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Arie Trouwborst
Tilburg University

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The Practice of Shared Responsibility in relation to Nature Conservation

Arie Trouwborst[*]

1. Introduction

This chapter addresses how questions of shared responsibility may arise in, and may be addressed by, international nature conservation law. This is understood to cover norms of public international law aimed at the conservation of wild flora and fauna (also referred to as 'wildlife') and their habitats, the ecosystems they compose, and 'biological diversity'[1] (biodiversity) at large.[2]

The motives of states to take action to conserve nature are wide-ranging, and include the 'ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components', as well as nature's 'intrinsic value'.[3] The rationale for *international* cooperation in this regard is multifold as well. International cooperation is an obvious prerequisite for the effective conservation of migratory species, populations of other species extending across international boundaries, transboundary ecosystems, and species and ecosystems in areas beyond national jurisdiction. Furthermore, many threats to nature are international, e.g. international trade in wild plants and animals. Of late, the apparent need for international cooperation in order to help species

[*] Associate professor, Tilburg Law School, Department of European and International Public Law, Tilburg University. The author acknowledges valuable suggestions and information provided by Eladio Fernández Galiano, as well as helpful discussions with Kees Bastmeijer and Jonathan Verschuuren regarding the subject-matter of this chapter. The author is also grateful for comments made by participants of the seminar 'Practice of Shared Responsibility in International Law of the Sea and International Environmental Law' (18-19 April 2013), and in particular by Catherine Redgwell who acted as commentator on a first draft of this chapter. Any errors this chapter may contain are, of course, the sole responsibility of the author. The research leading to this chapter has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013)/ERC grant agreement n° 249499, as part of the research project on Shared Responsibility in International Law (SHARES), carried out at the Amsterdam Center for International Law (ACIL) of the University of Amsterdam. All websites were last accessed in December 2014.

[1] Article 2 of the Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79 (CBD), defines biodiversity as the 'variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

[2] The academic literature on international nature conservation law is too vast to attempt to capture it in a footnote. For a comprehensive overview and analysis of the field, see M. Bowman, P. Davies and C. Redgwell, *Lyster's International Wildlife Law*, 2nd edn (Cambridge University Press, 2010).

[3] CBD, Preamble, n. 1; similar enumerations are included in the Preambles of other conservation treaties.

adapt to climate change constitutes an added reason.[4] Moreover, quite independently from these practical considerations, states – at least the 193 parties to the Convention on Biological Diversity (CBD)[5] – regard the conservation of biodiversity as a 'common concern of humankind'.[6] International nature conservation law is thus permeated by a clear perception of 'shared responsibility *ex ante*' as understood in the conceptual framework guiding the present volume.[7]

International nature conservation law is chiefly composed of global and regional treaties, with a significantly lesser role reserved for customary international law. At the global level, a dominant role is reserved for the international nature conservation law equivalent of the African 'Big Five',[8] i.e., the Ramsar Wetlands Convention;[9] the World Heritage Convention;[10] the Convention on International Trade in Endangered Species (CITES);[11] the Bonn Convention on Migratory Species (CMS);[12] and the aforementioned CBD. Many of the other treaties target defined species or groups of species. Some of these have a worldwide scope, for instance the International Whaling Convention,[13] or the less familiar Agreement on the Conservation of Albatrosses and Petrels (ACAP).[14] Most treaties in this category, however, have a regional scope; examples include the Gorilla Agreement[15] and the African-Eurasian Waterbirds Agreement (AEWA),[16] both of which, like the ACAP, constitute subsidiary instruments to the CMS. Yet another category comprises treaties aimed at nature conservation in a broad sense within defined continents, ocean areas or mountain ranges. The

[4] For a current discussion of this issue, see A. Trouwborst, 'Climate Adaptation and Biodiversity Law', in J.M. Verschuuren (ed.), *Research Handbook on Climate Adaptation Law* (Cheltenham: Edward Elgar Publishers, 2013), 298.
[5] See n. 1.
[6] CBD, Preamble, ibid.
[7] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 366-369.
[8] The first four of these, concluded in the 1970s, were dubbed the 'big four' by S. Lyster, *International Wildlife Law* (Cambridge: Grotius Publications, 1985).
[9] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar, 2 Febuaray 1971, in force 21 December 1975, 996 UNTS 245 (Ramsar Wetlands Convention or Ramsar Convention).
[10] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, (1972) 11 ILM 1358 (World Heritage Convention).
[11] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, 3 March 1973, in force 1 July 1975, 993 UNTS 243 (CITES).
[12] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, (1980) 19 ILM 15 (Bonn Convention on Migratory Species or CMS).
[13] International Convention for the Regulation of Whaling, Washington, 2 December 1946, in force 10 November 1948, 161 UNTS 72 (International Whaling Convention).
[14] Agreement on the Conservation of Albatrosses and Petrels, Canberra, 19 June 2001, in force 1 February 2004, 2258 UNTS 257 (ACAP).
[15] Agreement on the Conservation of Gorillas and their Habitats, Paris, 26 October 2007, in force, 1 June 2008, 2545 UNTS 55 (Gorilla Agreement).
[16] Agreement on the Conservation of African-Eurasian Migratory Waterbirds, The Hague, 16 June 1995, in force 1 November 1999, (1995) 6 YIEL 773, at 907 (African-Eurasian Waterbirds Agreement or AEWA).

foremost treaties covering particular continents are the African Convention on the Conservation of Nature and Natural Resources (African Convention);[17] the Bern Convention on European Wildlife and Natural Habitats (Bern Convention);[18] the Western Hemisphere Convention (covering the Americas);[19] and the Environment Protocol to the Antarctic Treaty.[20] Examples of treaties concerning specific marine regions include the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention),[21] and the Barcelona Convention's Protocol on Specially Protected Areas and Biodiversity Conservation in the Mediterranean.[22] Finally, specific mountain regimes exist for the Alps[23] and the Carpathians.[24]

The present chapter considers situations within the field of international nature conservation law as just described where multiple actors – principally states – have contributed to a harmful outcome, and where questions have arisen, or could arise, concerning their shared responsibility for that contribution. Given the huge number of potentially relevant practical scenarios and the considerable number of potentially relevant legal instruments, the analysis below cannot aspire to be exhaustive. Instead, it seeks to identify and discuss a representative choice of factual situations, legal instruments, and obligations which are of interest from a shared responsibility point of view. European Union nature conservation law is left outside the scope of this chapter. Likewise, legal instruments governing transboundary water resources, the law of the sea, fisheries and the Antarctic are left virtually undiscussed, in order to avoid undue overlap with other chapters.[25] The chapter comprises four parts: factual scenarios (section 2); primary rules (section 3); secondary rules (section 4); and processes (section 5).

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[17] African Convention on the Conservation of Nature and Natural Resources, Algiers, 15 September 1968, in force 16 June 1969, 1001 UNTS 3 (African Convention).
[18] Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, CETS No. 104 (Bern Convention).
[19] Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Washington, 12 October 1940, in force 30 April 1942, 161 UNTS 193.
[20] Protocol on Environmental Protection to the Antarctic Treaty, Madrid, 4 October 1991, in force 14 January 1998, (1991) 30 ILM 1461 (Antarctic Environment Protocol).
[21] Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, in force 25 March 1998, (1993) 32 ILM 1069 (OSPAR Convention).
[22] Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Barcelona, 10 June 1995, in force 12 December 1999, (1995) 6 YIEL 773, at 887.
[23] Protocol to the Convention for the Protection of the Alps on Conservation of Nature and the Countryside, Chambéry, 20 December 1994, in force 18 December 2002, available at www.alpconv.org.
[24] Protocol on Conservation and Sustainable Use of Biological and Landscape Diversity to the Framework Convention on the Protection and Sustainable Development of the Carpathians, Kiev, 22 May 2003, in force 28 April 2010, see www.carpathianconvention.org.
[25] See e.g. in this volume Chapter 34, O. McIntyre, 'Transboundary Water Resources', ___; Chapter 14, Y. Takei, 'Fisheries', ___; and Chapter 16, K. Bastmeijer, 'Antarctica', ___.

2. Factual scenarios

It is not at all difficult to identify actual and potential scenarios in the field of nature conservation in which the question of the responsibility *ex post facto* of multiple states for their contribution to a single outcome could arise. That outcome could, for instance, be the degradation or destruction of a natural area; the decline or disappearance of a particular population of a species; or indeed the very extinction of a species. The sheer endless instances can be classified in several interesting categories of situations which could potentially be construed in terms of shared responsibility. It should be noted that there may be a degree of overlap between some of the categories involved.

The question of shared responsibility between multiple states may arise in relation to:

(1) transboundary natural areas/ecosystems, i.e. areas like the Wadden Sea shared by Denmark, Germany and the Netherlands; the Orange River delta shared by Namibia and South Africa; or the Great Lakes shared by Canada and the United States;

(2) transboundary populations of (threatened) species, e.g. the South Andean huemul (*Hippocamelus bisulcus*, an endangered deer species) shared by Argentina and Chile; the Rhone streber (*Zingel asper*, an endangered freshwater fish species also known as apron) shared by France and Switzerland, but also species whose distribution extends across many more states, such as African wild dogs (*Lycaon pictus*); lions (*Panthera leo*); rhinoceros; vultures and other vulnerable wildlife on the African continent;

(3) 'international' migratory species, including a myriad of migratory bird, mammal, fish, and insect species;

(4) species and ecosystems in areas beyond national jurisdiction, e.g. fish and seamounts in the high seas; and

(5) activities, conducted under jurisdiction or control of several states, which jointly threaten particular species or ecosystems, e.g. the complex international chains of actors involved in the acquisition, trading, and marketing of tropical hardwood; bluefin tuna; rhinoceros horns; and elephant tusks,[26] to name a few high-profile examples.

It is furthermore possible, to some extent, to distinguish between types of conduct or omissions that may result in shared responsibility. Here we can distinguish between:

A. a failure to adopt required conservations measures under conservation treaties; and

[26] For a pertinent discussion of the fate of the African elephant (*Loxodonta africana*) in a shared responsibility context, see P.A. Nollkaemper, 'The Illegal Ivory Trade Chain', *SHARES Blog*, 7 March 2013, available at www.sharesproject.nl.

B. a failure to realise particular results agreed in connection with international obligations.

It appears that shared responsibility in the context of nature conservation will often be of the 'cumulative responsibility' type, which is characterised by a cumulation of separate individual acts which as such need not be wrongful, but may equally involve 'cooperative responsibility', which arises in a context of joint or concerted action.[27] Unless a joint obligation to cooperate in providing adequate protection has been violated, a failure of several states to provide adequate protection to a given bird species along its migration route, resulting in a decline of its population, is a typical example of *cumulative* responsibility. In the presence of such a joint obligation, the same scenario would be one of *cooperative* responsibility. Shared responsibility of this type may also arise, to name an instance from the fifth category, when several states are jointly involved in trade in endangered species in contravention of applicable international restrictions. Besides, cooperative responsibility can arguably result where, for instance, the poor implementation of a cooperative management arrangement for a transboundary natural area results in a failure to meet agreed conservation outcomes (a combination of categories (1) and B). It would seem, however, that drawing a distinction between the two types of shared responsibility will not in every case be easy, in particular in the case of omissions.

3. Primary rules

This section sets out with an introduction of the various types of obligations that are characteristic of international nature conservation law (under 3.1). This is followed by discussions of the typically collective nature of treaties in this area (under 3.2), and of obligations and practice concerning joint performance (under 3.3).

3.1 Obligations under international nature conservation law: an introduction

Depending on the species, areas and states concerned, an array of international instruments and obligations may govern scenarios such as the ones outlined above. As they constitute key

[27] For a description and examples of these notions, see Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 7, at 368-369.

ingredients of situations of shared responsibility, a closer look is merited at the nature of the obligations involved. These vary from treaty provisions which leave a lot of discretion to the states involved, to strict and unconditional obligations. The CBD provides many examples of the former. Notwithstanding their rather comprehensive material scope, the Convention's provisions are almost without exception qualified by the phrase 'as far as possible and as appropriate'. Various other conservation treaties contain similarly phrased obligations, for instance the duty of states parties to the Ramsar Convention to 'formulate and implement their planning so as to promote ... as far as possible the wise use of wetlands in their territory'.[28] From a state responsibility perspective, these formulations make it difficult – albeit not impossible – to identify unambiguous instances where such obligations have been breached. The determination of situations of *shared* responsibility is in such cases therefore also made difficult.

More strictly phrased obligations can be drawn from a similarly wide range of instruments. A distinction can be made here between strictly phrased obligations of a general nature and more specific ones. An instance of the former is provided by the OSPAR Convention, which broadly stipulates that states parties 'shall take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area'[29] in the North-East Atlantic covered by the Convention. The Bern Convention and African Convention also contain overarching obligations covering *all* wildlife in the regions concerned, including species not specifically listed under the Conventions' respective Appendices and Classes, such as the European red fox (*Vulpes vulpes*) and the aforementioned African wild dog. Article 2 of the Bern Convention stipulates in general terms that parties 'shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the sub-species, varieties or forms at risk locally'.[30] The corresponding provision in the African Convention provides, in arguably somewhat more permissive wording, that 'contracting States shall undertake to adopt the measures necessary to ensure conservation, utilization and development of soil, water, flora

[28] Article 3(1) Ramsar Convention, n. 9.
[29] OSPAR Convention Annex V, Article 2(a), n. 21.
[30] What the 'level' referred to amounts to precisely is not defined in more detail in the Bern Convention, n. 18, nor in the accompanying Explanatory Report. Much will thus depend on the circumstances and positions taken by states parties in each case, although it appears safe to assume that species should at a minimum be kept away from a threatened status on the International Union for Conservation of Nature Red List. The formulation of Article 2 also appears to suggest that conservation considerations will outweigh socio-economic ones in cases of irreconcilable conflict between the two. It is clear, at any rate, that the burden imposed on parties by Article 2 is a significant one. See also Bowman, Davies and Redgwell, *Lyster's International Wildlife Law*, n. 2, at 299-300.

and faunal resources in accordance with scientific principles and with due regard to the best interests of the people'.[31] With regard to animals, this is supplemented with a generic obligation to 'ensure conservation, wise use and development of faunal resources and their environment'.[32] What the 'necessary' or 'requisite' measures are is evidently context-dependent and different states may hold different views in a given instance. Such room for disagreement is gradually diminishing, however, as a result of guidance adopted by competent treaty bodies representing the parties, such as the Bern Convention Standing Committee, and the OSPAR Commission. Clear illustrations in respect of the latter are the OSPAR 'List of Threatened and/or Declining Species and Habitats', which indicates the species and habitats most in need of protection in the region,[33] and the OSPAR Marine Protected Area (MPA) Network scheme.[34] Although not binding by itself, such guidance clearly informs the treaty obligation of parties to take the necessary conservation measures.

The general obligations just reviewed and similar ones can properly be characterised as result-oriented obligations, in the sense that they 'simply' seem to require states to do what it takes to secure a healthy conservation status for the wildlife and ecosystems in question. Complying with them may thus be an easy affair with regard to a common species like the red fox, but must be deemed extremely onerous with respect to the African wild dog (currently classified as 'endangered' on the International Union for Conservation of Nature Red List),[35] several threatened shark and ray species in the North-East Atlantic, and a great many other species.

The above general obligations may be contrasted with others that are quite specific. CITES, for instance, provides that contracting parties 'shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention',[36] and requires the observance and implementation of detailed rules concerning each category. Further examples out of the many that could be given concern the detailed rules on the conservation of wild fauna under the African Convention. This Convention, for instance, requires states parties to impose unconditional prohibitions on the use of poisoned baits and several other means of hunting animals.[37] Furthermore, it provides that animal

[31] Article II African Convention, n. 17.
[32] Article VII African Convention, ibid.
[33] See OSPAR Agreement 2008-06, available at http://www.ospar.org/.
[34] See OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas and subsequent decisions, and OSPAR Recommendation 2010/2 amending the former, available at http://www.ospar.org/.
[35] See www.iucnredlist.org.
[36] Article II(4) CITES, n. 11.
[37] Article VII(2) African Convention, n. 17.

species listed in 'Class A' under the African Convention – including inter alia white rhinoceros (*Ceratotherium simum*) and all vulture species – 'shall be totally protected throughout the entire territory of the Contracting States', and that 'the hunting, killing, capture or collection of specimens shall be permitted only on the authorization in each case of the highest competent authority and only if required in the national interest or for scientific purposes'.[38] A more lenient protection regime applies to 'Class B' animals, including lions.[39] The Bern Convention employs a broadly comparable approach with regard to European wildlife, prescribing 'special protection' for species of its Appendices I (flora) and II (fauna), and a lesser degree of 'protection' for Appendix III fauna.[40] Mention may also be made here of specific treaty obligations concerning the designation and protection of natural sites, e.g. those included in the List of Wetlands of International Importance under the Ramsar Convention, and those included in the World Heritage List under the World Heritage Convention.[41]

3.2 The collective nature of conservation treaties

Naturally, the above obligations and other provisions of international nature conservation treaties must be viewed in light of the overarching objectives of the treaties involved.[42] Although particular subject matter, geographic scope and approach vary widely from instrument to instrument, there is a striking degree of uniformity in terms of their ultimate objectives. Indeed, as hinted at in the introduction above, it seems fairly accurate to say that each treaty within the present chapter's remit aims chiefly for the long-term conservation (including in some instances the sustainable use) of the populations/species/sites/ecosystems on which it focuses. Generally speaking, and this is clearly an important point, the achievement of these objectives of nature conservation treaties tends to hinge on the cooperation of *all* pertinent states. Considerations concerning free riders and the 'tragedy of the commons'[43] are not limited to areas beyond national jurisdiction, but permeate international nature conservation law generally. For instance, meeting the broad aims of the

[38] Article VIII(1)(a) African Convention, ibid.
[39] Article VIII(1)(b) African Convention, ibid.
[40] See Articles 5-9 Bern Convention, n. 18.
[41] Articles 2-4 Ramsar Convention, n. 9; Articles 4, 5 and 11 World Heritage Convention, n. 10.
[42] See inter alia Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 UNTS 331.
[43] G. Hardin, 'Tragedy of the Commons' 162 (1968) *Science* 1243.

Bern Convention – which may be summarised as the conservation of European wildlife and habitats[44] – would in principle seem to require the active involvement of all states in Europe (and even states beyond that, e.g. for long-distance migrants), and by implication at a very minimum all of its present contracting parties.

A related question to be considered here is whether the rules in question serve the interests of individual parties, the collectivity of parties, and/or a 'higher' interest recognised by the international community at large. In some situations, the observance of the requirements imposed by nature conservation treaties may be construed as safeguarding the interests of individual parties or combinations of such individual interests. Migratory species agreements, particularly the CMS and its subsidiary treaties, are a case in point. One may, for instance, envisage a (partly fictitious) scenario involving the AEWA-listed black-tailed godwit (*Limosa limosa*), in which costly efforts to improve breeding success in the Netherlands – still the most important godwit breeding stronghold – are frustrated because the birds are shot down in large numbers over the territories of several other AEWA parties during their annual migrations. Somewhat comparable is the (hardly fictitious) scenario in which lax enforcement of CITES standards concerning trade in rhino horns largely nullifies good-faith efforts by other parties.

Typically, however, the rules constituting international nature conservation law may be viewed as serving, above all else, a general or higher interest quite separate from, and arguably superior to, the specific interests of individual states. This follows, foremostly, from (i) the objectives of the instruments as referred to above; and is reinforced by (ii) the aforementioned acknowledgement of biodiversity conservation as a 'common concern of humankind';[45] (iii) the fairly widespread notion that nature is held in trust for future

[44] See Article 1 Bern Convention, n. 18.

[45] 'Common concern' is not to be confused with 'common heritage of mankind'. As Bowman, Davies and Redgwell, *Lyster's International Wildlife Law*, n. 2, at 51 summarise, the latter regime – whereby resources are not to be exploited for individual advantage, but must be conserved and utilised for the benefit of the international community of states as a whole – has 'made little impact in relation to wildlife, and is, in fact, not actually reflected even in the World Heritage Convention itself'.

generations;[46] and (iv) the endorsement of the intrinsic value of nature, meaning that nature is worthy of protection independently from its manifold value to mankind.[47]

3.3 Obligations and practice concerning joint performance

As just discussed, for the achievement of nature conservation treaties' objectives, it is often imperative that *multiple* states duly comply with their respective *individual* obligations. Moreover, in several cases, treaty provisions or subsequent treaty practice make express provision for the *joint* performance of obligations. Such provisions and practice expressly reflect the apparent need for international cooperation in the field of nature conservation. It is instructive for present purposes to consider a number of such instances. Clearly, obligations of the aforementioned type raise the possibility that shared responsibility may arise in case of their breach. It is recalled in this regard that:

> The type of responsibility (whether individual or shared) is to a large extent a function of the nature of the underlying obligations. In case states accept a joint obligation, or when obligations provide for collective action, shared responsibility may be implied in case of breach. If, contrariwise, obligations provide for individual action, no questions of shared responsibility need arise (though they may arise, for instance in case of cumulative responsibility).[48]

The stated aims of the Bern Convention indicate that international cooperation is at the Convention's heart. These aims are 'to conserve wild flora and fauna and their natural habitats, *especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation*'.[49] This emphasis on joint conservation efforts is fleshed out in a general obligation for parties to 'co-operate whenever appropriate and in particular where this would enhance the effectiveness of measures taken under other

[46] See, e.g., CBD (Preamble), n. 1; and P. Sand, 'The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity', in L. Kotze and T. Marauhn (eds.), *Transboundary Governance of Biodiversity* (Leiden/Boston: Brill Nijhoff, 2014), 34.

[47] This intrinsic value is explicitly recognised in the 1982 World Charter for Nature, UN General Assembly, UN Doc. A/RES/37/7 (28 October 1982) (Preamble); Bern Convention, n. 18 (Preamble); Antarctic Environment Protocol, n. 20 (Article 3); and CBD (Preamble), ibid.

[48] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', SHARES Research Paper 03 (2011), ACIL 2011-07 (revised version May 2012), available at www.sharesproject.nl, at 56-57, footnotes omitted.

[49] Article 1 Bern Convention, n. 18 (emphasis added). See further F.M. Fleurke and A. Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats Directives', in L. Kotze and T. Marauhn (eds.), *Transboundary Governance of Biodiversity* (Leiden/Boston: Brill Nijhoff, 2014), 128.

articles of this Convention'.[50] This obligation is flanked by a specific transboundary cooperation duty regarding the migratory species from the Convention's appendices. Parties 'undertake', 'in addition to' the habitat and species protection measures required under other Convention provisions, to 'co-ordinate their efforts for the protection of the migratory species specified in Appendices II and III whose range extends into their territories'.[51] The African Convention contains a further example of a general cooperation duty, where it sets out that parties 'shall co-operate ... whenever such co-operation is necessary to give effect to the provisions of this convention'.[52] The parties to AEWA, furthermore, have a general duty in respect of all the waterbird species covered by the Agreement, according to which parties 'shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status'.[53] In addition, the Agreement requires states parties to '*coordinate* their efforts to ensure that a network of suitable habitats is maintained or, where appropriate, re-established throughout the entire range of each migratory waterbird species concerned, *in particular where wetlands extend over the area of more than one Party to this Agreement*'.[54]

The latter provision provides a convenient link to the growing practice of Ramsar Convention parties with respect to the designation and protection of Transboundary Ramsar Sites (TRS). This practice is based on Article 5 of the Convention and a related Resolution adopted by the Conference of the Parties (COP) to the Ramsar Convention.[55] Article 5 provides that:

> The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.

The Ramsar Manual clarifies that a TRS exists when an ecologically coherent wetland extends across national borders and the 'Ramsar Site authorities on both or all sides of the border have formally agreed to collaborate in its management, and have notified the

[50] Article 11(1)(a) Bern Convention, ibid.
[51] Article 10(1) Bern Convention, ibid.
[52] Article XVI African Convention, n. 17.
[53] Article II(1) AEWA, n. 16.
[54] Article III(2)(d) AEWA, ibid. (emphasis added).
[55] COP Resolution VII.19 (1999) on International Cooperation, available at www.ramsar.org.

Secretariat of this intent'.[56] Thirteen TRS have hitherto been established, one in Africa – the Niumi-Saloum Complex in Gambia and Senegal – and the remainder in Europe.[57] All TRS involve two states, except the 'Trilateral Ramsar Site Floodplains of the Morava-Dyje-Danube Confluence', which unites four pre-existing Ramsar Sites in three countries (two in Austria, one in the Czech Republic, and one in Slovakia).[58] On the basis of considerations similar to those underlying the TRS scheme, various transboundary sites have also been designated under the World Heritage Convention. The World Heritage Committee's Operational Guidelines refer to these as 'transboundary properties'.[59] Examples of transboundary properties inscribed on the World Heritage List include the Wadden Sea (Germany-Netherlands), Waterton-Glacier (Canada-United States), and Mount Nimba Strict Nature Reserve (Côte d'Ivoire-Guinea). Finally, the designation in 2010 of several high seas MPAs by the parties to the OSPAR Convention constitutes a very apposite example of shared performance of international nature conservation obligations.[60]

4. Secondary rules

The generally accepted rules on state responsibility, as reflected by and large in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[61] of the International Law Commission (ILC) also find application in the field of international nature conservation law. The breach, attributable to a state, of one or more of its international obligations under a nature conservation treaty will, absent any 'circumstances precluding wrongfulness', constitute an internationally wrongful act, and will entail its international responsibility. As regards *shared* responsibility, the state of affairs in the current issue area generally appears to support the acknowledgment in the conceptual framework analysis underpinning the present study that 'it may be argued that the law as formulated by the ILC, while not perfect, offers sufficient flexibility for addressing questions of shared

[56] Ramsar Convention Secretariat, *The Ramsar Convention Manual: A Guide to the Convention on Wetlands (Ramsar, Iran, 1971)*, 6th edn (Gland: Ramsar Convention Secretariat, 2013), 61.
[57] See www.ramsar.org.
[58] Austria: Donau-March-Thaya-Auen, Untere Lobau; Czech Republic: Mokrady dolního Podyjí (Floodplain of lower Dyje River); Slovakia: Moravské luhy (Morava floodplains).
[59] Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, update July 2012 (Paris: UNESCO World Heritage Centre, 2012), paras. 134-136.
[60] See the series of OSPAR Decisions adopted at the 2010 Meeting of the OSPAR Commission in Bergen, and several OSPAR Recommendations adopted at the 2012 Meeting in Bonn, available at www.ospar.org.
[61] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

responsibility'.[62] The present author has not identified any *lex specialis* deviating notably from the ARSIWA in this regard. Simultaneously, however, a number of shortcomings and unresolved questions can be identified from the perspective of international nature conservation law.

First of all, it can be recalled that the principles of reparation as laid down in the ARSIWA 'allow for a wide variety of legal consequences … taking into account the nature of the obligation and the nature of the breach, and indeed the public nature of the interests at stake'.[63] Furthermore, it is recognised that Article 47 of the ARSIWA is directly relevant to questions of shared responsibility, as it states that '[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.'[64] Article 47 thus acknowledges 'the possibility of parallel or concurrent independent wrongs'.[65] In considering the legal consequences of individual wrongful acts, the 'public nature' of the interests involved, noted in the above statements, is obviously relevant. Indeed, when states (be it collectively or individually) fail to live up to nature conservation obligations under international law, then restoring legality and repairing the ecological harm done – including within the territories of the responsible states, e.g. by restoring populations or natural areas – are the primary concerns, rather than recompensing particular 'injured states'. It is significant in this regard that the obligations to 'cease [the internationally wrongful act], if it is continuing';[66] to offer 'appropriate assurances and guarantees of non-repetition';[67] and to provide 'full reparation for the injury caused'[68] are not contingent in the ARSIWA on the invocation by an injured state.[69] Insofar as the ARSIWA thus reflect the protection of legality and the reparation of harm as freestanding objectives, this evidently matches the objectives of international nature conservation law.

Some of the shortcomings and questions concerning the ARSIWA certainly arise in a nature conservation context. In particular, the ARSIWA leave it unclear on the basis of what criteria international responsibility and the resulting obligation to provide reparation is to be apportioned between states.[70] Such apportionment may be relatively straightforward in cases

[62] Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (2012 version), n. 48, 80.
[63] Ibid.
[64] Article 47(1) ARSIWA, n. 61.
[65] Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 7, 395.
[66] Article 30(a) ARSIWA, n. 61.
[67] Ibid., Article 30(b).
[68] Ibid., Article 31.
[69] Compare Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 7, 402-403, 418-420.
[70] Ibid., at 394.

where states have breached clear and specific individual obligations. The question is much more intricate, however, in cases of the 'cooperative responsibility' type, especially those involving general obligations to take the 'necessary' measures to ensure a healthy conservation status of species. Revisiting the black godwit instance can serve to illustrate this. How to determine to what extent the bird's decline is a consequence of, to name a few suspected causes, first, the loss of suitable breeding grounds in the Netherlands and other states; second, legal and illegal hunting in Mediterranean states during its migration; and third, deterioration of its West-African wintering grounds? In a complex scenario such as this, identifying the respective contributions of the states involved with any accuracy will often amount to a mission impossible.

Other issues might be noted which are pertinent but not specific for *shared* responsibility, as they concern the application of state responsibility rules to nature conservation generally, including where internationally wrongful acts are committed by a single state. One instance is the limited utility of the principle of *restitutio in integrum* where the harm caused is irreversible, whether in absolute terms (e.g. the extinction of a species) or in practical terms (e.g. the cutting of a 500-year-old forest).[71] For present purposes, however, there is no need, nor space, to discuss this and other generic issues in any detail.[72]

Standing to invoke responsibility is an issue which should, in any event, not be omitted from the present analysis. The duties of cessation and non-repetition of breach, and reparation of harm, to borrow the words of the ARSIWA, 'may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and the circumstances of the breach'.[73] All three varieties are conceivable in the context of international nature conservation law. Of special interest is the category of obligations *erga omnes*. Arguably, many treaty obligations in the field of nature conservation belong to this category.[74] With respect to treaties establishing obligations 'for the protection of a collective interest',[75] Article 48 of the ARSIWA acknowledges that *all* parties have 'a collective and individual interest in the enforcement of

[71] For a discussion of the notion of irreversible environmental harm in international legal discourse, see A. Trouwborst, *Precautionary Rights and Duties of States* (Leiden: Martinus Nijhoff, 2006), 57-62.
[72] See, e.g., P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, 3rd edn (Oxford University Press, 2009), 211-237.
[73] Article 33(1) ARSIWA, n. 61.
[74] There is an apparent and compelling analogy here with the reasoning of the ICJ in *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Judgment, ICJ Reports 2012, 422, paras. 68-69.
[75] Article 48(1)(a) ARSIWA, n. 61.

such treaties',[76] and that consequently any state party will have *locus standi* to sue for non-compliance. It thus opens the door for 'genuinely public interest claims, enforcing *erga omnes* obligations'.[77] In the words of the International Court of Justice, any state party 'may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* ... and to bring that failure to an end'.[78] According to the ARSIWA, such a state acting in the general interest can claim cessation and assurances and guarantees of non-repetition.[79] To what extent it can claim *reparation*, however, is less than clear.[80] A further restriction incorporated in the ARSIWA is that the choice of such an individual state in terms of its response to the alleged wrongful act is limited to lawful measures, as the right to take countermeasures is expressly reserved for 'injured states'.[81]

5. Processes

The analysis so far indicates the existence of plenty actual and potential situations where legitimate questions could arise as to the shared responsibility *stricto sensu* – i.e. the international responsibility for wrongful acts in the sense of the ARSIWA[82] – of multiple states for the breach of international nature conservation obligations. However, clear-cut cases where such shared responsibility *has* been formally established are, to the knowledge of the author, non-existent. The present part will therefore focus on situations that come close, including situations of 'shared accountability',[83] and on avenues that could be used to establish such shared responsibility.

In the field of international nature conservation law, *ex post facto* determinations of *regular* – 'individual' or 'independent'[84] – state responsibility are scarce as it is. Whereas international

[76] Birnie, Boyle and Redgwell, *International Law and the Environment*, n. 72, 234.
[77] Ibid.
[78] *Belgium* v. *Senegal*, n. 74, para. 69.
[79] Article 48 ARSIWA, n. 61.
[80] Ibid. For instance, Birnie, Boyle and Redgwell, *International Law and the Environment*, n. 72, at 235 submit that it is 'unlikely that individual states will be entitled to demand reparation for material damage to the global environment beyond any clean-up or reinstatement costs which they may incur'.
[81] Articles 49-54 ARSIWA, n. 61.
[82] Nollkaemper and Jacobs, 'Shared Responsibility in International Law' (2012 version), n. 48, at 16.
[83] According to Nollkaemper and Jacobs, 'Shared Responsibility in International Law', n. 7, at 369, this concept is understood 'to cover situations in which a multiplicity of actors is held to account for conduct in contravention of international norms, but where this does not necessarily involve international responsibility for internationally wrongful acts in its formal meaning'.
[84] Ibid., at 381.

tribunals (not counting the European Union Court of Justice) have in the past not often been in a position to pronounce upon alleged breaches of international nature conservation instruments, the docket of the ICJ has recently included three cases in this area (two of these were still pending at the time of writing), all of which concern independent responsibility. These concern the violation by Japan of obligations under the International Whaling Convention;[85] the alleged violation by Nicaragua of the Ramsar Convention;[86] and the alleged violation by Costa Rica of the CBD, the Ramsar Convention, a regional nature conservation treaty, and a bilateral treaty on transboundary protected areas.[87]

Of course, judicial dispute settlement is not the only option. Indeed, a role of sorts appears to be reserved even for the United Nations Security Council, as illustrated by its recent call for an investigation into the alleged involvement of the Lord's Resistance Army in 'elephant poaching and related illicit smuggling' in the Central African region.[88]

More obvious, however, are the alternative pathways provided under several nature conservation treaties themselves. The tasks endowed on treaty supervisory bodies often include collecting and sharing information, receiving and reviewing reports on implementation submitted by states, and facilitating compliance. A smaller number of these bodies may, if circumstances so warrant, expressly declare that a particular state has breached its treaty obligations, and/or impose sanctions.

Several examples may be given to illustrate how concrete and relevant accountability mechanisms under international nature conservation instruments can be. The CITES Standing Committee, for instance, has COP-delegated powers to make findings of non-compliance, and in the most serious cases to recommend the suspension of trade in one, several, or all CITES-regulated species with the state party concerned.[89] At present, to illustrate, CITES parties are to refrain from trading Hippopotamus (*Hippopotamus amphibius*) with Mozambique, and saker falcons (*Falco cherrug*) with Bahrain. Trade suspension recommendations currently

[85] *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*,Judgment of 31 March 2014 (not yet published in ICJ Reports).
[86] ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, proceedings instituted on 18 November 2010. Proceedings joined with *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* on 17 April 2013
[87] ICJ, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, proceedings instituted on 21 December 2011. Proceedings joined with *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* on 17 April 2013.
[88] Statement by the President of the Security Council on 19 December 2012, UN Doc. S/PRST/2012/28. On the potential shared responsibility aspects of this issue, see Nollkaemper, 'The Illegal Ivory Trade Chain', n. 26.
[89] See CITES Resolution Conf. 14.3 (2007) on CITES Compliance Procedures, available at www.cites.org.

apply in respect of some twenty states parties.[90] These decisions have hitherto separately targeted individual states, but nothing precludes the Standing Committee from targeting several parties jointly where appropriate.

Also of interest is the 'case file' system operated within the framework of the Bern Convention, under which suspected violations of the Convention are investigated, and recommendations are adopted by the Standing Committee as appropriate. Such potential violations are often brought to the attention of the Committee (or the Secretariat) by non-governmental organisations (NGOs). Case file procedures may involve findings by the Standing Committee that a particular party has breached its obligations. One example is the 1992 declaration (later followed by others) that Greece had violated its treaty obligations concerning the conservation of the loggerhead turtle (*Caretta caretta*).[91] Of the over 130 closed and pending case files, the great majority concerns single states.[92] Interestingly, however, three instances involve(d) more than one state party.

The first of these concerned the United Kingdom (UK) and some other countries, and centered on the threat posed to the fragile populations of native European white-headed ducks (*Oxyura leucocephala*) – a strictly protected Appendix II species – by hybridisation with American ruddy ducks (*Oxyura jamaicensis*).[93] The latter species was introduced into the wild in the UK and proceeded from there to 'infect' populations of white-headed duck, which are confined in Europe to the Iberian peninsula and the very South-East of the continent. Although this case file itself has been officially closed for some time, the conservation issue itself still figures prominently on the Bern Convention's agenda, and portrays distinct shared responsibility streaks. In 1997, the Standing Committee called on all contracting parties involved to set up and implement, without delay, national control programmes to eradicate ruddy ducks from Europe.[94] Two years later a concerted Bern Convention Action Plan was issued for this very purpose.[95] A Standing Committee Recommendation adopted in 2010, however, addressing nearly twenty states of relevance to white-headed duck conservation,

[90] See CITES Standing Committee Notification No. 2012/059 of 25 September 2012, available at www.cites.org.
[91] Standing Committee Declaration concerning Laganas Bay, Zakynthos, 4 December 1992. For discussion of this case, see Bowman, Davies and Redgwell, *Lyster's International Wildlife Law*, n. 2, 340-341.
[92] See the overview in the latest version of the 'Register of Bern Convention Complaints', Doc. T-PVS/Inf (2013) 3, available at wcd.coe.int.
[93] Case file 1997/1/63, Oxyura leucocephala *(White Headed Duck), UK & others*, available at http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp.
[94] Standing Committee Recommendation No. 61 (1997) on the Conservation of the White-headed Duck (*Oxyura leucocephala*), available at http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp.
[95] Wildfowl & Wetland Trust, 'Bern Convention Action Plan for Eradication of the Ruddy Duck (1999-2002)', Doc. T-PVS/Birds (99) 9, available at wcd.coe.int.

observed and lamented that insufficient progress has been made.[96] While welcoming the 'very effective control carried out in the United Kingdom' and the 'commendable efforts to control the species in the wild in other contracting parties', the Recommendation expressed regret that 'delayed or insufficient action in some states following the Bern Convention eradication plan, has allowed the establishment of populations in mainland Europe and thereby made eradication more costly and difficult', and that 'very little action has been taken to address the issue of Ruddy Ducks in captive collections'.[97] It then set a new agenda to achieve the 'full eradication of the Ruddy Duck in the wild in the Western Palaearctic in the next five years', noting that this goal 'will only be reached if all states concerned collaborate in a common action plan for eradication of the species'.[98] To that end, it urged all states involved to implement without delay a series of detailed actions specified in an 'Action Plan for the Eradication of the Ruddy Duck in the Western Palaearctic, 2011-2015', appended to the Recommendation.[99] Given the firm obligation in the Convention, discussed earlier, for parties to cooperate whenever this would enhance the effectiveness of required conservation measures, the white-headed duck scenario appears to include all ingredients for *cooperative* responsibility.

The second instance also encompasses cooperative responsibility, but of a different kind. It does not concern a failure to cooperate for conservation purposes, but instead a case of active cooperation for economic development between two Bern Convention parties, Morocco and France, in apparent violation of their conservation obligations.[100] At stake was a planned tourist resort to be built in Morocco and co-financed with French funds, which threatened the habitat of the bald ibis (*Geronticus eremita*), a critically endangered Appendix II species.[101] Although the case file as such in the end formally targeted Morocco only, the Convention Secretariat expressly took the position that the French financing of the project through a debt conversion scheme engaged the international responsibility of France as well.[102]

[96] Standing Committee Recommendation No. 149 (2010) on the Eradication of the Ruddy Duck (*Oxyura jamaicensis*) in the Western Palaearctic, available at http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Case file 2001/7/85, *Tourist Development in Souss Massa National Park, Morocco*, available at http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp.
[101] See, e.g., Doc. T-PVS (2001) 78, available at wcd.coe.int.
[102] Letter by Eladio Fernández-Galiano of the Bern Convention Secretariat to the French Ministry of the Environment of 25 September 2001.

The third multiple-state procedure – which is currently marked as a case 'in stand-by' – concerns the aforementioned Rhone streber, a strictly protected fish species from Appendix II of the Bern Convention which is threatened with extinction. In this case two states, France and Switzerland (the only countries where the species occurs), are responsible.[103] This case thus concerns a schoolbook example from the second category of factual scenarios listed in section 2 above, concerning transboundary populations. In their complaint, the French and Swiss NGOs which instigated the procedure submitted that the two states have failed to take effective action in order to tackle the various threats to the Rhone streber, including hydrological works and various types of pollution, and ought to do so urgently.[104] Among other things, they called on the Standing Committee to declare that, by failing to implement programmes of measures ensuring adequate protection for the streber, both the French and Swiss authorities failed to meet the obligations incumbent upon them under various provisions of the Bern Convention.[105] The required action mainly concerns measures to be taken by each state separately, which would appear to indicate a primarily *cumulative* rather than a cooperative responsibility setting. Interestingly, however, both relevant parties are expressly included in a single nascent case file, and a recently adopted Standing Committee Recommendation on the issue addresses both parties jointly, calling on them to inter alia '[s]trengthen transboundary co-operation in coordinating activities directed towards preserving the Rhône streber (*Zingel asper*) and improvement of its habitat.'[106]

Finally, it is appropriate here to draw attention to the Ramsar and World Heritage Conventions, in connection with the first category of factual scenarios mentioned in section 2, concerning transboundary natural areas. Amongst nature conservation treaties, the Ramsar Convention is not equipped with the sharpest teeth when it comes to ensuring parties' compliance. A noteworthy feature in the latter context, nevertheless, is the denominated 'Montreux Record'. This list, maintained by the Ramsar Secretariat in consultation with the state(s) concerned, is the 'principal tool of the Convention for highlighting those sites where an adverse change in ecological character has occurred, is occurring, or is likely to occur, and

[103] Case file 2011/5/121, *Apron du Rhône (Zingel asper) Menacé dans les Départements du Doubs (France) et les Cantons du Jura et de Neuchâtel (Suisse)*, available at http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp.
[104] *Menaces pour l'Apron du Rhône (Zingel asper) dans le Doubs (France) et dans les Cantons du Jura et de Neuchâtel (Suisse): Rapport des ONG*, Doc. T-PVS/Files (2011) 21, available at wcd.coe.int.
[105] Ibid.
[106] Standing Committee Recommendation No. 169 (2013) of the Standing Committee on the Rhone Streber (*Zingel asper*) in the Doubs (France) and in the Canton of Jura (Switzerland), available at http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp.

which are therefore in need of priority conservation attention'.[107] Although a Montreux Record listing certainly cannot by itself be taken to mean that the state party in question has breached its conservation obligations under the Ramsar Convention in respect of the site involved, it may raise that suspicion. Likewise, despite the absence of sharp teeth and states' own marked influence on the inclusion of sites on the Montreux Record and their deletion from it, there is some practice to suggest that national authorities tend to regard a Montreux Record listing as a blemish on their own record which they wish to avoid.[108] Against this background, it is of interest to note that two component parts of the 'Trilateral Ramsar Site Floodplains of the Morava-Dyje-Danube Confluence', one of the TRS mentioned above, figure on the Montreux Record, namely one of the Austrian sites[109] plus the Czech site,[110] whereas the Slovak site does not. For present purposes, this evidently constitutes an intriguing state of affairs.

A fairly similar practice exists under the World Heritage Convention. Inscription of a site on the List of World Heritage in Danger under Article 11(4) of the Convention does not equal a determination of breach of obligations and is not intended as a sanction, but nonetheless can be perceived as such. The inclusion of a 'transboundary property' in this List, as has actually happened with the transboundary Mount Nimba Strict Nature Reserve shared by Côte d'Ivoire and Guinea, thus appears of some significance from a shared responsibility point of view.[111] This is all the more the case when states cause or allow the deterioration of a site to the point where the World Heritage Committee decides to delete it from the World Heritage List altogether.[112] Until now, only one natural site has been so delisted, the Arabian Oryx Sanctuary in Oman in 2007, but in theory this fate could befall a transboundary site as well.

6. Conclusion

The above exploration clearly demonstrates the relevance of the shared responsibility concept to the field of international nature conservation law. This relevance may be expected to come

[107] Ramsar COP Resolution VI.1 (1996), Annex, para. 3.1 (Guidelines for Operation of the Montreux Record). The Record is closely linked to Article 3(2) of the Convention, n. 9. For the latest version, see www.ramsar.org.
[108] This has, for instance, been clearly documented with respect to the South-African Orange River Mouth site in J. Verschuuren, 'The Case of Transboundary Wetlands under the Ramsar Convention: Keep the Lawyers Out!', (2008) 19 *Colorado Journal of International Environmental Law and Policy* 49.
[109] Donau-March-Thaya-Auen, added to the Montreux Record in 1990.
[110] Mokrady dolního Podyjí, added to the Montreux Record in 2005.
[111] For the latest version of the List, see whc.unesco.org/en/danger.
[112] See WHC Operational Guidelines, n. 59, para. 192.

increasingly to the fore, as the need for international cooperation keeps pace with the escalating biodiversity crisis it is intended to address. The above exploration equally clearly illustrates the complexity of the questions involved in the analysis of the challenging and multifaceted notion of shared responsibility.