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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

31st meeting
Strasbourg, 29 November – 2 December 2011

**Revised Resolution No. 2 (1993)
on the scope of Articles 8 and 9
of the Bern Convention**

*Document
prepared by
the Directorate of Democratic Governance, Culture and Diversity*

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Convention on the Conservation
of European Wildlife and Natural Habitats

Standing Committee

Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, adopted on 2 December 2011

The Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats, acting under the terms of Article 14 of the Convention;

Considering that it would be useful to further clarify the conditions laid down in Article 9 for the granting of exceptions and the submission of two-yearly reports on such exceptions;

[Noting that, for Contracting Parties that are Member States of the European Union, and the EU itself, the reports submitted under the Habitats and Birds Directives Derogation System (Habides) format is considered to meet the reporting obligations under this resolution, on the condition that these reports are made accessible through the Secretariat]¹;

RECOMMENDS that the Contracting Parties bring the appended document, which contains useful guidance for interpreting the scope of Article 9, to the attention of all those responsible for applying and interpreting the Convention in their respective countries;

RESOLVES that, in future, the reports which the Contracting Parties are required to submit every two years under Article 9 on the exceptions made from the provisions of Articles 4, 5, 6, 7 and 8 cover only:

- a. General exceptions;
- b. Individual exceptions if they are so numerous as to result in a generalised practice;
- c. Individual exceptions concerning more than ten individuals of a species;
- d. Individual exceptions concerning individuals of endangered or vulnerable populations of species;

RESOLVES that, following common procedures and guidance in other fora, derogation reports specify, as appropriate, additional information to help provide an understanding of the reasoning behind the derogations and monitor their impacts, including:

- a. Information on the conservation status of the derogated species;
- b. Justification for derogation for a species in an unfavourable conservation status;

¹ At its 34th meeting the Standing Committee decided to bracket (and thus suspend) this paragraph until the EU will have provided a comparative analysis ensuring that the reports submitted through the Habides+ system do address all substantive issues raised under Article 9 of the Bern Convention. In fact, the Committee observed that the regulations in place do not prevent the EU from submitting the reports on behalf of its member States, or the EU member States from reporting on the Bern Convention using the Habides reporting system or any other reporting tool. However, the reports should comply with the conditions set under Article 9 of the Convention and thus: address all of the substantive issues included under Article 9; be submitted every two years; be supplied in one of the Council of Europe official languages; be sent in a format allowing the Secretariat to make them public. Thus the Committee requested the EU to prepare an analysis comparing the information requested by the Bern Convention and the reporting requirements under relevant EU instruments.

- c. Alternative solutions considered and compared with any available data;
- d. Results of derogations implemented, including cumulative effects and the effects of any compensation measure taken, where relevant.

Appendix to Resolution No. 2

Interpretation of Articles 8 and 9 of the Bern Convention

I. PROHIBITED MEANS OF CAPTURE AND KILLING

1. Article 8 of the Convention requires Parties, in respect of the species specified in Appendices III and II (in the case of exceptions under Article 9), to prohibit the use of:

- a) all indiscriminate means of capture and killing;
- b) means capable of causing local disappearance of populations of a species; and
- c) means capable of causing serious disturbance to populations of a species.

2. Article 8 refers, in connection with the prohibited means, to Appendix IV of the Convention, which lists means and methods of hunting and other prohibited forms of exploitation, in respect of birds and other animals.

3. It should be noted that the use of some of the means listed in Appendix IV is not prohibited absolutely, but only in certain circumstances. Thus, the footnotes indicate that:

- a) explosives to be prohibited "except for whale hunting";
- b) nets and traps to be prohibited "if applied for large-scale or non-selective capture or killing";
- c) snares are not to be allowed "except *Lagopus* north of latitude 58° North".

II. EXCEPTIONS ALLOWED BY ARTICLE 9

4. Article 9 allows exceptions to the provisions of a number of articles of the Convention, and in particular derogations in respect of:

- a) prohibited activities in respect of the strictly protected species listed in Appendices I and II; and
- b) the use of non-selective means of capture and killing and the other means prohibited in Article 8, in respect of the species listed in Appendices II and III.

5. The possibility of derogating from the articles of the Convention is subject to two very clear general conditions, and the non cumulative specific reasons for which the exceptions may be granted are listed exhaustively in Article 9.

6. The two general conditions that should be met are:

- a) that there is no other satisfactory solution; and
- b) that the exception will not be detrimental to the survival of the population concerned.

7. These two conditions are mandatory and cumulative, but the first raises a difficult problem of interpretation.

The existence of another satisfactory solution should be appreciated by considering possible alternatives which, in fact, depend on the motives for the derogation whilst ensuring that the survival of the population is not threatened. The competent national authority should choose, among possible alternatives, the most appropriate one that will have the least adverse effects on the species while solving the problem. The reasoning of the choice should be objective and verifiable. Thus, for example, in the case of the first derogation under Article 9 (1), "for the protection of flora and fauna", alternatives which are likely to cause as little damage as possible to flora and fauna should be taken into consideration. Regarding derogations for "the overriding public interest", possible solutions can include alternative locations or routings of

infrastructure, other sizes of development or alternative activities, processes or methods. For damages to property, less oppressive measures can be regarded as an alternative solution, e.g. electric fences against predators. In the case of the last indent of paragraph 1, since the motives for the derogations are not spelled out in Article 9 and States are free to decide for what reasons derogations have to be granted, taking into account the goals of the Convention, it is up to them to ensure that the condition "no other satisfactory solution" is satisfied. The Standing Committee of the Bern Convention can only examine this condition if the State who presents the report provides in appropriate cases additional information on the reasoning.

Regarding the second condition that "the exception will not be detrimental to the survival of the population concerned", this should be based on current data on the state of the population, including its size, distribution, state of the habitat and future prospects.

In case of a transboundary population, its entire habitat and subpopulations should be considered when issuing an authorisation. Cumulative effects of several derogations should be also taken into account, as appropriate.

Special caution should be taken in case of species that are not in "favourable" conservation status.

8. If the two general conditions indicated at paragraph 6 above are fulfilled, exceptions are allowed:

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

9. There is an important difference between the reasons given under paragraph 8 i) to iv) above and those given under v). In the first case, the Convention specifies the purpose of the exception (protection of flora and fauna, prevention of serious damage to crops, interests of health, etc), whereas in the second the Convention merely specifies the characteristics of the means to be used, without indicating the purpose for which the exception is granted.

10. The relevant characteristics are:

- the strictly supervised conditions under which the exception can be granted;
- the selective nature of the means used; and
- the limited numbers of individuals whose taking, keeping or other judicious exploitation are permitted.

11. From the differing nature of the exceptions contained in the last indent of paragraph 1 of Article 9, it follows that these exceptions, while they conform to the general conditions set out in paragraph 6 above and the special characteristics set out in paragraph 10 above:

- a) may be decided by a Contracting Party for any reason which to it seems valid (for instance, hunting, recreation, etc); the Party should ensure that such reason is clearly identified;
- b) should be temporary but may be renewed from time to time.

It can be taken that, from the legal angle, the application of the conditions laid down in Article 9 remains the same irrespective of the species in question, with no possibility of a distinction being drawn on the basis of the Appendices in which the species appears. However, when granting the exception referred to in paragraph 8 v. and when setting the special conditions (paragraph 10), regard should be had to the state of

populations of species. The expression "small numbers" should thus be construed in the light of the state of conservation of the population of a species.

12. It follows from the above that in the case of this exception the Standing Committee of the Bern Convention is not required to check the merits of the purpose of the exception, but to ensure that the other conditions are satisfied, i.e.:

- a) The no other satisfactory solution condition has been met;
- b) The exception will not be detrimental to the survival of the population concerned;
- c) The provision "under strictly supervised conditions" should be interpreted to mean that the authority granting the exception must possess the necessary means for checking on such exceptions either beforehand (e.g., a system of individual authorisations) or afterwards (e.g., effective on-the-spot supervision), or also combining the two possibilities;
- d) The expression "on a selective basis" raises difficult problems of interpretation in view of its apparent contradiction with the wording of Article 9 in that it could lead to the following paradox: exceptions to the prohibition of using the non-selective means mentioned in Article 8 are permitted provided that the capture is done on a selective basis. In reality, this contradiction disappears if the indent in question is interpreted in the following manner: the non-selective means may be used provided it is used for the purpose of permitting the "taking, keeping or other judicious exploitation" on a selective basis. In other words, the means used must allow the individuals of the species in question to be kept ("selection") and those of other species to be released without harm. In other words, the means used must either allow individuals of the species in question to be kept ("selection") and those of other species to be released unharmed or enable the capture of individuals of the species to be avoided by appropriate methods, or else permit a combination of the two.
- e) The expression "other judicious exploitation" should be interpreted to mean activities other than taking or keeping allowed by way of an exception that is "reasonable", as distinct from any "excessive" action that would prejudice the conservation of the populations concerned in favourable conditions. Exploitation of the species other than taking or keeping can comprise, for example, the taking of eggs, the use of down, selling, and the disturbance of animals by tourists, etc.
- f) The expression "to a limited extent" suggests that the means authorised should not be general, but should be limited in both space and time;
- g) The expression "small numbers" is more difficult to interpret, especially if considered from a global point of view. How, in fact, can "small numbers" be defined at national or regional levels. In contrast, if applied to the individual granted the exception, the expression acquires a meaning in that the means employed must not allow the whole-scale taking of members of the species concerned. Of course, from an overall point of view, the introductory sentence of paragraph 1 of Article 9 still applies since the number of persons granted exceptions must not be such as to be detrimental "to the survival of the population concerned".

13. The purpose of the exception indicated in the third indent of paragraph 1 of Article 9 raises a very difficult problem, namely the interpretation of the expression "other overriding public interests".

14. With regard to the definition of the scope of similar concepts, e.g. "public order", experience with other international Conventions (including the European Convention on Human Rights) has in fact shown that it is extremely difficult, if not impossible, to find a general, prior interpretation for such concepts.

15. In contrast, under the Bern Convention it is possible for the Standing Committee to consider whether a particular exception is justified on the grounds put forward, in this case "other overriding public interests". Consequently, if the grounds in question were put forward, the Standing Committee of the Bern Convention

could assess the merits of the exception in the light of all the provisions contained in the Convention. Article 18 could be applied in the event of difficulties.

16. A further interpretation issue which arises in connection with Article 9, paragraph 1, second sub-paragraph, is that of how to interpret "serious damage" (to crops, livestock, forests, fisheries, water and other forms of property). If "damage" is taken to mean prejudice sustained by a person as a result of damage caused to those items of property that are listed in Article 9, paragraph 1, second sub-paragraph, and it seems legitimate to do so, then the adjective "serious" must be evaluated in terms of the intensity and duration of the prejudicial action, the direct or indirect links between that action and the results, and the scale of the destruction or deterioration committed. "Serious" does not, of course, necessarily mean that the damage was widespread: in some cases the item of property affected may cover only a limited geographical area (for example, a region), or even a particular farm or group of farms. However, the exceptions should be proportional to the damage suffered: the fact that an isolated farm sustains damage would not appear to justify the capture or killing of a species over a very wide area, unless there is evidence that the damage could extend to other areas. It is not required that the damage be already present. Rather, it is sufficient if serious damage in all likelihood will occur.