

Strasbourg, 5 October 2020
[pa07e_2020.docx]

T-PVS/PA (2020) 07

CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

40th meeting
Strasbourg, 30 November - 4 December 2020

**OBLIGATIONS OF BERN CONVENTION PARTIES REGARDING THE CONSERVATION OF
CANDIDATE AND ADOPTED EMERALD NETWORK SITES: A LEGAL ANALYSIS**

4 October 2020

*Document prepared by
Mr Arie Trouwborst
Associate Professor of Environmental Law, Tilburg Law School, The Netherlands*



on behalf of the Bern Convention

TABLE OF CONTENTS

1. INTRODUCTION	3
2. THE LEGAL BASIS OF THE EMERALD NETWORK	4
3. GENERAL OBLIGATION OF RESULT	6
3.1. Doing what it takes.....	6
3.2. The result to be achieved.....	8
3.3. The measures needed to achieve the result	12
4. APPROPRIATE HABITAT PROTECTION AND MANAGEMENT REGIME	13
4.1. Site protection regime.....	13
4.2. Site management measures.....	15
5. MONITORING AND REPORTING	18
6. ANTICIPATING AND RESPONDING TO SPECIFIC THREATS.....	20
6.1. Potentially harmful projects: four basic requirements	20
6.2. Timely and comprehensive impact assessment	21
6.3. Authorising only activities compatible with conservation.....	23
6.4. Authorising harmful activities – making exceptions under Article 9	25
7. COMPARISON BETWEEN CANDIDATE AND ADOPTED EMERALD NETWORK SITES.....	29
8. COMPARISON WITH THE NATURA 2000 OBLIGATIONS OF EU MEMBER STATES	30
9. CONCLUDING OBSERVATIONS.....	35
BIBLIOGRAPHY	36

1. INTRODUCTION

The purpose of this report is twofold: (1) to identify, as precisely as possible, the obligations of non-EU Contracting Parties to the Bern Convention with regard to the conservation of Emerald Network sites on their territories, both with regard to candidate and adopted Emerald Network sites; and (2) to compare these obligations with the obligations that EU Member States have regarding sites that are part of the Natura 2000 network.

For Contracting Parties that are also EU Member States, the Natura 2000 regime established under the EU Birds and Habitats Directives¹ officially constitutes their implementation of Emerald Network commitments. In the words of Resolution No. 8 (2012):

“for Contracting Parties which are Member States of the European Union, the Emerald Network sites are those of the Natura 2000 Network and ... the procedures established under the European Union Directives 2009/147/EC (codified version of the amended Directive 79/409/EEC) and 92/43/EEC are those to apply for them.”²

Conversely, the Emerald Network obligations of non-EU Contracting Parties to the Bern Convention flow from several binding provisions in the Convention, read in light of a large set of non-binding Resolutions and Recommendations adopted by the Standing Committee (discussed below). This report aims to assess the dimensions of the gap that remains between the separate sets of Emerald Network conservation obligations currently borne by EU and non-EU Convention Parties, respectively. The outcome of the analysis will hopefully be of use to the Standing Committee regarding any future decisions on the further reduction of this gap to the degree considered desirable, and to individual Parties regarding the implementation of the Emerald Network on their territories.

Although uncertainty remains on several aspects, it is generally quite clear what the legally binding obligations of EU member States are regarding the conservation of Natura 2000 sites on their territories.³ This is largely due to a considerable body of case law by the Court of Justice of the EU (CJEU), as well as guidance documents by the European Commission and an ample literature. By contrast, it remains much less clear what the legally binding obligations are of non-EU Contracting Parties to the Bern Convention regarding the conservation of Emerald Network sites on their territories. Most of the present report is, therefore, dedicated to attempting the clarification of the latter set of obligations, both regarding candidate and designated Emerald Network sites. The analysis is performed using standard public international and European law research methodology.

¹ Directive 2009/147/EC of the European Parliament and of the Council on the Conservation of Wild Birds (30 November 2009), [2010] OJ L20/7; Council Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora (21 May 1992), [1992] OJ L206/7.

² Resolution No. 8 (2012) on the National Designation of Adopted Emerald Sites and the Implementation of Management, Monitoring and Reporting Measures, Preamble. See also the similar statement in the Preamble to Resolution No. 5 (1998) Concerning the Rules for the Network of Areas of Special Conservation Interest (Emerald Network): *“Considering that for Contracting Parties which are Member States of the European Union Emerald Network sites are those of the Natura 2000 network. Thus the procedures established by European Council Directives 79/409/EEC and 92/43/EEC will be the only rules to apply”*.

³ See Section 8 below.

2. THE LEGAL BASIS OF THE EMERALD NETWORK

The Emerald Network of Areas of Special Conservation Interest (ASCIs) was created and progressively developed through a series of Resolutions and Recommendations, adopted by the Standing Committee and implemented by Contracting Parties and, completely voluntarily, by observer States. The following Resolutions and Recommendations are of particular relevance in this connection:

Resolutions on site conservation:

- Resolution **No. 1** (1989) on the Provisions Relating to the Conservation of Habitats
- Resolution **No. 3** (1996) Concerning the Setting Up of a Pan-European Ecological Network
- Resolution **No. 4** (1996) Listing Endangered Natural Habitats Requiring Specific Conservation Measures
- Resolution **No. 5** (1998) Concerning the Rules for the Network of Areas of Special Conservation Interest (Emerald Network)
- Resolution **No. 6** (1998) Listing the Species Requiring Specific Habitat Conservation Measures
- Resolution **No. 8** (2012) on the National Designation of Adopted Emerald Sites and the Implementation of Management, Monitoring and Reporting Measures

Recommendations on site conservation:

- Recommendation **No. 14** (1989) on Species Habitat Conservation and on the Conservation of Endangered Natural Habitats
- Recommendation **No. 15** (1989) on the Conservation of Endangered Natural Habitat Types
- Recommendation **No. 16** (1989) on Areas of Special Conservation Interest
- Recommendation **No. 25** (1991) on the Conservation of Natural Areas Outside Protected Areas Proper
- Recommendation **No. 157** (2011/2019) on the Status of Candidate Emerald Sites and Guidelines on the Criteria for their Nomination
- Recommendation **No. 172** (2014) Interpreting Certain Provisions of Resolution No. 6 (1998)
- Recommendation **No. 207** (2019) on the Progress in the Implementation of the Emerald Network of Areas of Special Conservation Interest
- Recommendation **No. 208** (2019) on Detecting, Reporting, Assessing and Responding to Changes in the Ecological Character of Emerald Network Sites

These Resolutions and Recommendations are not legally binding by themselves, and do not by themselves impose any legal obligations on Convention Parties. Rather, Parties' legal obligations regarding the designation and conservation of protected sites result from provisions in the Convention, principally Article 4, and also Articles 1, 2, 3, 6(b) and 9. The various Resolutions and Recommendations guide Parties in the implementation of these substantive Convention provisions, and inform those provisions' interpretation. As a 2013 guidance document puts it, strictly speaking participation in the Emerald Network is "*optional*" for Convention Parties, but at the same time it is "*important to note that the obligations on the Contracting Parties to protect natural habitats are rigorous requirements clearly set out in the Convention and forming part of binding international law.*"⁴

Depending on their content and the wording employed, Resolutions and Recommendations can influence the interpretation of associated binding Convention provisions.⁵ The essential rules of public international law governing treaty interpretation are codified in the Vienna Convention on the Law of Treaties (VCLT).⁶ According to the principal rule, a treaty "*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"⁷ The latter dimension of this rule has been clarified by the UN International Law Commission as follows:

⁴ Directorate of Democratic Governance et al. (2013), p. 2; also Bevez (2018), p. 94.

⁵ Generally, see Shine (2010); Trouwborst (2011), p. 7-8, 12-13; and Trouwborst (2014).

⁶ Convention on the Law of Treaties (Vienna), 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). The main interpretation rules laid down in this treaty reflect customary international law. See, e.g., Harris (2004), p. 832-843.

⁷ VCLT, Art. 31(1); the International Court of Justice (ICJ) has consistently held that this reflects customary international law: *Territorial Dispute (Libyan Arab Jamahiririya v Chad)*, Judgment, ICJ Reports (1994) 6, par. 41; *Oil Platforms (Islamic Republic of Iran v United*

*“When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”*⁸

In addition to a Convention’s text and objectives, “*any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*” “*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*” and “*any relevant rules of international law applicable*” may be taken into account.⁹ Evident examples of Resolutions and Recommendations that inform the interpretation of Convention provisions in the capacity of ‘subsequent agreement’/‘subsequent practice’ are Resolution No. 2 (1993) on the Scope of Articles 8 and 9 of the Bern Convention (revised in 2011); Recommendation No. 142 (2009) Interpreting the CBD Definition of Invasive Alien Species to Take into Account Climate Change; and Recommendation No. 173 (2014) on Hybridisation between Wild Grey Wolves (*Canis lupus*) and Domestic Dogs (*Canis lupus familiaris*). A prime example for the purposes of this report is Resolution No. 1 (1989) on the Provisions Relating to the Conservation of Habitats, which expressly states that, “*for the purposes of improving the effectiveness of the convention, the terms listed hereunder are to be interpreted as follows,*” and then goes on to provide specific interpretations of terms used in the Convention text, including in Article 4.

Yet, not all of the guidance adopted by the Standing Committee concerning the Emerald Network in Resolutions and Recommendations influences the interpretation of Article 4 and other relevant provisions to the same degree. Determining the extent of each document’s influence is a nuanced affair, and it would be erroneous to think that the interpretation rules automatically turn the entire content of all non-binding Resolutions and Recommendations into binding law whenever those instruments are associated with particular Convention provisions. Conversely, it could just as evidently be difficult for a Party which is completely ignoring the Resolutions and Recommendations on the Emerald Network regime, to still argue that it is performing its obligations under the Convention in good faith. Identifying the influence of ‘subsequent agreement’ and ‘subsequent practice’ on treaty obligations thus requires careful case-by-case analysis, and even so it often remains difficult to delineate the scope of a given obligation with absolute exactness.

In pursuing its mission to clarify the obligations of non-EU Parties regarding the conservation of candidate and adopted Emerald Network sites to the greatest degree possible, this report not only examines the Resolutions and Recommendations that focus expressly on the Emerald Network and/or habitat conservation generally (listed above), but also Recommendations that focus on specific sites or issues, as these can likewise provide very useful indicators regarding the correct interpretation of Parties’ obligations.

The ultimate legal basis of the Emerald Network, and therefore pivotal to the present analysis, is Article 4 of the Bern Convention, the first three paragraphs of which read as follows:

“1. Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats.

2. The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas.”

3. The Contracting Parties undertake to give special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas.”

In accordance with the rules of treaty interpretation, Article 4 must be read in light of the Bern Convention’s central aim, set out in Article 1, to “*conserve wild flora and fauna and their natural habitats;*” in association with other relevant provisions, including Article 2, 3, and 6(b); and taking into account the aforementioned Resolutions

States of America/Chad), Preliminary Objections, Judgment, ICJ Reports (1996) 803, par. 23; *Kasikili/Sedudu Island (Botswana v Namibia)*, Judgment, ICJ Reports (1999) 1045, par. 18.

⁸ International Law Commission (1966).

⁹ VCLT, Art. 31(3).

and Recommendations. Exceptions to the obligations laid down in Article 4 may be made for the purposes and under the conditions mentioned in Article 9.¹⁰

3. GENERAL OBLIGATION OF RESULT

3.1. Doing what it takes

A first thing to note when trying to identify the legal implications of the Bern Convention's provisions for the conservation of Emerald Network sites is that several key provisions are phrased in such a manner as to impose obligations of *result* rather than effort or procedure. This particularly concerns Article 2 on population levels, Article 4(1) on habitat conservation, and Articles 5-7 on species protection.¹¹ This reading has repeatedly been confirmed by the Standing Committee. Already in Resolution No. 1 (1989) it was acknowledged, with regard to the obligations laid down by "Articles 1, 2, 3, 4, 6.b and 9," that "*most of these obligations bind Contracting Parties as to the results to be attained, while leaving them the choice of the means to be used for that purpose.*"¹² Resolution No. 1 contains significant further clues. The Standing Committee's choice of words in this Resolution makes clear that these clues have a strong interpretive value in terms of the VCLT. The Resolution expressly aims to provide a "*common interpretation*" and thus to "*promote agreement ... as to what is required to be done in order to implement the convention.*"¹³ Specifically, the Standing Committee "[r]esolves that, for the purpose of improving the effectiveness of the convention, the terms listed hereunder are to be interpreted as follows." Some of the most pertinent passages are reproduced here:

"For the purpose of Article 4:

- a. **'necessary measures'** means in particular those measures which are **required**:
 - i. to **ensure** the conservation of the habitats of those species which have been identified by the Standing Committee ... as requiring specific habitat conservation measures ... ;
 - ii. to **ensure** the conservation of those natural habitats which have been identified by the Standing Committee ... as ... requiring specific conservation measures ;
- b. **'appropriate measures'** means in particular those measures, pursuant to paragraph a above, which are **able to ensure** the conservation of the habitat of particular species or of particular natural habitats ;
- c. **'conservation'** means the maintenance and, where appropriate, the restoration or improvement of the abiotic and biotic features which form the habitat of a species or a natural habitat ... and includes, where appropriate, the control of activities which may indirectly result in the deterioration of such habitats ..."¹⁴

Especially with regard to the word 'appropriate', Resolution No. 1 (1989) has added significant interpretive clarity. On the basis of the Convention text alone, there would apparently have been at least some scope for arguing that it is up to individual Parties to determine what is 'appropriate' in each set of circumstances, and even for the argument that considerations of a socio-economic or cultural nature can render a 'necessary' conservation measure 'inappropriate'. Instead, Resolution No. 1 makes clear that 'appropriate measures' in the sense of Article 4 is to be understood as 'effective measures'. Of course, social, economic and cultural considerations may influence the determination of what is an 'effective' conservation measure. Clearly, however, such factors may not *detract* from the effectiveness of conservation measures.

The species and natural habitats mentioned in the quoted text from Resolution No. 1 (1989) have subsequently been identified by the Standing Committee in Resolutions No. 4 (1996) and No. 6 (1998). Furthermore, Emerald Network sites, both candidate and adopted sites, must obviously be deemed to be of key importance to the conservation of the species and natural habitats involved. Thus, it follows from Article 4, interpreted in conformity with Resolution No. 1 (1989), that each Convention Party has a general obligation of result with regard to the candidate and adopted Emerald Network sites on its territory. Four key words characterise this obligation. Parties

¹⁰ See Section 6.4 below.

¹¹ See also Bowman et al. (2010), p. 298-300; Backes et al. (2009), 34; and Trouwborst et al. (2017a).

¹² Resolution No. 1 (1989), Preamble; see also Standing Committee Guidelines No. 3 (1993).

¹³ Resolution No. 1 (1989), Preamble.

¹⁴ Id., par. 2 (bold print added).

shall take those measures which are **required** and **able** to **ensure** the **conservation** of the habitats of species and natural habitat types involved. Achieving the result of safeguarding (or restoring) those “*abiotic and biotic features which form the habitat*”¹⁵ is paramount. In plain English, Parties must do what it takes, and do whatever works, to achieve the required conservation outcome.

This is a potentially far-reaching and demanding obligation. Nevertheless, from a legal point of view, the existence of this binding obligation of result is hardly controversial. It follows logically from the application of the general rules of treaty interpretation to the language of Article 4 in combination with the unambiguous interpretive statements in Resolution No. 1 (1989). These statements have not been contradicted in other and later Resolutions or Recommendations,¹⁶ but rather confirmed, as further demonstrated and illustrated below. Also with regard to the Emerald Network in particular, notwithstanding a range of procedural requirements set out in Resolutions and Recommendations, the Standing Committee has characteristically been “*more interested by the achievement of conservation results than by a particular ‘area protection’ procedure.*”¹⁷

The focus of this report is on ‘candidate’ and ‘adopted’ Emerald Network sites, and these will remain the target of attention below. It is important, however, to underline that the obligation of result of Article 4 is already triggered in an earlier stage of the Emerald Network constitution process. When, during Phase I of the development of the Emerald Network, a Contracting Party finalises the list or database of sites on its territory which it considers to be of importance to the conservation of the species and habitats mentioned in Resolutions No. 4 (1996) and No. 6 (1998)¹⁸ that is a defining moment for the application of Article 4. After all, this “*database containing scientific information on the sites selected for ensuring the long-term survival of the species and habitats to be protected according to the relevant resolutions of the Bern Convention*”¹⁹ provides for a strong indication and assumption that the selected sites are indeed significant for habitat conservation under the Bern Convention – and that, at least in the view of the government involved, these are key areas for the purposes of Article 4. This assumption becomes even stronger after completion of the evaluation of the proposed sites on a species-by-species and habitat-by-habitat basis for the biogeographical region(s) concerned in Phase II.²⁰ As soon as such evaluation is finalised, and certain basic criteria mentioned in the Appendix to Recommendation No. 157 (2011/2019) are met, each Party involved is requested to submit the site proposals to the Standing Committee for “*official nomination as candidate Emerald Network sites.*”²¹ The awarding by the Committee of this predicate is hardly more than a formality. Although it evidently confirms the aforementioned assumption, from a *legal* perspective the official nomination as candidate site by the Standing Committee is not a defining moment as far as the binding obligations from Article 4 are concerned – those begin to apply much earlier. Thus, when reading the remainder of the report, it should be realised that much of what is stated with regard to candidate and adopted Emerald Network sites, most likely also applies with regard to the sites on national lists compiled and submitted during Phase I, pending their official approval as ‘candidate’ or ‘adopted’ Emerald Network sites.

3.2. The result to be achieved

Under Article 4 as interpreted by Resolution No. 1 (1989), the result to be achieved – one way or another – is the “*conservation*” of the habitats involved, defined as the “*maintenance and, where appropriate, the restoration or improvement of the **abiotic and biotic features** which form the habitat of a species or a natural habitat.*”²² This interpretation has been expressly recalled by the Standing Committee more recently.²³

Subsequent Resolutions and Recommendations have provided further indicators as to the required conservation result. For instance, according to Resolution No. 8 (2012), Emerald Network sites are expected to

¹⁵ Id., par. 2(c).

¹⁶ E.g., Recommendation No. 14 (1989), par. 4, recommending Parties to “*ensure that appropriate and necessary measures of conservation are taken for the species, habitats and sites identified.*” Recommendation No. 16 (1989), par. 3-5; Resolution No. 8 (2012), par. 2(1).

¹⁷ Directorate of Democratic Governance, Culture and Diversity (2016), p. 10.

¹⁸ See, e.g., Directorate of Democratic Governance et al. (2013); and Directorate of Democratic Governance, Culture and Diversity (2016).

¹⁹ Recommendation No. 207 (2019), various par.

²⁰ See Directorate of Democratic Governance et al. (2013).

²¹ Recommendation No. 157 (2011/2019), par. 3-4 and Appendix.

²² Resolution No. 1 (1989), par. 2(c) (bold print added).

²³ See Resolution No. 8 (2012), Preamble (bold print added).

contribute to the “*long term survival of the species and habitats*” involved.²⁴ Likewise, Recommendation No. 157 (2011/2019) on candidate Emerald Network sites calls for the taking of conservation measures “*corresponding to the ecological requirements for the long term survival of species and habitats present in the proposed Emerald Network sites.*”²⁵

It can very well be argued that ecological processes and connections are part of the abiotic and biotic features to be conserved under Article 4²⁶. This holistic perspective appears to find reflection in the notion of the “*integrity*” of habitats and sites, which is another recurring concept in the practice of the Standing Committee. In a 2004 Recommendation on dams in Iceland, the Standing Committee urged the Icelandic government to ensure the “*ornithological integrity*” of an Important Bird Area (IBA) and the “*ecological integrity*” of another site.²⁷ In 2007, the Standing Committee suggested the relocation of certain wind farm projects under construction in Bulgaria “*in order to restore the integrity of sites to be considered as Natura 2000 sites, IBAs, or under other protection status.*”²⁸ In another 2007 Recommendation, Croatia was called upon to ensure that “*the integrity of the Drava Marshlands as a habitat is protected and maintained.*”²⁹ The “*integrity*” of Natura 2000 sites is an express feature of the site protection regime laid down in the Habitats Directive,³⁰ and also plays a role in the implementation of the UNESCO World Heritage Convention.³¹

A closely related, key notion in the Standing Committee’s Resolutions and Recommendations on the Emerald Network is the maintenance or restoration of the “*ecological character*” or “*ecological characteristics*” of sites.³² For example, one of the (non-binding) “*Rules for the Emerald Network*” laid down in Resolution No. 5 (1998) is that governments shall inform the Convention Secretariat of any important changes “*likely to affect negatively in a substantial way the ecological character of the designated ASCIs or the conditions having justified their designation.*”³³ With regard to candidate ASCIs, Recommendation No. 157 (2011/2019) notes that the “*ecological quality of proposed Emerald Network sites should be preserved as soon as they are officially nominated as ‘candidate Emerald Network sites’ by the Standing Committee.*”³⁴ Therefore, it calls on Parties to take the necessary measures in order to “*maintain the ecological characteristics of the candidate Emerald Network sites.*”³⁵ This requirement has been recalled in subsequent Recommendations.³⁶

Recommendation No. 208 (2019) specifically addresses the topic of “*detecting, reporting and responding to changes in the ecological character*” of Emerald Network sites, and recommends Contracting Parties (and invites observer States) to make use of a dedicated guidance document and associated flowchart in order to “*describe, monitor and preserve the ecological character of their Emerald Network sites.*”³⁷ The guidance document contains fifteen ‘Guidelines’ and sets out the following definition of the ‘ecological character’ of an Emerald Network site, incorporating an express link to the notion of site ‘integrity’:

“the particular combination of ecosystem components, processes and other ecological features or characteristics that contribute to the quality and functioning of the site. This is more than a statement of the

²⁴ Id., par. 3(3) (bold print added).

²⁵ Recommendation No.157 (2011/2019), par. 2.

²⁶ See also Pritchard (2018), p. 7-10.

²⁷ Recommendation No. 112 (2004) on Hydroelectric Dams at Kárahnjúkar and Nordlingalda (Iceland), par. 4 and 6.

²⁸ Recommendation No. 130 (2007) on the Windfarms Planned near Balchik and Kaliakra, and Other Wind Farm Developments on the Via Pontica Route (Bulgaria), par. 3.

²⁹ Recommendation No. 131 (2007) on the Planned Motorway Vc Across the Drava Marshlands in Slavonia (Croatia), par. 1(a).

³⁰ See, e.g., Art. 6(3) of the Directive.

³¹ Convention Concerning the Protection of the World Cultural and Natural Heritage (Paris), 16 November 1972, 11 I.L.M. 1294 (1972); Operational Guidelines for the Implementation of the World Heritage Convention, WHC.17/01; see Pritchard (2018), p. 10.

³² See Pritchard (2017); and Pritchard (2018).

³³ Resolution No. 5 (1998), Art. 4(2).

³⁴ Recommendation No. 157 (2011/2019), Preamble.

³⁵ Id., par. 1.

³⁶ Recommendation No. 201 (2018) on the Development of a Commercial Project in Skadar Lake (Montenegro), Preamble; Recommendation No. 202 (2018) on the Planned Hydro-Power Plant Developments on the Vjosa River (Albania), Preamble.

³⁷ Recommendation No. 208 (2019); the guidance document in question is Pritchard (2018) and the flowchart is Directorate of Democratic Participation (2019).

reasons why the site qualifies for inclusion in the Network – the emphasis here is instead on specifying the full mix of ingredients on which the site’s integrity depends.”³⁸

That the ‘ecological character’ of a site is something different – and/or something more – than the conditions justifying its designation as an Emerald Network site also follows from the use of the word “*or*” in Resolution No. 5 (1998).³⁹

Again, the above understanding of the ‘ecological character’ of Emerald Network sites can arguably be construed as informing the interpretation of the “*abiotic and biotic features*” of habitats to be conserved by Parties pursuant to Article 4. Besides recommending use of the guidance and flowchart to Parties, the Recommendation expressly instructs the Bureau to use them when assessing complaints about a Party’s alleged non-compliance with its obligations regarding Emerald Network sites, in the context of the case-file procedure.⁴⁰ It is hard to know for sure, however, to what extent the content of the guidelines and flowchart must be deemed to influence the interpretation of Convention obligations. None of the guidelines involved have been expressly reproduced in the Recommendation itself. Instead, a broad reference is made to a 29-page guidance document and a flowchart, with the recommendation to “*make use*” of them,⁴¹ while also stressing that the guidance document “*does not create new obligations but aims to support the implementation of existing provisions.*”⁴² Moreover, the guidance document itself declares that the guidelines it offers “*are not intended as a prescriptive recipe for implementation of the Bern Convention’s requirements concerning the Emerald Network,*” but instead “*simply provide a logical outline of elements to consider, and steps that can usefully be followed to design and operate a scheme that will be appropriate for the intended purpose.*”⁴³ The legal caliber of Recommendation No. 208 (2019) thus appears to be quite different from the aforementioned, unequivocal statement in Resolution No. 1 (1989) that “*for the purpose of improving the effectiveness of the convention, the terms listed hereunder are to be interpreted as follows*”⁴⁴ – which is then followed by several concrete definitions.

All of the aforementioned concepts are interrelated, and also linked to the concept of “*conservation status*”. The ‘conservation status’ of species and habitats, and the aim of achieving or maintaining a ‘favourable conservation status’, are key features of several other international legal instruments on nature conservation, particularly the 1979 Convention on Migratory Species⁴⁵ and the 1992 EU Habitats Directive.⁴⁶ Although the Bern Convention text itself does not mention it, the Standing Committee has incorporated the conservation status concept in many Resolutions and Recommendations, including important ones regarding the Emerald Network. Already in 1989, Recommendation No. 16 on ASCIs highlighted the plight of areas that are insufficiently protected under existing mechanisms, and called on Contracting Parties to “*improve the conservation status of such areas, using whatever mechanisms are appropriate in order to meet the requirements of the convention*”⁴⁷ – reflecting in the process once more the obligation of result flowing from Article 4. According to the Emerald Network rules promulgated in Resolution No. 5 (1998), governments “*shall undertake surveillance of the conservation status of species and natural habitats in designated ASCIs.*”⁴⁸ Resolution No. 8 (2012) also adopts the conservation status of species and habitats as the primary unit of assessment for monitoring and reporting purposes (see also below).⁴⁹ Moreover, the Resolution records the Parties’ understanding that the achievement of a “*satisfactory conservation*

³⁸ Pritchard (2018), Guideline 2.

³⁹ Resolution No. 5 (1998), Art. 4(2) speaks of changes likely to affect “*the ecological character of the designated ASCIs or the conditions having justified their designation.*”

⁴⁰ Recommendation No. 208 (2019), operative par.

⁴¹ *Id.*

⁴² *Id.*, Preamble.

⁴³ Pritchard (2018), p. 4.

⁴⁴ Resolution No. 1 (1998), Preamble.

⁴⁵ Convention on the Conservation of Migratory Species of Wild Animals (Bonn), 23 June 1979, 1651 U.N.T.S. 333, 19 I.L.M. 15 (1979), Art. I(1)(b)-(d), IV(1) and V(1).

⁴⁶ Habitats Directive, Art. 1(a), 1(e), 1(i), 2(2) and 3(1).

⁴⁷ Recommendation No. 16 (1989), par. 5.

⁴⁸ Resolution No. 5 (1998), Art. 4(1).

⁴⁹ Resolution No. 8 (2012), par. 3(2), 3(3) and 4(1).

status” of the species and natural habitats involved is the very rationale of their implementation of the Emerald Network regime:

*“The national designation of the adopted Emerald sites will ensure that they are protected from external threats and subject to an appropriate regime for achieving a satisfactory conservation status of the species and natural habitats listed in Resolutions No. 4 (1996) and No. 6 (1998) present on the site.”*⁵⁰

Recommendation No. 172 (2014) likewise appears to indicate that achieving a “*satisfactory conservation status*” of the species and habitats involved is a prime objective of the Emerald Network.⁵¹

Guidance documents point in the same direction. According to a 2013 document, the “*ultimate goal*” of the Emerald Network’s creation is the “*long term survival and maintenance of a favourable conservation status of the species and habitats of European Interest*,”⁵² whereas a 2014 document on the management of ASCIs similarly asserts that “*favourable conservation status is the main aim of the Emerald network*.”⁵³ Also in the practice of the Standing Committee, the term “*satisfactory conservation status*” has been alternated with the term “*favourable conservation status*”.⁵⁴ To illustrate, when addressing the impact of certain hydropower projects on specific sites in Iceland, the Standing Committee recommended the following:

“Avoid disturbance and pressure in the area of Eyjabakkur Important Bird Area (IBA) by restricting access during the moulting period of the Pink-footed goose (Anser brachyrhynchus). Furthermore, take appropriate measures to ensure that favourable conservation status of the area is maintained;

Maintain a favourable conservation status of the Úthérð to ensure the ornithological integrity of this IBA;

*Maintain the favourable conservation status of the Thjórsárver to ensure the ecological integrity of this ecosystem and protect against significant negative impacts that may arise as a result of energy projects.”*⁵⁵

Similarly, with regard to a project in Skadar Lake, Montenegro, the Standing Committee recommended the elaboration of a reference list of habitats present at the site, while urging the authorities to define the habitats’ “*favourable conservation status and the necessary conservation measures to maintain or restore the favourable conservation status*,” and to “*include those measures in any planning document related to the conservation of ... Candidate Emerald Sites Skadar lake*.”⁵⁶ The following statement made by the Standing Committee in 1993 expressly combines the notions of obligation of result and conservation status:

*“The Standing Committee to the Bern Convention has always followed the principle of ‘obligation of results’ to implement the convention. This implies that Parties are free to choose the mechanisms, procedures and instruments necessary in order to comply with the obligations of the convention, but that they are requested to show that the ‘results’ of their actions satisfy the requirements of the convention: the fact that some populations listed in Appendix II of the convention have proven unsatisfactory conservation status can be sufficient to lead the Standing Committee, in accordance with the objectives of the convention, to urge Parties to take the necessary measures.”*⁵⁷

It remains unclear what the precise *criteria* are for assessing conservation status, and what precisely constitutes a ‘satisfactory’ or ‘favourable’ conservation status of a species or habitat type,⁵⁸ although it makes apparent sense for Bern Convention Parties to align their understanding of the concept with the way it has been defined and applied under the Habitats Directive and the Convention on Migratory Species.⁵⁹ Moreover, there is as yet no

⁵⁰ Id., par. 2(1).

⁵¹ Recommendation No. 172 (2014), par. 1.

⁵² Directorate of Democratic Governance et al. (2013), p. 2.

⁵³ Opermanis (2014), p. 5.

⁵⁴ An example where the term “favourable conservation status” is employed is Guidelines No. 3 (1993) for Recovery Plans for Species of Amphibians and Reptiles. A further example with “satisfactory conservation status” is Recommendation No. 163 (2012) on the Management of Expanding Populations of Large Carnivores in Europe.

⁵⁵ Recommendation No. 112 (2004), par. 3, 4 and 6.

⁵⁶ Recommendation No. 201 (2018), par. 1(ii).

⁵⁷ Standing Committee Guidelines No. 3 (1993).

⁵⁸ For a treatment of these questions in relation to the Habitats Directive, see, *inter alia*, Epstein et al. (2016); and Trouwborst et al. (2017b).

⁵⁹ The latter two instruments employ largely similar definitions of the concept.

complete clarity regarding the *level(s)* at which a satisfactory or favourable conservation status is to be achieved.⁶⁰ Recommendations No. 16 (1989) and No. 112 (2004) speak expressly of the conservation status of individual sites, and such a site-level approach also appears implicit in Resolution No. 5 (1998) and Recommendation No. 201 (2018). Recommendation No. 172 (2014), however, appears to imply a national (or even transnational) approach. And Resolution No. 8 (2012) in fact may be interpreted as promoting the use of separate conservation status benchmarks at site level and at higher levels. According to one of its Emerald Network ‘rules’, sites must be subject to an appropriate regime “for achieving a satisfactory conservation status of the species and natural habitats ... present on the site.”⁶¹ According to another, specific “site objectives will be drawn up for the management of Emerald sites, in compliance with the national/regional conservation objectives of the country.”⁶² Likewise, one of the aforementioned guidance documents holds that conservation objectives should be set for each Emerald site “in order to make sure that the site contributes in the best possible way to achieving favourable conservation status at the appropriate level.”⁶³ It also asserts that “[t]he fact, that a species of Resolution No. 6 (1998) or a habitat of Resolution No. 4 (1996) is listed in the SDF [standard data form], means that the country holds a responsibility to maintain or restore them at the favourable conservation status in a given site, with the only exception concerning the features with insignificant (‘D’) occurrences.”⁶⁴ According to another guidance document, “[f]avourable conservation status is judged at the population, national, biogeographical or regional level,” whereas the conservation objective of individual sites is rather the “maintenance of the site’s ecological character,” which “contributes in turn to the objective of maintaining a favourable conservation status for the species and habitats that are collectively supported by the sites.”⁶⁵ Meanwhile, the first conservation status reporting exercises by Parties in response to Resolution No. 8 (2012) has focused on the (national) biogeographical level and the national level.⁶⁶

The best explanation – which also enables one to interpret the various Standing Committee statements in the most consistent manner possible – may be to assume that a favourable/satisfactory conservation status is indeed to be defined and achieved separately and in parallel at multiple levels (site, population, national territory, biogeographical region, Europe), whereby the maintenance of a site’s ecological character roughly approximates a favourable conservation status at site level. At any rate, absolute clarity and consistency regarding the use of the various concepts has unfortunately not yet been achieved.

The question also arises how, precisely, Article 4(2) of the Convention relates to the general obligation of result identified in the preceding analysis. Article 4(2) sets out an obligation to “have regard” in “planning and development policies” to the conservation requirements of protected habitats so as to “avoid or minimise as far as possible any deterioration of such areas.”⁶⁷ In light of the foregoing, this would appear to imply that some minor degree of deterioration of the habitats protected in Emerald Network sites as a consequence of planning and development policies may *prima facie* be allowed without violating Article 4, but only when its avoidance is ‘impossible’ and the deterioration does not prejudice the favourable or satisfactory conservation status of any species and habitat types, or the sites’ ecological character.

In summary, it would seem clear that, in principle, Article 4 of the Bern Convention requires Contracting Parties to prevent the **deterioration** of the conservation status of species and natural habitats within candidate and adopted Emerald Network. A proper rule of thumb for the application of Article 4 would appear to be not allowing any deterioration in any of a site’s features, measured from the moment of its selection for the Emerald Network, and avoiding a narrow focus on the site’s minimum qualifying attributes.⁶⁸ As a “pragmatic proxy,” a recent guidance document highlights the “presumption that the values identified for a site at the time of its inclusion in

⁶⁰ See also Shine (2010), p. 11; Trouwborst et al. (2017a), p. 161-164.

⁶¹ Resolution No. 8 (2012), par. 2(1).

⁶² Id., par. 2(3).

⁶³ Opermanis (2014), p. 5.

⁶⁴ Id.

⁶⁵ Pritchard (2018), p. 5-7.

⁶⁶ See, e.g., Roekaerts et al. (2020).

⁶⁷ Bern Convention, Art. 4(2).

⁶⁸ Pritchard (2018), p. 5-9.

the Network ... should be maintained in the state described for them at that time.”⁶⁹ In situations where the conservation status of a given species or habitat type is already unsatisfactory or unfavourable, it appears clear that **restoration** of the species or habitat to a satisfactory or favourable status is to take place in order to secure compliance with Article 4, but less clear within what timeframe.

Exceptions from the obligations flowing from Article 4 may be made under Article 9 of the Convention, discussed below (see Section 6.4).

3.3. The measures needed to achieve the result

It should be emphasised that the prevailing emphasis on results over procedure discussed above does not entail unlimited flexibility in the choice of concrete measures. As detailed above, to meet their obligations under Article 4 of the Convention, Parties must take those measures regarding their candidate and adopted Emerald Network sites which are required and suitable to effectively ensure the conservation of the habitats of species and the natural habitat types involved.

If certain measures are ostensibly indispensable to achieve the required result – whether expressed in terms of the “*abiotic and biotic features which form the habitat*” or ‘conservation status’ or ‘ecological character’ – then these measures must be taken in order to comply with Article 4. A minimum degree of monitoring appears to sit in this category, as the acquisition of sufficiently detailed information on how the conservation status of the various species and habitats is developing within the sites concerned – or how the ‘ecological character’ of the site is developing – is of the essence in order to determine in the first place to what extent the required result is being achieved.⁷⁰ Another example is the active screening of potentially harmful projects or activities, followed by either the outright prevention or refusal of such projects and activities, or a careful assessment of potential consequences prior to a decision on their authorisation. These specific obligations simply follow from the general obligation of result. This would be so even if they had not separately been promulgated in Resolutions and Recommendations regarding the Emerald Network – although they have in fact been thus reinforced, as discussed below.

Other measures promoted by the Standing Committee are *additional* to the measures that are strictly required by the general obligation of result flowing from Article 4. The distinction is not always razor sharp, and may be influenced by the concrete circumstances of each case and each site. Yet, clear examples of this second category can be given, and include the submission of standard data forms (SDFs),⁷¹ the informing of the Secretariat of changes affecting the ecological character of sites,⁷² and the adoption of site management plans.⁷³ Whereas these measures, and others like them, naturally appear conducive to achieving the effective conservation of species and habitats within Emerald Network sites, they cannot be said to be indispensable to that end in every instance. Therefore, they cannot be considered as unambiguously required by Article 4 of the Convention as a matter of course, especially in the absence of strong interpretive statements to the contrary by the Standing Committee. Indeed, if a given Contracting Party were able to demonstrate convincingly that it can maintain all native species and natural habitat types on its territory in a favourable conservation status without participating in the Emerald Network at all, that Party would arguably not be violating its obligations under Article 4 of the Convention.

The central question at issue in this report, however, is what the obligations of (non-EU) Contracting Parties are with respect to the areas on their territories that already have the status of candidate or adopted Emerald Network site. From this perspective, some of the more specific measures mentioned in the previous paragraphs, and some others, will be examined in further detail below. When doing so it is critical, for present purposes, to continually keep in mind their relationship with the obligations set out in the Convention’s binding provisions.

⁶⁹ Id., p. 7.

⁷⁰ See also Trouwborst (2017), p. 5-6.

⁷¹ Resolution No. 5 (1998), par. 3(1).

⁷² Id., par. 4(2).

⁷³ See, e.g., Resolution No. 8 (2012), par. 2(1).

4. APPROPRIATE HABITAT PROTECTION AND MANAGEMENT REGIME

Meeting the obligation of result under Article 4 with respect to Emerald Network sites apparently presupposes (i) setting in place a protection regime, and (ii) taking practical management measures, both of which are able to effectively meet the conservation needs of the habitats in question. There may be circumstances where either or both can be minimal, but in most instances it will be necessary to arrange for some sort of formal protection regime for the site involved, and to undertake active management action.

4.1. Site protection regime

Regarding the formal protection of Emerald Network sites, Article 4(1) of the Bern Convention requires each Contracting Party to “*take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats.*”⁷⁴ Recommendation No. 16 (1989) directs Parties to “*take such steps, either by legislation or otherwise, to ensure wherever possible that [ASCIs] are the subject of an appropriate regime, designed to achieve the conservation of the factors*” for which the areas have been selected.⁷⁵ It also recommends Parties to identify which ASCIs remain inadequately protected under existing mechanisms, and to protect them “*using whatever mechanisms are appropriate in order to meet the requirements of the convention.*”⁷⁶ The need for an appropriate protection regime for Emerald Network sites, whereby the meaning of ‘appropriate’ depends on the circumstances, is also highlighted in Resolution No. 8 (2012):

*“The national designation of the adopted Emerald sites will ensure that they are protected from external threats and subject to an appropriate regime for achieving a satisfactory conservation status of the species and natural habitats listed in Resolutions No. 4 (1996) and No. 6 (1998) present on the site, involving, if and where appropriate, management plans, administrative measures and contractual measures.”*⁷⁷

In many instances over the years, the Standing Committee has issued recommendations to Parties regarding the formal protection of individual sites through their designation as national parks, reserves or other concrete protected area figures. For instance, in 1987 the Standing Committee asked Turkey to “[c]onsider the protection of the Dalyan area as a national park or a biogenetic reserve in order to ensure the protection of sea turtles and Mediterranean monk seals as priorities.”⁷⁸ The following year, the Committee applauded the “*decision of the Government of Turkey to designate Dalyan as a Special Protection Area.*”⁷⁹ And in 1993 the Italian government was requested to “[c]reate, in collaboration with the Region of Sardinia, a National Park in the region of Gennargentu [and to i]nclude in that National Park the coastal area bordering the Gulf of Orosei.”⁸⁰ Other instances include further suggestions to designate sites as national parks⁸¹ or reserves,⁸² to purchase land to secure habitat protection,⁸³ or even to designate a site under the Ramsar Convention⁸⁴ as Wetlands of International

⁷⁴ Bern Convention, Art. 4(1).

⁷⁵ Recommendation No. 16 (1989), par. 3(a).

⁷⁶ *Id.*, par. 5.

⁷⁷ Resolution No. 8 (2012), par. 2(1).

⁷⁸ Recommendation No. 8 (1987) on the Protection of Marine Turtles in Dalyan and Other Important Areas in Turkey, par. 1.

⁷⁹ Recommendation No. 12 (1988) Concerning the Protection of Important Turtle Nesting Beaches in Turkey, Preamble.

⁸⁰ Recommendation No. 42 (1993) on the Conservation of Some Threatened Amphibians and Reptiles in the Area of Gulf of Orosei, Sardinia (Italy), par. 1-2.

⁸¹ E.g., Recommendation No. 63 (1997) on the Conservation of the Akamas Peninsula, Cyprus, and, in Particular, of the Nesting Beaches of *Caretta caretta* and *Chelonia mydas*, par. 1: “*Declare the Akamas peninsula a national park, comprising a marine and a terrestrial part following as far as possible the suggestions of the World Bank study and giving to the beach of Limni and its surrounding land a similar status to the Akamas core area.*”

⁸² E.g., Recommendation No. 13 (1988) Concerning Measures for the Protection of Critical Biotopes of Endangered Amphibians and Reptiles, par. B(1): “*give, by use of the legal instruments of regional authorities in habitat protection, adequate protection to sites in Friuli-Venezia Giulia (Italy) containing Proteus anguinus, by declaring the relevant caves as reserves*”; Recommendation No. 24 (1991) on the Protection of Some Beaches in Turkey of Particular Importance to Marine Turtles, par. (e): “*designating Akyatan and Agyatan areas as nature reserves.*”

⁸³ Recommendation No. 23 (1991) on the Protection of the Habitat of *Vipera ursinii rakosiensis* in Hungary, par. 1: “*Assure, preferably by purchasing land, the protection of the small isolated meadow habitats of Vipera ursinii rakosiensis in the plain between the rivers Danube and Tisza, especially in the region between Dabas and Fulophaza.*”

⁸⁴ Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar), 2 February 1971, 996 U.N.T.S. 245, 11 I.L.M. 963 (1971).

Importance;⁸⁵ and recommendations to apply a different protected area category to existing sites,⁸⁶ or to enlarge them.⁸⁷ In yet other cases, the Standing Committee has simply called for the protection of concrete habitats “*by the most appropriate means,*” without specifying any particular protected area figure.⁸⁸

Clearly, then, there is not one single national protected area figure or category that Bern Convention Parties are obliged to use for the national designation of Emerald Network sites within their territories, as long as they select and apply a regime capable of effectively delivering the conservation results required by Article 4.

4.2. Site management measures

Candidate and adopted Emerald Network sites have been selected because of their importance for certain species and natural habitats.⁸⁹ As concluded above, Article 4 of the Bern Convention obliges Contracting Parties to take those measures which appear necessary and suitable in order to maintain or restore the abiotic and biotic features of the habitats, to maintain or achieve a satisfactory or favourable conservation status of the species and habitat types involved, and to safeguard the ecological character of the sites. What measures those are exactly, will very much depend on the particular features and circumstances pertaining to each Emerald Network site. It will be recalled that ‘conservation’ in the sense of Article 4 not only requires addressing obvious and immediate threats to the habitats concerned, but also encompasses “*the control of activities which may indirectly result in the deterioration*” of habitats.⁹⁰

Increased clarity regarding the management measures required for the preservation and/or restoration of the habitats within a given site can be obtained by carefully defining the site’s conservation objectives. In this regard, one of the rules laid down in Resolution No. 8 (2012) reads as follows:

*“Specific short and long-term site objectives will be drawn up for the management of Emerald sites, in compliance with the national/regional conservation objectives of the country, in order to facilitate the monitoring of their implementation and the regular assessment of their achievement.”*⁹¹

The 2018 guidance document on ‘ecological character’ contains further instructions in this regard. It suggests stating the overarching conservation objective for each site as the “*maintenance of the site’s ecological character*” (the meaning of which was explored above in Section 3.2) and then explicitly defining what this entails.⁹² In doing so, an all too narrow focus on the maintenance of a site’s minimum qualifying attributes is to be avoided:

*“The conservation objective for Emerald sites needs to be more than simply maintaining the conditions that justified the site’s designation. This is because the reasons why the site meets the criteria are only a statement of the minimum qualifying threshold(s) it has satisfied; whereas a statement of the conservation/management objectives for it (and the baseline against which to evaluate change) will usually need to define more than this minimum qualifying state. To do otherwise would be to allow sites of more than merely qualifying value to decline to the minimum. Moreover in some circumstances (e.g. if reference animal populations reduced as a result) this could lead to repeated redefinitions of the relevant qualifying threshold(s), such that qualification could be maintained with successively smaller and smaller numbers, until the perverse but logical outcome is reached whereby the population becomes extinct.”*⁹³

⁸⁵ Recommendation No. 32 (1991) on the Protection of the Sources of the River Pescara (Popoli, Pescara Province, Italy), par. 9: “*study whether the area ... might be designated by the Italian authority under the Ramsar Convention to highlight its importance for avifauna and to ensure the authorities’ commitment to conserving it on a long-term basis.*”

⁸⁶ E.g., Recommendation No. 13 (1988), par. 5: “*designate the protected area of Le Bine (Italy) as a biogenetic reserve.*”

⁸⁷ Id., par. 4: “*extend the protection of Parco del Ticino (Italy) to include adjacent breeding sites of Pelobates fuscus insubricus;*” and par. 5: “*extend [the protected area of Le Bine] to include the critical biotope of the largest surviving population of the threatened species Rana latastei.*”

⁸⁸ Id., par. 3: “*ensure, by the most appropriate means, protection of the habitat of Alytes muletensis in Sierra de Tramuntana in Majorca (Spain);*” par. 6: “*ensure, by the most appropriate means, protection of the habitat of Podarcis hispanica atrata in the Columbretes islands (Spain).*”

⁸⁹ See, e.g., Directorate of Democratic Governance et al. (2013).

⁹⁰ Resolution No. 1 (1989), par. 2(c).

⁹¹ Resolution No. 8 (2012), par. 2(3).

⁹² Pritchard (2018), Guideline 1 (p. 5).

⁹³ Pritchard (2018), p. 8-9.

A long list of examples of on-site management measures is appended to a 2015 guidance document, aptly illustrating the endless variety of management measures the taking of which may, according to the circumstances, be required for concrete sites in order to comply with Article 4.⁹⁴ The records of the Standing Committee also provide numerous illustrations. A loose attempt is made here to categorise these measures, for primarily illustrative purposes. First, it may be necessary to adjust water management,⁹⁵ mowing regimes,⁹⁶ grazing regimes,⁹⁷ and other management practices in the area to habitat conservation needs. Second, Article 4 may require the removal, replacement or adjustment of buildings and other man-made structures, installations and infrastructure such as roads, lights, antennae, powerlines⁹⁸ and wind turbines.⁹⁹ A nearly Standing Committee Recommendation on turtle nesting beaches in Greece provides several examples:

“Recommends that the Government of Greece embark without delay on the following actions:

- *Remove the prefabricated houses in Dafni;*
- *Remove walls and concrete platforms built in the optimal sites for turtle nesting at Kalamaki and eastern Laganas beaches ...;*
- *Replace existing lights shining on the beaches or reorientate them in such a way that their impact on turtles is minimized.”*¹⁰⁰

Third, it may be necessary to cease, regulate or outlaw human activities that are difficult to reconcile with the preservation or restoration of the habitats protected by the Emerald Network site involved – such as the “*use of deck chairs, sunshades and pedalos*” on turtle nesting beaches,¹⁰¹ the mechanical cleaning of such beaches,¹⁰² the operation of restaurants,¹⁰³ and the use of (speed)boats in sensitive areas.¹⁰⁴ To illustrate the latter, in 2018 the Standing Committee urged Montenegro to apply *inter alia* the following conservation and management measures to the Skadar Lake area:

“The use of speedboats has to be limited to police, border police, ranger service and other authorities with competences on the lake. Those have to follow speed restrictions except in case of emergency,

*The use of personal water crafts (water scooters) and any other water activities which can harm the floating vegetation must be prohibited.”*¹⁰⁵

Fourth, it may be necessary to restrict the access of humans, and of domesticated and other alien species of animals, to (parts of) protected sites, as illustrated by Standing Committee Recommendations calling for barriers to stop vehicles,¹⁰⁶ the closing down of tourist zones,¹⁰⁷ and the prevention of the “*grazing of goats and predation*

⁹⁴ Directorate for Democratic Governance et al. (2015), Annex 1 (p. 16-18).

⁹⁵ E.g., Recommendation No. 83 (2000) on the Conservation Status of Lake Vistonis and Lagra-Lafrouda Lagoon (Greece): “*in order to maintain the uncultivated area eastwards of the dyke on the eastern side of lake Vistonis as an important wetland and to avoid its drainage, the ditches, which cross the canals at right angles need to be filled up.*” [pumping]

⁹⁶ E.g., Recommendation No. 13 (1988), par. A(1): “*ensure appropriate management of meadows at Moosbrunn and Neudegg (Austria) by reducing mowing to one cut in the late autumn.*”

⁹⁷ E.g., Recommendation No. 42 (1993), par. 4: “*Take special care to reduce grazing activities to a level which is compatible with the maintenance of the ecological values of the park.*”

⁹⁸ E.g., Recommendation No. 110 (2004) on Minimising Adverse Effects of Above-Ground Electricity Transmission Facilities (Power Lines) on Birds, par. 3: “*consider replacing underground overhead powerlines in areas of exceptional high interest for birds, particularly in protected areas and in areas designated for the Natura 2000 and Emerald Networks for their bird interest.*”

⁹⁹ E.g., Recommendation No. 130 (2007), par. 10: “*take measures for the removal of turbines in case of unacceptable bird collisions where no alternatives exist*”; Recommendation No. 144 (2009) on the Wind Park in Smøla (Norway) and Other Wind Farm Developments in Norway, par. 3: “*shutting down (some of) the turbines in crucial periods of the annual bird cycle.*”

¹⁰⁰ Recommendation No. 9 (1987) on the Protection of *Caretta caretta* in Laganas Bay, Zakynthos (Greece), par. 1, 2 and 7.

¹⁰¹ Id., par. 5.

¹⁰² Recommendation No. 63 (1997), par. 9: “*avoid ... mechanical cleaning of the beach.*”

¹⁰³ Id., par. 8: “*Close down illegal restaurants ... (including Aspros river restaurant).*”

¹⁰⁴ E.g., Recommendation No. 9 (1987), Preamble: “*ban the use of speedboats in the whole of Laganas Bay and set speed limits and appropriate corridors for other boats*”; Recommendation No. 63 (1997), par. 9: “*avoid water sports.*”

¹⁰⁵ Recommendation No. 201 (2018), par. 1(viii)-(ix).

¹⁰⁶ Recommendation No. 54 (1996) on Conservation of *Caretta caretta* at Patara (Turkey), par. 6: “*erect a barrier in front of the car-parks for the middle and north sections of the beach and ban motor traffic from the north section*”; also Recommendation No. 9 (1987), par. 6: “*Close the access of vehicles to the beaches from all roads and effectively enforce this ban.*”

¹⁰⁷ Recommendation No. 63 (1997), par. 6: “*Abolish the tourist zone near Toxeftra*”; par. 7: “*Regulate access of people and vehicles to the*

by cats.”¹⁰⁸ Fifth, particular mitigation measures may be required, for instance targeting noise pollution¹⁰⁹ or light pollution.¹¹⁰ Sixth, the taking of active habitat restoration measures may be necessary in order to comply with Article 4, as the latter not only requires the maintenance but also, where applicable, the “*restoration or improvement*” of the features which form the habitats involved.¹¹¹ For example, a Recommendation on certain Greek lakes calls for “*appropriate measures to reverse the adverse environmental effects*” of engineering works already undertaken;¹¹² and a Recommendation on a planned motorway through the Bulgarian Kresna Gorge site calls on the government to provide instead for the “*downscaling and rehabilitation of the existing road, restoring its initial status of a local road ..., with suitable planning to revitalize damaged areas.*”¹¹³ A final illustration of the emphasis on doing what it takes, and the concrete and sometimes drastic actions needed to comply with Article 4, is offered by a 2002 Recommendation on northern bald ibis (*Geronticus eremita*) conservation in Morocco:

*“end the illegal occupation of the coast through cave conversions, and evacuate and demolish all illegal constructions, since they represent an unjustifiable occupation of the coastal zone, threatening areas that are vital for the ibis and preventing the possibility of the species’ expansion; put an end to other activities that are incompatible with the national park’s objective and that have – or are likely to have – an impact on the bald ibis (military shooting range, circulation of cars along the cliff, paragliding, intensive chicken farm).”*¹¹⁴

The development and implementation of protected area management plans, or equivalent plans, is good practice and has been widely advocated by the Standing Committee. In its 1989 Recommendation on ASCIs, Parties are advised to “*take steps, as appropriate,*” to “*draw up and implement management plans which will identify both short- and long-term objectives,*” whereby it is clarified that such management plans can relate to “*individual areas or to a collection of areas such as heathlands.*”¹¹⁵ Parties are furthermore recommended to “*regularly review the terms of the management plans in the light of changing conditions or of increased scientific knowledge.*” Site management plans have also frequently featured in Recommendations concerning concrete areas. For example, in the Recommendation on Greek lakes just mentioned, the Standing Committee called for “*immediate steps to formulate a sound protected area management plan for Lake Vistonis and its environs.*”¹¹⁶ And when the Committee recommended the creation of a national park bordering the Gulf of Orosei, it also instructed the Italian authorities to “*[e]nsure that such park is provided, at the shortest delay, with a management plan.*”¹¹⁷

However, as indicated above, drawing up and implementing a management plan for each Emerald Network site cannot be considered a uniform prerequisite to comply with Article 4 of the Convention, as there may be cases where the habitats within a site can be adequately conserved in the absence of such a plan. This is aptly reflected in Resolution No. 8 (2012), which calls for management plans for Emerald Network sites “*if and when*

beaches.”

¹⁰⁸ Recommendation No. 13 (1988), par. B(8).

¹⁰⁹ E.g., Recommendation No. 9 (1987), Preamble: “*control the noise level of the discothèque on Sostis islet*”; Recommendation No. 32 (1991), par. 6: “*take suitable steps to reduce the noise and landscape pollution caused by the motorway (for instance, by means of acoustic barriers formed of tall standard trees typical of the region).*”

¹¹⁰ E.g., Recommendation No. 63 (1997), par. 9: “*Ensure that lights at the recently built Thanos hotel complex avoid photopollution of the beach.*”

¹¹¹ Resolution No. 1 (1989), par. 2(c).

¹¹² Recommendation No. 83 (2000).

¹¹³ Recommendation No. 98 (2002) on the Project to Build a Motorway Through the Kresna Gorge (Bulgaria), par. 6; for further examples regarding restoration measures see, e.g., Recommendation No. 112 (2004), par. 5; Recommendation No. 130 (2007), par. 3; Recommendation No. 201 (2018), par. 1(ii).

¹¹⁴ Recommendation No. 97 (2002) on the Conservation of the Bald Ibis (*Geronticus eremita*) and the Tourism Development Project in Tifnit (Souss Massa, Morocco), par. 5.

¹¹⁵ Recommendation No. 16 (1989), par. 4(a).

¹¹⁶ Recommendation No. 83 (2000).

¹¹⁷ Recommendation No. 42 (1993), par. 3; further examples include Recommendation No. 32 (1991), par. 1: “*draw up and put into effect a landscape plan for the sports palace in order to integrate it better into the environment*”; and Recommendation No. 113 (2004) on the Installation of a New Antenna (Pluto II) in the Sovereign Base Area (Akrotiri, Cyprus), par. 3: “*Draw up an integrated management plan for the whole wetland complex of the Salt Lake and Fissouri Marsh.*”

*appropriate.*¹¹⁸ Recommendation No. 157 (2011/2019) uses exactly the same words with regard to candidate Emerald Network sites.¹¹⁹

Several other recommended actions, which are generally considered good practice regarding protected areas, are situated in the same legal category as management plans – they may or may not be required from Bern Convention Parties as a matter of international law, depending on the circumstances. One example is research, the performance of which, in a “*properly co-ordinated fashion,*” is advocated in Recommendation No. 16 (1989) with a view to “*furthering the understanding of the critical elements in the management*” of ASCIs¹²⁰ (see also the discussion of monitoring in Section 5 below). Another example is stakeholder involvement, as called for in Resolution No. 8 (2012):

*“National, regional and local stakeholders will be involved, if and where appropriate, in the planning of the management of the sites, as well as in the implementation of the conservation and protection measures foreseen, and in the monitoring of the sites’ management.”*¹²¹

Although undoubtedly highly advisable, involving various stakeholders is not *per se* a strict prerequisite under Article 4 of the Convention – even if it may to some extent be required by other international legal instruments. A third example is the provisioning of adequate personnel and material. With regard to ASCIs, Parties have been called upon to ensure that:

*“the agencies responsible for the designation and/or management and/or conservation of such areas or any one of them have available to it sufficient manpower, training, equipment and resources (including financial resources) to enable them properly to manage, conserve and survey such areas.”*¹²²

All that can be said, again, is that Parties must indeed dedicate *sufficient* staff and other resources to warrant the conservation of habitats as required by Article 4.

5. MONITORING AND REPORTING

Without adequate monitoring, it will be difficult if not impossible to know what management measures are needed for the conservation of any given Emerald Network site. Moreover, to enable a meaningful assessment of the extent to which a given Party is in compliance with its obligations under Article 4 of the Convention with regard to the Emerald Network sites on its territory, and to enable a meaningful degree of oversight by the Standing Committee, it is necessary that each Party monitors and reports on the conservation status of the species and habitats concerned, and generally on any changes pertaining to the features for which those sites were selected.¹²³ Indeed, as Resolution No. 8 (2012) expressly acknowledges, monitoring and reporting are “*essential for ensuring the efficiency of the Emerald Network in the long-term for achieving its objectives.*”¹²⁴ Regarding monitoring, Resolution No. 8 (2012) stipulates the following rules:

“Parties will ensure that a monitoring framework forms an integral part of the management plans and/or other administrative measures taken for the designation of Emerald sites;

The monitoring of the site’s management will comprise regular surveillance of the implementation of the conservation regime and of the conservation status of the species populations and natural habitats – in particular those listed in the Standing Committee’s resolutions No. 4 (1996) and No. 6 (1998) – and/or other factors giving rise to the designation of the area as specified in paragraph 1 of Recommendation No. 16 (1989);

¹¹⁸ Resolution No. 8 (2012), par. 2(1).

¹¹⁹ Recommendation No. 157 (2011/2019), par. 2.

¹²⁰ Recommendation No. 16 (1989), par. 3(c).

¹²¹ Resolution No. 8 (2012), par. 2(4).

¹²² Recommendation No. 16 (1989), par. 3(b); see also Recommendation No. 42 (1993), par. 3, calling for the provisioning of the envisaged national park with “*appropriate wardens and guards.*”

¹²³ See also Trouwborst (2017).

¹²⁴ Resolution No. 8 (2012), Preamble.

The regular surveillance of the conservation status of species and natural habitats for which the site has been designated will comprise appropriate scientific and ecological research, aiming at identifying whether it contributes to the long term survival of the species and habitats."¹²⁵

Regarding reporting, the same Resolution states, in similarly firm language, that "*Parties will report to the Secretariat ... on the conservation status of species and habitats listed in Resolutions No. 6 (1998) and No. 4 (1996).*"¹²⁶

Long before the adoption of Resolution No. 8 (2012), the Standing Committee had already called on Contracting Parties to "*review regularly or continually in a systematic fashion their performance*" regarding Emerald Network sites; to "*provide for the monitoring of such areas and especially of the factors for which their conservation is important;*" and to ensure that "*appropriate ecological and other research is conducted, in a properly co-ordinated fashion, with a view to ... monitoring the status of the factors giving rise to their designation and conservation.*"¹²⁷ The Emerald Network rules set out in Resolution No. 5 (1998) also include the following:

"The governments shall undertake surveillance of the conservation status of species and natural habitats in designated ASCIs.

The governments shall inform the Secretariat of any important changes likely to affect negatively in a substantial way the ecological character of the designated ASCIs or the conditions having justified their designation."¹²⁸

Recommendation No. 208 (2019) and the associated guidance document pays special attention to the monitoring of (changes in) the ecological character of Emerald Network sites.¹²⁹ Finally, the importance of monitoring is stressed in several Recommendations concerning specific sites.¹³⁰

6. ANTICIPATING AND RESPONDING TO SPECIFIC THREATS

According to the definition of the word 'conservation' agreed upon by Parties in Resolution No. 1 (1989), conservation as required by Article 4 of the Convention "*includes, where appropriate, the control of activities which may indirectly result in the deterioration of such habitats.*"¹³¹ Hence, the obligation of result flowing from Article 4 dictates that Emerald Network sites be "*protected from external threats,*" in the words of Resolution No. 8 (2012).¹³² As discussed above (see Section 4.2), with regard to each Emerald Network site within its territory, a Contracting Party must take the management measures that are necessary to counter activities, projects and processes, and frankly address any causes of whatever nature, that threaten the conservation (status) of the species and habitats for which that site has been created, or the ecological character of the site.

As this is an obligation of *result*, its scope is clearly not limited to threatening factors arising *within* Emerald Network sites, but also covers developments that take place *beyond* a site's boundaries but nevertheless pose a threat to the species and habitats within the site. Likewise, the scope of Article 4 encompasses both *existing* and *new* threats. Some factors threatening the conservation (status) of species and habitat types involved may already be present when an area is selected or designated as an Emerald Network site. Such factors must be addressed to the extent necessary to maintain or restore a satisfactory or favourable conservation status, and the ecological character of the site. Many of the concrete examples of management measures given above concern such situations. In the present section, however, the focus is on the obligations of Parties regarding *new* activities or projects

¹²⁵ Id., par. 3(1)-(3). This is preceded by the statement that the Standing Committee "[r]esolves to adopt the following rules."

¹²⁶ Id., par. 4(1); see also Recommendation No. 172 (2014), par. 4.

¹²⁷ Recommendation No. 16 (1989), par. 2, 4(e) and 3(c), respectively.

¹²⁸ Resolution No. 5 (1998), par. 4(1)-(2).

¹²⁹ Pritchard (2018), Guidelines 8-10, p. 16-20.

¹³⁰ E.g., Recommendation No. 108 (2003) on the Proposed Construction of the 'Via Baltica' (Poland), par. 3; Recommendation No. 114 (2004), par. 1; Recommendation No. 130 (2007), par. 9; Recommendation No. 131 (2007), par. 2-3; Recommendation No. 201 (2018), par. 1(iii).

¹³¹ Resolution No. 1 (1989), par. 2(c).

¹³² Resolution No. 8 (2012), par. 2(1).

(whether within or outside Emerald Network sites) that are potentially harmful to the conservation of the features for which the affected sites have been selected.

6.1. Potentially harmful projects: four basic requirements

Article 4 requires the taking of those measures which are *necessary* and *able*¹³³ to ensure the conservation of the habitats concerned. From this, it can be concluded that, whenever a concrete activity, plan or project is proposed that may jeopardise the conservation (status) of the species and habitats within an Emerald Network site (or the ‘ecological character’ thereof), there must be sufficient clarity regarding the particular conservation consequences of the proposed development *before* a decision is taken regarding its authorisation or (in the case of a government project) its performance. Where such clarity does not already exist, an assessment of the project’s anticipated consequences will need to take place first. (Below, the term ‘project’ will be used as a broad term encompassing activities, plans, projects, and any other newly proposed development.) To ensure this, in turn, presupposes the existence of clear domestic rules regarding Emerald Network sites that make any potentially harmful project subject to prior authorisation in the first place. When it is apparent, from the impact assessment or otherwise, that the project is incompatible with the conservation requirements that flow from Article 4 of the Convention regarding the site concerned, authorisation must in principle be refused and the project prevented from going ahead. Exceptions to this may only be allowed under the terms of Article 9 of the Convention.

As discussed below, it is difficult to acquire absolute certainty regarding the precise modalities of how to judge the compatibility of a project with Article 4. However, as such, the four basic tenets just identified – (1) prior authorisation, (2) impact assessment where necessary, (3) refusal of incompatible projects, (4) except when applying Article 9 – follow logically from Article 4. These four elements are also reflected in Recommendation No. 25 (1991), which calls on Parties to consider taking the following measures with regard to ASCIs:

“requiring that any development or activity liable to have an adverse ecological impact on those areas be subject to the authorisation, consultation, or agreement of the nature conservation authorities;

requiring that any request for permission ... be accompanied by an environmental impact assessment or equivalent assessment making it possible to determine the precise effects of the proposed development or activity on the ecological characteristics which warranted the inclusion of those areas in the inventory;

advising government agencies against carrying out, authorising or subsidising developments or activities which are shown by the environmental impact assessment or equivalent assessment adversely to affect significantly those ecological characteristics;

*granting exceptions to these provisions only under the conditions specified in Article 9 of the convention and in Recommendation No. 15 (1989) of the Standing Committee.”*¹³⁴

In what follows, the second, third and fourth elements will be separately considered.

6.2. Timely and comprehensive impact assessment

In cases where the compatibility of a proposed project with the conservation requirements of Article 4 regarding one or more Emerald Network sites is not immediately apparent, a prior assessment of the project’s conservation impact is necessary before a decision is taken. This requirement, which follows from Article 4, has been repeatedly confirmed and elaborated upon by the Standing Committee, both in general¹³⁵ and in many specific cases. For this purpose, the Committee has particularly recommended the use of environmental impact assessment (EIA) and, for broader plans and policies, strategic environmental assessment (SEA).¹³⁶

¹³³ It will be recalled that the term ‘appropriate measures’ *sensu* Article 4 has been defined by Parties in Resolution No. 1 (1989), par. 2(b), as “*those measures ... which are able to ensure the conservation*” of the habitats in question.

¹³⁴ Recommendation No. 25 (1991), Appendix, par. II(1)(b)-(e).

¹³⁵ *Id.*, Appendix, par. II(1)(c); Recommendation No. 208 (2019) in association with Pritchard (2018), Guideline 13 (p. 23-24), and Directorate of Democratic Participation (2019).

¹³⁶ E.g., Directorate of Democratic Participation, *id.*: “*Environmental Impact Assessment (EIA) and Strategic Environmental Impact Assessment (SEA) are important tools for evaluating the significance of potential change and its implications for relevant conservation objectives.*”

It is instructive to consider the record of the Standing Committee in some detail. A straightforward example is the recommendation to Greece in 2000 to “*undertake an Environmental Impact Assessment (EIA) for all future engineering works in the area of lake Vistonis and its environs.*”¹³⁷ To provide another, the Bulgarian government was called upon in 2002 to ensure that the decision on the routing of a motorway threatening the Kresna Gorge would be taken “*on the basis of an in-depth environmental impact assessment.*”¹³⁸ Regarding another road, the Polish authorities were recommended in 2003 to complete a “*full Strategic Environmental Assessment, followed by a detailed and in-depth Environmental Impact Assessment Report, considering all possible alternatives and variants,*” and then to “*take the results of the SEA as a basis to decide about routing of the Via Baltica.*”¹³⁹ The Committee has recurrently emphasised the importance of performing and finalising impact assessments *before* a project is authorised or commenced. For example, in 2007 the Committee called for a “*strict moratorium on further turbines and windfarm projects in the coastal areas of Bulgaria until EIA and SEA reports ... are completed.*”¹⁴⁰ In 2004, the Ukrainian authorities were recommended to “*suspend works*” on a navigable waterway in the Danube Delta and to “*not proceed with phase 2 of the project until ... the EIA for phase 2 is undertaken to international standards.*”¹⁴¹ In various other instances the Standing Committee has similarly called for the suspension of projects already underway until adequate impact assessments had been carried out.¹⁴² To illustrate, in 2015 North Macedonia was called upon to:

“Suspend the implementation of all government projects, in particular the hydropower plants foreseen and related infrastructure, within the territory of the Mavrovo National park, until a Strategic Environmental Assessment will be completed taking into account the following point ..., putting specific emphasis on cumulative effects of all planned development activities ...

In the frame of the assessment, address the specific conservation needs of those species of fauna and flora for the conservation of which the Mavrovo National Park bears special responsibility, including the species and habitats for which this site was nominated as candidate Emerald site.”¹⁴³

To adequately perform their function within the scheme of Article 4, impact assessments must meet certain minimum quality standards. In the words of the Standing Committee, Parties must “*ensure the quality, independency and completeness of the Environmental Impact Assessments.*”¹⁴⁴ Furthermore, the Committee has called for impact assessments to be “*comprehensive,*”¹⁴⁵ “*detailed,*”¹⁴⁶ “*in-depth,*”¹⁴⁷ “*thorough,*”¹⁴⁸ “*precise and scientifically sound,*”¹⁴⁹ performed transparently¹⁵⁰ and “*according to international standards,*”¹⁵¹ and presenting “*independent peer reviewed conclusions.*”¹⁵² An important prerequisite, stressed recurrently by the Standing

¹³⁷ Recommendation No. 83 (2000).

¹³⁸ Recommendation No. 98 (2002), par. 2.

¹³⁹ Recommendation No. 108 (2003), par. 1-2.

¹⁴⁰ Recommendation No. 130 (2007), par. 7; also Recommendation No. 144 (2009), par. 2: “*Before licensing a wind farm ensure the quality, independency and completeness of the Environmental Impact Assessments*”; Recommendation No. 114 (2004), Preamble: “*Wishing that the possible establishment of a new antenna in the area or the expansion of the existing antennae or other development that may lead to deterioration of the site be subject to a thorough prior Environmental Impact Assessment and to a wide public consultation.*”

¹⁴¹ Recommendation No. 111 (2004), par. 1; they were also recommended to “*provide additional information on ecological and socio-economic aspects of alternative solutions [and] to this end prepare an Environmental Impact Assessment report with independent international experts, including from neighbouring states*” (par. 2).

¹⁴² E.g., Recommendation No. 201 (2018), par. 1(i); and Recommendation No. 202 (2018), par. 1: “*Uses the precautionary approach and suspends both Kalivac and Pocem hydropower plant projects – as their implementation would pose compliance concerns with the Bern Convention – until the necessary strategic planning and additional assessments are carried out in conformity with Recommendations 2-10 below.*”

¹⁴³ Recommendation No. 184 (2015) on the Planned Hydropower Plants on the Territory of the Mavrovo National Park (‘The Former Yugoslav Republic of Macedonia’), par. 1-2.

¹⁴⁴ Recommendation No. 144 (2009), par. 2.

¹⁴⁵ Recommendation No. 202 (2018), par. 3.

¹⁴⁶ Recommendation No. 108 (2003), par. 1.

¹⁴⁷ Id.; and Recommendation No. 98 (2002), par. 2.

¹⁴⁸ Recommendation No. 114 (2004), Preamble.

¹⁴⁹ Recommendation No. 130 (2007), par. 1.

¹⁵⁰ Recommendation No. 144 (2009), par. 2.

¹⁵¹ Recommendation No. 111 (2004), par. 1.

¹⁵² Recommendation No. 130 (2007), par. 1.

Committee,¹⁵³ is that the assessment take due account of cumulative impacts, as exemplified by these recommendations:

“Undertake a strategic environmental assessment of Bulgaria’s programme or plan for harnessing wind power, taking the greatest account, inter alia, of the risk of cumulative effects from different projects and other threats and adopt best practice in these respects, including a precautionary approach;

*Develop and use guidance on undertaking EIA screening and project assessment, including cumulative impacts and consideration of alternative locations, taking account of existing guidance ... and potential Emerald/Natura 2000 Network sites.”*¹⁵⁴

These statements furthermore highlight the need for EIAs and SEAs to assess the impacts not merely of the project as proposed, but of alternatives and variants as well.¹⁵⁵ This can be crucial also for the application of Article 9 of the Convention, which allows for exceptions to the protection offered by Article 4 only where it can be convincingly shown that there are no satisfactory alternatives to the envisioned project.¹⁵⁶ On several occasions, the Standing Committee has found concrete EIAs wanting and called on governments involved to improve or repeat them. An example is the following:

“Noting with concern that ... the decisions seem to have been based upon incomplete or partial information brought together in EIAs that minimize the likely effects of windfarms at the very core areas of mass migration, contrary to the results of more detailed ornithological monitoring during longer periods; ...

*EIA reports should be more precise and scientifically sound than those already presented and should formulate independent peer reviewed conclusions.”*¹⁵⁷

6.3. Authorising only activities compatible with conservation

When, after impact assessment or otherwise, it is plain that a proposed project is compatible with the conservation requirements pertaining to any implicated Emerald Network sites, then allowing that project to go ahead would seem to be in conformity with the obligations of the government involved under Article 4 of the Bern Convention. When, however, it is apparent that the project is incompatible with those conservation requirements, then in principle, Article 4 requires that the project be prevented from proceeding.

An important question for practical purposes is whether there is any particular threshold of significance which may be applied by Contracting Parties when deciding on the authorisation of projects, or on the taking of site management measures.¹⁵⁸ In other words, may a project be allowed which causes *some* damage to the relevant features of an Emerald Network site, as long as the damage it is expected to cause – in combination with other threats – is not deemed ‘significant’, or ‘substantial’, or stays below some other minimum threshold? The text of Article 4(1) of the Convention does not suggest the existence of any such threshold of significance. In light of Article 4(2), however, it was tentatively concluded above (see Section 3.2) that some minor degree of deterioration of the habitats protected in Emerald Network sites may be allowed without violating Article 4, when the damage (i) is a consequence of planning and development policies, (ii) its avoidance is ‘impossible’, and (iii) the deterioration does not prejudice the favourable or satisfactory conservation status of any species and habitat types,

¹⁵³ Recommendation No. 112 (2004), par. 1 “*Address cumulative negative impacts on Bern Convention species while conducting a strategic environmental impact assessment*”; Recommendation No. 144 (2009), par. 1; Recommendation No. 184 (2015), par. 1 (cited above); see also Directorate for Democratic Participation (2019).

¹⁵⁴ Recommendation No. 117 (2005), par. 2 and 5.

¹⁵⁵ See also, e.g., Recommendation No. 108 (2003), par. 1; Recommendation No. 111 (2004), par. 2.

¹⁵⁶ Bern Convention, Art. 9(1); see also Section 6.4 below.

¹⁵⁷ Recommendation No. 130 (2007), Preamble and par. 1; Recommendation No. 117 (2005), Preamble: “*the scientific work carried out within the framework of the EIA on the Balchik wind farm, was greatly insufficient, and for some aspects completely lacking*”; Recommendation No. 144 (2009), Preamble: “*decisions on the setting up of the wind farm seem to have been based upon incomplete or partial information included in the EIAs*”; Recommendation No. 201 (2018), par. 10: “*Implementation of EIA and public consultations need to improve*”; Recommendation No. 202 (2018), par. 5: “*Repeats the EIA study for the Poçem HPP project taking into account the River Basin Mangement Plan (Rec 2), the sediment study (Rec 3), any revision of the Emerald network (Rec 4), ... taking a precautionary approach to data uncertainty.*”

¹⁵⁸ On the latter, see Section 4.2 above.

or the sites' ecological character. The presumption was noted, furthermore, that *“the values identified for a site at the time of its inclusion in the Network ... should be maintained in the state described for them at that time.”*¹⁵⁹ It is instructive to review some of the most important interpretive clues to be found in Resolutions and Recommendations of relevance to the Emerald Network.

Recommendation No. 25 (1991) actually does suggest the existence of a threshold of significance, when it speaks of advising governments to refuse authorisation of projects which have been shown *“adversely to affect significantly those ecological characteristics”* which warranted the selection of a site as ASCI.¹⁶⁰ The interpretive strength of this statement is comparatively modest, however, as the Standing Committee merely recommends Parties to *“[e]xamine the possibility ... of taking conservation measures such as those mentioned as examples in the appendix to this recommendation.”*¹⁶¹ As discussed above, the influence of Resolution No. 1 (1989) on the interpretation of Article 4 is much greater, and this Resolution does *not* employ any threshold of significance. For instance, it speaks of the *“control of activities which may ... result in the deterioration of ... habitats”* – not the ‘significant’ deterioration. The impression raised in Resolution No. 1 (1989) is reinforced by the text of Resolution No. 8 (2012), the interpretive strength of which is also evidently superior to Recommendation No. 25 (1991) (in it, the Standing Committee *“[r]esolves to adopt the following rules”*). Resolution No. 8 (2012) instructs Parties to *“ensure”* that Emerald Network sites *“are protected from external threats”* – not just from ‘significant’ or ‘substantial’ external threats – and are *“subject to an appropriate regime for achieving a satisfactory conservation status of the species and natural habitats listed in Resolution no. 4 (1996) and no. 6 (1998) present on the site.”*¹⁶² Recommendation No. 16 (1989) points in the same direction, by recommending Parties to *“take such steps, either by legislation or otherwise, to ensure wherever possible”* that activities adjacent to ASCIs *“do not adversely affect the factors giving rise to the designation and conservation of those sites”*¹⁶³ – not affect ‘significantly’. Lastly, Recommendation No. 157 (2011/2019) calls on Parties, without more, to take *“the necessary protection and conservation measures in order to maintain the ecological characteristics of the candidate Emerald Network sites.”*¹⁶⁴

In Recommendations on specific issues, the Standing Committee has in several instances used threshold terms like ‘significant’ or ‘substantial’, but not in others. For example, in 2007 the Committee noted that the area of habitat lost to a motorway project across the Drava Marshlands was *“potentially significant,”* and urged the Croatian government to make sure that the road’s construction and operation *“will not significantly adversely affect the relevant species stated in the EIA ... as being present”* in the area.¹⁶⁵ Another instance is the Recommendation on Bulgarian wind farms of the same year, in which the authorities were called upon to *“ensure that new plants are not built in the region unless Environmental Impact Assessment (EIA) prove they do not have a substantial negative effect on the biological diversity protected under the Convention.”*¹⁶⁶ It should be noted, however, that this statement covers biodiversity at large in an entire region, rather than specific species and habitats protected in Emerald Network sites. By contrast, no minimum threshold is used in the aforementioned Recommendation on Skadar Lake of 2018, a Recommendation which expressly recalls that this involves an officially nominated candidate Emerald Network site:¹⁶⁷

*“The floating vegetation with large carpets of white water-lily and water chestnut is a special habitat on Skadar lake. It is the very sheer size of these habitat complexes that makes them representative on European level. Any reduction of those habitats will be prohibited.”*¹⁶⁸

Special attention should be paid in the present context to the aforementioned (non-binding) rule agreed upon by the Standing Committee in Resolution No. 8 (1998), to *“inform the Secretariat of any important changes likely*

¹⁵⁹ Pritchard (2018), p. 7.

¹⁶⁰ Recommendation No. 25 (1991), Appendix, par. II(1)(d).

¹⁶¹ Recommendation No. 25, par. 1.

¹⁶² Resolution No. 8 (2012), par. 2(1).

¹⁶³ Recommendation No. 16 (1989), par. 3(d).

¹⁶⁴ Recommendation No. 157 (2011/2019), par. 1.

¹⁶⁵ Recommendation No. 131 (2007), Preamble and par. 1(b).

¹⁶⁶ Recommendation No. 130 (2007), par. 1.

¹⁶⁷ Recommendation No. 201 (2018), Preamble.

¹⁶⁸ Id., par. 6.

to affect negatively in a substantial way the ecological character of the designated ASCIs or the conditions having justified their designation.”¹⁶⁹ The thresholds involved in this phrase do not, of course, mean that harmful projects and other threats can be tolerated as long as they do not embody ‘important’ changes that affect Emerald Network sites’ ecological character in a ‘substantial’ way. The thresholds merely imply that not all changes in ecological character need to be notified to the Secretariat. As a guidance document puts it, it would be “*neither practical nor helpful*” if “*any change or likely change, no matter how trivial, should be reported.*”¹⁷⁰ As to how to judge whether the thresholds have been crossed, the document sets out *inter alia* the following guideline:

*“Judging whether a change is likely to have a ‘substantial’ effect on a site’s ecological character will depend on the particular circumstances of the individual site. Significance may be judged in terms of absolute magnitude, departure from a baseline norm, defined variability limits or other methods. Given the predictive nature of the question, expert opinion will usually play a part, and a precautionary approach should be taken (i.e. ‘if in doubt, report’).”*¹⁷¹

Indeed, it appears to be fully in line with the text of Article 4, interpreted in light of the Convention’s purpose and the Standing Committee’s subsequent records, for Contracting Party authorities to give the benefit of any doubt to the conservation of Emerald Network sites rather than to potentially harmful projects. The taking of a precautionary approach in the context of decision-making regarding such projects has been expressly advocated by the Standing Committee as “*best practice*”.¹⁷² In the context of impact assessments, it has recommended “*taking a precautionary approach to data uncertainty.*”¹⁷³ This appears to mean that if, after an assessment of a project proposal, uncertainty remains regarding the project’s compatibility with the conservation requirements of Article 4 of the Convention, it should be assumed to be incompatible rather than compatible with those requirements – and therefore be prevented from going ahead.

6.4. Authorising harmful activities – making exceptions under Article 9

Exceptions to the obligations flowing from Article 4 of the Convention may be made only with recourse to Article 9(1), which reads as follows:

“Each Contracting Party may make exceptions from the provisions of Articles 4, 5, 6, 7 and ... Article 8 provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned:

- *for the protection of flora and fauna;*
- *to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;*
- *in the interests of public health and safety, air safety or other overriding public interests;*
- *for the purpose of research and education, of repopulation, of reintroduction and for the necessary breeding;*
- *to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.”*¹⁷⁴

Exceptions can thus be made when three conditions are met. It follows from the text of Article 9(1) that these conditions are cumulative.¹⁷⁵ First, an exception can only be made for one of the reasons or purposes indicated in the provision. This evidently concerns an exhaustive list.¹⁷⁶ Second, it must be clear that this purpose cannot be achieved through another “*satisfactory solution.*” For instance, according to interpretive guidance adopted by the Standing Committee, possible alternative solutions regarding derogations for an “*overriding public interest*” can include “*alternative locations or routings of infrastructure, other sizes of development or alternative activities,*

¹⁶⁹ Resolution No. 5 (1998), par. 4(2).

¹⁷⁰ Pritchard (2018), p. 15.

¹⁷¹ Id., Guideline 7.

¹⁷² Recommendation No. 117 (2005), par. 2; see also Recommendation No. 130 (2007), par. 10; Recommendation No. 202 (2018), par. 1.

¹⁷³ Recommendation No. 202 (2018), par. 5; see also par. 1.

¹⁷⁴ Bern Convention, Art. 9(1).

¹⁷⁵ See also Revised Resolution No. 2 (1993/2011) on the Scope of Articles 8 and 9 of the Bern Convention, Appendix, par. 6-8.

¹⁷⁶ Revised Resolution No. 2 (1993/2011), Appendix, par. 5: “*the non cumulative specific reasons for which the exceptions may be granted are listed exhaustively in Article 9.*”

*processes or methods.*¹⁷⁷ Third, an exception may only be made if it “*will not be detrimental to the survival of the population concerned.*”¹⁷⁸ According to the Standing Committee’s general guidance on the interpretation of Article 9, the determination of whether this condition is met “*should be based on current data on the state of the population, including its size, distribution, state of the habitat and future prospects.*”¹⁷⁹ When making this determination, the “[*c*]umulative effects of several derogations should be taken into account,” when applicable.¹⁸⁰ The burden of demonstrating that all conditions are met rests on the Contracting Party involved,¹⁸¹ and Parties must report regularly on the exceptions made under Article 9(1).¹⁸²

As for the application of Article 9(1) regarding Emerald Network sites, the “*Rules for the Emerald Network*” laid down in Resolution No. 5 (1998) unambiguously state that “[*e*]xceptions to the provisions of Articles 4, 5, 6 and 7 of the Convention in designated ASCIs shall be regulated by Article 9 of the Convention.”¹⁸³ The same conclusion can be inferred regarding candidate Emerald Network sites, given that Article 4 also imposes significant obligations on Parties with regard to such sites.¹⁸⁴ However, the formulation of Article 9 appears to be geared more towards species, and particularly exceptions from the species protection provisions of Articles 5-8 of the Convention, than towards habitats. This is particularly apparent from the phrasing of the third condition. It is significant, therefore, that the Standing Committee adopted the following interpretive guidance in 1989:

*“Recommends that Contracting Parties make exceptions to Article 4, by virtue of Article 9, paragraph 1, with respect to endangered natural habitat types as identified ... in Resolution No. 1 (1989) only in exceptional circumstances and provided that the exceptions will not be detrimental to the survival of the habitat type concerned.”*¹⁸⁵

Other than clarifying that the third condition should be applied to habitat types in addition to species populations, this statement is significant in that it explicitly urges Parties to make exceptions regarding (endangered) habitat types “*only in exceptional circumstances.*”

Various other Recommendations shed further light on the appropriate application of Article 9 with regard to Emerald Network sites. One of these concerns the aforementioned navigable waterway through the Bystroe estuary of the Danube Delta. The following selected excerpts are from a Recommendation addressing this issue, after an on-the-spot appraisal had been carried out:

“Considering that the protected area concerned ... will be a major component in the implementation of the Bern Convention Emerald Network;

Noting with concern that the limits of the protected area have been modified to exclude the Bystroe estuary so that the proposed development could legally proceed;

Firmly stating that the modification of limits of protected areas to accommodate development projects should in general be avoided ...;

Noting that no environmental impact assessment was made available to the experts at the time of the mission ...;

Noting that the establishing of the navigable waterway and its exploitation may deteriorate natural habitats protected under Article 4 of the Convention ...;

Noting that such engineering works and future shipping exploitation in an area of paramount biological importance can only be contemplated as ‘exceptions’ in the sense of Article 9 paragraph 1 of the Convention,

¹⁷⁷ Id., Appendix, par. 7.

¹⁷⁸ Bern Convention, Art. 9(1).

¹⁷⁹ Revised Resolution No. 2 (1993/2011), Appendix, par. 7.

¹⁸⁰ Id.

¹⁸¹ See, e.g., Revised Resolution No. 2 (1993/2011), Appendix, par. 7; and Shine (2010), p. 6: “*Competent authorities need to explain the particular circumstances justifying the choice of an Article 9.1 reason and verify that the specific conditions are met.*”

¹⁸² Bern Convention, Art. 9(2); see also Revised Resolution No. 2 (1993/2011).

¹⁸³ Resolution No. 5 (1998), Art. 4(4); see also Resolution No. 1 (1989), par. 2(e).

¹⁸⁴ See Sections 3-6.3 above, and Section 7 below.

¹⁸⁵ Recommendation No. 15 (1989).

that states that Parties ‘may make exceptions from the provisions of Articles 4, 5, 6 and 7’, among other reasons ‘in the interests of public health and safety, air safety or other overriding public interests’;

Noting, however, that Article 9, paragraph 1 of the Convention, states that a Party ‘may make exceptions of Articles 4, 5, 6, 7 ... provided that there is no other satisfactory solution’ and conscious that viable alternative solutions have not been sufficiently explored and analysed yet;

Noting that in this case Ukraine has failed to fulfil completely the terms of the Convention.”¹⁸⁶

Several aspects of these statements stand out. The use of the word “may” in the fifth cited paragraph indicates that the threshold of *likelihood* of adverse impacts that should be triggered for the obligations of Article 4 to become applicable, is a low one – in line with the aforementioned precautionary approach. In other words, when a project ‘may’ deteriorate habitats in Emerald Network sites, it can in principle not be authorised, unless and until the various conditions of Article 9(1) have demonstrably been met. Moreover, and importantly, the express statement that such projects which “*may deteriorate natural habitats protected under Article 4 ... can only be contemplated as ‘exceptions’ in the sense of Article 9*” forcefully contradicts any argument that Article 4(2) by itself provides Parties with discretion to allow certain harmful projects.

A second example is the Recommendation on the Kresna Gorge motorway.¹⁸⁷ It does not mention Article 9, but states the following:

“Considering that the Kresna Gorge site and its surroundings contain rare and endemic species and habitats of European importance that are conservation priorities and which Bulgaria has undertaken to protect;

Considering that the area concerned is a major component in the implementation of the Emerald Network ;

Aware of the foreseeable ecological impact of the motorway project ...;

Mindful of the need to reconcile the economic and ecological issues raised by this project and convinced of the necessity of identifying a route compatible with the natural and human environment,

Recommends that the Bulgarian Government ... ensure that the routing of the motorway is taken on the basis of an in-depth environmental impact assessment [and] consider the possibility of abandoning the option of enlarging the current road since this would substantially increase damage to a unique site, without possible measures of compensation, and continue studying alternative routes located outside the gorge ...”¹⁸⁸

A third example is the 2002 Recommendation on the conservation of bald ibis habitat in Morocco, which reads as follows:

“Given the major risks that the Club Méditerranée or any similar project inevitably poses for the conservation of the bald ibis, the natural biotopes and the Souss Massa National Park;

Considering that such a project is in contradiction with the provisions of the Convention on the Conservation of European Wildlife and natural Habitats, to which the Kingdom of Morocco is a Contracting Party (articles 1.2, 2, 3.2, 4.2, 6.b and 6.c);

Conscious of the concerns for local development, but nevertheless considering that any tourism development, however legitimate, will only harm the local natural heritage;

Recommends that the Government of Morocco ... oppose any project of touristic establishment that would be likely to threaten territories that are vital to the bald ibis and to authorise only development that is adapted to the park’s environmental constraints and conservation objectives.”¹⁸⁹

¹⁸⁶ Recommendation No. 111 (2004), Preamble.

¹⁸⁷ Recommendation No. 98 (2002).

¹⁸⁸ Id., Preamble and par. 2-3.

¹⁸⁹ Recommendation No. 97 (2002), Preamble and par. 1; note that Article 4(1) is curiously absent from the enumeration of Convention provisions.

Yet another, similar instance is the aforementioned unconditional statement with regard to Skadar Lake that “[a]ny reduction” of its floating vegetation habitats “will be prohibited.”¹⁹⁰

These Recommendations, and especially the latter two, seem to virtually preclude the application of Article 9 – as if the Standing Committee considered that the application of Article 9 in the case at hand would be *a priori* inappropriate, or as if the Committee has itself determined that the project in question did not meet the conditions of Article 9. At the very least, these Recommendations reinforce the emerging conclusion that recourse to Article 9 to authorise a project that is harmful to the conservation of an Emerald Network site should only be had under the most exceptional circumstances – in accordance with the aforementioned Recommendation to use Article 9 with regard to protected habitats “only in exceptional circumstances.”¹⁹¹

Compensating for the damage done to habitats or species as a consequence of exempted projects is not mentioned in Article 9(1), which would seem to indicate that this is not a binding condition for making exceptions to the obligations of Article 4 with regard to Emerald Network sites. Such compensation has, however, regularly featured in Standing Committee Recommendations. For instance, in the case of the Danube Delta waterway, the Ukraine was urged to “provide for measures of ecological compensation and mitigation for any possible environmental damage,” and in that context to realise a “considerable expansion both in quality and quantity of the protected area.”¹⁹² Likewise, Norway was recommended to “[c]ompensate the loss of natural area with ecological functions” due to wind park development through “designation of new conservation areas.”¹⁹³ Regarding a hydropower project, Iceland was recommended to consider “wetland restoration in the Úthérad IBA to compensate for negative impacts resulting from the project.”¹⁹⁴ Notably, furthermore, in the instance of the Kresna Gorge the Standing Committee recommended abandoning the motorway plan partly because of the absence of “possible measures of compensation.”¹⁹⁵ Recommendation No. 25 (1991) is of some relevance as well, by suggesting to Parties in general terms to “[e]nsure the conservation of endangered habitat types ... by requiring that all projects liable to cause their deterioration or destruction be subject to the permission” of the responsible authorities, and to subject such permission to “an obligation, where appropriate, to take suitable compensation measures.”¹⁹⁶ Finally, compensation is mentioned in Revised Resolution No. 2 (1993/2011) on the interpretation of Article 9, which resolves that the reports compiled and submitted by Parties regarding their Article 9 exception should specify, *inter alia*, the “effects of any compensation measure taken, where relevant.”¹⁹⁷ Altogether, it remains unlikely that compensation of damage must currently be considered a hard condition for making exceptions under Article 9.

7. COMPARISON BETWEEN CANDIDATE AND ADOPTED EMERALD NETWORK SITES

It has become clear in the course of the preceding analysis that Contracting Parties’ **legally binding obligations** under the Bern Convention are **essentially similar** for candidate and adopted Emerald Network sites (and indeed, during Phase I of the Network’s development, also for the sites on the national lists submitted by Parties¹⁹⁸).

The general obligation of result under Article 4 applies to species habitats and natural habitat types within all of these areas. Hence, with regard to both candidate and adopted Emerald Network sites Parties are under a duty to take those measures which are necessary and able to ensure the conservation of the “*abiotic and biotic features*” forming the habitats involved.¹⁹⁹ With regard to both candidate and adopted Emerald Network sites, this entails

¹⁹⁰ Recommendation No. 201 (2018), par. 6; see also Recommendation No. 113 (2004), in which the Standing Committee considers, with regard to another area that is “a major component in the implementation of the Natura 2000 / Emerald Network,” that “the natural value of the site makes it an inherently inappropriate location for developments that pose a potential threat to wildlife” (Preamble, emphasis added).

¹⁹¹ Recommendation No. 15 (1989).

¹⁹² Recommendation No. 111 (2004), par. 3.

¹⁹³ Recommendation No. 144 (2009), par. 10.

¹⁹⁴ Recommendation No. 112 (2004), par. 5.

¹⁹⁵ Recommendation No. 98 (2002), par. 3.

¹⁹⁶ Recommendation No. 25 (1991), Appendix, par. IV(1)-(2).

¹⁹⁷ Revised Resolution No. 2 (1993/2011).

¹⁹⁸ See Section 3.1 above.

¹⁹⁹ See Section 3 above.

providing the areas with an appropriate protection regime;²⁰⁰ taking the necessary management measures to ensure the maintenance or restoration of the habitats involved;²⁰¹ providing for sufficient monitoring;²⁰² and anticipating and responding to threats posed by potentially harmful activities, plans and projects, by providing for (1) a prior authorisation scheme, (2) prior impact assessment where necessary, and (3) the refusal of incompatible projects, (4) barring in exceptional cases by applying Article 9 of the Convention.²⁰³

From a legal perspective, the various specific actions called for by the Standing Committee with regard to **candidate** Emerald Network sites, can be considered manifestations of the aforementioned obligations flowing from Article 4. This includes the measures advocated in Recommendation No. 157 (2011/2019), which specifically addresses candidate Emerald Network sites:

“Conscious that the ecological quality of proposed Emerald Network sites should be preserved as soon as they are officially nominated as ‘candidate Emerald Network sites’ by the Standing Committee ...;

Recommends that Contracting Parties:

Take the necessary protection and conservation measures in order to maintain the ecological characteristics of the candidate Emerald Network sites;

Ensure that, if and when appropriate, these measures include administrative, management or development plans corresponding to the ecological requirements for the long term survival of species and habitats present in the proposed Emerald Network sites ... and that these are set in place at the latest once ASCIs have officially been adopted by the Standing Committee.”²⁰⁴

The Standing Committee reiterated these commitments in its Recommendations on Skadar Lake and the Vjosa River. To illustrate, in the former instance the Committee recalled:

“that the Skadar Lake has been officially nominated as candidate Emerald site in 2011 and – as such – it is subject to Recommendation No. 157 (2011) on the status of candidate Emerald sites ..., requiring national authorities to ‘take the necessary protection and conservation measures in order to maintain the ecological characteristics of the candidate Emerald sites’ until their full inclusion in the Emerald Network.”²⁰⁵

In the Mavrovo hydropower case, too, the Standing Committee stressed the “*special responsibility*” borne by the Mavrovo National Park for the “*species and habitats for which this site was nominated as candidate Emerald site.*”²⁰⁶ Notably, also before the adoption of Recommendation No. 157 in 2011, the Standing Committee had repeatedly stressed the need to avoid deterioration of ecologically important sites prior to their formal designation as protected areas. For example, when in 1997 the Committee recommended Cyprus to declare the Akamas peninsula a national park, it also urged the authorities to “[f]reeze planning permission” in the area “*till the appropriate conservation measures have been decided, this to avoid the further degradation of the area which is intended to become a national park.*”²⁰⁷ Indeed, to avoid confusion, it should be recalled that the obligation to prevent deterioration does not begin to apply only when a site is officially nominated as candidate Emerald Network site. From the perspective of Article 4, this official nomination appears to make virtually no legal difference.²⁰⁸

²⁰⁰ See Section 4.1 above.

²⁰¹ See Section 4.2 above.

²⁰² See Section 5 above.

²⁰³ See Section 6 above.

²⁰⁴ Recommendation No. 157 (2011/2019), Preamble and par. 1-2.

²⁰⁵ Recommendation No. 201 (2018), Preamble; a virtually identical statement is contained in the Preamble to Recommendation No. 202 (2018) on the Vjosa River.

²⁰⁶ Recommendation No. 184 (2015), par. 2.

²⁰⁷ Recommendation No. 63 (1997), par. 2; other examples include Recommendation No. 131 (2007), par. 1(c), calling on the Croatian authorities to ensure that the motorway project “does not prejudice future designations of the Drava Wetlands for their landscapes, habitats and species”; and Recommendation No. 144 (2009), par. 8, declaring that “[t]he priority of designating internationally important sites may not be influenced or delayed by the potential suitability for wind farm development in those areas.”

²⁰⁸ See Section 3.1 above.

In addition, several measures have been recommended by the Standing Committee specifically with regard to **adopted** Emerald Network sites. These include commitments to “*designate, by national legislation or otherwise,*” the sites on their territory adopted as Emerald Network sites by the Standing Committee;²⁰⁹ the involvement of stakeholders in site management;²¹⁰ the requirement to report “*every six years*” on the conservation status of the species and habitats from Resolutions No. 4 (1996) and No. 6 (1998);²¹¹ and the instruction to inform the Secretariat of “*important changes likely to affect negatively in a substantial way the ecological character*” of sites, which applies to “*designated ASCIs.*”²¹² Such measures are best viewed as non-binding commitments which are not strictly required by Article 4 of the Convention. Put differently, even if taking these measures appears to be conducive to meeting Parties’ obligations under the Convention, they do not seem universally necessary in order to ensure compliance.

8. COMPARISON WITH THE NATURA 2000 OBLIGATIONS OF EU MEMBER STATES

All Contracting Parties to the Bern Convention are bound by the obligations flowing from Article 4, including the Parties which are also EU member States. With regard to the Emerald Network, however, as recalled above, it has been agreed that for EU Member States, “*the Emerald Network sites are those of the Natura 2000 Network,*” and that “*the procedures established under the European Union Directives 2009/147/EC ... and 92/43/EEC are those to apply for them.*”²¹³ Needless to say, EU Member States (and the EU itself, which is also a Bern Convention Contracting Party) may not fall short of meeting any legally binding requirements that flow from Article 4 of the Convention. Naturally, the focus here is on any additional or stricter requirements that they may have pursuant to the Birds and Habitats Directives. The Convention explicitly allows Parties to “*adopt stricter measures for the conservation of wild flora and fauna and their natural habitats than those provided under this Convention.*”²¹⁴

The Natura 2000 protected area network consists of Special Protection Areas (SPAs) designated under the Birds Directive and Special Areas of Conservation (SACs) designated under the Habitats Directive, both of which are commonly referred to as ‘Natura 2000 sites’. The principal rules regarding the conservation of species and habitat types within Natura 2000 sites are laid down in Article 6 of the Habitats Directive, which is more elaborate and specific than the text of Article 4 of the Bern Convention:

“1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions

²⁰⁹ Resolution No. 8 (2012), par. 1(1)

²¹⁰ Id., par. 2(4).

²¹¹ Id., par. 4(1)-(2).

²¹² Resolution No. 5 (1998), Art. 4(2).

²¹³ Resolution No. 8 (2012) on the National Designation of Adopted Emerald Sites and the Implementation of Management, Monitoring and Reporting Measures, Preamble. See also the similar statement in the Preamble to Resolution No. 5 (1998) Concerning the Rules for the Network of Areas of Special Conservation Interest (Emerald Network): “*Considering that for Contracting Parties which are Member States of the European Union Emerald Network sites are those of the Natura 2000 network. Thus the procedures established by European Council Directives 79/409/EEC and 92/43/EEC will be the only rules to apply*”.

²¹⁴ Bern Convention, Art. 12.

of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.”²¹⁵

Just from the text of this provision, it is clear that there are great similarities as well as some notable differences between the obligations of EU Member States regarding Natura 2000 sites and the obligations of non-EU Bern Convention Parties regarding Emerald Network sites, as identified above.

The first two paragraphs of Article 6 of the Habitats Directive do not appear to add much to what is already required from Parties by Article 4 of the Bern Convention. Article 6(1) of the Directive broadly mirrors the general obligation under Article 4 of the Convention to take the “*necessary*” conservation measures regarding Emerald Network sites, whereby the development of site management plans is expressly suggested, but not a strict requirement. Regarding Article 6(2) of the Directive, avoiding deterioration of habitats is also required by Article 4 of the Convention.

An extensive jurisprudence regarding the interpretation of Article 6 has been forthcoming from the CJEU, which is the ultimate authority on EU law interpretation. Overall, the Court’s decisions display a tendency to interpret the rules in such a way as to maximise their effectiveness in light of the Directive’s nature conservation objectives. For instance, according to the Court, Articles 6(1) and 6(2) must both be considered as laying down obligations of result rather than effort.²¹⁶ As with Article 4 of the Convention, Member States must do what it takes to conserve or restore the species and habitat types concerned within the corresponding Natura 2000 sites.²¹⁷ What the “*appropriate steps*” mentioned in Article 6(2) are will depend on the circumstances, but what counts eventually is the conservation result.²¹⁸ The case law of the CJEU makes very clear that the protection of Natura 2000 sites is “*not to be limited to measures intended to avoid external anthropogenic impairment and disturbance,*” but must also, “*according to the situation that presents itself, include positive measures to preserve or improve the state of the site.*”²¹⁹ The Court has stressed in this regard that, in order to meet the requirements of Article 6(2), damage that has already been caused to habitats must be undone. To illustrate, in a case involving harm caused to a Natura 2000 site in Ireland through overgrazing by sheep, the Court explained that “*it is necessary for the Irish authorities not only to take measures to stabilize the problem of overgrazing, but also to ensure that damaged habitats are allowed to recover.*”²²⁰

The third and fourth paragraphs of Article 6 of the Habitats Directive stipulate the applicable procedure and requirements regarding potentially harmful plans and projects. Whereas the broad essence of these provisions is similar to the corresponding requirements of the Bern Convention discussed above – a prior authorisation scheme, impact assessment, and the refusal of harmful projects, unless certain strict conditions are met – several differences exist. The most notable ones concern the degree of certainty that is expressly required under the Habitats Directive before a project can be permitted, and the conditions in the exception clause of Article 6(4). Both are discussed below. Other differences include the explicit attention for cumulative effects and the use of a threshold of

²¹⁵ Habitats Directive, Art. 6; according to its Art. 7, the second, third and fourth paragraphs of Art. 6 also expressly apply to SPAs designated under the Birds Directive.

²¹⁶ E.g., CJEU Case C-96/98, *Commission v France* (1999); Case C-117/00, *Commission v Ireland* (2002); Case C-301/12 *Cascina Tre Pini* (2014).

²¹⁷ *Id.*

²¹⁸ An especially clear example can be found in Case C-117/00, *id.*, par. 26-33.

²¹⁹ CJEU Case C-535/70, *Commission v Austria* (2006), par. 59; see also Case C-418/04, *Commission v Ireland* (2007), par. 154.

²²⁰ *Id.*, par. 31.

“*significant effect*” in Article 6(3). Regarding the latter, as discussed above, the existence of any similar minimum threshold(s) in the context of Article 4 of the Bern Convention and Emerald Network sites is doubtful.²²¹

A famous interpretation of Article 6(3) was provided by the CJEU in a 2004 case concerning mechanical cockle fisheries in the Wadden Sea.²²² According to this ruling, the requirement to perform an “*appropriate assessment*”²²³ of the implications of a plan or project is triggered by “*a probability or a risk*” that the plan or project will have significant effects on one or more Natura 2000 sites.²²⁴

*“In the light, in particular, of the precautionary principle, ... by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. ... Such an interpretation ..., which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorized.”*²²⁵

Regarding the nature of the assessment and the authorisation decision, the ruling provides the following clarifications:

*“an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site’s conservation objectives must be identified in light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.”*²²⁶

A “*less stringent authorisation criterion,*” the Court reasons, “*could not as effectively ensure the fulfilment of the objective of site protection.*”²²⁷

When significant adverse effects cannot be thus excluded, a plan or project may only be permitted under the conditions of Article 6(4). This exception clause, like Article 9(1) of the Bern Convention,²²⁸ sets out three cumulative conditions, but only the second of these is similar to Article 9, namely the “*absence of alternative solutions.*” The first condition of Article 6(4) is that an exception may only be made for “*imperative reasons of overriding public interest, including those of a social or economic nature.*” This is strict when compared to the longer list of eligible purposes in Article 9 of the Convention. Third, Article 6(4) of the Directive makes any exception conditional on the taking of “*all compensatory measures necessary*” to ensure the coherence of the Natura 2000 network, whereas compensation is not an express criterion in Article 9 of the Convention. Conversely, the third condition of Article 9 – that exceptions may not be “*detrimental to the survival of the population*” (or habitat type) concerned²²⁹ – is absent in Article 6(4) of the Directive (although this remains a condition that must be met by EU Member States when making exceptions to Article 4 of the Bern Convention).

It is for the authorities involved in any given case to demonstrate convincingly that the various conditions of Article 6(4) are satisfied and, being an exception clause, its conditions must be interpreted restrictively.²³⁰ For instance, the Court has clarified that high economic costs cannot by themselves disqualify a certain alternative as

²²¹ See Section 6.3.

²²² CJEU Case C-127/02, *Waddenvereniging* (2004).

²²³ Habitats Directive, Art. 6(3).

²²⁴ Case C-127/02, par. 43.

²²⁵ *Id.*, par. 44.

²²⁶ *Id.*, par. 61.

²²⁷ *Id.*, par. 58.

²²⁸ See Section 6.4 above.

²²⁹ Bern Convention, Art. 9(1).

²³⁰ See, e.g., CJEU Case C-239/04, *Commission v Portugal* (2006), par. 35-36; CJEU Case C-182/10, *Solvay* (2012), par. 73.

unsatisfactory in terms of Article 6(4).²³¹ Regarding compensation, it must be assumed that, in principle, compensation ratios “*should be generally well above 1:1*”²³² and that compensatory measures should be operational once the damage to the site concerned occurs.²³³

For the purposes of the current comparison, it is also of interest to take note of the Habitats Directive regime for ‘candidate’ Natura 2000 sites in the stages prior to formal designation. As soon as a site is adopted by the European Commission as a Site of Community Importance (SCI), Articles 6(2)-(4) become applicable to that site, pending its designation as SAC by the Member State involved.²³⁴ Once designated as such, Article 6(1) becomes applicable as well. Notably, also in the phase preceding adoption of sites as SCI, when member States have submitted lists of sites “*eligible for identification*” as SCIs and which “*may include in particular sites hosting priority natural habitat types or priority species,*” member States are “*required to take protective measures appropriate for the purpose of safeguarding that ecological interest,*” according to the CJEU.²³⁵ Regarding this same procedural phase, the Court has ruled that “*the appropriate protection scheme applicable*” to all sites on these national lists “*requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites.*”²³⁶

It has long been the aim of Bern Convention Parties to achieve as much consistency as possible between the legal regimes for the Emerald Network and the Natura 2000 network.²³⁷ A measure of coherence between the two regimes appears “*essential for ensuring the whole of Europe holds a homogeneous network of areas.*”²³⁸ Therefore, the constitution process and methodology of the Emerald Network “*got inspired and followed the Natura 2000 examples and best practices.*”²³⁹ To some degree, it could indeed be argued that “*the Emerald Network extends the EU nature conservation standards outside its borders.*”²⁴⁰ Thus, whereas complete consistency between the two regimes may not be feasible due to differences in legal and institutional settings, there is good reason to strive for as much consistency as possible also when it comes to the conservation obligations of Parties with regard to sites that form part of the two networks. Attempts to do so have already come into view in the preceding analysis, and other examples remain. For instance, the Standing Committee noted in its Recommendation on Skadar Lake that “[*b*]etter coordination is needed with the ‘appropriate assessment’ procedure under the Habitats Directive.”²⁴¹ Recommendation No. 208 (2019) also recalls Article 6 of the Habitats Directive,

*“which requires that projects likely to have a significant effect on a Natura 2000 site should only be permitted when the assessment of their implications shows that there will not be an adverse effect on the site’s integrity and that in the absence of alternative solutions, such projects can only be carried out for imperative reasons of overriding public interests.”*²⁴²

A closer alignment between the obligations of non-EU Convention parties with the obligations of EU Member States regarding Natura 2000 sites could be ensured by the Standing Committee, acting under Article 14 of the Convention. As far as this requires influencing the content and nature of Parties’ obligations under the Convention, this can only be achieved properly – leaving aside the more unpractical and lengthy process of Convention amendment – through the adoption of one or more Resolutions containing strong interpretive statements regarding

²³¹ CJEU Case C-399/14, *Grüne Liga Sachsen* (2016), par. 77: “*it cannot be accepted that the economic cost of such measures alone may be a determining factor in the choice of alternative solutions.*”

²³² European Commission (2018), p. 68.

²³³ *Id.*, p. 70.

²³⁴ Habitats Directive, Art. 4(2) and (5).

²³⁵ CJEU Case C-117/03, *Dragaggi* (2005), par. 29.

²³⁶ CJEU Case C-244/05, *Bund Naturschutz* (2006), par. 47.

²³⁷ Directorate of Democratic Governance et al. (2013), p. 2; in respect of the Emerald Network, this has led to what has been described as a “*simplified approach without losing the essence*” (*id.*).

²³⁸ Directorate of Democratic Governance, Culture and Diversity (2016), p. 12.

²³⁹ Directorate of Democratic Governance, Culture and Diversity (2012), p. 11.

²⁴⁰ Directorate of Democratic Governance, Culture and Diversity (2016), p. 12.

²⁴¹ Recommendation No. 201 (2018), par. 10; it also called for the provision of a detailed habitat map, classifying habitat types “pursuant to the EUNIS habitat classification and EU Habitat Directive,” to serve as basis of any EIAs (par. 1(i)).

²⁴² Recommendation No. 208 (2019), Preamble.

the scope and meaning of Articles 4 and 9 of the Convention, in the kind of phrasing also employed in Resolution No. 1 (1989).

For instance, building on Resolution No. 1 (1989) and other relevant Resolutions and Recommendations, a new Resolution could recall the obligations flowing from Article 4 as identified in the preceding analysis, and then state *inter alia* that the Standing Committee:

“Resolves that, for the purposes of improving the effectiveness of the Convention, Articles 4 and 9 are to be interpreted as follows:

1. Article 4 is to be interpreted as meaning that:

a) any activity, project or plan which could have adverse effects on the conservation within a proposed, candidate, adopted or designated Emerald Network site of species or habitat types for which that site was selected shall be subjected to a prior comprehensive impact assessment if it cannot be excluded on the basis of objective information that the activity, project or plan will have such effects;

b) carrying out an impact assessment in terms of subparagraph a) entails that, prior to a decision on approval, all the aspects of the activity, project or plan which may, by themselves or in combination with other existing or potential threats, affect the site’s conservation objectives, are identified and assessed in light of the best scientific knowledge in the field, and also that, where appropriate, alternatives for the activity, project or plan are identified and their impacts likewise assessed;

c) the competent national authorities, taking account of the associated impact assessment, are to authorise such an activity, project or plan only if they have made certain that it will not adversely affect the integrity or ecological characteristics of the site involved, or the conservation within that site of the species or habitat types for which the site was selected; that is the case where no reasonable scientific doubt remains as to the absence of such effects.

2. Article 9(1) is to be interpreted as meaning that:

an activity, project or plan for which it cannot be excluded, in conformity with paragraph 1 above, that it will adversely affect the integrity or ecological characteristics of the site involved, or the conservation within that site of the species or habitat types for which the site was selected, may be approved and allowed to proceed only in exceptional circumstances, where (a) imperative reasons of overriding public interest, including those of a social or economic nature, so require; (b) other satisfactory solutions are demonstrably absent; and (c) doing so will not be detrimental to the long-term survival of the species and habitats affected; and (d) subject to the taking of the necessary compensatory measures to ensure that no net loss of the affected habitats within the Emerald Network will occur.”

This is merely one example of how an agreed interpretation of Article 4 and 9 codified in a Resolution could be formulated. Moreover, there is scope for clarification and alignment of legal obligations regarding many additional aspects, for instance the further definition and explanation of the result to be achieved according to Article 4 with regard to the conservation of species and habitats within Emerald Network sites, including terms such as ecological character, site integrity, and conservation status.²⁴³ Another instance is the precise meaning of Article 4(2) *vis-à-vis* Article 4(1) and Article 9.

9. CONCLUDING OBSERVATIONS

Given the intricate nature of the legal analysis undertaken in this report, attempting a comprehensive summary would be unproductive, and risk losing crucial nuance. Some of the main findings are nevertheless presented here.

²⁴³ See Section 3.2 above.

Contracting Parties' **legally binding obligations** under the Bern Convention are **essentially similar** for **candidate** and **adopted** Emerald Network sites – and indeed, during Phase I of the Network's development, also for the sites on the national lists compiled by Parties.

From Article 4 of the Convention, interpreted in conformity with Resolution No. 1 (1989) and other relevant Resolutions and Recommendations, it follows that each State Party to the Convention has a general obligation of result with regard to the candidate and adopted Emerald Network sites on its territory (and sites on Phase I national lists). With regard to all such sites, Parties shall take those measures which are **necessary** and **able** to effectively **ensure** the **conservation** of the habitats of species and natural habitat types involved. Ultimately, Parties must do what it takes, and do whatever works, to achieve the result of safeguarding (or restoring) those "*abiotic and biotic features which form the habitat*"²⁴⁴ of species and habitat types in the sites concerned – a result which has also been expressed by the Standing Committee in terms of the maintenance (or restoration) of the sites' ecological character, and of the satisfactory/favourable conservation status of the species and natural habitats involved. Whereas this is a potentially demanding obligation, its existence follows logically from the application of the general rules of treaty interpretation to the language of Article 4 in combination with the unambiguous interpretive statements in Resolution No. 1 (1989), further supported in various other Resolutions and Recommendations.

What it takes exactly for a Party to meet the obligation of Article 4 will depend on the circumstances pertaining to the sites in question. Generally, however, with regard to the sites involved, Article 4 will require the application of a suitable site protection regime, the taking of the management measures necessary for its preservation or restoration, a sufficient degree of monitoring, and the active screening of potentially harmful projects or activities. Whenever a concrete activity, plan or project is proposed that may jeopardise the conservation (status) of the species and habitats within an Emerald Network site, or the ecological character thereof, there must be sufficient clarity regarding the particular conservation consequences of the proposed development *before* a decision is taken regarding its authorisation or (in the case of a government project) its performance. Where such clarity does not already exist, a comprehensive and detailed assessment of the project's anticipated consequences will need to take place first, paying due attention to alternatives and cumulative impacts. When it is apparent, from the impact assessment or otherwise, that the project is incompatible with the conservation requirements that flow from Article 4 of the Convention regarding the site concerned, authorisation must in principle be refused and the project prevented from going ahead. Exceptions to this may only be allowed under the terms of Article 9 of the Convention.

To a significant degree, the current obligations that non-EU Contracting Parties have under the Convention with regard to Emerald Network sites, are similar to what is required from EU Member States under the Habitats Directive with regard to **Natura 2000** sites. Notable differences, however, concern the **degree of certainty** that is expressly required under the Habitats Directive before a potentially harmful plan or project can be permitted, and certain **conditions** in the **exception** clause of Article 6(4) of the Directive that are more restrictive than the conditions of Article 9 of the Convention. Regarding the latter, Article 6(4) only allows exceptions for harmful projects for "*imperative reasons of overriding public interest, including those of a social or economic nature*" (compared to the longer list of eligible purposes in Article 9), and subject to the taking of compensatory measures (which is not explicitly required by Article 9).

More awareness and clarity concerning the precise legal obligations of non-EU Convention Parties regarding the Emerald Network sites on their territories, and a closer alignment of those obligations with the obligations of EU Member States regarding Natura 2000 sites, could be provided by the Standing Committee, acting under Article 14 of the Convention. As far as influencing the content and nature of Parties' obligations under the Convention is concerned, this can only be achieved properly – barring amendment of the Convention – through the adoption of one or more Resolutions containing strong interpretive statements regarding the scope and meaning of Article 4 and 9 of the Convention, in the kind of language also used in Resolution No. 1 (1989).²⁴⁵

²⁴⁴ Resolution No. 1 (1989), par. 2(c).

²⁴⁵ Some examples are provided above in Section 8.

BIBLIOGRAPHY

- Backes C.W., Freriks A.A. and Robbe J. 2009. *Hoofdlijnen Natuurbeschermingsrecht* (2nd ed.). Sdu Publishers.
- Bezv O., 2018. 'Legal Regulation of the Emerald Network: National and Global Aspects'. 5 *Journal of Vasyk Stefanyk Precarpathian National University* 91-98.
- Bowman M., Davies P. and Redgwell C. 2010. *Lyster's International Wildlife Law* (2nd ed.). Cambridge University Press.
- Directorate of Democratic Governance, Culture and Diversity. 2012. *The Emerald Network: A Network of Areas of Special Conservation Interest for Europe – Explanatory Document and Compilation of Relevant Texts*. Bern Convention Doc. T-PVS/PA(2012)2.
- Directorate of Democratic Governance, ETC/BD and Roekaerts M. 2013. *Revised Criteria for Assessing the National Lists of Proposed Areas of Special Conservation Interest (ASCIs) at Biogeographical Level and Procedure for Examining and Approving Emerald Candidate Sites*. Bern Convention Doc. T-PVS/PA(2013)13.
- Directorate of Democratic Governance, Dimitrova L. and Dimova D. 2015. *Draft Guidelines on Managing the Emerald Sites, Including Climate Change Adaptation and Mitigation*. Bern Convention Doc. T-PVS/PA(2015)10.
- Directorate of Democratic Governance, Culture and Diversity. 2016. *The Emerald Network: A Network of Areas of Special Conservation Interest for Europe – Explanatory Document and Compilation of Relevant Texts*. Bern Convention Doc. T-PVS/PA(2016)4.
- Directorate of Democratic Participation. 2019. *Flowchart of Steps to be Taken to Assess, Report and Respond to Changes in Ecological Character of Emerald Network Sites*. Bern Convention Doc. T-PVS/Inf(2019)3.
- Epstein Y., López-Bao J.V. and Chapron G. 2016. 'A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe'. 9 *Conservation Letters* 81-88.
- European Commission. 2018. *Managing Natura2000 Sites: The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC*. Commission Notice C(2018)7621
- Harris D.J. 2004. *Cases and Materials on International Law* (6th ed.). Sweet & Maxwell.
- International Law Commission. 1966. *Yearbook of the International Law Commission*, 4 (U.N. Pub. Sales No. 67.V.2, Vol. II).
- Opermanis O. 2014. *Towards Management of Emerald Sites: Guidance Document*. Bern Convention Doc. T-PVS/PA(2014)8.
- Pritchard D. 2017. *The Concept of the 'Ecological Character' of Sites in the Bern Convention/Emerald Network Context, and Options for Addressing Changes in Ecological Character*. Bern Convention Doc. T-PVS/PA(2017)8.
- Pritchard D. 2018. *Guidance on Detecting, Reporting, Assessing and Responding to Changes in the Ecological Character of Emerald Network Sites*. Bern Convention Doc. T-PVS/PA(2018)13.
- Roekaerts M., Opermanis O. and Soms-Tiesnesis K. 2020. *Reporting under Resolution No. 8 (2012) – Period 2013-2018*. Bern Convention Doc. T-PVS/PA(2020)03.
- Shine C. 2010. *Interpretation of Article 9 of the Bern Convention*. Bern Convention Doc. T-PVS/Inf(2010)16.
- Trouwborst A. 2011. *Conserving European Biodiversity in a Changing Climate: The Bern Convention, the EU Birds and Habitats Directives and the Adaptation of Nature to Climate Change*. Bern Convention Doc. T-PVS/Inf(2011)21.

- Trouwborst A. 2014. *Applying the Bern Convention on the Conservation of European Wildlife and Natural Habitats to the Problem of Hybridisation between Wolves (Canis lupus) and Domestic Dogs: An Analysis and a Proposal for a Standing Committee's Recommendation*. Bern Convention Doc. T-PVS/Inf(2014)15.
- Trouwborst A. 2017. *Emerald Network Reporting Requirements under the Bern Convention: A Legal Analysis*. Bern Convention Doc. T-PVS/Inf(2017)11.
- Trouwborst A., Fleurke F.M. and Linnell J.D.C. 2017a. 'Norway's Wolf Policy and the Bern Convention on European Wildlife'. 20 *Journal of International Wildlife Law and Policy* 155-167.
- Trouwborst A., Boitani L. and Linnell J.D.C. 2017b. 'Interpreting "Favourable Conservation Status" for Large Carnivores in Europe: How Many Are Needed and How Many Are Wanted?' 26 *Biodiversity and Conservation* 37-61.