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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

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**EMERALD NETWORK REPORTING REQUIREMENTS UNDER
THE BERN CONVENTION: A LEGAL ANALYSIS**

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Final Draft

1. INTRODUCTION

This report contains a legal analysis of the requirements regarding the reporting on the establishment of the Emerald Network and on the conservation status of species and habitats that flow from the Bern Convention, and in particular from Resolution No. 8 (2012) of the Standing Committee. In the latter Resolution, the Standing Committee adopted the following rules regarding such reporting:

“Parties will report to the Secretariat of the Bern Convention on the conservation status of species and habitats listed in Resolutions No. 6 (1998) and No. 4 (1996) of the Standing Committee to the Bern Convention;

The report will be submitted in English, every six years from the date of adoption of this Resolution and shall reflect the previous period of six years;

The Group of Experts on Protected Areas and Ecological Networks will prepare a reporting format to be used for the purposes of this reporting.”¹

Subsequently, in particular in meetings of said Group of Experts and of the Standing Committee, discussions have arisen concerning the appropriate scope and format for the purported reporting.² Recurrent issues in these discussions include the degrees to which reporting should cover the conservation status of species and habitats, reflect a consistent, pan-European approach, and be aligned with the reporting concerning the Natura 2000 network by EU member states.³

To inform the decision-making concerning the final scope and form of reporting, each of the aforementioned issues is concisely analyzed from a legal perspective below. To provide a proper basis for this analysis, a brief exposition is first provided of the legal nature of the Emerald Network regime. The analysis is performed using standard public international law research methodology.

2. THE LEGAL NATURE OF THE EMERALD NETWORK REGIME

An exploration of the *requirements* imposed by the Bern Convention regarding Emerald Network reporting must begin by focussing on the legal character of the Emerald Network regime itself. After all, the binding obligations of parties laid down in the Convention do not *expressly* require parties to report on their habitat conservation measures and the latter’s effect on the conservation status of species and habitats.

The Emerald Network of Areas of Special Conservation Interest (ASCI) was set up and shaped through a series of Resolutions and Recommendations, adopted by the Standing Committee and implemented by parties.⁴ These Resolutions and Recommendations are not as such legally binding and do not as such impose legal obligations on the parties to the Convention. They do, however, guide parties in the implementation of the substantive provisions in the Convention regarding habitat protection, in particular Article 4, and also Articles 1, 2, 3, 6 and 9, and influence the interpretation of these provisions.

In legal terms, Resolutions and Recommendations, depending on their content and the wording employed, can influence the interpretation of associated binding provisions in the Convention.⁵ The basic rules of public international law on treaty interpretation are codified in the Vienna Convention

¹ Resolution No. 8 (2012) on the National Designation of Adopted Emerald Sites and the Implementation of Management, Monitoring and Reporting Measures, paras. 4.1-4.3.

² See, in particular, the Reports of the 5th (2013), 6th (2014) and 7th Meetings of the Group of Experts on Protected Areas and Ecological Networks, and the Report of the *Ad-Hoc* Restricted Group of Experts on Reporting on the Emerald Network of Areas of Special Conservation Interest (2016).

³ *Ibid.*

⁴ Resolution No. 1 (1989); Recommendations Nos. 14, 15 and 16 (1989); Resolutions Nos. 3 and 4 (1996); Resolutions Nos. 5 and 6 (1998); Recommendation No. 157 (2011); Resolution No. 8 (2012); Recommendation No. 172 (2014).

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

on the Law of Treaties (VCLT).⁶ According to the principal rule, a treaty “*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*”⁷ The UN International Law Commission has clarified the latter dimension of this rule as follows:

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

In addition to treaty text and objectives, “*any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*” “*any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*” and “*any relevant rules of international law applicable*” may be taken into account.⁹ Clear examples of Resolutions and Recommendations that inform the interpretation of Convention provisions in the capacity of “subsequent agreement”/ “subsequent practice” are Resolution No. 2 (1993) on the Scope of Articles 8 and 9 of the Bern Convention (revised in 2011); Recommendation No. 142 (2009) Interpreting the CBD Definition of Invasive Alien Species to Take into Account Climate Change; and Recommendation No. 173 (2014) on Hybridisation between Wild Grey Wolves (*Canis lupus*) and Domestic Dogs (*Canis lupus familiaris*).

Likewise, the extensive body of guidance adopted by the Standing Committee concerning the Emerald Network evidently influences the interpretation of Article 4 and other relevant Convention provisions. Determining the extent of this influence is a nuanced affair, however. It would certainly be erroneous to think that the interpretation rules automatically turn non-binding Resolutions and Recommendations into binding law whenever the latter are associated with particular Convention provisions. Conversely, it would just as clearly be difficult for a party which is completely ignoring the Resolutions and Recommendations on the Emerald Network regime, to still argue that it is performing its obligations under the Convention in good faith. Determining the influence of “subsequent agreement” and “subsequent practice” on treaty obligations thus requires careful case-by-case analysis, and even so it will often be hard to delineate the scope of a given obligation in any great detail.

Usefully, then, the question for present purposes is to what extent the provisions in the Bern Convention, viewed in light of the Convention’s objectives and relevant Resolutions and Recommendations, provide for any requirements regarding the reporting by parties on the Emerald Network and the conservation status of species and habitats.

3. REPORTING ON CONSERVATION STATUS OF SPECIES AND HABITATS

The Bern Convention aims to “*conserve wild flora and fauna and their natural habitats.*”¹⁰ Key provisions in the Convention, in particular Article 2 on population levels, Article 4(1) on habitat conservation, and Articles 5-7 on species protection, are phrased in such a manner as to impose obligations of *result* rather than effort or procedure.¹¹ The practice of the Standing Committee confirms this reading, as reflected, for instance, in the following statement:

“The Standing Committee to the Bern Convention has always followed the principle of ‘obligation of results’ to implement the convention. This implies that Parties are free to choose the mechanisms, procedures and instruments necessary in order to comply with the obligations of

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

⁷ VCLT, Art. 31(1). The International Court of Justice has repeatedly acknowledged that this constitutes customary international law: *Territorial Dispute (Libyan Arab Jamahiririya v Chad)*, Judgment, ICJ Reports (1994) 6, para. 41; *Oil Platforms (Islamic Republic of Iran v United States of America/Chad)*, Preliminary Objections, Judgment, ICJ Reports (1996) 803, para. 23; *Kasikili/Sedudu Island (Botswana v Namibia)*, Judgment, ICJ Reports (1999) 1045, para. 18.

⁸ International Law Commission (1966).

⁹ VCLT, Art. 31(3).

¹⁰ Bern Convention, Art. 1(1).

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

the convention, but that they are requested to show that the ‘results’ of their actions satisfy the requirements of the convention: the fact that some populations listed in Appendix II of the convention have proven unsatisfactory conservation status can be sufficient to lead the Standing Committee, in accordance with the objectives of the convention, to urge Parties to take the necessary measures.”¹²

Also with regard to the Emerald Network, the Standing Committee has characteristically been “*more interested by the achievement of conservation results than by a particular ‘area protection’ procedure.*”¹³

For reporting, however, this emphasis on results over procedure does not entail unlimited flexibility. Quite the contrary, if the conservation result is what ultimately counts, there must be a reliable method of knowing to what degree this result is being achieved. Thus, the acquisition and reporting of sufficiently detailed information on how the conservation status of species and habitats is developing within the territories of the various contracting parties is paramount.

In line with this, the Standing Committee in 2012 agreed in Resolution No. 8, in strong language, that “*Parties will report to the Secretariat of the Bern Convention on the conservation status of species and habitats listed in Resolutions No. 6 (1998) and No. 4 (1996).*”¹⁴ This reflects the parties’ consciousness that monitoring and reporting are “*essential for ensuring the efficiency of the Emerald Network in the long-term for achieving its objectives.*”¹⁵ Regarding the monitoring that is to provide the basis for reporting, Resolution No. 8 lays down the following rules:

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

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

The regular surveillance of the conservation status of species and natural habitats for which the site has been designated will comprise appropriate scientific and ecological research, aiming at identifying whether it contributes to the long term survival of the species and habitats.”¹⁶

Resolution No. 8 builds on prior occasions where the Committee emphasized the importance of reviewing and reporting. In this connection, Recommendation No. 16 (1989) called on contracting parties to “*review regularly or continually in a systematic fashion their performance*” regarding ASCIs, and to ensure that “*appropriate ecological and other research is conducted, in a properly co-ordinated fashion, with a view to furthering the understanding of the critical elements in the management of such areas and to monitoring the status of the factors giving rise to their designation and conservation.*”¹⁷ Furthermore, Resolution No. 5 (1998) set out the following rules:

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

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

¹² Standing Committee Guidelines No. 3 (1993).

¹³ Directorate of Democratic Governance, Culture and Diversity (2016), p. 10.

¹⁴ Resolution No. 8 (2012), para. 4.1. This is preceded by the statement that the Standing Committee “[r]esolves to adopt the following rules.” See also Recommendation No. 172 (2014) Interpreting Certain Provisions of Resolution No. 6 (1998), para. 4.

¹⁵ Resolution No. 8 (2012), Preamble.

¹⁶ *Ibid.*, paras. 3.1-3.3.

¹⁷ Recommendation No. 16 (1989) on Areas of Special Conservation Interest, paras. 2 and 3(c).

*The Standing Committee shall periodically review the contribution of the Emerald Network towards the achievement of the objectives of the Convention.*¹⁸

Both Resolutions No. 5 and No. 8 present the “conservation status” of species and habitats as the primary unit of assessment for monitoring and reporting. Indeed, Resolution No. 8 records the parties’ understanding that the rationale of their implementation of the Emerald Network regime is “*achieving a satisfactory conservation status of the species and natural habitats listed in Resolutions no. 4 (1996) and no. 6 (1998).*”¹⁹ Incidentally, in the records of the Standing Committee, the term “satisfactory conservation status” has been alternated with the term “favourable conservation status”.²⁰ The latter term is also employed in a 2014 guidance document on the management of Emerald Network sites.²¹

4. A CONSISTENT, PAN-EUROPEAN APPROACH

For similar reasons to those outlined above, concerning parties’ compliance with their Convention obligations as interpreted in light of the Convention’s aims and the relevant practice of the Standing Committee, it appears important for reporting to be conducted in a manner that is as consistent as possible amongst all parties. Besides promoting a better insight into individual parties’ implementation of the Convention, a systematic reporting modus applied consistently across Europe seems essential for gaining meaningful insight into pan-European trends of species’ and habitats’ conservation status. Thus, such a pan-European approach to reporting appears essential, ultimately, to enable the Standing Committee to adequately evaluate progress towards meeting the Convention’s aims.

This need for a systematic, pan-European approach is manifested in the Standing Committee’s agreement, recorded in Resolution No. 8 (2012), that reporting be conducted on a periodical (six-yearly) basis and according to a uniform reporting format.²²

It would make evident sense for this reporting exercise to achieve pan-European consistency by aligning it as closely as possible with the reporting done by EU member states under Article 12 of the EU Birds Directive²³ and Article 17 of the EU Habitats Directive.²⁴

These Directive provisions themselves are obviously not legally binding for Bern Convention parties that are not EU member states. Furthermore, *complete* consistency between the Natura 2000 regime established under the Directives and the Emerald Network regime is not feasible due to differences in legal and institutional settings and available resources. Yet, from the outset the aim has clearly, and for good reasons, been to achieve as much consistency between the two regimes as possible.²⁵

¹⁸ Resolution No. 5 (1998) Concerning the Rules for the Network of Areas of Special Conservation Interest (Emerald Network), paras. 4.1, 4.2 and 5.2.

¹⁹ Resolution No. 8 (2012), para. 2.1.

²⁰ Another example where the term “satisfactory conservation status” is used is Recommendation No. 163 (2012) on the Management of Expanding Populations of Large Carnivores in Europe. An example where the term “favourable conservation status” is employed is Guidelines No. 3 (1993) for Recovery Plans for Species of Amphibians and Reptiles.

²¹ Opermanis (2014), p. 5. The document asserts that “*favourable conservation status is the main aim of the Emerald network;*” and furthermore that conservation objectives must be set for each Emerald site “*in order to make sure that the site contributes in the best possible way to achieving favourable conservation status at the appropriate level;*” and that “[t]he fact, that a species of Resolution No. 6 (1998) or a habitat of Resolution No. 4 (1996) is listed in the SDF [standard data form], means that the country holds a responsibility to maintain or restore them at the favourable conservation status in a given site, with the only exception concerning the features with insignificant (‘D’) occurrences.”

²² Resolution No. 8 (2012), para. 4.2-4.3.

²³ Directive 2009/147/EC of the European Parliament and of the Council on the Conservation of Wild Birds (30 November 2009), [2010] OJ L20/7.

²⁴ Council Directive 92/43/EC on the Conservation of Natural Habitats and of Wild Fauna and Flora (21 May 1992), [1992] OJ L206/7.

²⁵ Directorate of Democratic Governance et al. (2013), p. 2. In respect of the Emerald Network, this has led to what has been described as a “*simplified approach without losing the essence.*” *Ibid.*

For EU member states, the Natura 2000 regime established under the EU Directives officially constitutes their implementation of Emerald Network commitments. In the words of Resolution No. 8 (2012):

*“for Contracting Parties which are Member States of the European Union, the Emerald Network sites are those of the Natura 2000 Network and ... the procedures established under the European Union Directives 2009/147/EC (codified version of the amended Directive 79/409/EEC) and 92/43/EEC are those to apply for them.”*²⁶

This includes their reporting obligations under Articles 12 and 17 of the respective Directives. Clearly, achieving coherence between the Emerald Network and Natura 2000 is *“essential for ensuring the whole of Europe holds a homogeneous network of areas.”*²⁷ Therefore, *“the Emerald constitution process and methodology got inspired and followed the Natura 2000 examples and best practices.”*²⁸ Indeed, in a way, *“the Emerald Network extends the EU nature conservation standards outside its borders.”*²⁹ There is thus every reason for the Emerald Network reporting by non-EU Bern Convention parties to also mirror the Natura 2000 reporting procedure as closely as feasible.

5. CONCLUSIONS

The above legal analysis of Emerald Network reporting requirements flowing from the Convention provisions as interpreted in light of the Convention’s aims and the relevant practice of the Standing Committee, underscores:

- (1) the need for parties to acquire and report sufficiently detailed information on how the conservation status of species and habitats is developing within (the ASCIs in) their territories; and
- (2) the need to do so in a systematic manner that is consistent across Europe;
- (3) which is best achieved by mirroring as closely as possible the reporting done by EU member states under Article 12 of the Birds Directive and Article 17 of the Habitats Directive.

BIBLIOGRAPHY

- Backes C.W., Freriks A.A. and Robbe J. 2009. *Hoofdlijnen Natuurbeschermingsrecht* (2nd ed.). Sdu Publishers.
- Bowman M., Davies P. and Redgwell C. 2010. *Lyster’s International Wildlife Law* (2nd ed.). Cambridge University Press.
- Directorate of Democratic Governance, Culture and Diversity. 2012. *The Emerald Network: A Network of Areas of Special Conservation Interest for Europe – Explanatory Document and Compilation of Relevant Texts*. Bern Convention Doc. T-PVS/PA(2012)2.
- Directorate of Democratic Governance, ETC/BD and Roekaerts M. 2013. *Revised Criteria for Assessing the National Lists of Proposed Areas of Special Conservation Interest (ASCIs) at Biogeographical Level and Procedure for Examining and Approving Emerald Candidate Sites*. Bern Convention Doc. T-PVS/PA(2013)13.
- Directorate of Democratic Governance, Culture and Diversity. 2016. *The Emerald Network: A Network of Areas of Special Conservation Interest for Europe – Explanatory Document and Compilation of Relevant Texts*. Bern Convention Doc. T-PVS/PA(2016)4.
- Harris D.J. 2004. *Cases and Materials on International Law* (6th ed.). Sweet & Maxwell.
- International Law Commission. 1966. *Yearbook of the International Law Commission*, 4 (U.N. Pub. Sales No. 67.V.2, Vol. II).
- Opermanis O. 2014. *Towards Management of Emerald Sites: Guidance Document*. Bern Convention Doc. T-PVS/PA(2014)8.

²⁶ See also the similar statement included in the Preamble to Resolution No. 5 (1998).

²⁷ Directorate of Democratic Governance, Culture and Diversity (2016), p. 12.

²⁸ Directorate of Democratic Governance, Culture and Diversity (2012), p. 11.

²⁹ Directorate of Democratic Governance, Culture and Diversity (2016), p. 12.

Shine C. 2010. *Interpretation of Article 9 of the Bern Convention*. Bern Convention Doc. T-PVS/Inf(2010)16.

Trouwborst A. 2011. *Conserving European Biodiversity in a Changing Climate: The Bern Convention, the EU Birds and Habitats Directives and the Adaptation of Nature to Climate Change*. Bern Convention Doc. T-PVS/Inf(2011)21.

Trouwborst A. 2014. *Applying the Bern Convention on the Conservation of European Wildlife and Natural Habitats to the Problem of Hybridisation between Wolves (Canis lupus) and Domestic Dogs: An Analysis and a Proposal for a Standing Committee's Recommendation*. Bern Convention Doc. T-PVS/Inf(2014)15.

Trouwborst A., Fleurke F.M. and Linnell J.D.C. 2017. 'Norway's Wolf Policy and the Bern Convention'. 20 *Journal of International Wildlife Law and Policy* (in press).

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