinating institutions, in particular the Executive Director and, under its guidance, the Secretariat.

[1617] The MIDP introduces two support projects: the Tourism Investment Facilitation Project and the Community Based Enterprise Development Facility. The first one is intended to maximise the tourism potential of the TFCA focusing on product diversification (in terms of space time as well as by type and price) and commercialisation of viable transboundary opportunities in order to attract more visitors and benefit the local economy. This project offers uniform and reliable mechanisms for investors that are otherwise challenged by a limited tourism product base and different national contracting and tendering procedures. A practical guide is foreseen to address major challenges and opportunities connected to transboundary tourism products. The project applies to the whole territory of the KAZA TFCA, in each WDA and area with tourism potential. Enabling factors include, first, the positive attitude of KAZA governments to be transparent on national procedures, second, community interest in being involved in tourism partnership, and third, the willingness of the private sector to share benefits. The Community Based Enterprise Development Facility project aims to address multiple challenges that affect communities living in the KAZA TFCA (e.g., employment shortage, provision of basic services, and infrastructure development) by developing a financing mechanism for community enterprise and socio-economic development opportunities in the TFCA. This would ultimately result in lifting community pressures on wildlife and surrounding ecosystems. See MIDP, 48-50.

The KAZA organisational structure is articulated over several levels of governance. The KAZA TFCA is recognised at SADC level and integrated within its structure – as all the TFCAs by way of the Wildlife Protocol.[1618] This connection is made explicit in Article 9 of the KAZA TFCA Treaty and is exemplified by the reporting obligations that the KAZA Ministerial Committees and the KAZA Secretariat have towards the SADC Ministers for Natural Resources and the Environment.

The Ministerial Committee[1619] is the highest authority and gathers the five Ministers of the KAZA Countries in environmental affairs and tourism – i.e., those responsible for the National Implementing Agents[1620] – and the Executive Director. It provides political leadership and final approval in all matters. The Coordinating Country[1621] (Chairperson) rotates every two years among the Partner States, and it is responsible for driving the planning process and expediting decision-making, convening and chairing all the meetings, and mobilising resources.[1622]

The Committee of Senior Officials[1623] (COSO) comprises the Permanent Secretaries or heads of the national Ministers, thus ensuring institutional stability despite the changes of Ministers. Among its tasks, the COSO operationalises the decisions of the Ministerial Committee into activities, guidelines, and strategies, and supervises the Joint Management Committee (JMC).[1624]

[1618] This Protocol promotes the establishment of TFCAs, hence, all TFCAs are recognised at the SADC level. For this reason, SADC is supposed to attend all the meeting of the TFCAs. Mr. Mtsabiwa highlighted that the KAZA Secretariat and the SADC Secretariat have a special relation since the former provides funds for the position of the SADC Technical Advisor for TFCAs, a post that had been vacant for some time. The focus of the Technical Advisor for TFCAs changes a lot depending on the person holding the position: in recent years, attention has been payed to the drafting of the TFCA Guidelines and the generation of revenues for the development of TFCAs, thus focusing on implementation. Regarding the SADC Wildlife Protocol, see also Chapter 6, Section 6.4.2.
[1619] KAZA TFCA Treaty, Article 11.
[1620] KAZA TFCA Treaty, Article 7.
[1621] Since the establishment of this TFCA, the Partner States holding the Coordinating Country role did not take advantage of their position, but pursued a common agenda as enshrined in the Treaty. Nevertheless, one country can be more effective than the others in holding this role depending on its location within the TFCA and problems of accessibility. To this respect, the Executive Director highlighted the difficulties of reaching Luanda to consult with the Chairperson and the need to have a translator since Angola is the only Portuguese-speaking country in the KAZA TFCA. On the other hand, he clarified that, once decisions have been taken in the official meetings and are in the implementation phase, communication via email is sufficient.
[1622] KAZA TFCA Treaty, Article 11(5).
[1623] KAZA TFCA Treaty, Article 12.
[1624] KAZA TFCA Treaty, Article 13.

The JMC is composed of two individuals for each Member State and one from the Secretariat. Here sit the directors of the national conservation agencies of the five Countries. This body is responsible for the formulation of action plans and strategy protocols for the management and development of the TFCA.[1625] Moreover, it has to ensure effective stakeholder engagement during the planning and developing phases,[1626] monitor the activities of both stakeholders and institutions in specific sectors.[1627] The JMC oversees the work of the KAZA Secretariat[1628] as well as the activities of other *ad hoc* Specialist Advisory Groups, better known as Working Groups.[1629] The creation of these advisory bodies responds to needs on the grounds and reflects the adaptive management approach used in the framework of the KAZA TFCA. In fact, by creating or dismissing working groups the KAZA can adapt its structure to the needs and challenges on the ground.

Below the JMC is located the KAZA Secretariat, which is headed by an Executive Director[1630] appointed by the Ministerial Committee and accountable to it.[1631] The Secretariat is located in Kasane (Botswana) along with the Executive Director and staff. They work in close collaboration with the five KAZA TFCA Liaison Officers[1632] and the Working Groups. The Executive Director is also called Regional Coordinator, indeed, this official has a coordination role rather than an implementation one. Implementation takes place at the Partner Countries' level, but is also coordinated by the Secretariat.[1633]

The Secretariat has several responsibilities. First of all, it leads and coordinates the daily activities of the TFCA. Moreover, it coordinates the drafting and implementation of an action

[1625] KAZA TFCA Treaty, Article 13(1)(b).
[1626] KAZA TFCA Treaty, Article 13(1)(c).
[1627] KAZA TFCA Treaty, Article 13(1)(d).
[1628] KAZA TFCA Treaty, Article 13(1)(e).
[1629] KAZA TFCA Treaty, Article 13(1)(f)
[1630] Since the 16 April 2018 the Executive Director is Nyambe Nyambe. This post was previously held by Morris Mtsambiwa who I met and interviewed during my fieldwork in the southern African region.
[1631] KAZA TFCA Treaty, Article 14(1).
[1632] There is one Liaison Officer per country, which is responsible for raising the issues coming from their respective country, thus working together with their respective governments to identify projects that need to be funded and developed under the KAZA. Morris Mtsambiwa, 11 October 2016.
[1633] For instance, if Partner Countries want to organise joint patrols, these activities will be carried out by their patrolling bodies, but coordinated by the KAZA Secretariat to ensure their successful development. Morris Mtsambiwa, 11 October 2016.

plan with the effective engagement of all the relevant stakeholders. It also has to facilitate the convening of KAZA TFCA's meetings.[1634] Therefore, the Secretariat deals with the day-to-day development of the TFCA,[1635] including the coordination of the strategic action plan,[1636] and fosters the participation of local stakeholders. In preparing meetings, the Secretariat performs activities that range from setting the venue to drafting policy documents that will be discussed by decision-makers. Although the agenda is mainly based on the needs that emerge in Partner Countries and are collected through the KAZA Liaison Officers, the Secretariat can play an important role in setting the agenda order and can also reconvene meetings on specific issues.[1637]

The role of the KAZA Secretariat is to coordinate transboundary efforts, while final decisions and implementation rests with the governments. For this purpose, each Partner Country has a National Committee and is free to determine its composition and operation.[1638] Nonetheless, the Secretariat can play an important role in facilitating the achievement of KAZA objectives. For example, harmonisation of policies is a key issue for the development of the TFCA: the Secretariat can identify the policies that need to be harmonised for carrying out certain activities and prepare draft policy documents to be discussed and decided upon by decision-makers (KAZA Partner Countries). The Secretariat coordinates also the implementation of the decisions taken in the JMC. Although the decision-makers are free to discuss the drafts prepared by the Secretariat, they are arguably guided towards certain

[1634] KAZA TFCA Treaty, Article 14.
[1635] Morris Mtsambiwa, 11 October 2016.
[1636] MIDP, 13.
[1637] Morris Mtsambiwa explained that the Ministerial Committee and the COSO meet twice a year, while the JMC meets four times a year. Two of the JMC meetings are combined with that of both the Ministers and the Senior Officials. These consequential meetings (i.e., that of the JMC, then of the COSO, and finally of the Ministerial Committee) takes a full week according to the following schedule: on Monday the JMC takes place; on Tuesday, based on the decision of the JMC, the Secretariat prepares the draft documents that have to be escalated to the upper decision level; on Wednesday the COSO meets; on Thursday the Secretariat works on the results coming from the COSO to draft documents that will be discussed the following day (Friday) in the framework of the Ministerial Committee that takes final decisions. In the context of the JMC meeting, the chairman of each Working Group can present the results of issues discussed previously in the relevant Working Group in order to feed these issues into the KAZA institutional structure. Morris Mtsambiwa, 11 October 2016.
[1638] In particular, the Committees are responsible for implementing and coordinating national and local level programmes of the TFCA as well as facilitating the effective participation of relevant stakeholders. KAZA TFCA Treaty, Article 15.

decisions. Hence, by drafting almost final documents, the Secretariat designs policies and implementation strategies for the Partner States to agree on. This activism of the Secretariat facilitates the prevalence of a transboundary logic over national interests.

Harmonisation does not necessarily happen at the level of the entire TFCA, but can also be pursued on a bilateral basis when the opportunity arises. A clear example is the KAZA UNIVISA Project, which was launched by the Governments of Zambia and Zimbabwe in order to simplify the movements of tourists between these two Countries. In this context, the facilitative role of the KAZA Secretariat was to locate the resources for the two Governments to meet and discuss the project as well as to set up the system to issue the UNIVISA.[1639] After a rollout phase, the mechanism has been ameliorated and, since the 21 December 2016, the KAZA UNIVISA can be issued on a permanent basis. Given the attention paid to regional tourism in the context of this TFCA, the idea and desire is to extend the UNIVISA to the other three KAZA Partner Countries.[1640] Arguably, this case shows that TFCAs can be laboratories for experimenting (decentralised) cooperative solutions that work for an international localised space, but can be replicated within the same TFCA, in other parts, or outside it. Therefore, the UNIVISA project provides evidence on the practical potential of decentralised international cooperation and its implications on the ground.

Another example of bilateral collaboration within the KAZA TFCA involves the navigation on the section of the Chobe River that marks the border between Botswana and Namibia. Boat operators of the two Countries have different regimes despite using the same water body: a code of conduct exists on the Botswana side,[1641] but not on the Namibian side. In

[1639] To set up a functioning system the two countries agreed on several issues, including border crossing opening times, sharing of revenues, statistics to be collected on visitors, and countries that could have access to the UNIVISA (initially forty countries, now more than sixty). Morris Mtsambiwa, 11 October 2016.

[1640] For instance, Morris Mtsambiwa explained that in order to embed the UNIVISA into the national immigration system of each country, KAZA resources were invested to enlarge or build offices and buy computers for new immigration officers. On their side, national governments had to provide the officials to sit in these offices, otherwise the UNIVISA could not be issued. This example emphasises how much implementation depends on national governments even when the Secretariat carries out all the background work and puts up all the necessary facilities. Morris Mtsambiwa, 11 October 2016. Further information on the UNIVISA is available at https://www.kavangozambezi.org/en/information/tourist-visa accessed 30 November 2018.

[1641] This code deals with issues like the maximum speed limits, the size of the engine, etc.

2016, the KAZA Secretariat organised a meeting to bring together tourist operators of both Countries operating on this river, and they agreed on having a common code of conduct for the navigation on the Chobe River. Based on the information collected in the field, a draft code was going to be prepared with the help of the Secretariat that would scale it up for approval in governments, thus filling a policy and legislative gap that exists at national level. The tourist operators participating in the meeting also agreed to cooperate on other issues such as fisheries and other land use options like hunting. This example shows that, although cross-border cooperation can be initiated at grassroots level and be relevant only for a localised portion of the TFCA and for very specific needs, it can be successively scaled up to higher governance levels. Moreover, by working together in one sector the chances to extend cooperation to other sectors increase, especially when corresponding actors across the borders are brought together to discuss similar challenges and needs. In this context, national sovereignty over natural resources fades away since the actors involved perceive the water body as the reference management unit regardless of international borders. Arguably, the concept of decentralised international cooperation becomes relevant and is applicable also in this case.

Therefore, both the UNIVISA and Chobe code of conduct show that the KAZA Secretariat can proactively identify spaces for cross-border cooperation and provide operational support for initiating decentralised cooperative processes.

7.2.3 The landscape approach and Wildlife Dispersal Areas

Figure 4: The KAZA TFCA and wildlife movements[1642]

The KAZA TFCA is said to be enormous[1643] and 'too vast to describe'.[1644] Therefore, once the wider cooperative framework has been established, implementation activities have to be conceived on a different spatial scale in order to be effective. In line with this, the MIDP has highlighted the presence of development needs that are geographically specific and require interventions at a spatial scale different from that of the whole TFCA. To this end, WDAs have been conceived as new management units operating at a 'landscape scale'.

The landscape scale is a 'large geographic scale for conservation' that enables key ecological processes (e.g., long-range migration of wildlife species),[1645] provides ecosystem

[1642] Map developed by Peace Park Foundation and available at https://www.peaceparks.org/tfcas/kavango-zambezi/ accessed 01 January 2019.
[1643] An overview of the KAZA TFCA is available at http://www.kavangozambezi.org/en/sites/default/files/Publications%20&%20Protocols%20/3.%20Overview%20of%20KAZA%20TFCA.pdf and related webpages accessed 30 November 2018.
[1644] SADC brochure on Transfrontier Conservation Areas 8.
[1645] Daniel N Laven, Nora J Mitchell and Deane Wang, 'Examining Conservation Practice at the Landscape Scale' 5, 5.

services (e.g. from provision of food and raw materials, to maintenance of biological diversity and recreational uses),[1646] and preserves the interlinkage between nature and culture that characterises a distinct area.[1647] The landscape approach complements other approaches that focus on protected areas.[1648] Indeed, a landscape encompasses protected areas that, despite being a pillar of biodiversity conservation, have become 'isolated "islands" of partial protection'.[1649] Since the extension of protected areas will be always too small to ensure the effective conservation of biodiversity, conservation-friendly practices need to be applied beyond protected areas,[1650] to adjacent areas characterised by different land uses (e.g., agriculture, forestry). Moreover, the landscape is seen as a habitat for species and communities, thus providing the possibility to address trade-offs between conservation and local livelihoods.[1651] Moreover, in a landscape context, indigenous peoples and local communities can find an appropriate planning and management scale for customary sustainable use and traditional knowledge.[1652] Therefore, the landscape can be seen as a space for the complex interactions between different spatial scales, multiple conservation and development objectives, diverse land use options and sectors, and a myriad of actors. Such a space requires coordinated and negotiated solutions.[1653]

[1646] UNEP Subsidiary Body on Scientific Technical and Technological Advice, 'Report on How to Improve Sustainable Use of Biodiversity in a Landscape Perspective.' (2011). For a definition of ecosystem services refer to Millennium Ecosystem Assessment, *Ecosystem and Human Well-Being: Synthesis, cit.*, (n 14).

[1647] The anthropogenic impact on the surrounding environment is stressed in the UNEP Report on How to Improve Sustainable Use of Biodiversity in a Landscape Perspective that says: 'At present, and even more in the future, the form and process of terrestrial ecosystem in most biomes will be predominantly anthropogenic, the product of land use and other direct human interactions with ecosystems'. The same report sees humans as a component of most ecosystems and emphasises their interest in controlling their impact on the surrounding environment in order to preserve the availability of goods and service as well as biodiversity and ecological processes. UNEP Subsidiary Body on Scientific Technical and Technological Advice, 'Report on How to Improve Sustainable Use of Biodiversity in a Landscape Perspective.', *cit.*, (n 1646) 13–14.

[1648] Jeffrey Sayer, 'Reconciling Conservation and Development: Are Landscapes the Answer?' (2009) 41 Biotropica 649.

[1649] Laven, Mitchell and Wang, 'Examining Conservation Practice at the Landscape Scale', *cit.*, (n 1645) 6.

[1650] United Nations Environment Programme Subsidiary Body on Scientific Technical and Technological Advice para. 15.

[1651] Sayer, 'Reconciling Conservation and Development: Are Landscapes the Answer?', *cit.*, (n 1648).

[1652] United Nations Environment Programme Subsidiary Body on Scientific Technical and Technological Advice para. 18.

[1653] In this regard, Sayer underlines that conservation at a landscape scale results from a process of compromise and social change that lie on setting clear conservation goals (i.e., make the trade-offs between biodiversity conservation and economic activities explicit and measurable), and investigate the alternative biodiversity scenario that benefit local economies and are endorsed by local people and long-term engagement of relevant stakeholder. In this multi-actor and multifunctional context, coordination is an essential element. Sayer, 'Reconciling Conservation and Development: Are Landscapes the Answer?', *cit.*, (n 1648). In a successive article, ten principles have been identified to guide the landscape approach in reconciling the different land uses. These are: 1) continual learning and adaptive management, 2) common concern entry point, 3) multiple scales, 4) multifunctionality, 5) multiple stakeholders, 6) negotiated and transparent change logic, 7) clarification of rights and

The KAZA TFCA meets all these characteristics: it extends over an enormous territory encompassing protected areas and other land use areas that are more or less conservation-friendly and compatible with each other. It is home to a myriad of flora and fauna species and complex ecosystems (e.g., the Okavango inland delta), but it is also characterised by urbanised and sparsely populated areas where human-wildlife conflict is very high. Therefore, the application of the landscape approach provides an opportunity to combine environmental and development goals in line with the aspiration of the KAZA TFCA Treaty.

In a TFCA, the landscape scale can cover a transboundary space and, in the case of the KAZA, it can coincide with the WDA. The geographical boundaries of WDAs have been delineated for the purpose of connecting natural protected spaces[1654] (*in primis* the 36 national parks, but also reserves, conservancies, etc.) and establishing ecological corridors that allow for the migration of wildlife species. In fact, WDAs are defined as 'a region where fauna can freely move from their birth site to their breeding site ("natal dispersal"), as well as from one breeding site to another ("breeding dispersal")'; and the 'dispersal' character identifies 'any movement that has the potential to lead to gene flow' with consequences for individual fitness, population dynamics, population genetics, and species distribution.[1655] WDAs intend to improve biodiversity conservation in close-to-nature areas devoted to different land use options. Ecological corridors are only one component of WDAs: they are designated single paths that animals follow to avoid the different land uses characterising the area (e.g., agricultural land, houses). Efforts have been made at the KAZA level to identify the directions in which wildlife moves and the range of their movements.[1656]

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responsibility, 8) participatory and user-friendly monitoring, 9) resilience, and 10) strengthened stakeholder capacity. These principles emphasise the role of local populations in the landscape context. J Sayer and others, 'Ten Principles for a Landscape Approach to Reconciling Agriculture, Conservation, and Other Competing Land Uses' (2013) 110 Proceedings of the National Academy of Sciences 8349.

[1654] In this way, WDAs give substance to Article 6 (1)(b) of the KAZA TFCA Treaty that promotes the creation of a network of protected areas linked through corridors.

[1655] See https://maps.ppf.org.za/arcgis/apps/MapJournal/index.html?appid=a541ce2645c2484cb7e9a4b86d27ea7c accessed 3 December 2018.

[1656] In this regard see the description of the six WDAs and the map tracing wildlife movements available at https://www.peaceparks.org/tfcas/kavango-zambezi/ accessed 3 December 2018.

The landscape approach reserves a primary role to people.[1657] In fact, in the KAZA context, local stakeholders contribute to defining the boundaries of WDAs[1658] since they interact with wildlife on the ground and know their movements within their area.[1659] In this sense, local stakeholders can be a unique source of first-hand information. Nevertheless, these mapping efforts on the ground need to be refined at governmental level and gazetted[1660] as a WDA, so that sharing countries harmonise the use of that area by law.[1661] Once the WDA has been gazetted it becomes the new management unit for the countries involved, so they can work together in pursuing the TFCA objectives.

The input to initiate the process to gazette a potential WDA comes from the KAZA Secretariat. Arguably, such activism proves that the KAZA Secretariat, operating at a transfrontier level, influences national law and shapes conservation spaces beyond national borders. WDAs represent a space for integrated management and, therefore, require the application of the ecosystem approach.[1662] The interests of the multiple sectors and stakeholders operating or inhabiting the WDAs can be negotiated within the stakeholder forums that provide space for participative decision-making processes. In this complex context, the KAZA

[1657] Sayer and others, 'Ten Principles for a Landscape Approach to Reconciling Agriculture, Conservation, and Other Competing Land Uses', *cit.*, (n 1653) para 8355.

[1658] In this regard, the KAZA Secretariat asks to each country, through the KAZA Liaison Officer, to identify all the relevant stakeholders to be involved in the mapping exercise: NGOs, academia, border police, local communities, etc. The mapping exercises are carried out in each country and the resulting (national) maps are later integrated by the Secretariat to reconstruct the borders of a WDA. These borders are then analysed and approved by national governments, so that the WDA is legally recognised in all relevant countries and no one can change the land use arbitrarily from what has been agreed. Morris Mtsambiwa recalled one of these stakeholder meetings organised in Zimbabwe: he emphasised the presence of a varied range of stakeholders and the lively participation of local communities, who were also providing detail on existing land uses and discussing the main challenges in some areas. He praised this case as a successful example of stakeholder forum. Morris Mtsambiwa, 11 October 2016.

[1659] For instance, this exercise was developed in the case of the Kwando River Dispersal Area. MIDP, 23.

[1660] The alignment between landscape zoning and national legislation is essential for the integration of landscape into broader conservation and development strategies. UNEP Subsidiary Body on Scientific Technical and Technological Advice, 'Report on How to Improve Sustainable Use of Biodiversity in a Landscape Perspective.', *cit.*, (n 1646) 9. This is even more so in a transboundary context where national interests and development plans can conflict with each other. In the context of the KAZA TFCA, the WDAs – i.e., the landscapes – are already integrated in a wider cooperative conservation and development framework. Hence, States have to define the boundaries of WDAs as they have been defining the boundaries of the whole TFCA.

[1661] Morris Mtsambiwa, 11 October 2016.

[1662] Morris Mtsambiwa, 11 October 2016. The UNEP Report on How to Improve Sustainable Use of Biodiversity in a Landscape Perspective identifies the ecosystem approach as the main implementation tool at the landscape level since the latter combines different ecosystems. Hence, the guidelines and principles of the ecosystem approach are applicable to the landscape context. Regarding the ecosystem approach and its application to transboundary natural resources see Chapter 2 Section 2.7.

Secretariat operates as a coordinator, thus rebalancing the limited capacity that conservation agencies usually have in influencing broad development processes.[1663] The KAZA Secretariat is empowered to do so by the Treaty.[1664]

WDAs pursue more than conservation by promoting socio-economic objectives in the tourism sector. WDAs exemplify the idea of decentralised international cooperation proposed in this thesis since they represent a transboundary management unit whose geographical boundaries do not coincide with those of the Partner States nor of the TFCA. The delineation of a WDA follows an ecological logic by connecting core protected areas with each other, while taking into account land use options that are in between parks in order to avoid ecosystem fragmentation. It also respects cultural interlinkages by merging territories that have been similarly shaped by the presence of local communities, and responds to socio-economic criteria by encompassing areas with geographically specific development needs. Therefore, WDAs follow an *international* logic since Partner Countries retain final powers, define the boundaries of these decentralised management units, and are responsible for implementation. Nonetheless, they focus on localised interests and allow for the participation of local stakeholders, inhabiting or operating in the area. In this sense, WDAs manifest their *decentralised* character and can be characterised as decentralised cooperative mechanisms, as intended in this thesis. In a WDA cooperation is adapted to territorial specificities: the objectives pursued and the activities performed are more appropriate to this new space.

At the time of my fieldwork, WDAs were in a preliminary phase, their conceptual development and the mapping exercise to define their territorial scope were ongoing. The MIDP

[1663] According to Sayer, this is one of the main shortfalls of conservation institutions in the developing world. Sayer, 'Reconciling Conservation and Development: Are Landscapes the Answer?', *cit.*, (n 1648) para 651.

[1664] Article 14(4)(a) recognises that the Secretariat is responsible to 'drive and coordinate the daily activities associated with the planning and development of the KAZA TFCA', while paragraph (c) of the same article foresees its responsibility to 'coordinate the drafting and implementation of an effective action plan for achieving the objectives of the KAZA TFCA, with full participation of the relevant stakeholder'. Therefore, this role has to be performed by the Secretariat also in the context of WDAs.

identifies six WDAs.[1665] They are all transboundary and the countries involved in each WDA depend on the section of territory considered, but there are parts of the TFCA territory that are not included in any of them. In some cases, transboundary cooperation at the landscape level[1666] or joint institutional arrangements[1667] predate the establishment of the WDA. More recent information available on the KAZA TFCA website describes in detail three WDAs: the Zambezi-Chobe Floodplain WDA, the Kwando WDA, and the Hwange-Kazuma-Chobe WDA.[1668] It is expected that KAZA institutions are working to advance the formal establishment of the remaining TFCAs WDAs and improve their operational value.

The creation of WDAs arguably demonstrates that the KAZA TFCA provides the opportunity to build on successful decentralised cooperative results – that is to say, pursued at a landscape level – especially thanks to the presence of the KAZA Secretariat. In fact, the Secretariat promotes a transfrontier logic and expedites inter-State cooperation that, otherwise, would be hindered by the bureaucratic slowness characterising many countries in southern Africa. The active role played by the KAZA Secretariat can be seen as an unintended consequence of the creation of the KAZA TFCA. This TFCA is the first endowed with a Secretariat and its potential dynamism might have been underestimated by the KAZA Partner Countries.

The fact that decentralised international cooperation is supplemental and not alternative to the traditional idea of international cooperation has emerged also from the views expressed by the former Executive Director during the interview. In fact, Morris Mtsambiwa constantly

[1665] The six WDAs are: the Kwando River WDA (encompassing territories of Angola, Botswana, Namibia and Zambia); the Zambezi-Chobe floodplain WDA (crossing four international borders: Botswana, Namibia, Zambia and Zimbabwe); the Zambezi-Mosi-oa-Tunya WDA (shared by Zambia and Zimbabwe); the Hwangue-Kazuma-Chobe WDA (lying between Botswana and Zimbabwe); the Hwangw-Makgadiki-Nxai Pan WDA (also shared by Botswana and Zimbabwe); and the Khandum-Ngamiland WDA (straddling Angola, Botswana and Namibia). For further details on each WDA refer to the MIDP.
[1666] For example, this is the case of the Kwando River WDA.
[1667] The Zambezi Watercourse Commission (ZAMCOM) – that gathers the five KAZA TFCA countries plus Malawi, Mozambique and Tanzania – operates in the Kwando River WDA, Zambezi-Chobe floodplain WDA and Zambezi-Mosi-oa-Tunya WDA.
[1668] The WDAs' dedicated section of the KAZA TFCA website provides details regarding their conservation status, stakeholders involved in specific projects, activities performed and key challenges to be addressed in each of them. See https://maps.ppf.org.za/arcgis/apps/MapJournal/index.html?appid=a541ce2645c2484cb7e9a4b86d27ea7c accessed 4 December 2018.

reiterated the importance of States in agreeing to jointly manage shared natural resources since they exercise sovereignty over them. However, once their authorisation is granted, the Secretariat aims to pursue transboundary cooperation by bringing all the relevant stakeholders onto the stage, local communities *in primis*. Arguably, the integration of the international – i.e., inter-State – and local dimensions confirms the relevance of the concept of decentralised international cooperation and its potential if applied within the KAZA TFCA.

7.2.4 The participation of local actors in the KAZA TFCA[1669]

The participation of sub-national or local actors in cross-border instances is at the core of the concept of decentralised international cooperation proposed in this thesis. In the KAZA TFCA, such participation is promoted through the Transboundary Natural Resources Management Forum and the WDAs' Stakeholder Forums.

The significance of stakeholder engagement emerges from the Treaty itself, which empowers the Secretariat to this end[1670] and auspicates the creation of appropriate structures to ensure this result.[1671] In this context, a Working Group has been created to deal with stakeholders' involvement in the KAZA TFCA and the Secretariat has come up with an overall stakeholder engagement strategy. Various projects are already in place to promote the economic growth and development of local communities in the framework of the Community Development Programme.[1672]

Theoretically speaking, the number of stakeholders to be involved in a specific issue depends on the land uses found in the area under consideration while trying to create linkages between the parks and other protected natural spaces. For example, these can be park authorities in the case of parks, forest commissions for forest reserves, farmers and communities when

[1669] The content of this paragraph is based on the interview with Morris Mtsambiwa, 11 October 2016.
[1670] KAZA TFCA Treaty, Article 14(4)(c).
[1671] KAZA TFCA Treaty, Article 5(1)(g).
[1672] See https://maps.ppf.org.za/arcgis/apps/MapJournal/index.html?appid=8b0641d0a6f94483977b518cd8294a14 accessed 4 December 2018.

agriculture is the main activity in the area, and the private sector where tourism development is present. Non-State actors are very important stakeholders, especially during the planning phase and for endorsing negotiated decisions. The views of the different stakeholders are supposed to be represented within the management plans. Once these plans have been endorsed by all relevant stakeholders, they have to be approved by KAZA institutions and then implemented by the relevant government agencies responsible for the issue.

According to the information gathered in the field in October 2016, the structures for stakeholder engagement had been already established and their involvement achieved mainly at national and regional levels. Nevertheless, the Secretariat was working to expand participation by integrating new stakeholders, especially local communities, also at cross-border level in the framework of the landscape scale. For this purpose, the original idea was to duplicate the JMC at the bottom level, but this would have implied the participation of all actors in the management phase, whereas their involvement is seen as essential in the planning phase and the endorsement of plans. This concern has led to envision a platform or a forum in which stakeholders can meet and ensure that their interests are taken into consideration within each specific WDA, the 'stakeholder forum'.[1673] It is worth adding that, when it comes to implementation, people that live in the area can only participate in supporting activities.[1674]

[1673] Morris Mtsambiwa, 11 October 2016.

[1674] Morris Mtsambiwa provided two examples to clarify the extent of participation possible in the context of law enforcement, and tourism and development. On the one hand, law enforcement implies the carrying of firearms which can be done only by somebody with the authority to do so, especially when crossing the border – as can happen in the context of the KAZA TFCA – with the explicit authorisation of the national governments involved. Therefore, people cannot fight poachers directly. On the other hand, law enforcement is also based on intelligence gathering: people inhabiting a specific area can provide intelligence to the relevant authorities who can take action based on the information gathered on the ground. Hence, actors living in areas subject to joint law enforcement activities can participate in their planning and might have a supporting role in the implementation phase depending on the activity considered. As for tourism and development, local people and interested stakeholders can participate in identifying shared projects and, once these are approved, participate directly to their implementation since there is room for their involvement, for example as employees in tourist lodges, as food producers for the tourism market, or as tourist guides. Some countries foresee the involvement of local communities also in the context of wildlife management. For example, in Namibia, local communities own conservancies, hence, they are empowered to decide, manage, and use wildlife – there are community rangers – but with the authorisation of the Namibian government that issues the relevant permits for people to utilise the wildlife they are looking after.

Moreover, the level of participation of stakeholders differs from sector to sector and varies from country to country.[1675]

In October 2016, the former Executive Director characterised this participatory platform as 'Stakeholder Forum' and explained that they were envisioned in the framework of the WDAs. Possibly, the stakeholder forums established in each WDA form the Transboundary Natural Resources Management Forum that enable the involvement of local communities at the TFCA level.[1676] As already noticed, the formal recognition of participatory platforms is foreseen in the Treaty.[1677] Morris Mtsambiwa explained that, informally, stakeholder forums already exist in some cases and participate in the life of the KAZA; for example, they participated in the WDAs' mapping exercises.[1678] However, as far as they remain informal, they are only loose associations of stakeholders rather than legal entities. With the formal establishment of WDAs, these forums are meant to gather relevant stakeholders belonging to various sectors and operating in or inhabiting the WDAs. Their formal recognition by the relevant countries is needed to give them a role in the decision-making phase and beyond that when possible. Since each forum operates in a cross-border context – i.e., that of the WDA – each Partner Country should facilitate the participation of its national stakeholders under the coordination of the KAZA Liaison Officer.

This case study shows that the existence of a TFCA indirectly influences the management of wildlife in individual countries and addresses policies and legislative gaps at the national level. The facilitative role of the KAZA Secretariat can be characterised as active coordination since the Secretariat seizes any opportunity to promote the transfrontier logic and advance

[1675] For example, in some countries people are allowed to hunt wildlife through hunting quotas – always within the limits established by international conventions. In other countries, like Botswana, it was possible to hunt, but the law changed and communities cannot do it anymore. Anyway, hunting can take place on private land.
[1676] This Forum is mentioned in the KAZA TFCA institutional website as the main mechanism to facilitate community participation. See the Section on Partners and Stakeholders available at https://www.kavangozambezi.org/en/ accessed 20 December 2018.
[1677] KAZA TFCA Treaty, Article 5(1)(g).
[1678] Morris Mtsambiwa, 11 October 2016. A preliminary identification of these forums (in 2015) is available at http://www.nacso.org.na/resources/tbnrm-forums-map-2015 accessed 4 December 2018.

transfrontier interests over national ones. In this sense, the KAZA Secretariat moves from the theory of transfrontier conservation area to actual transfrontier action and *de facto* supports the application of decentralised international cooperation in this TFCA.

7.3 The Great Limpopo Transfrontier Conservation Area – Case Study 4

The GLTFCA crosses three international boundaries (Mozambique, South Africa, and Zimbabwe), covers almost 100.000 km and embraces a core area of protection of about 37,572 square kilometres that is the Great Limpopo Transfrontier Park (GLTP). The GLTP represents the first step in the cross-border conservation process of these three Countries and was formally established by a treaty signed on 9 December 2002 at Xai-Xai, Mozambique.[1679] The Transfrontier Park joins together some of the most established wildlife areas – the Kruger National Park dates back to 1898 – with more recent protected areas such as the Limpopo National Park, which was proclaimed in 2001 and was formerly known as the Coutada 16, a hunting concession area.[1680]

The GLTP is traversed by four main river systems: the Limpopo, the Olifants, the Save, and the Komati. It is characterised by different vegetation types and has abundant wildlife animal and plant species, including the iconic African big game species. Wildlife crime, especially rhino poaching, has reached alarming rates in recent years. To contain these threats joint anti-poaching activities are developed in key areas, and an MOU on Biodiversity Conservation and Management was signed by Mozambique and South Africa in 2014.[1681] Human presence in the GLTP is unbalanced: while the Kruger and Gonarezhou National Parks

[1679] Treaty between the Government of the Republic of Mozambique, the Government of South Africa and the Government of Zimbabwe on the Establishment of the Great Limpopo Transfrontier Park (Xai-Xai) 9 December 2002. Hereinafter, GLTP Treaty. A copy of this Treaty was provided by the International Coordinator of the GLTP/GLTFCA and is in file with the author.

[1680] The Transfrontier Park is formed by the Limpopo National Park in Mozambique, the Kruger National Park and Makuleke region in South Africa, and in Zimbabwe the Gonarezhou National Park as well as the Malipati Safari Area, the Manjinji Pan Sanctuary and the Sengwe communal land constituting the biodiversity corridor between the Gonarezhou and the Kruger.

[1681] For a general overview of the GLTP and GLTFCA refer to the SADC brochure on Transfrontier Conservation Area 6-7, and the dedicated website http://www.greatlimpopo.org/, accessed 17 March 2017.

do not host human settlements, local communities are still located in the core areas of the Limpopo National Park. A voluntary resettlement programme has begun in the Limpopo to move these communities to buffer zones.[1682]

The GLTFCA, instead, expands beyond the GLTP to encompass also rural, peri-urban and urban areas. The heart of this cross-border conservation initiative is the Pafuri area, where the three Countries converge and two Shangaan clans, the Makuleke and the Sengwe, maintain traditional rules and practices across borders. Hence, this is a focus area for the institutional reform and application of the livelihoods diversification strategy that are being developed in this TFCA. This institutional reform arguably reflects the utility of decentralised international cooperation in the GLTFCA and facilitates its application.

7.3.1 The GLTP Treaty and the GLTFCA

Article 3 of the GLTP Treaty identifies the areas comprised in the Transfrontier Park[1683] and those contained within the TFCA.[1684] Therefore, the Treaty provides for the establishment of both the GLTP and the GLTFCA. In 2017, the GLTFCA was extended for the first time on the Mozambican side to include the Greater Lebombo Conservancy.[1685] More recently, on 5 December 2018, a cooperative agreement expanded this TFCA on the South African side adjoining the Greater Kruger area. This agreement was signed between SANParks and the conservation areas located on the western border of the Kruger Park and including communal areas, state and private reserves.[1686] A similar process is expected to be realised in the future

[1682] This is a procedurally complex and slow process. As of December 2018, it is still ongoing and is expected to be completed by 2021. Skype interview with Piet Theron, International Coordinator of the GLTP/GLTFCA, 14 December 2018. Interview 9 in Annex I; hereinafter, Piet Theron, 14 December 2018.
[1683] GLTP Treaty, Article 3(1). This is also referred as the 'core area' in the GLTFCA cooperative project. Interview with Piet Theron, International Coordinator of the GLTFCA, Johannesburg (South Africa), 28 October 2016. Interview 8 in Annex I; hereinafter, Piet Theron, 28 October 2016.
[1684] GLTP Treaty, Article 3(2).
[1685] This Conservancy has been formally established on 22 February 2016 through an MOU signed between ANAC and Licoturismo (an association of the independent concession holders constituting the Greater Lebombo Conservancy). This is the first privately-owned area to be included in the TFCA and an important component of the largest rhino refuge area in southern Africa. See https://www.peaceparks.org/expanding-great-limpopo/ accessed 3 December 2018.
[1686] Piet Theron, 14 December 2018. A digital copy of this agreement is in file with the author.

for a group of privately-owned areas located in Mozambique and bordering the Gonarezhou National Park (Zimbabwe).[1687]

In the GLTP/GLTFCA, cooperation aims to facilitate ecosystem management across borders in order to enhance ecosystem integrity and natural ecological processes. It also pursues the development of ecotourism, and the exchange of technical, scientific and legal information for jointly managing shared ecosystems. The private sector, local communities, and NGOs have to be involved in the appropriate management of natural resources.[1688] Arguably, also in this TFCA the two main elements of decentralised international cooperation emerge already from its founding treaty. These are the transboundary dimension of nature conservation and the involvement of non-State actors, *in primis* local communities.

The Treaty recognises the principles of sovereign equality and territorial integrity of Partner States in both the Preamble and its substantive provisions.[1689] The development and management of the Transfrontier Park have to respect regional and international law[1690] and is guided by a Joint Management Plan.[1691] A Plan was drafted in 2002, but never updated. A new Plan should be drafted in 2019 and other strategy documents are now guiding the advancement of cooperation in the Great Limpopo.

The Treaty establishes an organisational structure[1692] that consists of a Ministerial Committee, which is responsible for the overall policy guidance,[1693] a Joint Management Board with implementation tasks,[1694] a Coordinating Party,[1695] and other technical/advisory bodies that can be established depending on the needs on the ground. However, the implementation

[1687] Piet Theron, 14 December 2018.
[1688] Article 4 of the GLTP Treaty lists the objectives of cooperation.
[1689] GLTP Treaty, Article 5. Moreover, Article 7(4) reiterates border integrity by saying that 'each Party undertakes to respect sovereign rights of a bordering Party and do not allow its officials to cross into a bordering Part's territory, unless previously agreed'.
[1690] GLTP Treaty, Article 5(3).
[1691] GLTP Treaty, Article 6.
[1692] GLTP Treaty, Article 9.
[1693] GLTP Treaty, Article 10.
[1694] GLTP Treaty, Article 11.
[1695] GLTP Treaty, Article 12.

deficit that has characterised cooperation in the Great Limpopo since its creation has led to an institutional reform that is ongoing.

Although the Treaty defines the GLTP and GLTFCA as two distinct but overlapping geographical and conservation spaces and is silent on how to structure cooperation in the TFCA, it can be argued that the objectives, management principles, and institutional structures provided for the Transfrontier Park are applicable to the TFCA as well. Therefore, the present analysis focuses on the GLTFCA since the GLTP is contained within it.[1696] The need to consider the wider GLTFCA space is reiterated in the policy documents that are guiding the institutional reform and the development of the integrated livelihoods diversification strategy. Possibly, a distinction will eventually emerge in terms of conservation objectives to be pursued within the Transfrontier Park and the responsible management authorities. Arguably, this difference should be highlighted in the Joint Management Plan when it will be drafted.

A preliminary comparison with the KAZA TFCA Treaty shows that the GLTP Treaty is more concise in terms of cooperation objectives and guiding principles, and has a simpler institutional structure. The cooperative experiment in the Great Limpopo is older than that in the Kavango Zambezi, and the area covered by the GLTFCA is far smaller than that encompassed by the KAZA TFCA. Arguably, the institutional architecture and functioning of the KAZA TFCA has benefitted from previous experiences.[1697] For instance, the creation of the

[1696] The actors interviewed in the Great Limpopo were all referring to the GLTFCA – not to the GLTP – as the main cooperative conservation framework, except for the local leaders of two villages (Chibotane and Mavodze) located in the Limpopo National Park who were explaining their relations with the authorities of this National Park.

[1697] TFCAs have been introduced by the SADC Wildlife Protocol in 1999, and their conception has been further developed by the 2001 IUCN publication 'Transboundary Protected Areas for Peace and Cooperation'. See, respectively, Chapter 6 Section 6.4.2 and Chapter 3 Section 3.6.1. While, the GLTP Treaty was signed in 2002, based on theory rather than practice, the KAZA TFCA Treaty was concluded in 2010. The latter represents the culmination of a cooperative process initiated in 2003 with the commitment of the KAZA Tourism Ministers to create a TFCA and reiterated by the 2006 MOU signed by the Ministers of environmental affairs and tourism, which laid the foundation for the negotiation of a treaty. Moreover, the KAZA TFCA has benefitted from the lessons learned in older SADC TFCAs and addressed potential pitfalls, like the implementation deficit in the GLTFCA that was resolved by creating the KAZA Secretariat. Lubbe highlights that the principles entrenched in the GLTP Treaty are fewer and less substantial than those included in the KAZA Treaty. This aspect shows that the former is more exposed to political compromise and follows the logic of territorial sovereignty rather than a transfrontier logic. Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC', *cit.*, (n 1581) 256.

KAZA Secretariat can be seen in this perspective as well as the numerous provisions of the KAZA TFCA Treaty dealing with effective stakeholder engagement.

The implementation shortcomings that have emerged over the years in the GLTFCA are being addressed through a process of reform focusing on institutional, participative, and security aspects. In this regard, the current International Coordinator, Piet Theron, highlighted that the GLTFCA is undergoing a 'policy shift' towards *decentralisation* in order to empower people and increase their sense of ownership of locally-implemented projects.[1698] In this context, it can be argued that the concept of decentralised international cooperation is not only relevant in the GLTFCA, but is actually shaping the ongoing reform.

7.3.2 The institutional reform

The institutional architecture of the TFCA is being reformed to 'make it more implementation-based and decentralised'.[1699] For this purpose, the new structure counts with three major developments. First, the role of the Joint Management Board[1700] is revised with a focus on policy development, advocacy, and enhanced guidance of the cross-border cooperative initiative. Second, under this Board, the establishment of decentralised Joint Park Management Committees (JPMCs) is foreseen for the effective implementation of the cooperative objectives on the ground.[1701] Moreover, the GLTFCA is going to be endowed with a permanent Secretariat.[1702]

[1698] Piet Theron, 28 October 2016. This interview has provided useful insights on the institutional and governance restructuration of the GLTFCA, including by providing documents on the institutional reform process that are not publicly available.
[1699] Piet Theron, 28 October 2016.
[1700] Its membership remains unchanged (i.e., as foreseen in the GLTP Treaty, Article 11), but its role should be expanded in comparison to what is foreseen in the GLTP Treaty in order to act as a 'Board of Directors' for the GLTP and GLTFCA. Hence, it should concentrate on policy development and implementation, advocacy, measuring progresses, lobbying and negotiating for political interventions on specific issues, measuring the overall performance of the Great Limpopo cooperation project.
[1701] 'Proposed re-engineering of the current institutional structures in order to facilitate the effective implementation and further development of the GLTFCA. Institutional Reform Strategy, 1 December 2014'. Unpublished document, a special permission to discuss the document was obtained from the International Coordinator, Piet Theron. Hereinafter, Institutional Reform Strategy.
[1702] Piet Theron, 14 December 2018.

Four JPMCs have been proposed and are under formation: three of them are bilateral, while one is trilateral.[1703] The rationale behind their creation is geographical. The JPMCs are meant to replace the existing thematic Management Committees and are responsible for the implementation of approved plans and decisions in specific areas within the TFCA, thus representing the 'implementation arm' of the Board in that areas.[1704] Each JPMC is competent for one or more 'nodal strategies'[1705] depending on its geographical scope. Hence, besides dealing with daily operational issues, each JPMC should decide on the development and management of its space with the authorisation of the Board, in line with the overall TFCA development and management strategic framework set by the Board.[1706] Therefore, JPMCs are decentralised cross-border implementation structures foreseen to enhance the cooperative governance of a defined shared natural space.

Cooperative governance has an inclusive character that is reflected in the composition of the JPMCs. Each Committee has two or three national components depending on its bilateral or trilateral nature. Each national component encompasses representatives of implementing agencies (e.g., national conservation agencies, game farm authorities, rural district councils, and local authorities), border authorities, and other actors inhabiting or operating on the geographical portion of the TFCA considered. Each JPMC should also establish a corresponding national stakeholder forum to facilitate the communication between relevant stakeholders as well as enable their participation in the implementation of the GLTFCA.[1707] JPMCs can also decide to establish permanent or *ad hoc* Sub-Committees or Task Teams

[1703] These are 'JPMC 1: bilateral committee established between game farms (Imofauna, Chefu, Mutembu, Mbalala, Kambaku, and Mogolwane) in Mozambique and GNP (Zimbabwe); JPMC 2: trilateral committee established between LNP (Mozambique), the Makuleke Area in the KNP (South Africa), and the Sengwe / Tshipise Corridor (Zimbabwe) to oversee the overall joint management and development of Pafuri Node; JPMC 3: bilateral committee established between LNP (Mozambique) and northern section (between Olifants and Levuvhu Rivers) of KNP (South Africa); and JPMC 4: bilateral committee between the Greater Lubombo Conservancy (Mozambique) and southern KNP South Africa (between the Crocodile and Olifants Rivers)'. Institutional Reform Strategy, 6.
[1704] Institutional Reform Strategy, 6.
[1705] The concepts of nodes and nodal strategies are explained in the following Section (7.3.3).
[1706] Institutional Reform Strategy, 6.
[1707] The Institutional Reform Strategy indicates the composition of each JPMC, but the actual membership has to be defined by the different partner countries.

dealing with specific topics (e.g., conservation, tourism, safety and security, and buffer area development) depending on the needs on the ground.[1708] Based on their structures, objectives and tasks, the JPMCs can be defined as decentralised cooperative mechanisms.

The implementation of the four JPMCs is underway. As of December 2018, three JPMCs are already operational: the trilateral Committee responsible for the Pafuri Node (JPMC 2),[1709] the bilateral Kruger-Limpopo Committee (JPMC 3), and the Greater Lebombo Committee (JPMC 4).[1710] The establishment of the remaining committee (JPMC 1) is subject to previous agreements between the Mozambican Government and the conservancies located in these areas.[1711]

The Pafuri JPMC is the most inclusive, due to the presence of community land falling within its territorial scope. As of December 2018, its members are: on the Zimbabwean side, the Gonarezhou Conservation Trust, two district councils, and the Sengwe Community; on the South African side, SANParks and the Makuleke Community; and for Mozambique, ANAC and a district council. In the future, community representatives will be also included on the Mozambican side. Hence, the constituency of JPMCs can vary and more stakeholders can be brought in depending on the needs and the projects to be developed according to the relevant nodal strategies. Moreover, decision-making in the JPMCs is based on *consensus*, which means

[1708] Institutional Reform Strategy, 10-11.
[1709] For simplicity JPMC 2 can be referred as the Pafuri JPMC.
[1710] Piet Theron, 14 December 2016.
[1711] Piet Theron explained the steps involved in this process. Since the TFCA is an intergovernmental programme, a representative of the private sector in Mozambique cannot directly deal with the conservation agency across the border (i.e., in South Africa) without the authorisation of the Mozambican Government. Hence, private concession areas have to be formalised into a legal entity that is the Conservancy. This entity can then sign an agreement with then national conservation agency (ANAC in the case of Mozambique), and the Mozambican Government can eventually add the Conservancy to the territorial scope of the TFCA in terms of the Treaty. After this process, the Conservancy is authorised to collaborate across borders and a JPMC can be created. It is worth reminding that, in 2017, a formal arrangement was reached for the establishment of the Greater Lebombo Conservancy and its incorporation into the GLTFCA. This step was key in expediting the creation of JPMC 4, thus formalising ongoing cross-border discussions and efforts focusing on rhino poaching. It is worth underling that hunting and ecotourism are the main activities carried out in the Conservancy. Piet Theron clarified that the Greater Lebombo Conservancy are granted protected area status as game farms. In fact, under the Mozambican conservation law, the protected area status encompasses different levels of protection (national parks, protected natural environment, game farms, etc.). Piet Theron, 28 October 2016. More recently (December 2018), this process was also followed in the case of the Greater Kruger area on the South African side of the GLTFCA. For both cases see *supra* Section 7.3.1.

that ‘members cannot vote, but have to agree’ on a specific point on the agenda before moving to the next.[1712]

Under the Pafuri JPMC, a bilateral sub-committee on wildlife crime and anti-poaching has been established between South Africa and Zimbabwe. Interestingly, this sub-committee is driven by the Kruger National Park on the South African side, while Chief Sengwe is leading the Zimbabwean component. Actually, it was the same Chief that proposed its creation.[1713] Hence, local communities living across international borders are participating directly to this decentralised cooperative mechanism, at times by driving cooperative initiatives. This case proves that the effective conservation and management of a shared natural space and the resources contained therein require the involvement of all the relevant stakeholders on the ground, and arguably represents an example of decentralised international cooperation with the active involvement of local communities.

The institutional reform discusses also the role of the International Coordinator[1714] and proposes to turn it into a permanent position that acts as a secretariat to the Joint Management Board and, if needed, increase its capacity by hiring support staff.[1715] As of December 2018, the establishment of a Secretariat is foreseen for 2019 and a design and feasibility study is being

[1712] Piet Theron, 14 December 2018.

[1713] Piet Theron, 28 October 2016. In the context of JPMCs, local communities can participate more effectively to nature conservation, including across borders. In this regard, Piet Theron provided an example relating to an anti-poaching project put in place based on the initiative of Chief Sengwe. In the framework of the bilateral sub-committee on anti-poaching, ten Sengwe people have been trained and are payed to help with law enforcement, especially for anti-poaching and cattle theft purposes, in community areas on the Zimbabwean side. While six Makuleke people have been trained on the South African side to work in the Makuleke Contractual Park incorporated within the Kruger National Park. In so doing, community people participate in law enforcement activities within the GLTFCA. Usually, anti-poaching efforts are driven by governmental agencies, but the initiative of Chief Sengwe demonstrates that actors on the ground – for being directly affected by and interested in the utilisation of natural resources – are able to identify existing challenges and willing to solve them. Therefore, local communities can take over from governmental conservation agencies where the latter do not have the means to effectively ensure conservation and sustainable management including in transboundary localised spaces. TFCAs can provide opportunities for this empowerment process.

[1714] According to the GLTP Treaty, Article 12, the International Coordinator is appointed by the Coordinating Country that rotates every two years.

[1715] Institutional Reform Strategy, 6. During the interview, Piet Theron explained that the International Coordinator works for all the three Countries on an equal basis and has reporting obligations towards both the Joint Management Board and the Coordinating Country.

developed to this end.[1716] The main focus is now on shaping an efficient and effective structure 'where the form fits the function'[1717]

Piet Theron has been holding this position since 2013 and explained how the role of the International Coordinator has changed thanks to the institutional reform and acquired a dynamic character in order to boost the GLTFCA project. In particular, based on discussions with relevant stakeholders in the three Countries, the Coordinator can identify the actions needed 'to get the project back on track and make it functional'.[1718] Beside the facilitating and coordinating role, the Coordinator can also directly initiate cooperative processes. Piet Theron explains that, when the need for a cooperative initiative arises,[1719] he usually develops a concept that is first discussed with each country individually to have a general buy-in. Then, this concept is revised thoroughly by discussing it in a bilateral or trilateral platform with the contribution of relevant stakeholders. Eventually the so-reviewed conceptual document is approved as a final strategy.[1720] This participative process is not disciplined in the GLTP Treaty, but evolved out of need. In this sense, it can be argued that needs on the grounds are shaping the evolution of this TFCA in terms of its institutional structure, implementation strategies, and governance processes. For instance, the International Coordinator indicated that, since the establishment of the GLTP/GLTFCA, each Country has a national coordinating body[1721] where TFCA issues are addressed given their cross-sectoral nature; these bodies are not explicitly foreseen in the Treaty. Nevertheless, the Treaty entitles the Joint Management Board to create any structure useful for achieving the broad cooperative objectives and complement the basic institutional set-up foreseen therein.

[1716] For instance, major issues relate to its form (if it should be a legal entity or not), where to base the headquarter, the staff required, the tasks of the International Coordinator and of other officers, etc. Piet Theron, 14 December 2018.
[1717] Piet Theron, 14 December 2018.
[1718] Piet Theron, 28 October 2016.
[1719] These initiatives encompass a wide set of topics and can influence the GLTFCA governance system, like the institutional reform and the livelihoods diversification strategy, or deal with specific aspects, including wildlife translocation, cross-border tourism development, youth and education, communication and awareness strategies, joint trainings, ethical hunting.
[1720] Piet Theron, 28 October 2016.
[1721] In Zimbabwe this is an inter-ministerial coordinating committee.

The establishment of a permanent Secretariat will also require the development of the Joint Management Plan by 2019 to guide its activities. Drafting this Plan is expected to be a 'stakeholder-intense process' and might be aligned with the design of a landscape-level elephant management strategy, which is also foreseen for 2019.[1722]

Arguably, thanks to the institutional flexibility provided in the Treaty and by responding to the needs emerging on the ground, the GLTFCA is advancing cooperation paying attention to the specificities of cross-border localised areas, thus operationalising the concept of decentralised international cooperation proposed in this thesis.

7.3.3 Decentralising cooperation: the Integrated Livelihoods Diversification Strategy

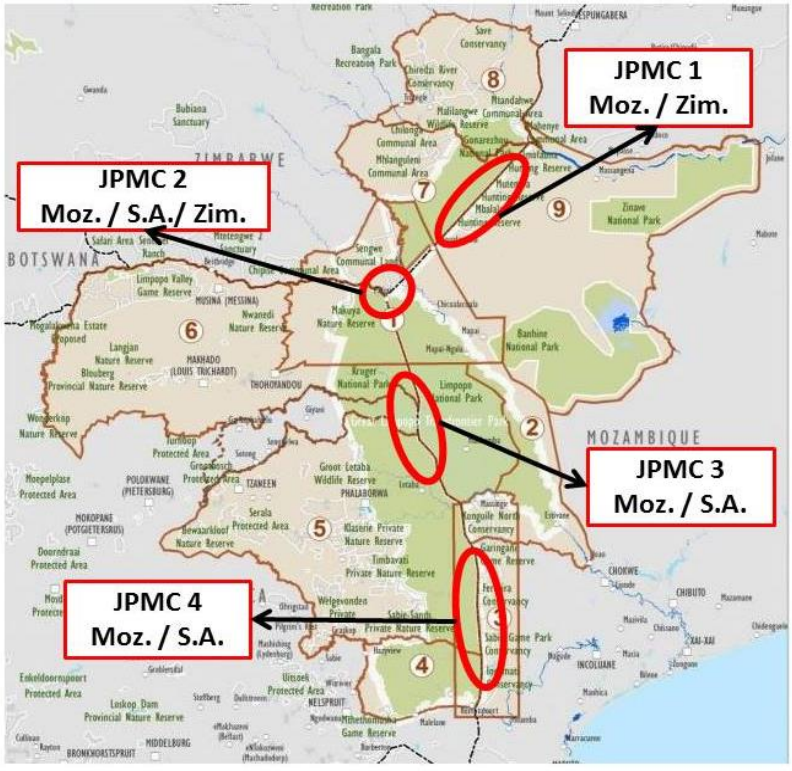

Figure 5: Nodes and JPMCs in the GLTFCA[1723]

[1722] Piet Theron, 14 December 2018.
[1723] Map developed by the Peace Park Foundation. JPMC's elaboration by Piet Theron.

The GLTFCA Integrated Livelihoods Diversification Strategy[1724] aims to enhance livelihood options in the entire TFCA. On the one hand, it establishes both a shared vision[1725] and mission,[1726] common guiding principles – including to work collaboratively across boundaries on a local, district, provincial, national and transnational level[1727] – as well as collective objectives and connected strategic goals.[1728] On the other hand, it relies on a geographically focused implementation through the establishment of 'Nodes'. These nodes are smaller spatial units that allow for a more effective and strategic management of the greater GLTFCA area. Hence, strategic priorities and implementation actions can be tailored to the needs, opportunities and risks existing in each node. Therefore, the GLTFCA Integrated Livelihoods Diversification Strategy provides the overall framework for the development of a customised nodal livelihood strategy[1729] that is called 'Conservation development framework' and includes the key interventions that would primarily benefit local communities.[1730] Arguably, in the GLTFCA, decentralised international cooperation is happening by integrating a wider cooperative vision with specific decentralised cross-border actions.

[1724] For detailed information refer to the GLTFCA: Integrated Livelihoods Diversification Strategy 2016-2030 (2016) available at https://www.greatlimpopo.org/wp-content/uploads/2016/09/GLTFCA_Integrated_Livelihood_Diversification_Strategy.pdf accessed 01 January 2019 and the dedicated page http://www.greatlimpopo.org/2016/06/livelihoods-strategy-for-gltfca-on-the-map/ accessed 23 March 2017. Hereinafter, GLTFCA Integrated Livelihoods Diversification Strategy.

[1725] The vision is 'flourishing together in harmony with nature'. The idea of flourishing implies that individuals, families, villages, communities, institutions, and countries improve their livelihoods when they achieve greater resilience, enhanced well-being and self-sustainability while protecting and restoring natural capital. Hence, development and conservation objectives are pursued in parallel, in line with the spirit of sustainable development. GLTFCA Integrated Livelihoods Diversification Strategy, 9.

[1726] The mission consists in 'becoming more responsible citizens, better neighbours and wiser stewards'. Hence, local people living within or in the vicinity of protected areas should minimise their impact on the surrounding environment and capture the positive benefits deriving from it (e.g., ecosystem services). These efforts should be supported by other stakeholders and have a long-term perspective in terms of pre-empting, mitigating, and adapting to climate change. GLTFCA Integrated Livelihoods Diversification Strategy, 10.

[1727] GLTFCA Integrated Livelihoods Diversification Strategy, 9.

[1728] Five strategic objectives form the pillars of this strategy. These include protecting and restoring natural resources that support livelihoods, enhancing the ability of local communities to capture benefits from several livelihood opportunities, empowering people to reduce their dependence from natural capital reserves, and strengthening governance capacity at community level. GLTFCA Integrated Livelihoods Diversification Strategy, 11.

[1729] The first step is to carry out a situation analysis and define a baseline from which to start. A second step consists in developing a livelihood strategy with the participation of all the interested stakeholders, including communities. In a third step, interventions are prioritised by the stakeholders (as urgent, medium- and long-term interventions) and the scale for their realisation is identified (from a village to the whole nodal area). Based on that a business plan is developed to know the resources needed and fundraise to make implementation viable. The GLTFCA project strongly relies on external donors including development cooperation agencies (USAID, KfW, FAD), international institutions (World Bank), non-profit organisations (Peace Park Foundation), and the private sector. Piet Theron, 28 October 2016.

[1730] Piet Theron, 28 October 2016.

The GLTFCA has been broken into nine nodes. In this context, the decentralised cross-border implementation structures foreseen in the institutional reform – the JPMCs – have a primary role since each Committee is responsible for the implementation of the nodal strategies falling within its geographical scope. Three nodes have a transboundary character: Node 1 'Pafuri/Sengwe',[1731] Node 3 'Greater Lebombo Conservancy',[1732] and Node 9 'Bahine and Zinave Corridors'.[1733] The corresponding decentralised cross-border management authorities will be the Pafuri JPMC for Node 1, JPMC 4 for Node 3, and JPMC 1 for Node 9.

In Nodes 3 and 4, where the Greater Lembombo JPMC (4) is at work, there is a strong focus on security around wildlife crime and a Joint Security Committee has been set up to address this issue. Other activities relate to cross-border tourism planning and products around the Limpopo and Kruger National Parks, and community development along the Greater Lebombo.[1734] While in Node 5, which encompasses the Greater Kruger area covered by the 2018 cooperative agreement, a big component is economic development.[1735]

In the Pafuri area, corresponding to Node 1, several activities have been accomplished, *in primis* the establishment of the JPMC. Based on more recent information (December 2018), a new border post between South Africa and Zimbabwe is in the process to be established outside the Kruger National Park. Moreover, a security assessment is undergoing with the aim to understand how to address cross-border crime issues, especially with the support of local communities.[1736]

The Pafuri area represents the heart of the GLTFCA project because it is where the three Partner Countries meet. Moreover, it encompasses community lands in all the three Countries

[1731] For further details on Node 1, see GLTFCA Integrated Livelihoods Diversification Strategy, 16-17.
[1732] For further details on Node 3, see GLTFCA Integrated Livelihoods Diversification Strategy, 20-21. For instance, given the presence of hunting concession areas in this Node, a hunting strategy will be developed and integrated in the dedicated Conservation development framework. Piet Theron, 28 October 2016.
[1733] For further details on Node 9, see GLTFCA Integrated Livelihoods Diversification Strategy, 32-33.
[1734] Piet Theron, 14 December 2018.
[1735] Piet Theron, 14 December 2018.
[1736] Piet Theron, 14 December 2018.

and, on the Mozambican side, local communities are also located within the Limpopo National Park. The Mozambican Government has created a relocation programme for the communities living within the Limpopo National Park in order to move them from core areas to buffer zones.[1737] This situation is unique to Mozambique since neither the Kruger National Park nor the Gonarezhou National Parks have local communities living inside.

Samuel Cosa, Head of the Pafuri Administrative Post in Mozambique, stressed this peculiarity and the consequent difficulties in terms of local livelihoods, governance strategy, and cross-border cooperation.[1738] Samuel Cosa explained that human-wildlife conflict is high, especially along the Limpopo River since both animals and humans need water to survive. Agriculture and small-scale livestock farming are the two main economic activities in this area. Elephants often eat and destroy crops, while lions occasionally attack cattle, but there are no compensation schemes for residents enduring these costs. Many young people move to South Africa to have better employment chances but end up working as shepherds for livestock farmers. Moreover, a prolonged drought is strongly affecting crop production. Irrigations

[1737] The relocation programme started in 2005 and is still ongoing. It is meant to improve living conditions of local communities by providing access to land and forests to carry out activities that are prohibited in the core areas of the park, like sustainable timber production and farming. Piet Theron explained that buffer areas are anyway located within the Limpopo National Park and are resource use zones for the communities. Piet Theron, 28 October 2016. Once relocated, community members can also access better services (schools and hospitals) or find jobs easier than if living within the Park. In so doing, conservation in the Limpopo Park is expected to improve and tourism to flourish thanks to adequate investments and tourism development plans. Tourism would provide employment opportunities for these communities and result in an increased Park income that, in turn, would also benefit the communities since at least 20% of the Park revenues collected annually have to be allocated to communities by law. The relocation requires the formalised consent of the community that is going to be moved. A 'village resettlement committee' is created to negotiate the terms of the relocation resulting in a 'village resettlement plan'. This plan is drafted together with a consultant appointed by the Mozambican government and focuses on compensation issues (for example, all the names of community members eligible for houses or land as well as those that have to be compensated for livestock fencing). Once the relocation happens, the community loses the property title on the land in the core area of the Park, but acquires proprietorship over the area where it is resettled. The area in the Park becomes governmental property, but the community can be authorised to access it for rituals or traditional practices. Interview with António Abacar, Director of the Limpopo National Park, Massingir (Mozambique), 20 October 2016. Interview 5 in Annex I; hereinafter, António Abacar, 20 October 2018. The GLTP/GLTFCA International Coordinator explained that the relocation programme responds also to security concerns since poachers were found crossing the internal Kruger-Limpopo borders with arms, thus representing a threat for peoples in the parks, including tourists. Piet Theron, 28 October 2016. The Limpopo Park Authorities have a facilitative role in the relocation process. There is a Community Support Programme in the Park responsible for all the community projects; many of these projects aim to raise awareness on conservation, poaching, and human-wildlife conflicts. A Community Officer of the Limpopo National Park, accompanied the author to visit two villages located in the Park: Mavodze and Chibotane. The first is located within the core area and is under relocation [see http://www.greatlimpopo.org/2015/06/process-to-move-largest-village-in-park-starts/ accessed 3 December 2018], while the latter is in the buffer zones and has agricultural land and an irrigation scheme in place. In the interviews emerged a very different attitude of the two community leaders towards the Limpopo Park authorities.

[1738] Interview with Samuel Cosa, Head of the Pafuri Administrative Post (Chefe do Posto), Pafuri (Mozambique), 24 October 2016. Interview 7 in Annex I. Hereinafter, Samuel Cosa, 24 October 2016.

schemes and new employment opportunities in the tourism sector foreseen in the framework of the GLTFCA would be beneficial for local communities and provide diversified employment opportunities. According to Samuel Cosa, relocating people is not necessarily the best solution, at least in the territories under his administration: people should be allowed to inhabit the area they belong to, but their economic activities should be moved outside the Park to decrease the chances of human-wildlife conflict.[1739] As for the governance and cross-border cooperation issues, Samuel Cosa pointed out that there are no corresponding administrative authorities on the South African and Zimbabwean sides since there are no communities living in the other two components of the GLTP, therefore, it is unrealistic to address together challenges that do not exist across borders.[1740] Furthermore, he explained that the administrative competences of the Pafuri Administrative Post are regulated by the Land Act, and this authority has no power in terms of the TFCA. Nevertheless, he sees the potential that the GLTFCA has for empowering people through environmental education and training in conservation or tourism activities in order to improve their relationship with wildlife, but also diversify their employment opportunities.[1741]

Notwithstanding the practical difficulties in communicating with all the actors on the ground, the interview with Samuel Cosa showed that the GLTFCA project is still perceived as a distant reality and its functioning is still trapped within top-down mechanisms that hopefully will be overcome with the decentralisation shift foreseen in the institutional reform and livelihoods diversification strategy. For instance, from an institutional point of view, the administrative isolation that Samuel Cosa is experiencing should change with its inclusion in the Pafuri JPMC. In fact, the purpose of this JPMC is to connect all the governance levels and

[1739] In the Pafuri area of the Limpopo National Park, people live across the two sides of the Limpopo River. According to Smuel Cosa, people can live in the buffer zones of the park that is on the right bank of the river, while agricultural and livestock activities should be moved to the left bank of the river and outside of the buffer zones. Samuel Cosa, 24 October 2016.
[1740] It is worth stressing that I could grasp this aspect only when doing research in the field. Despite studying the different conservation history and approaches adopted in the southern African countries, some peculiarities did not emerge until going to the field.
[1741] Samuel Cosa, 24 October 2016.

relevant stakeholders across the borders within the GLTFCA, regardless of the fact that there are no corresponding local authorities operating in the three components of the GLTP. From a governance perspective – in terms of environmental governance, public participation, and operationalising cooperation in the GLTFCA – the decentralised livelihoods strategy developed for each node is meant to address territorially-specific needs,[1742] like human-wildlife conflicts experienced by communities living in the Limpopo National Park, while integrating this response in the wider TFCA project.

7.3.4 South Africa, Mozambique, and Zimbabwe learning from each other[1743]

According to Article 4(f), one of the objectives of the GLTP/GLTFCA is to 'establish mechanisms to facilitate the exchange of technical, scientific, and legal information for the joint management of the ecosystem'. This provision can be intended as allocating a greater responsibility on stronger States to share information that benefits weaker Partners.[1744] In this sense, each Partner Country can participate to this exchange according to its capacities and knowledge.

This process of cross-sectoral mutual learning emerged in the field. The authorities of the Limpopo National Park[1745] highlighted the numerous benefits in terms of conservation and wildlife management skills that they are acquiring by collaborating with the Kruger National Park, especially through joint park rangers' trainings and exchange of experiences. In fact, while the Kruger has a long history, the Limpopo was created in 2001 and soon (in 2002) integrated in the GL in order to re-establish ecological connectivity across international borders,

[1742] Only three of the nine nodes are transboundary, therefore, ecological and socio-economic characteristics are peculiar to a territory regardless of it extending over international boundaries.
[1743] This section focuses primarily on the bilateral cooperation between the Kruger National Park and the Limpopo National Park as a result of the fieldwork performed in the South African and Mozambican components of the GL. Fieldwork in the Gonarezhou National Park was impeded by contingent factors, including the time and resources necessary to obtain a research permit in Zimbabwe.
[1744] Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC', *cit.*, (n 1581) 256.
[1745] Interviews were conducted with the director of the Limpopo National Park and several park officers working in different programmes and dealing with conservation, wildlife management, tourism, and community support.

but also to build stability at bilateral and regional levels given the historical tensions between South Africa and Mozambique.[1746] Most of the areas incorporated within the Limpopo Park were hunting areas, and wildlife in Mozambique was depleted by years of civil war and poor management.[1747] The creation of the GLTP allows for inter-park relocation of animals, which is mostly a human-driven process since fences are still dividing the three national parks.[1748]

The bilateral collaboration with the Kruger National Park is stronger than that with the Gonarezhou National Park for the geographical conformation of the GLTP, but also for other reasons. Collaboration is focusing on anti-poaching and tourism activities. As for the latter, since the Kruger National Park is an internationally-known destination that counts 1.7 million tourists each year, the objective is to attract some of them on the Mozambican side (for example, those heading to the coast) in order to boost tourism in the Limpopo National Park.[1749] To this end, two border posts have been opened within the Transfrontier Park: at Pafuri and Giriyondo. A 2011 Protocol between the Kruger and the Limpopo foresees the compulsory overnight stay for the people using these border posts[1750] in order to avoid the use of parks' roads for commercial purposes.[1751] Tourism development is foreseen in the core area of the Limpopo National Park that is currently subjected to the community relocation programme.[1752] Tourims is expected to benefit local communities directly thanks to their involvement in tourism

[1746] António Abacar, 20 October 2016.
[1747] See Soto, 'Protected Areas in Mozambique', *cit.*, (n 1262).
[1748] The Director of the Limpopo National Park explained that more than 4.700.000 animals of different species have been relocated from the Kruger to the Limpopo. The removal of fences is foreseen for connectivity purposes and to re-establish migratory routes, but this process will take time. António Abacar, 20 October 2016.
[1749] Piet Theron, 28 October 2016.
[1750] The enforcement of this Protocol is confirmed by the direct experience of the author that, during the fieldwork, used both border posts: the one in Giriyondo to pass from the Kruger National Park to the Limpopo National Park, and that of Pafuri on the way back from Mozambique to South Africa. Proofs of overnight accommodation had to be shown in both cases.
[1751] Interview with Mauro Mósse, Tourism Manager of the Limpopo National Park, Massingir (Mozambique) 20 October 2016. Interview 6 in Annex I. He underlined that the Protocol has shown to be effective since there is less litter on the roads, and car accidents in the Limpopo Park have decreased.
[1752] The Tourism Manager of the Limpopo National Park explained that tenders for tourism activities (lodge, safari and game drives, bike trails, etc.) will be launched as soon as the relocation of the communities living within the Park takes place. Interview with Mauro Mósse, 20 October 2016.

activities through the development of private-community partnerships,[1753] with positive repercussions in terms of employment.[1754]

Since the benefits deriving from transfrontier cooperation appeared as unbalanced between the Partner Countries, I asked what are the interests that South Africa has in the GL project. The International Coordinator explained that from being a politically-driven process[1755] the GLTP/GLTFCA became a security-driven process.[1756] This paradigmatic shift reinforced the value of the TFCA that is perceived as the appropriate scale to address challenges that have a transnational character, like wildlife crime.[1757] The institutional reform, the livelihoods diversification strategy, and all the other initiatives recently developed to revive the GL project have a security component. This aspect has led to a broader policy and legal reform in the two Countries that culminated in an MOU on Biodiversity Conservation and Management.[1758] Piet Theron emphasised that without Mozambique, South Africa would have not achieved the same positive results in addressing wildlife crime,[1759] thus proving 'how well the TFCA model can work if it is functional; so, the better the TFCA model working, the better is for things on the ground'.[1760] Therefore, it is South Africa's interest that Mozambique is capacitated in order to improve collaboration and strengthen conservation. In this context, the private sector can be positively involved and invest resources.[1761]

[1753] Piet Theron, 28 October 2016.
[1754] The Director of the Limpopo Park underlined the positive repercussions of the GLTP/GLTFCA in terms of employment not only in the tourism sector, but also in relation to agriculture, thanks to the irrigations schemes implemented in the buffer zones, and as technical staff for the Park. António Abacar, 20 October 2016.
[1755] Cooperation in the Great Limpopo was initially meant to promote peace and integration in the southern African region to overcome the conflictual relationship that apartheid South Africa had with its neighbours and as a way to share benefits with them. Piet Theron, 28 October 2016.
[1756] Since 2013, collaboration between South Africa and Mozambique has been strengthened to better cope with the escalation of wildlife crime. Piet Theron, 28 October 2016.
[1757] Piet Theron, 28 October 2016.
[1758] Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the Republic of Mozambique on Cooperation in the Field of Biodiversity Conservation and Management, signed at Skukuza (Kruger National Park) on 17 April 2014 available at https://www.environment.gov.za/sites/default/files/docs/sa_mozambique_mou_fieldofbiodiversity.pdf accessed 3 December 2018. For further details see https://www.environment.gov.za/legislation/international_agreements/sa_mozambique_sign_mou accessed 26 March 2017.
[1759] On the ground bilateral collaboration and capacitation of human resources in Mozambique resulted in increased participation and successful security outputs. For example, most of the poaching is now happening from the South African side and not from the Mozambican side as it was before. Piet Theron, 28 October 2016.
[1760] Piet Theron, 28 October 2016.
[1761] Piet Theron, 28 October 2016.

In addition, the Kruger National Park has a significant capacity from a scientific, research, and management point of view, but can learn from the other countries on the use of wildlife as a livelihood option and on how to benefit people from conservation, since both Zimbabwe and Mozambique have more experience in this sense. For this purpose, one of the objectives is the creation of a trilateral learning network that works on the ground on specific topics[1762] and arguably enables the cross-sectoral mutual learning foreseen in Article 4(f) of the GLTP.

It can be argued that, in the context of the GLTFCA, the concept of decentralised international cooperation proposed in this thesis is not only theoretically relevant, but is finding concrete application through the institutional reform and the implications of the livelihoods diversification strategies. In fact, this paradigmatic shift towards decentralised implementation is necessary to address localised challenges that, at times, have transboundary implications. The new GLTFCA institutional architecture should be able to overcome communication problems and ensure the inclusion of local actors (both governmental and non-governmental) in the cooperative process, especially through the establishment of JMPCs and stakeholder forums.

7.4 The subtle power of TFCAs

Although the KAZA and the GL TFCAs have different origins, evolutions, and structures, this chapter shows that the concept of decentralised international cooperation is applicable to both of them, and similar developments in both contexts demonstrates the subtle power of the TFCA mechanism.

Cooperation in the Great Limpopo started as a politically-driven process that aimed to heal the wounds of the destabilising role that apartheid South Africa played in the southern African

[1762] To exemplify, Piet Theron explained that a pilot test of this learning platform will consist in bringing a group of officials working in the Kruger and the Limpopo to the Gonarezhou National Park to discuss specific themes they are interested in and that are well developed in the Zimbabwean component (including community development, and private sector engagement) in order to observe how things work on the ground and learn from that. Piet Theron, 28 October 2016. This establishment of this trilateral network was foreseen in 2017, but has been postponed for practical issues and is expected for 2019. Nonetheless, bilateral learning network are already in place. Piet Theron, 14 December 2018.

region. Formalised with a treaty in 2002, this cooperative project was initiated by linking three national parks across the international borders of Mozambique, South Africa, and Zimbabwe (Limpopo, Kruger, and Gonarezhou National Parks respectively) to create a Transfrontier Park. The GLTFCA was meant to follow as a second step, but it fell short of implementation due to the simplistic institutional structure foreseen in the Treaty, and the primacy of sovereignty rights over the transfrontier logic. Since 2013, the GLTP/GLTFCA is undergoing an institutional and strategy restructuration designed to revive the cooperative project and make implementation effective through decentralisation.

The KAZA TFCA, instead, is more recent: it was established in 2011 by a Treaty that evolved from a collaborative process initiated in 2003. The KAZA Treaty establishes the KAZA TFCA as such and not as a spinoff project, like in the case of the GLTFCA. The institutional architecture designed by the KAZA Treaty is more complex than the one of the GLTP/GLTFCA, and includes a Secretariat.[1763] Moreover, the principles guiding cooperation are more than the three foreseen in Article 5 of the GLTP Treaty and reflect an advanced conceptualisation of transfrontier conservation and management of shared resources. For example, these principles extend cooperation to natural and cultural heritage resources, introduce the idea of habitat and species rehabilitation as well as the precautionary approach and effective participation of stakeholders, and recognise that the ownership and guidance of the KAZA TFCA belongs to both the governments and *the people* of Partner Countries.[1764] It can be argued that the conceptualisation and establishment of the KAZA TFCA benefitted from the experience of other TFCAs, including the Great Limpopo initiative. Its territorial vastness – this is the world's largest TFCA and it is fourteen times bigger than the GLTFCA[1765] – is also

[1763] KAZA TFCA Treaty, Article 14.
[1764] KAZA TFCA Treaty, Article 5.
[1765] Lubbe, 'Straddling Border and Legal Regimes: A Legal Framework for Transfrontier Biodiversity Conservation in SADC', *cit.*, (n 1581) 254.

leading to the creation of decentralised management units that aim to make implementation more effective and participative.

Therefore, in both TFCAs, intergovernmental cooperation is being complemented by decentralised cooperative mechanisms that mark the emergence of sub-national actors on the transboundary scene. In the KAZA TFCA, this is occurring through the creation of WDAs; while in the GLTFCA, this is being realised through the nodes and the JPMCs. In both TFCAs, the participation of local stakeholders is ensured through the creation of cross-sectoral and geographically specific bodies that contribute to addressing the needs and challenges on the ground.

In both contexts, the presence of a TFCA is fostering the transfrontier logic beyond the cooperative project, thus influencing the normative and policy development at national level. In the KAZA, for example, the Code of Conduct for the navigation of the Chobe River will provide a uniform regime for the use of this water body in Botswana and Namibia. The opportunity to jointly draft this Code has been identified by the KAZA Secretariat, which is facilitating the meetings between grassroots stakeholders (boat operators of the two Countries) and, once drafted, will scale the Code up for approval at governmental level, thus filling a gap in the national systems. Similarly, the UNIVISA project between Zambia and Zimbabwe has led to the revision of the visa application and granting procedures in both Countries. As for the Great Limpopo, stronger cooperation between South Africa and Mozambique in the field of biodiversity conservation and anti-poaching has led to legislative revisions in the latter country in order to align with South African legislation, which is more advanced. For this purpose, the biodiversity law is under reform, while the criminal law was already changed by introducing hot pursuit and upgrading the degree of punishment for wildlife crimes. Therefore, cooperation in the framework of the TFCA is bringing about changes in national legislation and policies in

order to both move national systems closer and enable them to achieve the objectives foreseen in the cross-border cooperative project.

Another common element is the emergence and dynamism of TFCA-coordinating institutions: namely, the KAZA Secretariat headed by an Executive Director/Regional Coordinator and the GLTP/GLTFCA International Coordinator. Enough leeway is left to the individuals holding these positions to interpret their role in facilitating the functioning of the cooperative project and the achievement of the objectives connected to it. In this context, the Coordinators interviewed during fieldwork[1766] have been working to advance the transfrontier logic over the national one in three main ways: first, by identifying spaces for cooperation at cross-border grassroot level, thus making participation easier for sub-national stakeholders; second, by shaping the policy and normative development of Partner Countries through the promotion of transboundary measures and decisions that have an impact on national systems; and third, by expediting the operation of the cooperative mechanisms that would otherwise be subjected to the interests of State Parties.

Arguably, the analysis of these two case studies shows that SADC TFCAs can be seen as laboratories for decentralised international cooperation where conservation and management of shared resources is being strengthened through the involvement of local stakeholders, especially on cross-border localised portions of the TFCAs. This aspect is reinforced by the proactive role played by TFCA-coordinating institutions in promoting more participative cross-border grassroots processes.

[1766] It is worth reminding that Morris Mtsambiwa hold his position as KAZA TFCA Executive Director until 15 April 2018 and has been succeeded by Nyambe Nyambe.

Chapter 8. The value of decentralised international cooperation for the governance of transboundary resources and spaces

8.1 Introduction

The concept of *decentralised international cooperation* proposed in this thesis describes the practice of cross-border cooperation between sub-national actors for the governance of transboundary natural resources and spaces. This legal phenomenon is emerging in different regions of the world and, though understudied, has innovative potential for environmental governance.

Environmental governance is undergoing a paradigmatic shift, moving away from State-centric logic.[1767] In this context, several actors are acquiring a stronger role at the international level and contributing to the development of international environmental law both directly and indirectly. This thesis focuses on the role played by local communities – which can encompass indigenous peoples[1768] – and local authorities in shaping new governance solutions and practices for the joint conservation and sustainable management of shared natural resources and spaces. Arguably, the concept of decentralised international cooperation supports the claim that sub-national actors have a role to play at the international level. What is more, this concept can be framed in existing international environmental law principles and regimes, and used as an interpretative approach to provide an innovative and bottom-up reading of international environmental law. This local-level interpretation has an influence at the international level and serves an agenda that empowers peoples, together with States, as custodians of nature.

This thesis addressed the issue of cooperation over transboundary natural resources and spaces from a different perspective than the usual intergovernmental one, and presented four

[1767] On this point see Kotzé, 'Transboundary Environmental Governance of Biodiversity in the Anthropocene', *cit.*, (n 31) 23 ff. See also Chapter 2 Section 2.2.2.
[1768] In this regard see the definition of local communities provided in Chapter 1, Section 1.1.4 and, more generally, Chapter 2 Section 2.2.2 on the emergence of new actors on the international scene.

case studies to describe how decentralised international cooperation is applied in practice through appropriate governance structures that are *decentralised cooperative mechanisms*. Decentralised international cooperation is not meant to replace traditional inter-State cooperation, rather it is additional to it. It recognises that traditional intergovernmental approaches have inherent limitations, since they do not register nor explain the role that sub-national actors play in reality.

The thesis is divided into two main sections: the first locates the concept of decentralised international cooperation in international environmental law (Chapters 2 and 3), while the second provides a practical perspective by reflecting on the application of this concept in the European (Chapters 4 and 5) and southern African (Chapters 6 and 7) contexts. The research undertaken to this end combines conventional legal techniques, such as the study of primary and secondary sources of law, with the collection of empirical data through semi-structured interviews with key actors and fieldwork. Empirical data were essential to develop the four case studies and describe how decentralised international cooperation is put into practice in different contexts. This chapter summarises and compares the findings to identify if there are common elements in the four decentralised cooperative experiences and to reflect on their potential value for guiding similar processes for the governance of transboundary natural resources elsewhere in the world.[1769]

8.2 Locating decentralised international cooperation in international environmental law

Decentralised international cooperation deals with transboundary natural resources and spaces that, due to their inherent shared character, are subject to a governance framework that differs from that applicable to exclusive natural resources, traditionally guided by the principle of permanent sovereignty.

[1769] A detailed explanation of the research design and methodological approach of this thesis are provided in Chapter 1 Section 1.2.

The governance of shared resources has a predominantly cooperative dimension and is guided by general environmental obligations. In this context, it can be argued that the conservation and sustainable use of transboundary natural resources and spaces ensured through decentralised international cooperation contributes to global environmental objectives, *in primis* biodiversity conservation and the fight against climate change, which are common concerns of humankind. Global obligations to ensure environmental protection and tackle common concerns bind the whole international community, that is States and other actors operating at the international level, such as international organisations, NGOs, but also sub-national actors where decentralised international cooperation is at work, and, more generally, individuals seen as global citizens.[1770] The fact that individuals and groups of individuals, including local communities, are addresses of global environmental obligations – although to a lesser extent than States – reinforces their international role and can benefit environmental protection wherever they act in this direction, including before national, regional and international courts.[1771]

Hence, general obligations to ensure environmental protection and tackle common concerns deal with issues that are beyond the reach of individual States. These issues engage all States and even transcend the inter-State dimension by capturing the interests and concerns of the international community and requiring international cooperation, in line with the idea of a global partnership foreseen in the Rio Declaration.[1772] In this sense, the principles of cooperation and good neighbourliness apply to all States for the achievement of general environmental objectives; however, they can also acquire more precise features in relation to specific transboundary natural resources and thus in the context of decentralised cooperative experiences.[1773]

[1770] On the emergence of new actors on the international scene see Chapter 2 Section 2.2.2.
[1771] In this regard refer to Chapter 2 Sections 2.5 and 2.9.
[1772] See, in particular, Rio Principles 7 and 27.
[1773] On the principles of cooperation and good neighbourliness see Chapter 2 Section 2.6.

Cooperation can be operationalised differently depending on the resources and ecosystems considered as well as the actors involved in the shared governance effort. In fact, decentralised cooperative mechanisms are cooperative solutions tailored to cross-border local realities and reflect the community of interests and law applicable to the relevant resources.[1774] A community of interests implies that all sharing States have common legal rights and obligations over these resources and should agree on their equitable and reasonable utilisation. Indeed, transboundary resources and spaces cannot be divided piecemeal, but have to be conceptualised as an indivisible ecological whole that requires the adoption of the ecosystem approach and the integrated management of the system, regardless of international boundaries.[1775]

The defining aspect of decentralised international cooperation is the involvement of sub-national actors in the governance of transboundary natural resources and spaces. A strong hook for this argument is public participation in the conservation and sustainable use of shared resources. Participatory rights enable the participation of individuals and groups in environmental matters, on the one hand, and foresee corresponding State obligations to ensure the enjoyment of these rights on the other.[1776] Access to information, participation in decision-making, and access to administrative and judicial remedies have been discussed in relation to conservation initiatives. In these cases, local communities can be qualified as concerned publics and should thus be granted participatory rights and involved in the cooperative process through effective and culturally appropriate mechanisms, including in transboundary contexts.[1777]

Public participation in environmental matters is further supported by the need to ensure environmental protection for the benefit of both present and future generations. Indeed, intergenerational equity is discussed in this thesis as a principle that guides the interpretation and application of international environmental law principles and substantive norms. I argue

[1774] These arguments are further developed in Chapter 2 Section 2.7.
[1775] Regarding the equitable and reasonable use of shared resources and the ecosystem approach refer to Chapter 2 Section 2.7.
[1776] On public participation in environmental matters see Chapter 2 Section 2.8.
[1777] In this regard refer to Chapter 2 Sections 2.8.1 and 2.8.2.

that the reference to future generations provides these principles and norms with an intertemporal character and reinforces their compulsory nature. Moreover, this reference explicitly relates to peoples, and, in so doing, arguably expands the dimensions of States' obligations. Therefore, environmental protection and the obligations it entails – including the obligations to cooperate in the conservation and sustainable use of transboundary natural resources, to ensure their equitable and reasonable use, and to tackle common concerns of humankind – can be said to bind States not only among each other, but also vis-à-vis individuals as members of present and future generations.[1778]

Therefore, it can be argued that the governance framework applicable to the conservation and sustainable use of transboundary natural resources and spaces results from the application of the international environmental law principles presented above. These principles inform decentralised international cooperation and are put into practice through decentralised cooperative mechanisms. Arguably, States are not the only addresses of the obligations stemming from these principles, other actors involved in decentralised international cooperation are also bound by them, though to a different extent. Therefore, the concept of decentralised international cooperation strengthens the international role of sub-national actors, especially local communities, in line with emerging trends in international environmental law and in the environmental regimes described in Chapter 3.

By investigating the governance framework applicable to transboundary natural resources with the involvement of sub-national actors across borders, I have demonstrated that the concept of decentralised international cooperation can be located within existing international environmental law principles. Moreover, I also showed the transformative power of legal research in interpreting international environmental law through a new lens, that is the concept

[1778] Intergenerational equity is discussed in Chapter 2 Section 2.9.

of decentralised international cooperation, and outlined the advancing protagonist role of local actors on the international scene.

This objective was further pursued in Chapter 3 of this thesis, which analysed environmental regimes for the protection of transboundary natural resources and spaces and, in this context, explored the role of sub-national actors as well as the possibility for creating decentralised cooperative mechanisms for the governance of these resources and spaces.

The Biodiversity Convention,[1779] the Ramsar Convention,[1780] and the World Heritage Convention[1781] promote inter-State cooperation for the conservation and sustainable management of shared natural resources and spaces.[1782] Conservation is strengthened through protected areas,[1783] nature reserves[1784] or other mechanisms[1785] established at transboundary level.[1786] The participatory dimension emerges most clearly from the text of the Biodiversity Convention; nevertheless, both the Ramsar and the World Heritage regimes have also addressed this through the work of their governing bodies and official guidelines.[1787] Arguably, the Biodiversity Convention is setting the pace regarding the participation of indigenous peoples and local communities thanks to the activism of its Article 8(j) Working Group, which enables both direct participation by indigenous peoples and local communities' representatives at its sessions, and relies significantly on their knowledge and practices to advance relevant aspects of the biodiversity regime.[1788] Indeed, traditional knowledge and practices are a key aspect of

[1779] A detailed analysis of this Convention and its relevance in relation to decentralised international cooperation is provided in Chapter 3 Section 3.3 ff.
[1780] Regarding the Ramsar Convention see Chapter 3 Section 3.4.
[1781] For further discussion on this regime refer to Chapter 3 Section 3.5.
[1782] This is explicitly foreseen in the Preamble and Article 5 of the Biodiversity Convention, Article 5 of the Ramsar Convention, and Articles 6 and 7 of the World Heritage Convention.
[1783] Conservation can be pursued Biodiversity Convention, Article 8(a).
[1784] Ramsar Convention, Article 4(1).
[1785] Article 5(d) of the World Heritage Convention requires states take any appropriate measure to identify, protect, conserve, present, and rehabilitate the world heritage site.
[1786] Indeed, Goal 1.3 of the CBD PoWPA foresees the establishment of transboundary protected areas, the Ramsar regime promotes the designation of transboundary Ramsar sites to frame the collaborative management of shared wetlands, and the World Heritage Convention foresees the establishment of transboundary world heritage sites and, to this end, requires a joint nomination procedure.
[1787] In particular, the participation of local communities is tackled in the Ramsar Handbook on Participatory Skills and in the Operational Guidelines of the World Heritage Convention.
[1788] The activity of Article 8(j) Working Group is further analysis in Chapter 3 Section 3.3.2.

the relationship between these communities and natural resources or specific sites; this relationship goes beyond the mere utilitarian and has spiritual value as well.

Arguably, the role of local authorities is downplayed in the Biodiversity Convention compared to that of indigenous peoples and local communities, possibly because local authorities are embodied within States' administrative structures. So, it is left to the Parties to define their role within national legislation implementing the biodiversity regime. Nevertheless, the conservation and management of transboundary natural resources operates across governance levels, and the involvement of local authorities is essential. The biodiversity regime relies in this vein on a Plan of Action on Subnational Governments that defines the role and capacities of local authorities, prompts their engagement for the implementation of national strategies and action plans, and favours 'decentralised cooperation' and 'landscape level and ecosystem-based partnerships between subnational governments and local authorities' for biodiversity conservation and connectivity purposes.[1789] The Operational Guidelines of the World Heritage Convention identify local and regional governments among the relevant stakeholders to be involved for the successful conservation of protected sites.[1790] While the Ramsar Convention and its Handbooks do not mention them explicitly, this regime is nonetheless meant to operate at different governance levels, *in primis* at the scale of wetlands, and thus entails the engagement with competent local authorities.[1791]

All these regimes promote inter-State cooperation for the conservation of shared natural resources and protected sites on the one hand, and encourage the involvement of local actors – including in transboundary contexts – for achieving their conservation objectives, on the other. Arguably, these two aspects constitute the foundations of decentralised international cooperation. Therefore, this concept can be located within these regimes, whose application in

[1789] CBD Plan of Action on Subnational Governments, D paragraphs (g) and (i). For further analysis see Chapter 3 Section 3.3.4.
[1790] In this regard refer to Chapter 3 Section 3.5.
[1791] This argument is developed further in Chapter 3 Section 3.4.

turn provides decentralised cooperative experiences that can be studied to explore its operationalisation on the ground. In fact, I concluded Chapter 3 by highlighting a few elements that hint at the concept of decentralised international cooperation in existing international environmental law and favour the application of this concept in specific cases.

Chapter 3 also discussed the value of transboundary protected areas and biosphere reserves to study the concept of decentralised international cooperation, especially since they combine conservation and socio-economic objectives within the framework of sustainable development. The flexibility of transboundary conservation initiatives – in spatial, ecological, institutional, and governance terms – makes them laboratories for experimenting with decentralised cooperative mechanisms as confirmed by the four case studies presented in this thesis.

8.3 The EGTC: putting decentralised international cooperation into practice in Europe

In Europe, the transboundary dimension of nature conservation emerged out of need. In fact, the relatively small size of European States and the impact of human activities on the natural environment led to the development of cooperative solutions to ensure environmental protection across borders. The governance framework applicable to transboundary natural resources and spaces in this region is informed by general international environmental law principles,[1792] and relies on both international environmental regimes[1793] and regional instruments, in particular those adopted in the framework of the Council of Europe and the EU.[1794]

Both the Bern Convention and the EU Birds and Habitats Directives establish transboundary ecological networks – the Emerald Network and Natura 2000.[1795] Arguably,

[1792] Refer to Chapter 2 for international environmental law principles relevant for the governance of shared resources and spaces.
[1793] Not only the Biodiversity Convention, the Ramsar Convention, and the World Heritage Convention analysed in Chapter3, but also CITES, the Convention on Migratory Species and other relevant to this end.
[1794] A detailed analysis of these instruments is provided in Chapter 4.
[1795] For further details see Chapter 4 Sections 4.2.1 and 4.2.2.

these networks enhance national conservation efforts across borders by enabling ecological connectivity and ecosystem integrity. The cooperative attitudes promoted through these ecological networks is combined with specific obligations for the conservation of specially protected sites designated as ASCIs, SPAs, and SACs.[1796] These elements hint at the concept of decentralised international cooperation, which aims to reconcile the multiple governance, spatial, and ecological dimensions connected to the conservation and sustainable management of transboundary natural resources and spaces.

However, the involvement of local actors is downplayed in these instruments. Arguably, local authorities are inevitably bound by the obligation to preserve specially protected sites located within their territories in line with national plans developed to this end. Instead, local communities and individuals more generally can play a monitoring role and report uncompliant States through the Bern case-file system and by invoking EU directives in national courts.

Despite this, in the European context, sub-national actors – i.e., local authorities and communities as well as other territorial entities – are directly involved in the governance of transboundary natural resources and spaces through dedicated mechanisms, such as those set up in the framework of the Madrid Convention on Transfrontier Cooperation[1797] and the EGTC.[1798] These are decentralised cooperative mechanisms to all intents and purposes. In fact, they are purposely created to facilitate territorial cooperation between sub-national entities belonging to different States and to formalise spontaneous forms of cross-border localised cooperation existing in frontier regions with similar environmental conditions.

Therefore, it is legitimate to argue that decentralised international cooperation exists in Europe, both in theory and practice. Further evidence is provided by sub-regional agreements dedicated to the protection of mountain areas, namely the Alpine and Carpathian

[1796] ASCIs are Areas of Special Conservation Interest, SPAs are Special Protection Areas, and SACs are Special Areas of Conservation under the Bern Convention, the Birds and Habitat Directives respectively.
[1797] In this regard refer to Chapter 4 Section 4.3.1.
[1798] This mechanism is analysed in detail in Chapter 4 Section 4.3.2.

Conventions.[1799] The Alps and Carpathians are the ecological element defining the unit for cooperation – presented here as transboundary localised spaces – since these mountain ranges cross several countries, but their territorial scope encompasses only a portion of their State Parties. Mountain areas are endowed with high levels of biodiversity and fragile ecosystems and are characterised by similarities in the traditional knowledge, lifestyles and economic activities of local mountain communities. In fact, both the Alpine and Carpathian Conventions not only pursue transboundary conservation, but also acknowledge the peculiarity of local mountain communities, promote their development and involvement in conservation efforts, and encourage cross-border border cooperation between them. In this context, decentralised international cooperation is usually carried out by local and regional authorities that, in a European context, are conceived as the direct representatives of these communities based on an electoral mandate. This approach is also evident in the ZASNET EGTC.

The two case studies presented in Chapter 5, ZASNET and Alpi Marittime – Mercantour, prove the potential of the EGTC as a decentralised cooperative mechanism for the conservation and sustainable management of transboundary natural resources. The flexibility of this mechanism enables its adaptation in terms of conservation purposes and institutional structure to conditions on the ground. Moreover, the Group has a stronger operational capacity than its original members – usually sub-national governments and local entities – and the mandate to govern a transboundary space with a precise territorial scope and emerging identity increasingly strengthened by cooperation itself. In both cases, the EGTCs formalised previous cooperative experiences that lacked a precise legal basis but were motivated by homogenous geographical and socio-economic conditions, which arguably constituted the engine of decentralised international cooperation. In this context, it is worth stressing that decentralised cooperative mechanisms, such as the EGTC, reinforce the transboundary identity of a cross-border localised

[1799] These Conventions and their inclination towards the concept of decentralised international cooperation are discussed in Chapter 4 Section 4.2.3.

space and boost its potential in a way that could not be achieved through positive but nevertheless fragmented unilateral actions.

Both case studies demonstrated that the establishment of EGTCs had positive repercussions in terms of conservation and sustainable management of natural resources. The naturalistic value of the transboundary space has already been recognised in the framework of ZASNET with the designation of the Transboundary Biosphere Reserve Meseta Ibérica by the UNESCO MAB Programme in June 2016. In January 2017, a joint application for the addition of the Mediterranean Alps to the UNESCO World Heritage List as a transboundary natural site was submitted in the framework of the Alpi Marittime – Mercantour, and is under consideration. The UNESCO MAB recognition – and the World Heritage site designation, if attained – not only confirm the naturalistic value of the transboundary spaces, but also have repercussions on their legal status and bind all relevant actors at all governance levels to respect more stringent conservation and management standards for their preservation. Hence, it can be argued that decentralised international cooperation, operationalised through the establishment of the EGTCs, has enhanced conservation and sustainable management in these transboundary spaces. What is more, conservation objectives and environmental protection more generally can also be pursued outside EGTCs. In fact, the establishment of these mechanisms has raised new issues and prompted the revision and/or development of new environmental legislation in line with more advanced environmental standards. In this sense, decentralised international cooperation enhances environmental protection both locally, within the cross-border localised space governed by a decentralised cooperative mechanism, and globally, by contributing to general environmental objectives. This is also confirmed by the fact that EGTCs can be used to meet environmental obligations set by regional and international environmental agreements.[1800]

[1800] On this point refer to the arguments deployed in Chapter 5 Section 5.4 that discusses the contribution of the Alpi Marittime – Mercantour EGTC to the objectives of the Alpine Convention. More generally EGTCs can also pursue objectives in line with other conservation regimes.

Decentralised international cooperation in the EGTCs combines both a conservationist vocation and the aspiration to empower local actors. In fact, local and regional governments and entities can be members of an EGTC and thus represent territorial interests and needs. The participation of local communities is primarily mediated by local authorities in the two cases. Nonetheless, in both EGTCs, specific bodies are designed to enable the direct participation of local communities and facilitate a bottom-up process in connection to the UNESCO-designated spaces. This is the case of the Participatory Body of the TBR Meseta Ibérica and, possibly, the Transboundary Assembly and Supporting Committee foreseen in connection to the Mediterranean Alps transboundary site.[1801] These developments have the potential to reinforce the practice of decentralised international cooperation already underway in the EGTCs' transboundary spaces, and make participation more transparent and democratic if certain conditions are met. The participatory aspect raises concerns in the Alpi Marittime – Mercantour EGTC where both local authorities and communities seem to feel alienated. In fact, the EGTC members are the two parks that, in line with their mission, favour a traditional conservationist approach and engage with local actors to a limited extent. In this case, the potential designation of the Mediterranean Alps as a transboundary world heritage site might lead to an institutional reform by opening up membership of the EGTC to other actors, possibly local authorities. This change could be a step towards shaping more participatory solutions, though a similar process might be long and complex.

[1801] Further information on these bodies is available in Chapter 5 Sections 5.2.1 and 5.3.2 respectively.

8.4 TFCAs as laboratories of decentralised international cooperation in southern Africa

In southern Africa, nature conservation has its origins in colonial times and has always had a regional dimension as far as concerns the continuous contacts between professionals working in different countries, the creation of regional learning networks, and the exchange of best practices. The conservation of wildlife and habitats has been managed not only through conventional State-led forms, like national parks, but also through game farming and tourism development on private land as well as through community-based conservation on community land.[1802]

The establishment of SADC boosted cooperation over transboundary natural resources thanks to the adoption of dedicated Protocols and the creation of TFCAs as an appropriate governance framework. In this context, sub-regional policies and programmes for managing shared resources are a key element since they are easier to adopt and revise based on changing circumstances. Biodiversity and environment-related issues have lately come to be addressed in these types of instruments, as demonstrated by the Biodiversity Strategy and Action Plan, the TFCA Programme and the Law enforcement and anti-poaching strategy.

The concept of decentralised international cooperation can be located in the SADC Treaty and its environmental Protocols, especially in the Wildlife Protocol which introduces TFCAs as a mechanism for the joint governance of transboundary natural resources and spaces. This mechanism can be used to structure cooperation on wildlife species and habitats, forests, aquatic resources and ecosystems, and thus to operationalise cooperation over shared natural resources and ecosystems as required by other environmental Protocols.[1803]

The scope and operativity of TFCAs is clarified in the dedicated programme and guidelines.[1804] TFCAs exemplify the multidimensionality inherent to the cooperative

[1802] Refer to Chapter 6 Section 6.2.1, 6.2.2, 6.2.3 respectively.
[1803] In particular, the Protocol on Forestry (Section 6.4.3) and the Protocol on Fisheries (Section 6.4.5).
[1804] A detailed analysis of these instruments is provided in Chapter 6 Sections 6.4.8 and 6.4.9 respectively.

governance of shared resources. In fact, their spatial, ecological and governance dimensions are detached from national logics, since the objectives pursued through TFCAs unfold at transboundary, local and ecosystem levels. Nevertheless, the formal establishment of TFCAs depends on the political will of their State Parties. The concept of decentralised international cooperation aims to address the multidimensionality inherent to transboundary conservation, and can therefore be functionally applied in TFCAs to solve the potential mismatch between inter-State cooperation projects and conservation needs on the ground.

Moreover, TFCAs pursue both conservationist and developmental objectives since they are meant to address environmental and socio-economic concerns, benefit local stakeholders, and adopt inclusive approaches. Indeed, the effective participation of local communities – in the conservation and sustainable use of natural resources and deriving benefits – is reiterated across all the SADC instruments analysed in Chapter 6. It is possible that this aspect aims to redress the unfair practices of exclusion that have characterised conservation history, and recent history more generally, in the southern African region. In addition, this participatory attitude can be connected to the post-colonial claim that natural resources should be used in the interests and benefit of peoples, linking such use to self-determination and human rights purposes. Community-based conservation has been successfully applied in some southern African countries,[1805] therefore, SADC instruments promote this approach at national and sub-regional levels. Regardless of their original intentions, all the provisions calling for the involvement of local communities and the valuing of their traditional knowledge and practices arguably strengthen the role of local communities at both SADC and international levels, and bind State Parties to ensure this result. In fact, the participatory provisions included in the SADC Treaty and environmental Protocols are legally binding on State Parties, while similar provisions foreseen in the other policy documents indirectly reinforce States' commitments towards local

[1805] In this regard see Chapter 6 Section 6.2.3.

communities to the extent that they clarify, advance and pursue the objectives of the SADC Treaty and its Protocols. Therefore, the concept of decentralised international cooperation fits snugly into the SADC legal and policy framework. In addition, it can find application in the SADC region by way of customary and general international (environmental) law and the conventions to which SADC States are Parties. The concept is also in line with what is foreseen in the Maputo version of the African Union's Convention on the Conservation of Nature and Natural Resources, though this is not yet in force.[1806]

In the SADC region, decentralised international cooperation is put into practice in the context of TFCAs, as illustrated in the two case studies presented in Chapter 7: the KAZA and GL TFCAs. In both cases, the TFCAs cover an area so vast that the identification of smaller management units is necessary for the effective implementation of TFCA-wide strategies. In fact, ecological and developmental needs, but also opportunities and risks are present, and are geographically specific, requiring interventions at a more local spatial scale than the whole TFCA. To this end, the KAZA TFCA is developing six 'Wildlife Dispersal Areas' (WDAs), while the GLTFCA has identified nine 'Nodes' and is setting up four decentralised cross-border implementation structures called Joint Park Management Committees (JPMCs). Arguably, these solutions are decentralised cooperative mechanisms developed within the frameworks of the two TFCAs. These mechanisms operate at a cross-border localised level, deal primarily with the conservation and sustainable management of shared resources, and foresee the involvement of local actors. In so doing, they reflect the concept of decentralised international cooperation proposed in this thesis.

The rationale behind the creation of these decentralised international mechanisms is arguably the same: first, to articulate the cooperative objectives and principles set up for the whole TFCA in line with landscape-scale peculiarities and challenges and with the involvement

[1806] On this point refer to Chapter 6 Section 6.3.

of local stakeholders and; second, to ensure the effective implementation of these geographically focused solutions. Nonetheless, the governance structure of these decentralised international mechanisms differs between the two TFCAs.

The geographical scope and boundaries of WDAs are based on wildlife movement patterns. In fact, WDAs aim to connect natural protected spaces by establishing ecological corridors and promoting sustainable land use options in close-to-nature areas in order to secure the free movement of wildlife, but also enable socio-economic development within them to the benefit of local communities and local stakeholders more generally.[1807] The 2015-2020 KAZA MIDP identifies six WDAs, describes the key issues and challenges characterising these spaces, the initiatives and collaborations already in place and those foreseen. Three of these WDAs have been formally established according to information available on a dedicated page of the KAZA website, which also provides information about specific activities and the actors involved in each WDA.[1808] However, neither the MIDP nor the KAZA website say much about how decisions are taken within the WDAs, or clarify how local communities are involved in this process and in the successive implementation phase. This aspect was addressed during an interview with Morris Mtsambiwa, former KAZA Executive Director, whom I met with in October 2018 in Kasane (Botswana) during my fieldwork in the SADC region. Morris Mtsambiwa explained that each WDA should be endowed with a 'Stakeholder Forum' that gathers the representatives of local communities and other relevant actors to provide inputs to the decision-making process, depending on the issues discussed and, where possible, allow participation in the implementation phase. Morris Mtsambiwa highlighted that, informally, stakeholder forums already exist and participate in some activities, but noted that they should be formally established and their role defined within the framework of WDAs and, arguably,

[1807] Regarding WDAs refer to Chapter 7 Section 7.2.3.
[1808] See https://maps.ppf.org.za/arcgis/apps/MapJournal/index.html?appid=a541ce2645c2484cb7e9a4b86d27ea7c accessed 20 December 2018.

through the Transboundary Natural Resources Management Forum at the wider TFCA level as well.[1809] Despite the lack of clarity about the composition and role of both stakeholder forums and the Transboundary Natural Resources Management Forum, it is legitimate to argue that decentralised international cooperation is pursued in the KAZA TFCA through WDAs.

The institutional reform of the GLTFCA aims to enhance decentralisation and local participation in the conservation and sustainable management of natural resources. To this end, the GLTFCA Integrated Livelihoods Diversification Strategy is being implemented with a geographically focused approach through the 'Nodes'. These nodes correspond to smaller spatial units than the greater GLTFCA, so that strategic priorities and activities on the ground are tailored to the needs, opportunities and challenges of each node. Three of these nodes are transboundary, in the sense that they cover a cross-border localised area. The implementation of the nine nodal strategies falls under the responsibility of four JPMCs. These are decentralised cross-border implementation structures – they all have a transboundary character – and each JPMC deals with the nodal strategies falling within its geographical scope.[1810] At the time of my fieldwork (late 2016), the GLTFCA Integrated Livelihoods Diversification Strategy had been already adopted, but none of the JPMCs was yet in place. In December 2018, three of the JPMCs have been set up and are operative.[1811] The composition of each JPMC varies depending on the local actors and relevant stakeholders operating in the corresponding nodes. Local communities and authorities are represented in the JPMCs and participate effectively, since decisions are taken by consensus.[1812] Local communities not only participate in the decision-making process, but are also involved in the implementation of projects and conservation actions on the ground. Therefore, it can be argued that decentralised international cooperation

[1809] The KAZA website identifies the Transboundary Natural Resources Management Forum as the mechanism to enable the participation of local communities in the KAZA TFCA. However, it is not clarified if this forum operates at the TFCA-level or within the context of WDAs. On this point, it can be expected that the Transboundary Natural Resources Management Forum operates at the TFCA level and gathers the representatives of the six WDA stakeholder forums.
[1810] On the nodes and JPMCs see Chapter 7 Sections 7.3.2 and 7.3.3.
[1811] Update information was provided by the Piet Theron, during a skype interview on 14 December 2018.
[1812] Piet Theron, 14 December 2018.

is taking place in the GLTFCA and that the transboundary nodal strategies and the JPMCs are decentralised cooperative mechanisms useful to operationalise the concept proposed in this thesis.

The different spatial and institutional solutions developed in the two TFCAs reflect the fact that decentralised international cooperation is a general legal phenomenon in need of contextualisation. Decentralised cooperative mechanisms are locally specific solutions and are shaped to respond to local needs, challenges, opportunities, but also relevant actors. In any case these solutions have a cross-border localised relevance and character, since they are international and local at the same time. In this sense they mark the emergence of sub-national actors on the transboundary scene and complement inter-State cooperation by providing it with a practical dimension.

The establishment of these two TFCAs fostered similar dynamics. First, TFCAs enabled the emergence of new issues and brought about changes with implications at national level. For instance, they prompted the reform of national legislation and policies to meet conservation objectives pursued through the TFCA and enabled legal harmonisation in specific sectors. Moreover, they connected the sub-national and transboundary levels thanks to the operative capacity of TFCA-coordinating institutions that can identify needs on the ground and scale them up to higher governance levels as well as promote transboundary projects that might otherwise be hindered by national interests. All these dynamics are in line with the concept of decentralised international cooperation proposed in this thesis, and support its value as an innovative approach to address the governance of transboundary natural resources and spaces with the involvement of sub-national actors.

8.5 Looking at most-different cases: an interregional comparison

The concept of decentralised international cooperation has both a theoretical and a practical dimension. In this thesis, I discussed the former by showing to what extent this concept can be

located in existing international environmental law principles and regimes as well at regional and sub-regional levels. Moreover, through the four case studies, I investigated the practical implications of decentralised international cooperation and how it can be operationalised through locally specific solutions, defined here as decentralised cooperative mechanisms. This comparative exercise may appear inappropriate to some, since it evaluates diverse mechanisms operating in different regions of the world. However, all these mechanisms tackle similar problems and pursue a similiar objective, since they aim to ensure the involvement of sub-national actors in the conservation and sustainable management of transboundary natural resources and spaces. In this sense, diversity among the case studies provides inspiration and signals that a general legal phenomenon such as decentralised international cooperation can find application in a variety of forms that are shaped by the specific contexts considered. Notwithstanding the need for further research into decentralised international cooperation and its implementation in practice, the diversity of the mechanisms analysed also implies that common points arsising from their study are more generalisable to other instances of the phenomenon, thus supporting their applicability across contexts.

Through the four case studies I provide an original perspective on the governance of transboundary natural resources with the involvement of sub-national actors. The information presented is new and substantially based on the documents and empirical data collected in the field and through interviews with key stakeholders. In fact, existing literature on EGTCs does not focus on their utility for governing transboundary natural spaces and only a few EGTCs pursue environmental objectives. I address these aspects in Chapter 5. In Chapter 7, I describe how the decentralisation trend for the governance of transboundary natural resources is being developed in the KAZA and GL TFCAs. This process is still *in fieri* and complex to follow, since major developments in the field are not reported or do not garner much attention outside the TFCA itself. A comparative analysis of these case studies might provide useful elements

and/or solutions to facilitate the emergence of decentralised cooperative experiences, as well as inspiration to reflect upon and revise existing ones.

In all of the four case studies, the establishment of decentralised cooperative mechanisms marks the emergence of a new space for cooperation in which multiple levels of governance and relevant stakeholders are reorganised to better respond to specific geographical and ecological criteria. In this sense, cooperation acquires a *transboundary but localised spatial dimension* that is ecologically functional, complements inter-State cooperation, and acknowledges and legitimises the role of sub-national actors across borders. This transboundary, localised space becomes the reference unit for joint conservation and management, and is endowed with *ad hoc* participatory structures and processes.

In each of these case studies, the transboundary localised spatial units and participatory solutions are tailored to local needs as well as to the objectives of the cooperative project. For instance, the ZASNET EGTC is made up of sub-national authorities (provinces and municipalities) and its spatial scope encompasses their territories. Cooperative objectives focus on the environmental, tourism and cultural sectors, and are mainly pursued within the framework of the TBR Meseta Ibérica. This TBR is ecologically functional and endowed with additional organs – including a Participatory Body – that complement the institutional structure of the ZASNET EGTC. The members of the Alpi Marittime – Mercantour European Park EGTC are instead two parks aiming to strengthen nature conservation at the cross-border level. The institutions of this Group gather the authorities belonging to the two Parks, and interaction with local authorities and stakeholders is foreseen in the Assembly upon invitation. However, the potential establishment of the Mediterranean Alps as a World Heritage site could have repercussions on the institutional structure and membership of this Group to enable the direct participation of local authorities and stakeholders in the cooperative project. In the SADC TFCAs the situation is completely different. In the Kavango Zambezi, the relevant

transboundary localised spatial unit is the WDA endowed with a 'Stakeholder Forum' as the participatory structure. Instead, in the Great Limpopo, the 'Nodes' identify the relevant (transboundary) localised spatial units and the JPMCs enable the direct participation of local stakeholders. These variations among the cases serve to reaffirm that decentralised international cooperation is a general legal phenomenon that acquires its practical dimension when applied on the ground.

The definition of this new cooperative space can also favour the emergence of a transboundary identity. The latter might be useful to strengthen the environmental value of the transboundary space or to promote this space for tourism purposes, or it might rely on cultural or linguistic similarities shared by local actors inhabiting frontier regions. The transboundary identity of the TBR Meseta Ibérica as an ecologically functional unit, for example, is reflected in its motto 'nature without borders' and reinforced by the external actions of its representatives. In particular, this approach is evident in the meetings of the MAB national committees, where both the Spanish and Portuguese TBR Coordinators can participate to represent the TBR Meseta Ibérica as a single actor, regardless of the MAB national committee holding the meeting. The Alpi Marittime – Mercantour EGTC, as a European Park, aims not only to ensure nature conservation across borders, but also to be recognised as a single though cross-border tourist destination. The cultural and linguistic implications of decentralised international cooperation can also be explained via the example of the Swedish Laponian Area World Heritage Site presented in Chapter 3.[1813] As noted, on the Norwegian side of the border lies the Tysfjord/Hellemo fjord landscape that has been on the Norwegian Tentative List since 2002. This landscape is home to the Lule Sami, a minority of Swedish origin among the Norwegian Sami people. The potential designation of the Tysfjord/Hellemo fjord landscape and its connection to the Swedish Laponian Area would result in a transboundary World Heritage site.

[1813] See Section 3.5.

Arguably, once designated, this transboundary site would require the creation of a joint management body and a joint management plan. In this context, the 'Laponiatjuottjudus Association'[1814] created to administer the existing Swedish Laponian Area World Heritage Site would be complemented with a similar association including representatives of the Norwegian Lule Sami. Therefore, the establishment of a transboundary World Heritage site – arguably a decentralised cooperative mechanism – could reconnect these communities across borders, reinforce their cultural and linguistic ties, and enable the emergence of a transboundary identity.

Another aspect that emerged across the case studies presented in this thesis is that the bodies created in the framework of decentralised cooperative mechanisms somehow stretch normative limitations in terms of the operative and sectoral competence foreseen for their original members (local authorities, public or private entities, local associations, etc.). For example, an EGTC should act within the confines of the tasks falling within the competence of each member, in line with the national law of the Member States involved. Therefore, the EGTC is endowed with a system of integrated competences deriving from its original members and can exercise them to pursue its tasks in its transboundary localised space. In so doing, it *de facto* expands the competences of sub-national authorities or public/private entities and eludes the constitutional limitations set within the States that are Parties to it.[1815] In the case of SADC TFCAs, the activism and operative capacity of TFCA-coordinating institutions can shape policy and normative developments in the Partner Countries where functional to achieve transboundary objectives, and can boost the participation of local stakeholders by facilitating cooperation at the cross-border grassroots level. For instance, the Pafuri JPMC includes representatives of the Sengwe and Makuleke communities (from Zimbabwe and South Africa respectively), as well as local authorities (two district councils from Zimbabwe and one from

[1814] As explained earlier, this association has a Saami majority and includes representatives from two municipalities, nine Saami communities, the Norrbotten County Administrative Board (a government authority) and the Swedish Environmental Protection Agency, which is responsible for natural heritage.
[1815] In this regard see Chapter 4 Section 4.3.2.

Mozambique) and national conservation agencies (Gonarezhou Conservation Trust, ANAC, and SANParks).[1816] Through the JPMC and its consensus-based decisional process, these local actors can directly participate in shaping and implementing solutions in the relevant nodes, including across borders. Based on this, it can also be argued that decentralised cooperative mechanisms advance the role of local actors at the international level – not only from a theoretical point of view by strengthening their entitlement to certain rights and obligations, but also in practical terms, by making them beneficiaries of the cooperative project and actively involved in certain activities (conservation, tourism, etc.). In fact, these mechanisms aim to strengthen both conservation and sustainable development by enhancing livelihoods and opportunities for local inhabitants.

Another trend that is fostered by decentralised cooperative mechanisms is the reform of environmental policies and law at the national level to ensure harmonisation of (or, at least, the alignment with) higher environmental standards in the Partner Countries. This was noted in all the case studies. For example, in the ZASNET EGTC, the establishment of the TBR Meseta Ibérica prompted a legislative reform in Portugal and led to the establishment of the MAB National Committee. In the Alpi Marittime – Mercantour EGTC, the Action Plan foresees the development of common regulations to be applied in the whole territory of the European Park. In the KAZA TFCA, the UNIVISA project is a decentralised cooperative solution that led to the reform of visa procedures in Botswana and Zimbabwe, and is expected to involve the other KAZA Countries in the future. In the GLTFCA, joint conservation and anti-poaching objectives and actions implemented by South Africa and Mozambique led to the reform of biodiversity legislation in the latter Country.

The establishment of decentralised cooperative mechanisms can be fostered by the presence of conservation regimes in the relevant transboundary space and, once established,

[1816] This constituency is expected to change in the future and include more local actors, in particular representatives of local communities from Mozambique.

have positive impacts on biodiversity conservation. This aspect emerges in all the four case studies. For instance, the ZASNET EGTC includes protected areas and has provided the framework for the establishment of the TBR Meseta Ibérica. The Alpi Marittime – Mercantour EGTC joins two parks and is leading to the project to establish a larger transboundary World Heritage site, the Mediterranean Alps. In the SADC region, decentralised cooperative mechanisms are being developed within the Kavango Zambezi and Great Limpopo that, as TFCAs, pursue conservation objectives. These mechanisms are reinforcing environmental protection on the ground, for example, by enabling wildlife migration in KAZA WDAs or through anti-poaching strategies in the GL Nodes.

What is more, the four case studies show that decentralised cooperative mechanisms contribute to meet environmental obligations set in the framework of multilateral environmental agreements both at international and regional levels. Sometimes this connection is explicit, as in the case of the Alpi Marittime – Mercantour EGTC and its competence to apply the World Heritage Convention through the potential inclusion of the Mediterranean Alps in the List. In other cases, this connection is implicit but still evident, since it can be arguef, for example, that all these mechanisms pursue the objectives set in the Biodiversity Convention. A similar reasoning could be applied to the Ramsar Convention, where wetlands and aquatic resources are present in a transboundary localised space and wisely used through a decentralised cooperative mechanism. Therefore, it can be states that decentralised cooperative mechanisms are guided by relevant international environmental regimes and principles (*in primis* those analysed in Chapter 2) that, arguably, compose the governance framework applicable to transboundary natural resources and spaces.

A comparison of the four case studies also allows us to identify several differences. Indeed, the spatial scale, constituency, and institutional structure of the mechanisms analysed differ. These differences underline the fact that decentralised international cooperation is not a one

size fits all solution, rather it is an encompassing concept that is operationalised in practice through locally tailored solutions – decentralised cooperative mechanisms.

Nonetheless, it is worth reflecting further on the constituency of decentralised cooperative mechanisms and the different extent of involvement of local authorities and local communities in the EU and SADC cases. Sub-national governments can be members of EGTCs and the participation of local communities is usually mediated by these authorities. This approach is also applied in the framework of the Madrid Convention and its Protocols and emerges from the Alpine and Carpathian Conventions:[1817] it can thus be considered a general regional trend. On the other hand, the founding treaties of the two SADC TFCAs analysed in this thesis, in addition to the actions foreseen in the TFCAs' plans and strategies and, more generally, in SADC legal and policy documents, always refer to local, rural or traditional communities and disregard local authorities. This may be due to the fact that the involvement of local authorities is foreseen in the national legislation and policies implementing SADC and TFCA instruments when the need arises. For instance, in the GLTFCA, the Pafuri JPMC includes local authorities from both Zimbabwe and Mozambique.[1818] Again, this highlights that decentralised international cooperation is put into practice differently depending on local circumstances and can also be influenced by the regional context. The existence of both a cooperative regional framework, like the EU, Council of Europe or SADC, and good relations between neighbouring countries are positive factors for the creation of decentralised cooperative mechanisms. Moreover, the availability of a regional institutional blueprint also appears tp speed up this process. For instance, the EGTC works well as a decentralised cooperative mechanism and thus local actors – especially sub-national governments – have ready access to an established mechanism to facilitate cooperative projects in Europe. No similar mechanism exists in the

[1817] In comparison to the other instruments, the Alpine and Carpathian Conventions pay more attention to the involvement of local communities and encourage cross-border cooperation among them. To what extent the participation of these communities is direct and effective should be further researched on the ground.
[1818] Nevertheless, this thesis does not cover the legislation of SADC countries nor national measures giving implementation of to TFCAs' strategies in a comprehensive way.

framework of SADC, and the solutions developed in the two TFCAs are thus more complex. As seen, these examples will require more time to be fully realised. This finding suggests that developing mechanisms can enable decentralised international cooperation to take off more quickly. Though it is important that such mechanisms leave the space necessary for local tailoring, and further case study research is needed to confirm this finding given the small number of cases considered here.

8.6 Decentralised international cooperation, a way forward

The concept of decentralised international cooperation proposed in this thesis promotes the involvement of sub-national actors in the governance of transboundary natural resources and spaces, and thus acknowledges and legitimises their role at the international level. This concept has both a theoretical and practical dimension, and is relevant for international environmental scholars and practitioners as well as for professionals involved in transboundary conservation projects.

Decentralised international cooperation and decentralised cooperative mechanisms, useful for operationalising the concept on the ground, are not meant to replace traditional inter-State cooperation and intergovernmental agreements. Rather, they aim to complement the latter by formalising spontaneous forms of cross-border cooperation between local actors in frontier regions. Indeed, good neighbourly relations, existing inter-State agreements and regional cooperative frameworks can support the establishment of decentralised cooperative mechanisms where and when the need arises at different transboundary but localised spatial scales. Therefore, regional and sub-regional organisations, like the EU and SADC, and intergovernmental agreements, like TFCAs, are laboratories for exploring the theoretical and practical dimensions of decentralised international cooperation.

Decentralised international cooperation can be described as a global legal phenomenon, since it can be observed in different regions of the world wherever cooperative solutions for the

governance of shared natural resources apply across borders and have localised relevance. In each case, decentralised cooperative mechanisms are designed to fit the transboundary localised space by responding to its ecological, socio-economic, and cultural specificities as well as by ensuring the involvement of relevant actors that inhabit and operate in the space concerned, *in primis* local authorities and local communities. In line with the spirit of this concept, this thesis does not aim to offer a standard model for the governance of transboundary natural resources and spaces. Rather, it reflects on the principles that guide decentralised international cooperation and presents case studies to discuss potential applications and inspire similar solutions in other contexts.[1819]

Arguably, the concept of decentralised international cooperation has implications in terms of benefit-sharing. In fact, according to this concept, local actors are directly involved in the conservation and sustainable management of transboundary natural resources and can benefit from this, thanks to the adoption of decentralised cooperative mechanisms tailored to local needs. For example, in the Pafuri Node of the GLTFCA, members of the Sengwe and Makuleke communities are participating in anti-poaching activities. To this end, they are trained by park authorities and payed, thus acquiring benefits through capacity building and job opportunities. Further research in the field and targeted interviews with local actors could be useful to explore the connection between decentralised international cooperation and benefit-sharing.

An interesting issue emerging from this thesis revolves around the origin of the idea of decentralised international cooperation and its operational mechanisms. Has informal cooperation between local actors across borders prompted the emergence of this legal phenomenon, or is it externally driven? Are local communities and authorities shaping decentralised cooperative mechanisms or, rather, are they involved only once these mechanisms

[1819] In particular, Chapters 2 and 3 frame the concept of decentralised international cooperation in international environmental law principles and regimes. Chapter 4 and 6 discuss this concept in connection to the European and SADC contexts respectively. Chapters 5 and 7 presents four case studies and describe the decentralised cooperative mechanisms designed in each case.

have been created? The case studies analysed suggest that all these elements contribute to some extent to the emergence of decentralised international cooperation; therefore, further research would be useful to clarify this point.

In any case, the involvement of sub-national actors is a clear pillar of the concept of decentralised international cooperation and is foreseen in all the mechanisms presented in the case studies. Nonetheless, ascertaining to what extent these participatory processes are effective, transparent, and democratic is a complex task that requires further research and fieldwork as well as the adoption of an interdisciplinary approach. Indeed, participation in decision-making may also trigger participation in the implementation of relevant decisions, and thus strengthen environmental protection.[1820]

Arguably, this thesis has an inherent interdisciplinary vocation since it applies a constructivist approach to international environmental law. In fact, through the concept of decentralised international cooperation, I trace a relation between international environmental law and local actors in the context of transboundary biodiversity conservation, and indirectly explore how these actors – especially indigenous peoples and local communities – are changing and advancing international environmental law both by applying it in practice and, increasingly, by participating in its development in institutional venues like COPs and international conferences. Hence, to reconstruct a new idea of biodiversity conservation, including its application across borders, it is worth looking at what is happening at the local level and how local communities are actually ensuring biodiversity conservation by operating on the basis of international environmental principles and regimes (for example, what is decided in the CBD COP). In this regard, it can be argued that local communities are using international environmental law strategically to claim their space at the international level and bypass the national level. Moreover, in so doing, they are also reinforcing the implementation of

[1820] In this regard see Parks and Schröder, 'What We Talk about When We Talk about "Local" Participation: Indigenous Peoples and Local Communities' Participation under the Convention on Biological Diversity', *cit.*, (n 421).

international environmental law at the local level, and gradually changing biodiversity law both in theory and in practice. This process shows how a bottom-up approach can have powerful consequences at the international level.[1821]

Therefore, decentralised international cooperation plays across governance levels and has a transformative potential. Through both its theory and practice, it provides a useful perspective to reinterpret existing international environmental law and contributes to shape a more appropriate framework for the governance of transboundary natural resources and spaces with the involvement of sub-national actors.

[1821] In this regard see Parks and Morgera, 'The Need for an Interdisciplinary Approach to Norm Diffusion: The Case of Fair and Equitable Benefit-Sharing', *cit.*, (n 88).

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Annex I - List of Interviews[1825]

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Interview 1: Stefano Barchiesi, Project Officer of the IUCN Global Water Programme, Gland (Switzerland), 25 May 2016.

Interview 2: Sugoto Roy, Coordinator of the Integrated Tiger Habitat Conservation Programme, IUCN Global Species and Key Biodiversity Areas Programme, Gland (Switzerland), 27 May 2016.

Interview 3: Morris Mtsambiwa, Executive Director of the KAZA TFCA Secretariat, Kasane (Botswana), 11 October 2016.

Interview 4: Morris Mtsambiwa, Executive Director of the KAZA TFCA Secretariat, Kasane (Botswana), 12 October 2016.

Interview 5: António Abacar, Director of the Limpopo National Park, Massingir (Mozambique), 20 October 2016.

Interview 6: Mauro Mósse, Tourism Manager of the Limpopo National Park, Massingir (Mozambique), 20 October 2016.

Interview 7: Samuel Cosa, Head of the Pafuri Administrative Post (Chefe do Posto), Pafuri (Mozambique), 24 October 2016.

Interview 8: Piet Theron, International Coordinator of the GLTP/GLTFCA, Johannesburg (South Africa), 28 October 2016.

Interview 9: Piet Theron, International Coordinator of the GLTP/GLTFCA, Skype interview, 14 December 2018.

Interview 10: Joana Branco, Coordinator for the Portuguese territories of the TBR Meseta Ibérica, Skype interview, 5 June 2018.

Interview 11: Giuseppe Canavese, Director of the Ali Marittime Natural Park and Deputy Director of the Alpi Marittime – Mercantour EGTC, phone interview, 26 June 2018.

Other interviews

Interview 12: Alessandro Badalotti, Coordinator of the Save our Species Programme, IUCN Global Species and Key Biodiversity Areas Programme, Gland (Switzerland), 24 May 2016.

Interview 13: Trevor Sandwith, Director of the IUCN Global Protected Areas Programme, Gland (Switzerland), 31 May 2016.

Interview 14: Rebecca Welling, Project Officer of the IUCN Global Water Programme, Gland (Switzerland), 2 June 2016.

Interview 15: Marcela Bonnels, Scientific and Technical Support Officer, Ramsar Secretariat, Gland (Switzerland), 2 June 2016.

Interview 16: Antonio Amaral Chilenge, Conservation Programme Officer, Limpopo National Park, Massingir (Mozambique), 20 October 2016.

Interview 17: Pintos Armando Chenique, Regional Ranger, Limpopo National Park, Massingir (Mozambique), 20 October 2016.

[1825] The interviews are cited in chronological order.

Interview 18: Guilherme Dos Santos Maluleque, Senior Wildlife Manager, Limpopo National Park, Massingir (Mozambique), 20 October 2016.

Interview 19: Alberto Amos Valoi, Community Leader of the Mavodze Village, Limpopo National Park (Mozambique), 21 October 2016.

Interview 20: Albert Salomao Machaole, Community Leader of the Chibotane Village, Limpopo National Park (Mozambique), 22 October 2016.

Interview 21: Aruna Seepersadh, Deputy Director (Biodiversity Control Office B), Department of Environmental Affairs (South Africa), Transfrontier Conservation Areas, Pretoria (South Africa), 17 November 2018.