

Chaos or Coherence? – Implementing and Enforcing the Conservation of Migratory Species through Various Legal Instruments

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I. Requirements of Migratory Species Conservation

International law continues to suggest that wildlife within the borders of a state is a resource over which the relevant state has absolute territorial sovereignty. Although wildlife as part of biological diversity is recognised to be of common concern for humankind, it is no common good or common heritage of humankind which would necessarily require a common approach to its conservation. The classification as a common concern of humankind does not limit states' rights resulting from territorial sovereignty.¹ Consequently, states are in principle free to exploit the natural resources, including animal and plant species, located on their territory.²

For migrating species such an approach can prove fatal because their numbers may decrease significantly during their passage through different states, when several or even all states on their way make unlimited use of exploitation rights. Although not recognised as a common heritage of humankind in terms of law, migratory species that cross borders are a “common biological resource”³ shared by all states whose territory they cross on their migration routes. Hence, the involvement of all these states is necessary when establishing conservation schemes.

Terrestrial and marine migratory species are indifferent to state borders or sea zones. They cross borders between sovereign states following their instincts and needs, e.g. concerning food, breeding grounds, wintering areas and favourable conditions to raise their young. Migration of terrestrial and marine species is in

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¹ The customary understanding that states have sovereign rights over their own biological resources – including their exploitation – is affirmed and reaffirmed by several international agreements, e.g. article 195 UN Convention on the Law of the Sea (CLOS), 10 December 1982, 21 ILM (1982), 261 et seq., and the preamble to the Convention on Biological Diversity (CBD), 22 May 1992, 31 ILM (1992), 818 et seq.

² Wm. C. Muffet, International Protection of Wildlife, in: F. L. Morrison/R. Wolfrum (eds.), International, Regional and National Environmental Law, 2000, 343, 344.

³ L. Glowka, Complementarities Between the Convention on Migratory Species and the Convention on Biological Diversity, 3 J. Int'l Wildlife L. & Pol. 205, 210 (2000).

many cases cyclical and, consequently, more or less precisely predictable.⁴ The predictability of routes of migration leads to predictability of range states. The specification of range states indicates which states have to be involved in conservation programmes concerning a certain migratory species. The number of range states that have to be involved in the conservation of a migratory species can differ significantly according to the migration patterns and ranges of different marine and terrestrial migrants.

While some species frequently cross a state border in ecosystems shared by two or more states, e.g. gorillas or elephants, others pass through (or over) a larger number of states on their way to wintering quarters, e.g. European birds on their way to Africa before the European winter. Still others, such as whales, are “world travellers”⁵ and, despite the fact that under normal conditions they do not regularly come close to coastal areas, they may cross a large variety of different Exclusive Economic Zones (EEZs) and migrate from these to the high seas and back.⁶

If migratory species are captured or killed in any of the range states, unilateral conservation standards in the other range states – no matter how strict – can turn out to be useless to prevent a decline in numbers, a severe reduction of the gene-pool or, ultimately, extinction.⁷ As a consequence, the conservation of migratory species is by its very nature an issue of at least bilateral but mostly multilateral character that requires close co-operation and concerted action. Recognising this requirement, the Bonn Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention – CMS)⁸ calls in its preamble for

“concerted action of all states within the national jurisdictional boundaries of which such species spend any part of their life cycle”.

To be effective, i.e. to pursue common objectives in an agreed and systematic manner, state co-operation should not only be governed by multilateral legal rules. A legal framework should also provide for mechanisms for its implementation and the monitoring thereof and of continued compliance of parties thereto.

This article aims in section II to give an overview of those international conventions either explicitly intending to conserve migratory species or at least including such species within their broader scope. Section III will present European approaches to establish conservation schemes that are applicable to migratory species.

⁴ C. de Klemm, *Migratory Species in International Law*, 29 *Nat. Resources J.* 934 (1989).

⁵ On the migration of whales and their conservation, see E. Gardner, *Swimming through a Sea of Sovereign States: A Look at the Whale’s Dilemma*, 12 *Ocean Yearbook* 61 et seq. (1996).

⁶ Ph. Sands, *Principles of International Environmental Law*, 2003, 607, distinguishes four groups of migrants: 1) marine species breeding on the shores but migrating to the sea during adult life; 2) highly migratory marine species travelling between adjacent areas of the EEZ and high seas; 3) territorial species with specific migration cycles; 4) territorial or marine species which live in border areas and regularly cross the relevant borders.

⁷ To illustrate this consideration S. Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The ‘Bonn Convention’)*, 29 *Nat. Resources J.* 979 (1989), gives the example of the Siberian Crane, which was relatively secure in its Russian breeding sites and Indian wintering grounds, but was hunted on its migratory route through Pakistan, leading to a decline in its numbers.

⁸ 23 June 1979, 19 *ILM* 15 et seq. (1980).

Since co-operation not only between states, but also between the various institutions concerned with migratory species, is particularly relevant in order to establish a coherent and mutually reinforcing system of migratory species conservation, section IV of this paper focuses on inter-institutional collaboration. Another significant issue, when evaluating whether international approaches to the conservation of migratory species are chaotic or coherent, concerns measures of implementation and enforcement. Section V deals with questions of implementation and enforcement. The results of the review and an outlook on desirable action are summarised in section VI.

II. International Instruments with a Global Scope

The only multilateral convention that is both explicitly focused on the management and conservation of migratory species as well as by its nature potentially applicable to all migratory species is the Bonn Convention. Another convention with a global scope that is applicable to migratory species, albeit limited to certain marine migratory fish stocks, is the Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement).⁹ Other instruments specifically designed to conserve a single migratory species, e.g. the Inter-American Tropical Tuna Convention,¹⁰ are limited in a double sense: they are restricted to a species and to a region. Instruments belonging to the latter category will not be discussed in any detail in the course of this article.

Even if not explicitly designed to conserve migratory species, other multilateral agreements that are applicable to habitats, species or biodiversity generally include the protection of migratory species within their scope of application. Whether the Bonn Convention and such other applicable agreements co-operate in an effective manner or whether these instruments operate parallel to each other and without co-ordination is the central question examined by this article. The following paragraphs focus on the different approaches followed by multilateral agreements with applicability to all or at least a variety of migratory species on a global scale.

The Bonn Convention is one of the four biodiversity-related agreements with a global scope that are relevant to migratory species. The other three conventions are the Convention on Biological Diversity (CBD)¹¹, which is the most comprehensive agreement, the Ramsar Convention on Wetlands of International Importance Es-

⁹ 4 August 1995, 34 ILM 1547 et seq. (1995).

¹⁰ Originally dating from 1949, a revised Convention for the strengthening of the Inter-American Tropical Tuna Commission established by the 1949 Convention between the United States of America and the Republic of Costa Rica, the so-called "Antigua Convention", was adopted and opened for signature 14 November 2003. The text can be accessed at <<http://www.iattc.org/PDFFiles2/Antigua%20Convention%20Jun%202003.pdf>>.

¹¹ See note 1.

pecially as Waterfowl Habitat (Ramsar Convention)¹², which has particular relevance to migratory waterfowl species, and the Washington Convention on International Trade in Endangered Species of Fauna and Flora (CITES)¹³, with its sectoral approach to limiting trade in species.

The Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)¹⁴ is commonly cited as the fifth biodiversity-related agreement.¹⁵ However, although it is applicable to the conservation of sites considered to be part of the world's natural heritage, it does not focus on biodiversity, habitat or species. The convention does not refer to habitats of particular species of flora or fauna or to types of habitats but only to single natural objects defined by article 2. According to this article the natural heritage can *inter alia* consist of

“precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation”.

While it follows from this approach that under the World Heritage Convention states can also establish protected areas for nature conservation when they consider the habitats to have outstanding universal value, *de facto* there are relatively few world natural heritage sites compared to the number of world cultural heritage sites.¹⁶ The conservation of a world natural heritage site has implications for the conservation of habitat and species located within the relevant area, including migratory species that use the area as one of their habitats. However, this effect has to be classified as rather coincidental. As a consequence, in the context of the focus on migratory species, the World Heritage Convention is not considered as a viable tool for their conservation.

1. Scope and Approach of the Bonn Convention

The Bonn Convention is unique for a number of reasons. As already mentioned its approach specifically to address migratory species world-wide makes the agreement the only one of its kind. Two more elements distinguish the Bonn Convention from other wildlife conservation instruments: the rigorous restriction on the

¹² 2 February 1971, 11 ILM 969 et seq. (1972).

¹³ 3 March 1973, 12 ILM 1088 et seq. (1973).

¹⁴ 16 November 1972, 11 ILM 1358 et seq. (1972).

¹⁵ See for example, V. K o e s t e r, The Five Global Biodiversity-Related Conventions: A Stocktaking, 11 RECIEL 96 et seq. (2002); CBD-COP 7, Decision VII/26 on Co-operation with other conventions and international organisations and initiatives, accessible at <<http://www.biodiv.org/decisions/default.aspx>>; WCMC (T.H. J o h n s o n/I.K. C r a i n/M.V. S n e a r y), Feasibility Study for a Harmonised Information Management Infrastructure for Biodiversity-Related Treaties, 1998, accessible at <<http://www.wcmc.org.uk/convent/treaties.htm>>.

¹⁶ According to the World Heritage List, as accessible on the internet at <<http://whc.unesco.org/>>, there are 582 cultural, but only 149 natural sites listed. 23 are mixed properties with cultural and natural value.

taking of endangered species is unusual and the technique to rely on further (regional) agreements for specific species is unprecedented.¹⁷

The Bonn Convention deals with the conservation of migratory species through a two-tier approach, depending upon a classification of the conservation status of migratory species. Species listed on appendix I are classified as endangered. A strict regime protects them against taking. Appendix II comprises species that have either an unfavourable conservation status and require an international agreement for their conservation and management or a conservation status which would significantly benefit from an international agreement.¹⁸ To protect appendix II species, range states shall “endeavour to conclude agreements” to provide protection (article IV, para. 3, CMS). As only those species listed in either of the two annexes are included in the conservation schemes of the Bonn Convention, the treaty is only “potentially of global application”¹⁹. In theory, all migratory species could be listed when their conservation status is considered to require such listing, but at a given time the agreement only covers a certain number of species.

While the Bonn Convention is one of the agreements that refers to the global conservation of migratory species as far as appendix I species are concerned, instruments agreed upon between states parties to conserve migratory species listed in appendix II are usually of a regional scope.²⁰ So far six regional agreements concerning different migratory species and seven non-binding Memoranda of Understanding (MoU) have been concluded between groups of states parties. Although the adoption of further agreements for appendix II species is desirable from the perspective of joint efforts and standards of protection for threatened species, it is not obligatory.

The issue of effective habitat conservation under the Bonn Convention and, potentially, under other nature conservation schemes might prove vital for the sur-

¹⁷ S. Lyster, *International Wildlife Law*, 1985, 297.

¹⁸ Article IV, para. 1, CMS.

¹⁹ Sands, see note 6, 607.

²⁰ The instruments so far agreed upon between Bonn Convention states parties are the following (in chronological order): Agreement on the Conservation of Seals in the Wadden Sea, 16 October 1990; Agreement on the Conservation of Bats in Europe, 10 September 1991; Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, 13 September 1991; MOU Concerning Conservation Measures for the Siberian Crane, in effect since 1 July 1993, revised version in effect since 1 January 1999; MOU Concerning Conservation Measures for the Slender-Billed Curlew, in effect since 10 September 1994; Agreement on the Conservation of African-Eurasian Migratory Waterbirds, 16 June 1995; Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, 24 November 1996; MOU Concerning Conservation Measures for Marine Turtles of the Atlantic Coast of Africa, in effect since 1 July 1999; MOU on the Conservation and Management of the Middle-European Population of the Great Bustard, in effect since 1 June 2001; Agreement on the Conservation of Albatrosses and Petrels, 19 June 2001; MOU on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia, in effect since 1 September 2001; MOU Concerning Conservation and Restoration of the Bukhara Deer, in effect since 16 May 2002; MOU Concerning Conservation Measures for the Aquatic Warbler, 30 April 2003. The texts of the agreements and memoranda of understanding can be accessed via the CMS-Internet-Homepage at <<http://www.cms.int/>>.

vival of certain species. Habitat loss is one of the primary threats to migratory species.²¹ Although the establishment of protected areas might be a particularly viable tool to achieve the conservation or restoration of habitats and of the relevant linkages between range state habitats, protected areas are not an explicit priority in the Bonn Convention text. This becomes apparent from the limitations and particularly vague wording of article III, para. 4 (a) of the CMS, which mentions habitats without referring to the establishment of protected areas. According to this provision, states parties that are range states of migratory species listed in appendix I shall

“endeavour [...] to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction”.

In general, the same applies to the agreements on appendix II species concluded between states parties. Some of the agreements, like the MOU Concerning Conservation Measures for the Siberian Crane or the MOU Concerning Conservation Measures for the Slender-Billed Curlew, call for strict protection of the listed species and in this connection refer to measures to protect traditional breeding areas, yet again without explicitly calling for the establishment of protected areas. However, the objectives of the Convention or the subsidiary agreements must be met with a view to the conservation status of the relevant species. The means used to achieve the conservation objectives concerned are left to the discretion of the range states. In the case of endangered species listed in appendix I, implementation may require protection standards that are stricter than those applicable to species listed in appendix II and covered by a regional agreement. Hence, range states are free to establish protected areas according to their domestic laws: They may improve a species' conservation status without being obliged to do so by the text of the Bonn Convention or by regional agreements on certain migratory species.

Although the Bonn Convention has often been criticised for lacking focus and teeth as well as participants,²² the growing number of memoranda of understanding indicates awareness of the need to at least take action for particular species, even if migratory species are not addressed in a comprehensive manner. One of the significant shortcomings of the Convention's approach, as already mentioned, is the fact that habitat conservation, e.g. by means of corridors that connect regions in different range states, is not elaborated upon in terms of obligation. This deficiency, however, is basically shared with all other nature conservation conventions, which usually limit the applicability of concrete provisions using a yardstick of feasibility and appropriateness for the implementing state party.

²¹ Migratory species rely on certain key sites, also called “bottleneck areas”. Loss or degradation of such key site habitats poses a significant risk to a species' survival. See *Glowka*, note 3, 208.

²² Compared with e.g. the CBD (188 states parties) and the Ramsar Convention (138 states parties), the Bonn Convention with its currently 86 states parties suffers from limited participation.

2. Explicitly Focusing on Migratory Fish: the Fish Stocks Agreement

Migratory fish stocks that are subject to exploitation for human consumption are particularly prone to overfishing. When fish stocks migrate to the territorial waters or Exclusive Economic Zones of different states, their exploitation results from the exercise of fishing rights or illegal fishing by a variety of actors. Such practice can lead to particularly rapid over-exploitation. The same risks apply when highly migratory fish stocks wander to different fishing areas on the high seas and hence make themselves subject to exploitation at different locations.

Due to its economic implications, the issue of high seas fisheries is particularly sensitive. This sensitivity is reflected by the negotiations of the UN Convention on the Law of the Sea²³ that left the regulation of specific conservation and management measures for migratory fish stocks to be negotiated between coastal states and distant-water fishing nations and established only general guidance.²⁴ The discussions concerning sustainable development and the protection of the oceans during the UNCED process in 1992 resulted in chapter 17 of the Agenda 21. This chapter deals with the protection and rational use of marine living resources. Concerning migratory species, it paved the way for the 1995 Fish Stocks Agreement by calling on parties to convene an intergovernmental conference on the issue of straddling and highly migratory fish stocks as a means of improved implementation of the CLOS.²⁵

According to article 2 of the Fish Stocks Agreement, its objective is

“to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention”,

namely articles 63 and 64, CLOS. As an implementation agreement, the Fish Stocks Agreement mainly follows the criteria of the Convention on the Law of the Sea regarding the conservation standards for those highly migratory fish stocks covered by the agreement. The applicable measures depend upon the maximum sustainable yield of the fish stocks in question. Consequently, absolute conservation standards that are similar or at least comparable to the ones established for migratory species listed in appendix I of the Bonn Convention are not envisaged. In this respect the Fish Stocks Agreement – like most other fisheries agreements – is an exploitation-oriented and not a conservation-oriented convention. Likewise, protected areas, despite the attempt to incorporate an ecosystem approach into the regime on the exploitation of marine living resources under the current law of the sea, are not subject to regulation in the Fish Stocks Agreement.

²³ See note 1.

²⁴ C. de Fontaubert, *The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Another Step in the Implementation of the Law of the Sea Convention*, 12 *Ocean Yearbook* 82 (1996).

²⁵ *Ibid.*, 83.

With regard to regional conventions on migratory fish stocks, the Fish Stock Agreement had some influence on their scope and the underlying principles adopted by these instruments. This becomes particularly apparent by examining the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPT Convention).²⁶ The Western and Central Pacific region is heavily dependent upon the fishing of different species of tuna. However, in contrast to the efforts undertaken by the Inter-American Tropical Tuna Commission and other regional agreements specifically focussing on tuna, the WCPT Convention has a broader scope and comprises all migratory fish stocks. Although the WCPT Convention as a regional agreement takes into consideration the specific features and needs of the Western and Central Pacific Ocean, it is governed by the approach and principles of the Fish Stocks Agreement. Article 2 of the WCPT Convention provides that it is the Agreement's objective to

“ensure through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific in accordance with the 1982 [LOS Convention] and the 1994 United Nations Fish Stocks Agreement”.

Migratory fish stocks, either as general group or with regard to single species such as tuna, have received the greatest attention with respect to international regulation, particularly on a regional scale. The underlying reason – as already mentioned – is the significant economic weight a sustainable harvesting has on a mid- and long-term basis. Many migratory fish species are heavily exploited. Those nations that depend upon their fisheries have realised the necessity of conservation and management schemes. This is a fundamental difference to other migratory species and also explains why the standards remain exploitation-oriented for all fisheries agreements and conservation-oriented for the economically irrelevant terrestrial migratory species or marine species not subject to intentional catching, e.g. turtles and dolphins. Likewise, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),²⁷ which is particularly relevant for whales when migrating to Antarctic waters, is not a fisheries agreement and clearly reflects a conservation-oriented approach.

3. Migratory Species as Part of Biodiversity under the CBD

The Convention on Biological Diversity is the most comprehensive nature conservation agreement when measured by its scope. Its definition of biological diversity includes “diversity within species, between species and of ecosystems” (article 2, CBD). Hence, this definition also refers to those species qualified as migratory. Certain measures, e.g. the protection and restoration of habitats and other pro-

²⁶ 5 September 2000, 40 ILM 278 et seq. (2001).

²⁷ 19 ILM 841 et seq. (1980)

tected areas²⁸ or the prevention of the introduction of alien species,²⁹ can assist with protecting migratory species. However, the CBD does not make any reference to the close co-operation needed when setting effective conservation standards for migratory species. So far the parties to the CBD have neither adopted any specific decisions on strategies, programmes or other activities focussing on migratory species, nor have they considered the issue as a cross-cutting theme of biodiversity conservation.

Despite the lack of decisions on migratory species, the issue is not considered irrelevant by the parties to the CBD. Co-operation with other biodiversity-related conventions is frequently emphasised and has been subject to decisions adopted by the Conference of the Parties (COP) since the second COP in 1995. The third meeting of the COP to the CBD in Buenos Aires in 1996 requested the Executive Secretary, in consultation with the Secretariat of the Bonn Convention,

“to evaluate how the implementation of that Convention can complement the implementation of the CBD through its transboundary, co-ordinated and concerted action on a regional, continental and global scale”.³⁰

A year later, the CMS Secretariat submitted a paper to COP-4 to the CBD entitled “Linkages and Co-ordination Between the Convention on the Conservation of Migratory Species of Wild Animals and the Convention on Biological Diversity”.³¹

Based upon this report and a continuous exchange of information, the parties to the CBD accept that the issue of migratory species is already sufficiently dealt with under more specific agreements, namely those found in the Bonn Convention. Accordingly, COP-6 to the CBD recognised the Bonn Convention as its leading partner with respect to conservation and sustainable use of migratory species over their entire range of migration. The Bonn Convention was also seen as providing an international legal framework through which range states can co-operate on migratory species issues. Such an understanding of co-operation and recognition of aims and regulatory approaches demonstrates the potential for streamlining issues in international environmental law, whereby the duplication of efforts as well as inconsistencies can be avoided.

Due to its focus on migratory species and its specific approach toward achieving their conservation and management, the Bonn Convention and its agreements for appendix II species have great potential to fill gaps left by the broader framework of the CBD.³² At the same time, approaches of the CBD, e.g. in regard to habitat conservation, can have some impetus on CMS conservation schemes.

²⁸ See articles 8 (a), (d), (e) and (f), CBD.

²⁹ See article 8 (h), CBD.

³⁰ Decision III/21, Doc. UNEP/CBD/COP/3/38, 112 et seq.

³¹ Doc. UNEP/CBD/COP/4/Inf.22/Rev.1.

³² Glöwka, see note 3, 245.

4. Migratory Waterfowl and the Ramsar Convention

The issue of migratory birds, particularly migratory waterfowl, was already regulated in international conventions and pieces of national legislation in the early 20th century. An example of very early efforts to address the decline of waterfowl species is the Convention between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada³³ and the resulting US Migratory Bird Treaty Act.³⁴ Due to its different understanding of environmental conservation and its limited scope, the Migratory Bird Treaty Act, which is still applicable law, is of relatively little relevance today.³⁵

In the multilateral context, the Ramsar Convention is the primary international convention aiming at the conservation of waterfowl in its natural habitat. Despite focusing on waterfowl and its habitat, the agreement obliges states parties to provide for the protection and wise use of all wetlands. The Ramsar Convention may be considered the first modern global nature conservation treaty.³⁶

The particular relevance of the Ramsar Convention in the context of this paper relates to the fact that many species of waterfowl are migratory. In fact, one of the reasons for the Convention was to promote the conservation of migratory waterfowl by protecting wetlands from human destruction, e.g. by drainage and pollution. Migratory birds are explicitly mentioned in the preamble and in article 2, para. 6 of the Ramsar Convention. Another example of particular conservation needs in regard to migratory waterfowl is given by the Agreement to the Bonn Convention on the Conservation of African-Eurasian Migratory Waterbirds.³⁷ By specifically addressing habitat conservation, the Ramsar Convention takes a different approach to species conservation than the Bonn Convention. At least for migratory waterfowl species depending upon wetlands protected by the Ramsar Convention, the two regimes taken together can provide for more comprehensive conservation standards.³⁸

³³ 16 August 1916, 39 Stat. 1702.

³⁴ As amended in 1994, 16 U.S.C. §§ 703-11 (1994).

³⁵ On efforts to expand the scope of the Migratory Bird Treaty Act, see C. A. Fjeltland, Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds, 40 Nat. Resources J. 47 et seq. (2000).

³⁶ D. Navid, The International Law of Migratory Species: The Ramsar Convention, 29 Nat. Resources J. 1001, 1002 (1989).

³⁷ There are 235 species of waterbirds dependent upon wetlands in Africa and Eurasia with altogether 117 range states. However, of these 117 range states, only 44 have ratified the agreement.

³⁸ Navid, see note 36, 1002, notes that the Ramsar Convention "provides a crucial counterpart for migratory species conservation" to the Bonn Convention. However, while habitat conservation is in fact crucial to nature conservation efforts, it shall not be forgotten that the Ramsar Convention through its focus on wetlands and waterfowl habitat, covers only a fraction of all migratory species.

5. Trade Restrictions: CITES

CITES is restricted to the regulation of trade. Migratory species, if endangered, can certainly be and in fact are listed in the CITES appendices. If one compares, for example, the migratory mammals listed in appendix I³⁹ of the Bonn Convention with those in appendix I⁴⁰ of CITES, i.e. the categories under the conventions that provide for the strictest conservation measures, respectively, 19 out of 31 migratory species are listed in both appendices. The remaining species listed in appendix I of the Bonn Convention are either appendix II or appendix III species under CITES.

Since CITES and the Bonn Convention have different scopes and objectives, while to a significant extent covering the same migratory species, they must be considered to at least potentially complement one another. The regulation and, particularly, the prohibition of trade, if effectively implemented, promotes the conservation of the relevant migratory species, because it removes an incentive for illegally taking such species in order to sell the animal itself or parts thereof. To regulate trade alone is not a viable conservation tool as long as habitats are not conserved. This aspect, however, is a weakness of the Bonn Convention, which mainly protects species listed in its appendix I against taking. Stronger emphasis on habitat conservation would be better suited to complement the trade restrictions and, as a result, provide for a comprehensive conservation scheme.

6. Conclusion

A comparison of the approaches of different international agreements with global scope shows that there are partial overlaps, but also gaps and a lack of comprehensiveness when it comes to concrete objectives and standards to conserve migratory species. However, comprehensiveness can be enhanced and gaps can be filled, if states as well as institutions involved in the conservation of migratory species co-operate in a more systematic manner. Before turning to structures and means of inter-institutional co-operation, two European instruments shall be used to demonstrate that the overlap of scopes and approaches of global instruments are reflected by a similar overlap of conventions applicable to migratory species on a regional basis. Again, as mentioned in respect to various global instruments, much will depend upon co-operation that aims to build a platform for information exchange, taking into consideration global as well as regional instruments.

³⁹ Valid as of 23 December 2002.

⁴⁰ Valid as of 16 October 2003.

III. European Approaches to the Conservation of Migratory Species

Other than some appendix II agreements under the Bonn Convention, there are no specific instruments for migratory species that are limited in applicability to Europe. Under the roof of the Bonn Convention, the Agreement on the Conservation of Seals in the Wadden Sea, the Agreement on the Conservation of Bats in Europe, and the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, as well as the non-binding Memorandum of Understanding on the Conservation and Management of the Middle-European Population of the Great Bustard, are applicable in and restricted to European range states.

The Bern Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)⁴¹, as an international treaty, and the European Community Directive on the Conservation of Natural Habitats and of Wild Flora and Fauna (FFH Directive)⁴², as an example of European Union legislation are the main instruments which apply to the conservation of migratory species in European range states. However they are not designed to focus exclusively on the needs of migrants. The following section reviews these instruments according to their contribution to the conservation of migratory species.

1. The Bern Convention

The Bern Convention is generally perceived as an example of a successful regional agreement on the conservation of wild fauna and flora. The objective to conserve migratory species with regard to their special needs and their habitats in range states, and the requirement of particular international co-operation, is stressed not only in the preamble but also in article 1, para. 2 and article 4, para. 3. In article 10, the Bern Convention even includes special provisions for migratory species. In this article, states parties that are range states for a migratory species agree to co-ordinate implementing measures with a view to the particularities of migratory species. Consequently, the Bern Convention is much more specific than, for example, the Convention on Biological Diversity as far as particular conservation needs of migratory species are concerned.

Apart from these specific provisions, the regulations of the Bern Convention on habitat conservation and species protection are applicable to both migratory and non-migratory species. Many migratory species, e.g. many of those also listed under the Bonn Convention and CITES, are listed in annexes II and III of the Bern Convention. That means that particularly strict conservation standards apply to these species.

⁴¹ 19 September 1979, XXIII IEP, 40 et seq.

⁴² Council Directive 92/43/EEC, OJ (1992), L206/7.

The Bonn Convention, with its prohibition on taking for appendix I species and examples for the implementation of co-operation obligations by agreements or memoranda of understanding, seems more focused concerning the conservation of migratory species than the Bern Convention. However, since the Bern Convention is supported by a variety of expert groups,⁴³ workshops and implementing programmes, it has further potential to develop programmes designed for certain migratory species. While there is no specific expert group on migratory species so far, migratory species are dealt with by the Expert Group on the Conservation of Birds and the Expert Group on the Conservation of Large Carnivores.

2. Species Conservation According to European Community Law

Currently, the main instrument of European Community law that concerns the conservation of species and habitats of fauna and flora is the FFH Directive. This instrument, whose implementation required that all member states meet its standards via their national nature conservation laws, does not focus on migratory species or their habitats. The EC Directive on the Conservation of Wild Birds⁴⁴ (Birds Directive) that now forms part of the conservation scheme of habitats under the FFH Directive, however, in its preamble explicitly recognises migratory birds as a common European heritage and calls for effective transfrontier protection. The instrument explicitly provides for the establishment of protected areas for endangered birds and for strict standards for those species listed in the annexes. All areas designated as protected areas under the Birds Directive are, according to the preamble of the FFH Directive, part of the ecological network established by the Directive.

Apart from the conservation of migratory birds under the Birds Directive, other migrants are not specifically addressed by European Community Law but referred to only more or less implicitly, e.g. by criteria for habitat-listing that refer to animals ranging over wide areas.⁴⁵ More specifically, the FFH Directive in article 10 recognises the importance of certain habitats for the migration of animals without referring to particular needs or species. Furthermore, the provisions on species conservation in article 12, para. 1 (a) seem to consider migratory as well as non-migratory species when referring to the strict protection of all species “in their natural range”. In addition to that somewhat general inclusion of migratory species in the conservation scheme, article 12, para. 1 (b) prohibits disturbances *inter alia* in times of migration of those species listed in annex IV. Annex IV to the FFH Directive lists species of Community interest and in need of strict protection, i.e.

⁴³ So far there are six Expert Groups on the conservation of amphibians and reptiles, on the conservation of invertebrates, on the conservation of plants, on legal aspects of introductions and re-introduction of wild species, on the conservation of birds and on large carnivores, respectively.

⁴⁴ Council Directive 79/409/EEC, OJ (1979), L103/1.

⁴⁵ S a n d s, see note 6, 537.

those considered to be endangered, vulnerable, rare or endemic (article 1 (g), FFH Directive).

As far as habitat conservation is concerned, one difficulty with the conservation scheme under the FFH Directive is the balancing of habitat conservation with economic interests of member states. The planning of transportation projects such as motorways or railways, for example, endangers the integrity of protected areas designated either under the Birds Directive or under the FFH Directive because of the exemptions from strict protection offered by article 6, para. 4 of the FFH Directive.⁴⁶ Since habitats and the linkage of habitats are particularly important for migratory species, exemptions for economic reasons and the potential “cutting” of habitats by roads and railroads can prove problematic to certain migrants’ conservation.

IV. Co-operation and Interaction between Different Institutions

The particularities of migratory species require certain safeguards that differ from conservation standards for the conservation of non-migratory species. A core issue is the need for a higher degree of co-operation between those states sharing the same groups of migratory species, i.e. all range states for a particular species. While co-operation between states regarding Bonn Convention appendix II species is required by the different agreements and memoranda of understanding, it is questionable whether the provisions on appendix I species are sufficient to conserve the species in question without further close co-operation of range states. The Conference of the Parties to the Bonn Convention has established a model of concerted actions recommended for appendix I species that require further-reaching co-operative measures for appendix I species not envisaged by the Bonn Convention text. By this tool a considerable shortcoming of the instrument can be addressed.

However, despite the fact that the Conference of the Parties can recommend concerted actions, it would have been advisable to give more detailed guidance on range state co-operation regarding appendix I species in the Bonn Convention, or to call for obligatory implementing agreements comparable to the appendix II agreements, instead of leaving this important issue to institutional practice. Particularly, the creation of cross-border protected areas and corridors for migration is necessary to conserve migratory species. This requires the collaboration of the affected range states and should be regulated by the Bonn Convention.

In addition to the requirements of close state co-operation there is a need for collaboration of different institutions engaging in biodiversity conservation. This is particularly true in the light of the mentioned diversity of instruments, which have

⁴⁶ See A. Nollkaemper, *Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests*, 9 JEL 271 et seq. (1997).

distinct focuses and approaches to the conservation of migratory species, while at the same time applying to the same species. An example of a migratory species that is strictly protected by all relevant agreements that are working with lists of strictly protected species, is the *monachus monachus*⁴⁷. This migratory species is listed in appendix I of the Bonn Convention, appendix I of CITES, as well as in annex II which lists strictly protected animals of the Bern Convention regime, and can also be found in annex IV of the FFH Directive.

The plenary bodies of the main biodiversity-related treaties, i.e. the Conferences or Meetings of States Parties, have long recognised the necessity to streamline the different agreements in order to avoid conflicts either between contradictory approaches or between specific treaty provisions, or to avoid a duplication of efforts and a waste of resources through the implementation of rules aiming at the same or comparable objectives.⁴⁸ The general will to co-operate, even if repeated in decisions of the Conferences of States Parties, is not sufficient, but rather needs implementation. A means to formalise co-operation between international institutions is so-called memoranda of understanding or memoranda of co-operation. While these memoranda often only further document the will to work together without specifying how to do so, they can be supplemented by joint working programmes or plans of action.

In recent years, there has been a proliferation of memoranda of understanding between treaties' secretariats in order to define co-operation. The Secretariat of the Ramsar Convention has concluded more than 25 memoranda of co-operation or memoranda of understanding either with other international or regional conventions' secretariats or with other institutions such as UNCTAD, as well as a variety of NGOs, such as the IUCN or the WWF International.

Examples for such approaches in regard to the joint conservation of migratory species are shown under the Bonn Convention and other biodiversity-related treaties. According to resolution 7.9, adopted by the Conference of the Parties to the Bonn Convention at their 7th meeting in 2002, the need to

“strengthen orderly institutional linkages with partner organisations, and to define the scope of their responsibility and the way to improve in the most efficient way, their tasks and to enhance their synergetic effect”

is not only emphasised but efforts to respond are also demonstrated by different joint work programmes and memoranda of understanding.

A Joint Work Programme has been elaborated for facilitating collaboration between the Bonn Convention and the CBD.⁴⁹ In addition to the existing Memorandum of Understanding, a work programme with the Ramsar Convention has been established. This work programme, which involves the Secretariat of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) as

⁴⁷ The *monachus monachus* is by its popular name called “Mediterranean Monk Seal”.

⁴⁸ On potential conflicts between different biodiversity-related conventions, see R. Wolfrum / N. Matz, *Conflicts in International Environmental Law*, 2003, 63 et seq.

⁴⁹ See Doc. UNEP/CMS/Inf.7.13.

a third party, is designed to operationalise the somewhat vague memoranda. Identification of conservation needs, strengthening co-operation of range states and enhancement of information flows are the focus of the work programme.

In addition to these work programmes, memoranda of understanding have been concluded between the Bonn Convention Secretariat and the International Whaling Commission, the UNESCO, and CITES, respectively. As with most memoranda of understanding, they suffer from vague declarations of intention. It is advisable to implement the objectives through detailed joint plans of action or working programmes.

Another example of an effective form of collaboration, although not specifically relating to migratory species, but rather to flora and fauna and habitats in general, is the one between the Bern Convention and the CBD. The Bern Convention, as part of the Biodiversity Strategy, understands its function as a sort of implementing body for Europe. In this context, the CBD sets the framework, while the Bern Convention implements standards and objectives through its working groups and other activities, and by observing its own standards. The background for this co-operation is, as in most cases, set by a memorandum of understanding.

V. Means of Enforcement

Enforcement is one of the most important but at the same time most difficult tasks in international environmental law. The same applies with respect to enforcement as in regard to the conservation of migratory species in general: close co-operation between different institutions is necessary to avoid, particularly, a duplication of efforts and a waste of resources.

In general, enforcement serves compliance with obligations under international instruments by the states parties. So-called confrontational means of enforcement, e.g. by sanctions, have mostly been given up in international environmental law in favour of incentive-based non-confrontational measures. In brief, the reason for a change of approaches from confrontational to non-confrontational policies was the conviction that the only way to prevent free-riding is to persuade reluctant states to join and adhere to environmental regimes instead of forcing them out of the system.⁵⁰ As a result, most modern environmental conventions have established funds or other financial mechanisms to support implementation and compliance by developing contracting parties.

The moral “good” of a certain conduct is in most cases and particularly in times of scarce financial resources insufficient to safeguard compliance and effective implementation. Nor does the legal obligation of *pacta sunt servanda* alone prevent breaches or non-compliance. Furthermore, the rule that states parties must adhere to binding treaties does not require effective implementation of treaty obligations,

⁵⁰ For a comprehensive study of these issues see, R. Wolfrum, Means of Ensuring Compliance with and Enforcement of International Environmental Law, 271 RdC 7 et seq. (1998).

but rather that a state's conduct not amount to a breach. Effective implementation, compliance and general good performance can be best achieved through financial incentives. The Bonn Convention, as one of the older multilateral agreements, does not provide for a substantive financial mechanism in the text of the agreement. Hence, there are no incentives for contracting parties to comply with obligations. Currently, the Bonn Convention operates a Small Grants Programme to provide some funding for developing countries and countries with economies in transition. Like other small grants mechanisms, the programme established by the Bonn Convention can assist implementation of and compliance with the agreement, but cannot be compared to financial mechanisms like the Global Environment Facility (GEF), which administers a significantly larger amount of financial resources.

Although no substantive financial mechanism exists to support the only agreement specifically and comprehensively addressing all migratory species, the Convention on Biological Diversity includes a financial mechanism allowing it to contribute to the conservation of migratory species. The financial mechanism of the CBD, the GEF, promotes projects to cover the agreed incremental costs of developing states parties to implement the Convention by. The term "agreed full incremental costs" as used by the Convention in article 20, para. 2, is not defined in article 2, the provision of the CBD that concerns the use of terms. Nor is there a common agreed definition. Generally speaking, the expression "incremental costs" relates to those extra costs that arise from implementation of and compliance with an agreement. Once an agreement is implemented, the costs arising from restrictions or adaptation to new technologies create difficulties for many countries lacking expertise as well as financial and technological resources. Consequently, projects aiming at the conservation of migratory species in developing countries may be supported by GEF funding within its biodiversity focal area. A prerequisite is corresponding guidance by the CBD-COP because of the specific relationship between the GEF and the CBD when it comes to the GEF's function as the financial mechanism of the Convention.

The other agreements applicable to the conservation of migratory species and discussed in this paper have not established viable implementation or enforcement measures. The CITES Trust Fund only serves to meet administrative costs, whereas the Small Grants Fund (SGF) under the Ramsar Convention is, as its name already implies, small and too small for far-reaching financial assistance. This fund, however, pursues financial assistance to the conservation of wetlands for developing states and states with economies in transition at least as one of its objectives. Hence, despite its limitations in regard to the amount of resources available, it serves as an incentive for compliance.

Reporting requirements may be used to control compliance. However, if states fail to comply with substantive provisions or with their reporting obligations, there are no instruments to nevertheless enforce or give incentives for compliance. As a consequence, states that are willing but financially unable to adopt stricter measures for the conservation of migratory species will largely depend upon international co-operation outside the treaties applicable to the conservation of migra-

tory species. Such co-operation may either be established with developed states or internationally active NGOs.

VI. The Way Forward

While there are a variety of instruments aiming at the conservation of at least some migratory species, one must not necessarily – despite the question posed in the title of this paper – come to the conclusion that the conservation of migratory species is chaotic. However, it is also not as coherent as it could and should be. Despite the fact that there is no perfect and coherent system of international regulation in any field of international environmental law, the obvious piece-meal approach, when migratory species are concerned, makes closer multilateral co-operation a necessity.

In this respect, joint work programmes are highly recommendable to structure co-operation even if they are only adopted on a bilateral basis. It would be desirable to conclude work programmes in which all competent bodies of treaties applicable to migratory species participate. Furthermore, at least specific tasks such as the collection of relevant data should be streamlined. One step to streamline efforts to conserve migratory species is to collectively gather information, e.g. by consistent information and reporting requirements for states participating in the various conventions. Such a measure is also envisaged by Resolution 7.9 of the Bonn Convention. In para. 2 (g), the Conference of the Parties to the Bonn Convention invites its Secretariat to engage in close co-operation with UNEP-WCMC and the CBD Secretariat in order to develop a format for CBD states parties to report via national reports on migratory species and their respective co-operation with other range states. This is intended to be one element of an on-going effort to harmonise reporting requirements. A collective Clearing-House-Mechanism designed for the monitoring of the conservation status of migratory species as well as of implementation measures by the relevant reporting states could relatively easily demonstrate where stricter standards have to be set, without the danger of a duplicating effort under different instruments. The Global Register on Migratory Species (GROMS) is another viable approach to overcome shortcomings based upon a lack of information.⁵¹

Whether the growing number of agreements and memoranda of understanding under the Bonn Convention will prove viable to enhance the conservation of at least some migratory species despite the lack of enforcement measures and the lack of legally binding character of memoranda will depend upon the dedication of the participating states.

Despite the gaps, insufficiencies and other shortcomings of the various biodiversity-related conventions, the potential interplay between them as well as prospec-

⁵¹ See K. Riede, *Global Register of Migratory Species – from Global to Regional Scales*, 2004; *ibid.*, *Global Register of Migratory Species – Weltregister wandernder Tierarten*, 2004.

tive new types of incentives to engage in conservation agreements and adopt stricter standards might provide a positive outlook on the future. However, it is necessary that the potential for collaboration be used to implement and create a more coherent system of rules and regulations for nature conservation in general and for migratory species in particular. The 25th anniversary of the Bonn Convention is a good opportunity for international actors – and this means primarily states to which the relevant obligations are addressed – to prove their commitment by taking seriously the catalogues of implementation measures of the different instruments applicable to migratory species.

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