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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

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**INTERPRETATION OF ARTICLE 9
OF THE BERN CONVENTION**

**- Final -
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SUMMARY

In April 2010, the Bern Convention Bureau asked the Secretariat to prepare a short compilation of the bi-annual reports where Article 9 has been applied to determine whether the restrictions on derogations (exceptions) foreseen under the Convention are broad and clear enough to be considered sufficient.

The Secretariat separately commissioned this short legal opinion on the interpretation of Article 9 to provide clarification on appropriate use of the derogation procedure, consistent with the Convention's aims and obligations. This report was prepared taking account of:

- The compilation and analysis of bi-annual reports 2003-2008 prepared by Ms Lidia Guitart-Xarpell (see Table in Annex for a condensed summary of findings);
- Recent relevant cases considered by the Bureau and/or Standing Committee (see 1.2) although these are not discussed in detail for reasons of length;
- Recent analysis and guidance on derogation practice developed under the EU birds and habitats Directives.

ABBREVIATIONS

Committee	Standing Committee to the Bern Convention
Convention	Convention on the Conservation of European Wildlife and Natural Habitats (Bern, 1979)
Birds Directive	Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version of Council Directive 79/409/EEC on the conservation of wild birds)
ECJ	European Court of Justice
Explanatory Report	Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats (ETS No.104)
EU	European Union
Habitats Directive	Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora
Parties	Contracting Parties to the Convention on the Conservation of European Wildlife and Natural Habitats (1979)
Resolution	Resolution No. 2 (1993) on the Scope of Articles 8 and 9 of the Bern Convention

1. RATIONALE FOR A LEGAL OPINION ON ARTICLE 9 OF THE CONVENTION

1.1 Function of the derogation provision

Derogations are intended to “permit flexibility of action within a common purpose”.¹ This means that Article 9 – which provides for limited exceptions to otherwise prohibited actions – needs to be interpreted by reference to the Article 1 goal to conserve wild flora and fauna and their natural habitats, especially endangered and vulnerable species.

National discretion in applying Article 9 is circumscribed to prevent use of the procedure to bypass the species protection obligations in Articles 4-8. Article 9 restricts the reasons for which exceptions may be considered, sets out mandatory checks and balances (Article 9.1) and requires bi-annual reporting to enable oversight of implementation (Article 9.2). These elements are discussed in Part 2 below.

1.2 Interpretation and implementation of Article 9 to date

The Standing Committee has only once reviewed Article 9 in detail. *Resolution n°2 (1993) on the scope of Articles 8 and 9 of the Bern Convention* (the Resolution) clarified some key terms, the conditions for granting derogations and submitting reports and called on Parties to bring these guidelines to the attention of all those responsible for applying and interpreting the Convention in their respective countries.

Over the years, several cases raising interpretation of the procedure have come before the Bureau and/or Standing Committee. Recent examples (non-exhaustive) include:

- Use of derogations for strictly protected species (wolf) whose population/range is expanding as a result of successful conservation and management efforts;²
- A complaint relating to capture of bottlenose dolphins (*Tursiops truncatus*) in the Black and Mediterranean Seas, apparently for use in therapy for handicapped persons;³
- A complaint related to the planned culling of badgers (*Meles meles*) in Wales for the purpose of bovine tuberculosis eradication.⁴

Based on the Secretariat’s compilation of the bi-annual reports for 2003-2008, national practice regarding the substantive and procedural application of Article 9 appears to vary widely.⁵ The synthesis table (see Annex) shows *inter alia*:

- gaps and/or irregularities in the categories and/or amount of information submitted, sometimes making it impossible to identify the particular species covered by the derogation;
- some implementation via administrative practices rather than legislation;
- some discrepancies in the reasons indicated for granting derogations;
- apparent lack of robust population data to justify certain derogations;

¹ Explanatory Report of the Bern Convention §10.

² e.g. Swiss proposal for amendment of the Appendices to transfer the wolf (*Canis lupus*) from Appendix II to Appendix III of the Convention: see discussion at e.g. 24th and 25th meetings of the Standing Committee and T-PVS/Inf (2005)18 (Shine 2005).

³ See discussion at 26th and 29th meetings of the Standing Committee. The complaint was first raised by the Whale and Dolphin Conservation Society and then by the delegate of Monaco (which hosts the ACCOBAMS Secretariat).

⁴ See minutes of Bureau meeting, 13 April 2010. The complaint was raised in 2009 by the Badger Trust (UK NGO). NB a 1998 decision of the Standing Committee (Recommendation No. 69) concerned the culling of badgers in the UK as a whole.

⁵ NB this report has not involved separate analysis of the individual reports but reproduces and develops the Secretariat’s draft findings and presents the country data in the form of a synthesis table for convenience (see Annex).

- Widespread confusion about description of Appendix III exceptions (many countries treat these species like species from Appendix II in terms of accuracy of the information or/and reporting on permitted actions);
- Some confusion as to the Appendix in which certain species are listed e.g. *Tetrao urogallus* and *Pipistrellus pipistrellus*.

1.3 Experience of derogation practice under EU nature directives

The EU implements the Convention through the birds Directive⁶ (1979, codified version adopted in 2009) and the broader habitats Directive.⁷ The derogation provisions under these Directives (Articles 9 and 16 respectively) are very similar, though not identical, to the Convention with the more recent habitats Directive providing additional precision.

Interpreting these provisions in relation to the Directives' species protection obligations has given rise to extensive case law of the European Court of Justice (ECJ), mainly under the older birds Directive. The European Commission has stated that as Article 9 (birds Directive) has close parallels in terms of content with Article 16 (habitats Directive), it can be reasonably assumed that the ECJ would take a similarly strict approach regarding the latter's interpretation and implementation (EC 2007).

Building on this case law and expert consultations, Commission services have developed formal guidance to help Member States applying protection / derogation provisions:

- *Guidance document on sustainable hunting under the birds Directive* (EC 2008, updating 2004 guidance);
- *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive* (EC 2007).⁸

Given the similarity between Article 9 of the Convention and the EU derogation provisions, this guidance has also been closely followed in developing the analysis in Part 2 below. Where reasoning is based on ECJ case-law, references are footnoted to facilitate more detailed exploration of issues if considered necessary by the Bureau.

2. SUGGESTED APPROACH TO INTERPRETATION OF ARTICLE 9

Competent national/subnational authorities need to ensure that derogations from Articles 4-8 meet both general and specific legal requirements. These include:

- Consistency with the overall aims of the Convention (see 2.1);
- Compliance with three separate but inter-related conditions (purpose; no satisfactory solution; and non-detriment) (see 2.2-2.4 below);
- Procedural conditions (see 2.5).

These are briefly examined in turn in the following sections.

2.1 Formal legal considerations

2.1.1 Full, clear and precise transposition of Article 9

At national/subnational level, derogations are based on legal provisions that provide exceptions/defences to what would otherwise be criminal offences related to protected species. Legislation for this purpose, whether general or specific, needs to reproduce the Article 9 criteria with enough specificity, precision and clarity to provide legal certainty.⁹

Using administrative practices should not be considered a substitute for formal transposition.

⁶ Directive 79/409/EEC on the conservation of wild birds.

⁷ Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora.

⁸ See also detailed analysis of derogation reporting under the habitats Directive for 2005-6 (N2K 2008).

⁹ Judgment of 17 May 2001, Commission/Italy, case C-159/99, ECR 2001, p.4007, §32 (birds Directive case).

These are not binding and cannot guarantee full application as they are alterable at will by the authorities.¹⁰

To ensure consistency in interpretation and application of Article 9, national transposition measures should not modify its terms, selectively apply its provisions or add supplementary conditions or derogations not provided for by the Convention.¹¹

2.1.2 Country-level consistency with overall aims of Convention

Derogation provisions need to be interpreted narrowly and implemented restrictively to avoid undermining the Convention's overall objective.¹²

In many Parties, nature conservation is devolved to subnational authorities. A proportional approach to the use of derogations needs careful consideration and framing at national and/or biogeographic level. The competent authority with the greatest territorial overview needs to guide this approach to ensure that derogations in their totality do not produce effects going against the Convention's aims and species protection objectives, even if application is carried out at regional or local level.¹³

2.2 Condition 1: demonstration of an Article 9.1 reason

The action(s) concerned by the derogation must be justified by one of the five reasons listed in Art.9.1 and transposed into national legislation. In practical terms, there is little point examining the other two requirements (no other satisfactory solution/impact on survival: see 2.3 and 2.4) if the actual reason for which a derogation is sought is not even recognised under the Convention.

The type and weight of the reason must be seen in relation to the interest of the protected species in the concrete and specific circumstances in question in order to judge the appropriateness of a derogation (EC 2007). Competent authorities need to explain the particular circumstances justifying the choice of an Article 9.1 reason and verify that the specific conditions are met.¹⁴

2.2.1 Protection of flora and fauna

This reason is open-ended. The case for using the derogation is likely to be strongest for actions to reduce negative impacts on endangered and vulnerable species, consistent with Article 1. It is not limited by damage threshold i.e. there is no requirement to prove likely seriousness of damage (EC 2008).

With regard to protection of other species, the Article 2 overarching obligation may be used as a guideline (*maintain/adapt populations of wild flora and fauna at a level corresponding to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally*).

¹⁰ "The criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of the common heritage is entrusted to the Member States in their respective territories." Judgment of 15 March 1990, Commission v Netherlands, Case C-339/87, ECR p.851, §28 (birds Directive); reasoning applied to the habitats Directive in judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, § 25-26.

¹¹ e.g. a derogation authorising acts that lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, provided such acts are lawful and cannot be reasonably avoided, was "contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof" (Judgment of 20 October 2005, Commission v UK, Case C-6/04, §109-113).

¹² *ibid.* §112. The ECJ observed that "Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16".

¹³ See e.g. Judgment of 8 June 2006, WWF Italia and others, Case-60/05, ECR 2006, p.5083, §41 (*Member State authorities should carefully examine the applicability of all three conditions, irrespective of the number and identity of the authorities within their territory responsible for applying that provision*).

¹⁴ Order of 19 December 2006 (Commission v Italy, Case C-503/06 R).

2.2.2 Prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property

This reason is relevant in cases where protected species are also pests/agents of damage to a non-exhaustive range of economic interests. Building on the 1993 Resolution and EC 2008:

- “damage” means prejudice sustained by a person as a result of damage caused to the listed property items;
- Consistent with the prevention focus, it is enough to demonstrate strong likelihood that damage will take place in the absence of action i.e. no need to prove actual damage;
- There must be a basis for concluding that damage will be “serious” in the absence of action. This test of extent goes beyond mere nuisance and normal business risk.¹⁵ “Serious” should 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;
- Derogations must be proportional. Damage need not be widespread (e.g. limited geographical area/a farm/group of farms) but *“the fact that an isolated farm sustains damage would not justify the capture or killing of a species over a very wide area, unless there was evidence that the damage could extend to other areas”*.¹⁶

2.2.3 Interests of public health and safety, air safety or other overriding public interests¹⁷

This non-exhaustive reason presents difficulties of general prior interpretation and should be applied on a case-by-case basis.¹⁸ However, the wording is unambiguous in showing that only public interests, whether promoted by public or private bodies, can be considered i.e. this reason does not cover projects entirely in the interest of companies or individuals.

For birds, EC 2008 notes that public health/air safety may be locally affected where the presence or feeding of birds causes a demonstrable risk to human health or increases accident risk, but highlights the scope for non-lethal solutions rather than hunting.¹⁹

In the broader EU context, the ECJ has recognised situations in which legitimate goals of economic and social policy can satisfy the public interest test to justify restrictive measures. However, the “overriding” character must be clearly demonstrated: not every kind of social/economic public interest is sufficient when balanced against the conservation interests protected by the Convention. In most cases, a public interest is likely to be overriding only if long-term: short-term interests that would only yield short-term benefits would not be sufficient to outweigh the long-term interest of species conservation (EC 2007).

2.2.4 Research and education, repopulation, re-introduction and necessary breeding

This reason is relatively straightforward where it involves non-lethal activities aimed at enhancing the conservation status of the species concerned and/or breeding programmes for game species with a view to their repopulation or re-introduction. However, research projects must also be subject to consideration of alternative solutions if they are likely to have a negative impact on the population concerned. Available best practices should be followed.²⁰

¹⁵ Judgment of 8 July 1987, Commission v Belgium, Case C-247/85, ECR p.3029, §56 (birds Directive). “*The aim of this provision ... is not to prevent the threat of minor damage. The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive.*”

¹⁶ Resolution, §16.

¹⁷ Under the habitats Directive, these include reasons “of a social or economic nature and beneficial consequences of primary importance for the environment”.

¹⁸ Where a Party makes a derogation for this purpose, the Committee should assess its merits in the light of all the Convention’s provisions and apply Article 18 in the event of difficulties (1993 Resolution).

¹⁹ e.g. habitat alterations (reduce a site’s attractiveness to bird flocks), exclusion of birds (scaring techniques), airport management measures: see EC 2008 § 3.5.6.

²⁰ e.g. for marine mammals, Parties to the ACCOBAMS Convention will consider Draft Resolution 4.18 on

2.2.5 *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*

This reason contains a set of elements which must each be respected and be capable of scrutiny by the Standing Committee. None of the tests are absolute and must be applied consistently with the conditions in 2.3 and 2.4 below.

The suggested interpretation builds on the 1993 Resolution and the more recent EC guidance:

➤ *“under strictly supervised conditions, on a selective basis and to a limited extent”*

The supervision element implies the need for clear authorisations related to particular individuals or groups of individuals, places, times and quantities as well as a strong enforcement element to ensure compliance. The competent authority must therefore have legal powers for ex ante examination of applications and ex post verification (e.g. effective on-the-spot supervision).²¹

The limited extent element supports this interpretation: it suggests that the means authorised should not be general, but should be limited in both space and time.²²

The selectivity element is also relevant to interpretation of Article 8.²³ The activity covered by the proposed derogation needs to be highly specific in its effect, targeting one species, group of closely related species or even one gender or age class of that species to the exclusion of all others. The risk of confusion and/or disturbance to species that are not the subject of the derogation should be minimised e.g. by allowing individuals of the target species to be kept and others released without harm and/or by using appropriate methods to avoid the capture of non-target individuals of that species.²⁴ Technical aspects of the method used should verifiably demonstrate selectivity, particularly for lethal methods. Further consideration may therefore be needed for methods that are themselves not entirely selective (e.g. use of certain nets) i.e. where results depend on the operator’s skills and/or experience.

Overall interpretation: this condition should be “understood to imply a system of individual authorisations (or narrow-category authorisations involving a high degree of accountability) and ...strict territorial, temporal and personal controls” (EC 2008). Derogations under this reason could be provided for under a species management/conservation plan to regulate relevant populations without adversely affecting their conservation status (EC 2007).

➤ *“taking, keeping or other judicious exploitation”*

The Convention does not define ‘judicious’ and the Committee cannot check the merits behind derogations for this reason, unless the Party volunteers such information in its report.²⁵ The position is similar under the birds Directive, for which the Commission describes the concept as including activities which make a vital contribution to improving the efficiency of the general protection system as well as other use provided that this does not jeopardise the instrument’s general objectives. Hunting using birds of prey in the context of falconry may qualify as a judicious use under appropriate conditions.²⁶

Guidelines on the granting of exceptions to Article ii, paragraph 1, for the purpose of non-lethal in situ research in the Agreement Area (MOP4, November 2010).

²¹ Resolution, §12(a).

²² Resolution, §12(c).

²³ Which prohibits the use of indiscriminate means of capture and killing for Appendix III fauna species and for Appendix II species covered by a derogation.

²⁴ Resolution, §12(b).

²⁵ Resolution, §7 and §9. On a case-by-case basis under the birds Directive, the ECJ has recognised as judicious hunting of wild birds for recreational periods during otherwise closed periods and the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets (Judgment of 8 July 1987, Commission/Italy, Case 262/85, ECR 1987, p.3073, §11, confirmed in Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, §32).

²⁶ Second Report on Birds Directive pp.9-10.

No activity can be “judicious” if liable to prejudice the conservation of the populations of the species concerned in favourable conditions or detrimental to the survival of the population concerned (see further 2.4). Any exploitative connotation needs to be “*balanced by the connotations of responsibility, restraint and good judgment imparted by ‘judicious’*”.²⁷

➤ “small numbers”

This criterion is necessarily relative. The starting point is for the competent authority to have regard to a species’ population level and not authorise whole-scale taking of individuals or any taking detrimental to that population’s survival.²⁸

The EC guidance seeks to determine a threshold or quantity below which the derogation can be granted, consistent with instrument aims. Applied to the Bern context, this suggests that:

- the condition specifying small numbers cannot be satisfied if a derogation does not ensure the maintenance of the species’ population at a satisfactory level;²⁹
- derogations should not be granted where there is a risk that this might have a significant negative effect on the population concerned in quantitative or qualitative (e.g. negative impact on population structure) terms (EC 2007);
- for hunting of bird species, overall annual mortality is an appropriate parameter because it takes population size, status and dynamics into account. Within this framework, a non-binding reference point could be taking of around 1% of the annual mortality of huntable species, subject to compliance with other relevant provisions.³⁰ For abundant species, up to 5% could be considered after in-depth scientific analysis;
- good quality scientific information on population size and natural mortality is a prerequisite of reliable calculations;
- derogations must be underpinned by robust monitoring systems for the populations concerned to ensure that taking is not detrimental to conservation status (EC 2008).

Based on these elements, derogations should not be granted for species or populations with an unfavourable conservation status, which are declining within the Convention area (or the Party considering such derogations), whose area of distribution is contracting or with very low population levels, unless it can be clearly demonstrated that such derogations are beneficial to their conservation status.

Lastly, national systems need to provide for consistency. Irrespective of its internal allocation of powers, each Party must ensure that the total quota for derogations authorising hunting of protected species on national territory does not exceed a “small numbers” ceiling determined on the basis of strict scientific data. The making and application of such administrative decisions should be subject to effective control exercised in a timely manner.³¹

²⁷ EC 2008, §3.5.26. For the birds Directive, language versions vary: the English version uses “wise use”.

²⁸ 1993 Resolution, §11 and 12(d). In a birds Directive case (Judgment of 27 April 1988, Commission v France, Case C- 252/85, ECR p.2243), the ECJ stated that “the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned”.

²⁹ Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l’Aménagement du territoire et de l’Environnement, Case C-182/02, §17.

³⁰ Figure based on the work of the ORNIS Committee under the birds Directive. See §47-59, Judgment of 15 December 2005, Commission v Finland, Case C-344/03, ECR p.11033. For detailed legal analysis of ‘small numbers’ in the hunting context, see EC 2008 §3.5.30–3.5.47 on e.g. percentage of total annual mortality of relevant population of sedentary or migratory hunted species; seasonal considerations when determining reference populations; etc.

³¹ Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083.

2.3 Condition 2: “no other satisfactory solution”³²

Competent authorities have to make this assessment and evaluate alternative solutions by reference to the purpose for the derogation (i.e. if to protect flora and fauna, what alternative solutions would cause as little damage as possible to flora and fauna?). Any solution that would be detrimental to the population’s survival should be automatically excluded as it breaches the third substantive condition (see 2.4).

EC guidance, following existing case law³³, splits this question into three parts:

➤ *What is the problem or specific situation to be addressed?*

This refers back to the first condition (see 2.2 above) i.e. is the problem/situation covered by one of the five 9.1 reasons? A strict approach should be adopted when assessing the “need” and “purpose” of the derogation.³⁴

➤ *Are there any other solutions?*

Alternatives must be assessed by reference to the Articles 4-8 prohibitions³⁵ and to objectively verifiable factors based on scientific and technical considerations e.g. related to population data.

Parties’ discretionary power is limited and arguments in favour of derogations should be robust. This implies an evidence-based balancing act between the benefits of action under the derogation and the possible species impacts. A solution must not be deemed unsatisfactory just because it would cause greater inconvenience or compel a change in behaviour by the beneficiaries of the derogation. *“It is in the nature of environmental protection that certain categories of persons may be required to amend their behaviour in pursuit of a general good... that such activities may be ‘ancestral’ or partake of a an ‘historical and cultural tradition’ does not suffice to justify a derogation from the Directive.”*³⁶

➤ *If so, will these resolve the problem or specific situation for which the derogation is sought?*

“Satisfactory” must be strictly interpreted to mean a solution which resolves the problem facing the competent authorities whilst respecting the Convention’s prohibitions as far as possible. A derogation may only be allowed where no other solution that does not involve setting aside these prohibitions can be adopted. This determination must again be based on objectively verifiable factors (EC 2007) and be *“fixed at the level of what proves to be objectively necessary to provide a solution for those problems”*.³⁷

2.4 Condition 3: “non-detrimental to survival of the population concerned”³⁸

The third condition relates to impact. Competent authorities need to address two questions:

- Actual conservation status of the population of a species in its natural range;³⁹

³² “No satisfactory alternative” under the habitats Directive.

³³ Based on two key cases: Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d’études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, ECR p.6775 and Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l’Aménagement du territoire et de l’Environnement, Case C-182/02.

³⁴ *ibid.* Case C-182/02.

³⁵ e.g. alternative locations/routes, different development scales or designs, or alternative activities, processes or methods.

³⁶ In Case C-10/96, the ECJ’s heavily qualified ruling in favour of taking protected birds from the wild for breeding for purely recreational purposes was limited to tightly defined risks of consanguinity that would result from too many endogenous crossings i.e. the facts of that specific case do not establish a generally applicable rule for such taking, although the ECJ’s sequenced reasoning is of broad application.

³⁷ *ibid.* Extensive case law considers this test with regard to recreational hunting (see EC 2008 §3.4.18-3.4.36).

³⁸ Under the habitats Directive, must not be detrimental to “the maintenance of the populations of the species concerned at a favourable conservation status in their natural range”.

³⁹ This term describes the spatial limits in which the species occurs and is not identical to the precise localities it actually occupies which can be patchy or disjointed for several species and for various reasons. It is a dynamic concept that needs to include natural spread of a native species and/or re-introduction into its former natural range.

- Impact of the proposed derogation on the population or populations concerned.

The conservation status of a species at biogeographic and population level underpins a flexible and proportionate approach to derogations within a framework of species conservation measures (EC 2007). The status of a species' (local) population in a certain area may be different from the overall conservation status (present and developing) of populations in the biogeographic region. Both levels should be taken into account in any decision.

The fundamental requirement is to apply derogations appropriately to deal with precise requirements and specific situations. The detailed assessment will usually need to be at a lower level to be ecologically meaningful in the context of a specific derogation. "Population" is not defined in the Convention but has been given a normal biological interpretation in implementation practice. This approach is supported in EC guidance which:

- Defines "population" as "a group of individuals of the same species that live in a geographic area at the same time and are (potentially) interbreeding (i.e. sharing a common gene pool)"; and
- suggests "metapopulation" - i.e. a group of spatially separated populations of the same species which interact at some level⁴⁰ - as a biologically meaningful reference unit to be adapted to the species in question, taking account of its biology/ecology (EC 2007).

In practice, the scale of assessment will vary depending on the species concerned. For those with transboundary⁴¹ or migratory populations, overall natural range should be considered in cooperation with neighbouring countries as appropriate.⁴² At the other end of the spectrum, impact of the destruction of a breeding site in a rather fragmented amphibian habitat may be evaluated at site or meta-population level.

As a general rule, no derogation should be granted if it has a significant negative effect on a species' conservation status – whether on the specific population (or its prospects) or at biogeographical level. The less favourable the conservation status and trends, the harder it will be to justify granting a derogation other than in the most exceptional circumstances. The net result of a derogation should be neutral or positive for a species.

Where the conservation status is different at different scales of assessment:

- The situation at population level should be considered first;⁴³
- This lower level assessment should then be considered in relation to the broader situation (national, transboundary/biogeographic) for a complete picture;
- Where the (local) population is healthy and unlikely to suffer detrimental effects from a derogation, even if the picture at biogeographic level is less good, a derogation would be easier to justify than if that population is already in a bad state and declining.

To apply this structured approach, it is essential for competent authorities to have sufficient information to assess the conservation status of the species and predict the likely effects of any proposed derogation (see 2.5 below on monitoring).

This condition does not affect the Article 2 obligation to maintain populations at a level that corresponds in particular to ecological, scientific and cultural requirements.⁴⁴ This can provide general

⁴⁰ Term coined by Richard Levins in 1969 to describe a model of population dynamics of insect pests in agricultural fields, but most broadly applied to species in naturally or artificially fragmented habitats) (cited from EC 2007).

⁴¹ e.g. wide-ranging large carnivores.

⁴² Depending on a Party's organisational structure, regional or local authorities may also be in a position to consider the effects of derogations beyond their own territories.

⁴³ It is implicit in the no-detriment requirement that the (local) population is actually viable. If not, authorisation to kill even one individual could potentially affect the survival of that population. This requirement cannot be delegated because a species is thriving in a different jurisdiction over which the Party has no control (Shine 2005).

⁴⁴ Explanatory Report, §40. See also Commission vs Belgium, Case 247/85, ECR p.3029 §8

orientation as to what the Convention requires and allows – providing room for Parties to adapt implementation to the specific circumstances of each case - but it does not constitute an independent ground for derogation from the general system of protection.

2.5 Procedural conditions: reporting on derogations

The formal conditions in Article 9 are intended to limit derogations to what is strictly necessary and facilitate supervision by the Standing Committee. The 1993 Resolution tailors factual reporting requirements⁴⁵ to the management requirements and/or threat level facing a species. It calls for biennial reports to cover:

- General exceptions;
- Individual exceptions if they are so numerous as to result in a generalised practice;
- Individual exceptions concerning more than 10 individuals of a species;
- Individual exceptions concerning individuals of endangered or vulnerable populations of species.

Unlike the habitats Directive, the Convention does not require Party reports to state: the reason for the derogation (arguably implicit in “conditions of risk”); the alternative solutions considered and scientific data used to compare them; or the results obtained. Based on the suggested interpretation in 2.2-2.4 above, it may be appropriate to extend Convention guidance on the content of future reporting by Parties.

Neither the Convention nor the EU Directives require competent authorities to monitor the impact of derogations and the effectiveness of compensation measures, if any, after they are implemented.

However, European Commission services have strongly supported this expansion, linked to general surveillance obligations, to detect any risk for a species arising unintentionally through derogations (possibly in combination with other negative factors). *“It would be reasonable for such surveillance to be sensitive to the effects (including cumulative effects and the effects of compensation measures) of derogations implemented for species for which derogations are regularly granted or which are in an unfavourable conservation status (and are nevertheless the subject of derogations) (EC 2007).*

EC services have therefore suggested that national derogation reports include additional information to help provide an understanding of the competent authorities’ reasoning in applying a proportionate and flexible approach, including:

- Information on the conservation status of the derogated species (at biogeographic level in the Party concerned);
- Special justification for derogations for species in an unfavourable status (e.g. reference to conservation plans, conservation measures undertaken and their effects, summary of the impact assessment of the derogation on the species, alternatives assessed);
- Any compensation measures taken, where relevant.

From 2010, a new electronic derogation reporting format (HaBiDeS: Habitats and Birds Directives Derogation System⁴⁶) must be used by EU Member States for reporting under these Directives. The Commission will use this summary of Member State derogation reports to prepare its own Article 9 reports to the Bern Convention.

⁴⁵ Article 9.2: Parties shall report every two years to the Standing Committee on the populations which are or have been subject to the exceptions and, when practical, the number of specimens involved; the means authorised for the killing or capture; the conditions of risk and the circumstances of time and place under which such exceptions were granted; the authority empowered to declare that these conditions have been fulfilled, and to take decisions in respect of the means that may be used, their limits and the persons instructed to carry them out; and the controls involved.

⁴⁶ See http://circa.europa.eu/Public/irc/env/monnat/library?l=expert_reporting/work-package_habides&vm=detailed&sb=Title).

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ANNEX 1: DEROGATION PRACTICE 2003-2008

The Table only mentions Appendices and falconry for which exceptions were notified.
CAs = competent authorities.

Country	App.	Reporting	Species & number covered by derogation	Reason (& method if stated)	Comment
Albania	II	2003-4	<i>Canis lupus</i> (10 permits to kill)	Protection of flora and fauna	
	III	2003-4; 2005-6	18 different bird species (20 licences: restriction of 5-15 individual per day)		
Armenia	II	2005-6	<i>Canis lupus</i>	Capture for population control (method not specified)	Means not stated as Appendix IV exceptions
			<i>Capra aegagrus aegagrus</i>	Capture for reintroduction in Georgia (prohibited means but not specified)	
			Falconry exceptions (6 species)	No information except population stable in the wild	
Azerbaijan	II	2005-6	<i>Canis lupus</i> (killing: no detailed information on number of licences, reasons, methods)	Prevention of serious damage to crops, livestock etc.	Info. not available to CAs
Austria	I	2003-4	A few licences: for plants, names not specified	Research	Nothing alarming
	II	2003-4	20 species (mainly invertebrates): low number of licences	Research (capture & disturbance; killing for Lepidoptera) (manual means; nets & traps for inverts)	
	III	2003-4	A few species, mostly amphibians	Research and repopulation	Nothing alarming
Belgium (FL region)	I	2003-4	<i>Apium repens</i> (1)	Research	
	II & III	2003-4	Species described mostly birds (46 species): highest number of licences (78) for <i>Phoenicopterus ruber</i>	Captured or transported to the zoo	Birds described together for both Apps. Lack of info on App.II birds – ‘all or various species of birds’.
		2005-6	Decrease in number of species (to 13) and number of birds <u>but</u> high number of licences (546) & individuals (100,000) for all bird species.	Mainly capture and trade for research; some licences for bird taxidermy and zoos. Methods of capture not specified.	
	III	2003-4	Mostly birds (around 40 species).	Capture and transport to zoo	
		2005-6	Decrease in number of species (16 species of birds, mammals and amphibians).	Captured and transport for research	
	IV	2003-4	Some Mustelidae (App.III)	Traps	
Belgium	II	2003-4	3 species	Found dead and used for trade	
(Walloon Region)	II	2005-6	Increase to 12 species (capture of Chiropters).	Public health and/or research (capture using nets).	No explicit information
			Falconry: possession of some species for breeding (both reports)		

	III	2003-4; 2005-6	Both reports similar. 10-15 species (mainly birds and mammals).	Museum naturalisation (taxidermy); research	
			High number of <i>Phalacrocorax carbo</i> (150-210 individuals) killed.	Prevent serious damage to crops, livestock etc.	
Belgium	II	2005-6	Some Chiropters were captured	Capture for research	
(Bxl region)	III	2005-6	<i>Pipistrellus pipistrellus</i>	Capture for research	
Cyprus	III	2003-4; 2005-6	<i>Gyps fulvus</i> (more captured in 05-06)	Research	
			<i>Ovis gmelini ophion</i> (more captured in 05-06)	Breeding	
		2005-6	Some licences for Coleoptera and Lepidoptera	Collection (information not available to authorities)	
Czech	I	2005-6	6 species	Diverse: research, exploitation, other public interests	Gradual improv't
Republic		2007-8	Significant increase in number of species (23)	All for research	in reports (all sections covered in 07-08).
	II	2005-6	Most licences for reptiles and amphibians	Mostly public health	
	II	2007-8	Enormous increase to 360 species, mainly birds (<i>Falco sp.</i> had most number of licences & of individuals captured).	Increase in capture: mostly for research purposes (basically research in rescue centres).	None of the reports described means of capture
		2003-6	<u>Falconry</u> : same species in both reports. Variable (sometimes unknown) number of individuals in captivity (thousands for some species). Individuals mostly reared in captivity or captured from the wild.	Capture from the wild only involved disabled or injured individuals (10 species had little or no population in the wild).	
			05-06: individuals increased for 8 species, esp. <i>Falco peregrinus</i> (78 new individuals) and <i>Tyto alba</i> (97 new individuals).	Most species were captive bred	
		2007-8	<u>Falconry</u> : reduction in number of species (29 to 10) and individuals, especially <i>F.cherrug</i> (525 less individuals) and <i>F.peregrinus</i> (602 less individuals). Slight increase in wild populations of those species over this period.	All species basically reared in captivity except <i>Accipiter nisus</i> (50% individuals still from the wild).	
	III	2005-6; 2007-8	Big increase (42 to 209), mostly birds in both reports. Number of licences (1-30) similar for both periods (higher for some amphibians).	Mostly killing, capture and site destruction basically for protection (keeping in a rescue center in 07-08).	Some App.III species considered exceptions of App.II
	IV	2007-8	1 exception: <i>Alburnoides bipunctatus</i>	Use of electricity	
Denmark	I	2005-6	1 exception	Research	Nothing alarming

	II	2003-4; 2005-6	Similar number of species for both periods (around 10). 03-04: 500-2000 individuals of Chiropters captured.	05-06 only stated means of capture (traps and nets). Some impact on amphibian populations.	
		2007-8	Number almost doubled, mainly for amphibians, with more variety of species.	Mainly research purposes and protection of flora and fauna. Capture was the predominant action in all reports: also significant taking of eggs and tadpoles in amphibians, trade and possession. Population impact on some species of amphibians (7 in 07-08)	
	III	2005-06	Number of species halved (from 13 to 7) mostly amphibians.	Exceptions not described, only numbers which were supposed to be the number of licences	
		2007-08	No exceptions described		
	IV	2005-6	Exceptions for use of nets and traps for a few App.II species	Unnecessary to describe these as no means of capture prohibited for amphibians, reptiles & insects.	
EEC	II	2003-4	Only bird species (68). Highest number of licences in UK (2003) and Spain (in 2004, 269 and 382 licences for <i>Ciconia ciconia</i> and <i>Sturnus unicolor</i> : also a high number of individuals for <i>Carduelis sp.</i> (88278) and <i>Sturnus unicolor</i> (34695)). Other species with high number of individuals: <i>Branta leucopsis</i> (591 in UK; 163 in Germany; 971 in Sweden; 292 in Estonia), <i>Delichon urbica</i> (521 in Hungary; 803 in Germany) and <i>Mergus serrator</i> (1458 in Finland; 128 in UK).	Variable: for most species, to protect fauna and flora or for research. For species with more licences/individuals, to prevent serious damage to crops, livestock, etc, and/or for public health. Most actions involved capture and killing (<i>Sturnus unicolor</i> , <i>Branta leucopsis</i>), taking eggs in 13 species (i.e. <i>Carduelis sp.</i>), possession/trade in another 12 and damage or destruction of sites for a few (i.e. <i>Ciconia ciconia</i> and <i>Delichon urbica</i>). Methods of capture not stated (except killing with firearms).	Reports generally gave very detailed information, presented on annual (cf biennial) basis.
		2003-4	Falconry: Only mentioned 2 species (<i>Accipiter sp.</i> , <i>Falco sp.</i>) and number of birds wild captured in 3 countries: Germany, Spain and Poland.		Lack of information in this section.

	III		Only bird species (62): number of licences not stated. Generally for a high number of individuals e.g. more than 1000 for 10 species (Sweden), 8 (Finland) and 7 (Italy). Species with most individuals: <i>Fringilla coelebs</i> (300,000 - Italy 2003), <i>Vanellus vanellus</i> (120.000 - NL 2004). Most eggs collected in UK e.g. <i>Larus ridibundus</i> (180000) and <i>Anser anser</i> (15000). 12 species including <i>Fringilla sp.</i> and <i>Larus sp.</i> were captured to permit small exploitation.	Mostly to prevent serious damage to crops, livestock, etc. and for public health interests. Methods of capture not specified.	
	IV		63 different bird species: most exceptions mentioned for Spain, Italy and UK.	Basically nets and traps. Poison and poisoned anesthetic bait in only a few cases.	
Estonia	I	2005-6	1 licence to collect parts of 10 flora species		
	II	2003-4; 2005-6	<i>Ursos arctos</i> & <i>Canis lupus</i> (higher number of licences in 05-06)	Prevention of serious damage to crops, livestock etc.	Falconry is prohibited
	III	2003-4 2005-6	<i>Lynx lynx</i> <i>Lynx lynx</i> (120 individuals)	Sustainable hunting Prevention of serious damage to crops, livestock etc.	
Finland	II	2003-4; 2005-6	227 species (mainly birds, mostly 1 licence per species: species varied between years)	03-4: birds - mainly capture for research; Chiropters – destruction of sites, disturbance for public health (nets) 05-6: birds - mainly killing for public health purposes; Chiropters – capture for research (methods not specified).	Very explicit on App.II excepns
	III	2003-4; 2005-6	11 species (mainly Soricidae and amphibians)	Research and repopulation	
	IV	2003-4	Use of nets for the App.II exceptions	Not all exceptions need reporting (e.g. amphibians)	
France	I	2005-6	Only a few species <i>Angelica heterocarpa</i>	Research Displacement for road construction	
	II	2005-6	52 species, mostly Chiroptera (high for Microchiroptera: around 200 licences and 200-300 individuals/species). <u>Falconry</u> : only 2 species of <i>Accipiter sp.</i> mentioned (a few individuals in captivity).	Research; protection of flora and fauna (mainly by hand and traps)	Impact on population not stated.
	III	2005-6	9 species, mostly amphibians (some with c.400 individuals captured)	Actions and reasons not stated.	Lack of information.
	IV		Mammals (basically Chiropters) for App.II. A few <i>Canis lupus</i> .	Traps and nets . Semiautomatic and automatic weapons (over two rounds of ammunition).	

FYRO Macedonia	II	2003-4; 2005-6	Both reports: 5 mammals and birds	Protection of flora and fauna; research (method only specified for <i>Canis lupus</i> – capture by hand)	Very little information as no licence req't for App.II and III species.
	III		8 species (mostly mammals)	Research	
Germany	I	2003-8	Number of species (5-7) similar in all reports.	Research (07-08 reasons not described but apparently research: some numbers without explanation).	
	II	2003-4; 2005-6	Increase of species number (from 43 to 60)	Capture and disturbance for research purposes; destruction of Microchroptera sites for interests of public health; significant increased use in taxidermy. 03-04: method of capture used was basically nets. 05-06: methods of capture not described.	General increase in species number (43-60) and variety over the three reports. Some App.II species described as App.III. Some non-Convention species mentioned
		2007-8	Numbers were described as actions and reasons.	Apparently similar to the above. More variety of methods (hand, nets, gassing or traps).	
	III	2003-4	Number of species difficult to determine as only classes or orders were described (neither species nor genus) in most cases. <i>Castor fiber</i> had most licences and individuals captured.	Mostly capture and disturbance for research purposes and protection of fauna and flora. <i>C. fiber</i> : prevention of serious damage to crops, livestock, etc and for public health purposes.	Inadequate info on species definition. Generally, some App.III species were described as App.II.
		2005-8	About 20 species. <i>Castor fiber</i> had most licences (453 in 05-06) and individuals captured in all reports.	Reasons not described but seemed similar to 03-04.	
	IV	2003-2004	No species reported	<i>Castor fiber</i> should have been reported as high number of individuals captured.	Unnecessary to report methods for amphibians and insects as no prohibited method for these species.
		2005-6	14 species described (mostly insects). Highest number of licences again for <i>Castor fiber</i> .	Basically research purposes and protection of flora and fauna (nets and traps the main methods used).	
		2007-8	4 species described (only numbers)	Reasons not given.	
Hungary	I	2003-4; 2005-6; 2007-8	Only a few species across all reports. 05-06: <i>Ferula sadleriana</i> - high number of specimens kept & positive population impact. 07-08: <i>Trapa natans</i> – low exploitation.	Research	

	II	2003-4; 2005-6; 2007-8	Progressive decrease in number of species (100 to 27), mostly birds. Highest number of licenses for capture of Microchiroptera (e.g. <i>Nyctalus noctua</i> in 07-08). 07-08: High increase in number of individuals for <i>Spermophilus citellus</i> and <i>Palingenia logicauda</i> (4858 and 2800 in 2008). <u>Falconry</u> : 9 species in each report (10-30 birds in captivity except for <i>Accipiter gentilis</i> and <i>Falco peregrinus</i> : 86 and 98 in 2008). 05-06: <i>A.gentilis</i> and <i>F.peregrinus</i> increase of 50 individuals each (<i>A.gentilis</i> 10-40 individuals captured from the wild every year (2003-2008) c.f. 07-08: decrease (80-130 individuals less in those two species)).	Trade and capture for research (usually live catch but only stated for a few species). The actions produced caused a positive impact on population for 20% of species. Wild population inexistent or low in 4 species (declining in 2, increasing in 2 more). Specimens only sourced 100% from the wild where populations increasing: however, 50-70% of wild-captured individuals from species with declining wild population. In 05-06 <i>A.gentilis</i> and <i>A.nisus</i> increased their wild populations to 1000 individuals each.	Similar information in all the reports.
	III	2003-4; 2005-6; 2007-8	Gradual decrease in number of species (from 43 to 19). Progressive increase of <i>Phalacrocorax carbo</i> licenses and individuals.	Actions and reasons not described in any report.	
	IV	2003-5 2003-8	Capture of some Mustelidae and birds.; some Cervidae All birds specified.	Semiautomatic weapons Anesthetic bait) Nets for ringing	
Iceland	III	2007-8	<i>Ursus maritimus</i> (2 licences for killing)		05-6 report gave
	IV	2003-8 2007-8	Some licenses to capture and kill <i>Laurus fuscus</i> (from 600 to unlimited individuals) 3 undefined species (unlimited number)	Prevention of damage in crops, livestock, etc. (poison, traps, nets); 07-08, also research. Prevention of serious damage in crops, livestock, etc.; public health interests (traps, nets, aircraft).	07-8 information not included in the report for that period.
Italy	I	2003-4	A few licences	Research	
	II	2003-4	44 species, mostly Microchiroptera: high number of licences (56) for that suborder.	Research (nets, traps and hand)	No falconry data
	III	2003-4	Less than 9 species (mainly amphibians)	Research	
	IV	2003-4	<i>Ursus arctos marsicanus</i>	Research (snares)	
Latvia	I	2003-4	A few species (none in 05-06)	Research	
	II	2003-4 2005-6	A few species (mainly amphibians) A few species (mainly insects)	Research (capture by hand) Research (capture by hand)	Reference to <i>Graphoderus bilineatus</i> (not App.II species)
Lithuania	I	2003-4	A few licences	Research (capture)	
	II	2005-6 2007-8	A few species (mainly amphibians) A few species (mainly insects)	Research (03-06: capture) Research (07-08: killing)	

	III	2003-8	2005-8: disturbance of high number of <i>Ciconia ciconia</i> individuals (104 in 2008) <i>Bison bonasus</i> (a few licences for killing unhealthy specimens in all reports)	Ringling (capture by hand and traps)	
	IV	2005-6 2003-6	<i>Turdus sp.</i> (2 species) Automatic light trap and poison for insects	Research Unnecessary as no means of insect capture prohibited 03-04: use of nets in <i>Acrocephalus paludicola</i> should have been stated but was not.	
Luxembourg	I	2003-4	A few licences	Research	
	II	2003-4	A few species (mainly birds – only class or order mentioned)	Protection of flora and fauna (capture by nets)	Falconry prohibited
		2005-6	A few species (mainly amphibians)	Research (capture by traps or hand)	
	III	2003-6	Some licences for ringing birds. 05-06: some licences for unspecified ‘wild animals’ and ‘hunting species’		
	IV	2003-4	Only mentioned for App.II birds	Capture using nets	
Moldova	II	2003-4; 2005-6	<u>Falconry</u> : 18 species (estimated population in the wild stated: all species had critically endangered population in wild).		Very little information
Monaco		2003-4	No exceptions made.		
Norway	II	2003-6	A few carnivores NB Falconry is prohibited.	Prevention of serious damage in crops, livestock, etc.; Some birds and mammals found dead.	Single detailed report for both periods: very little
	III		<i>Lynx lynx</i>	Reasons and actions not specified	information on
	IV		Use of semi-automatic weapons	Species and purpose not specified	derogations.
Poland	I	2003-4; 2005-6	Number of species doubled in 05-06 (from 7 to 13). Some research licences covered high number of specimens (1000 for <i>Cypripedium calceolus</i> & <i>Saxifraga hirculus</i> in 05-06).	Research	Species generally not well classified. Some App.II listed under App.III and
	II	2003-4; 2005-6	Marginally higher number of species in 05-06 (80-100). Low number of licences except for <i>Tetrao urugallus</i> (54 licences in 05-06). High number of individuals (17 species with more than 500 in 05-06, especially birds (e.g. 40,000 individuals of <i>Carduelis chloris</i> in 2006).	03-04: Research (capture, disturbance, trade). 28 bird species found dead used in taxidermy 05-06: Research + reasons linked to protection of flora and fauna. Capture with nets, traps but methods used for birds not specified.	vice versa e.g. for amphibians and invertebrates in 03-04. Some info on protected zones and hunting seasons.

		2003-4	<u>Falconry</u> : A few species, basically <i>Falco sp.</i> , mainly <i>F.peregrinus</i> and <i>A.gentilis</i> (144 & 131 individuals captured, some from the wild)	Populations in the wild low or inexistent except <i>A.gentilis</i> but licences still given for capture from wild.	
		2005-6	Decrease of individuals in captivity (from 30-150 to 1-10).	Origin of all individuals from rearing in captivity and/or importation.	
	III	2003-4	43 species. Higher number of individuals mainly: <i>Phalacrocorax carbo</i> (1150) <i>Helix pomatia</i> (2000t)	Main reason: research and taxidermy Prevention of damage to fisheries Comestible and trade Research and/or protection of flora and fauna (nets (mammals); traps (the rest)).	
		2005-6	Increase to 75 species, mostly birds, but lower number of licences. <i>Hirundo medicinalis</i> (1000)	Reasons as above. Taxidermy increased (40+ species) + higher number of nests destroyed (12+ species). Import and trade	
	IV	2003-4	No exceptions	Use of traps in <i>Laurus melanocephalus</i> should have been mentioned.	
		2005-6	24 species (mainly mammals and amphibians)	Research; protection of flora and fauna (using nets (mammals) and traps (other species)). NB unnecessary to report methods of capture for amphibians, reptiles and invertebrates.	
Portugal	I	2003-4; 2005-6	7-10 species (few licences). 05-06: high number of <i>Halimium verticillatum</i> (200).	Mainly research	
	II	2003-4	20 species (mainly reptiles). High number for some individuals eg <i>Emys orbicularis</i> 2000 individuals.	Research (capture by traps)	
	III	2005-6 2003-4 2005-6	20 species (mainly mammals – Chiropters) 13 species (mostly amphibians and reptiles) Increase to 38 species (mostly fish). Some species described were App.II species (Chiropters).	Research (capture by traps) Species disturbance Species disturbance	App III info not explicit enough.
Romania	II	2003-4	Data from hunting periods 2001-2004. 3 species of carnivore: high number of licences (65-1350) for high number of individuals (around 300)	Prevention of serious damage to crops, livestock etc.	
Slovakia	I	2003-4; 2005-6	Number of species halved in 05-06 (11 to 5): number of licences also reduced.	Research (little impact on population)	

Sweden	II	2003-4	70 species (mostly birds). Low number of licences but sometimes covering high number of species e.g. 1 licence for 26 bird species.	Research and/or public health (capture/disturbance: deliberate killing for <i>U.arctos</i>)	05-06 report excluded imports as movements between MS post-EU accession no longer qualify).
		2005-6	33 species (mostly birds). Low number of licences except <i>Ursos arctos</i> (69 licences 06).	Research and/or public health (capture/disturbance: deliberate killing for <i>U.arctos</i>)	
		2003-6	<u>Falconry</u> : Number of species halved in 05-06 (8 to 4): decrease in individuals in captivity (10-60 less individuals). Population in wild low for 2 sp of <i>Falco spp.</i>		
	III	2003-6	05-06: number of species halved (16-8): 200 individuals of <i>Phalacrocorax carbo</i> killed 06.	Research, monitoring, data collection.	
	IV	2003-4	4 App.II bird species	Research (capture by nets and acoustic recorders)	
		2005-6	Some Chiropters	Research (capture by nets)	
		2003-4; 2005-6	<i>Spermophyllus citellus</i>	Protection of flora and fauna; human health (snare)	
	I	2003-4; 2005-6	Small number of research licences. 03-04: limited impact on <i>Luronium natans</i> .	Research (little impact on population)	
	II	2003-4	16 species (mostly amphibians and birds; also high number of licences/individuals for e.g. <i>Branta leucopsis</i> , <i>Ursus arctus</i> . Limited impact on <i>Ursus arctos</i> and <i>Canis lupus</i> .	Varied, depending on species. Prevention of damage to crops and livestock (mammals and birds); public health (<i>B.leucopsis</i>); research. Methods listed as 'taking' or 'shooting'.	
		2005-6	23 species (mostly amphibians and birds). Higher number of licences for <i>Branta leucopsis</i> (1040) and of individuals of <i>Ursus arctus</i> (271). Limited impact on <i>Ursus arctos</i> , <i>Canis lupus</i> , <i>Gulo gulo</i> and <i>Branta leucopsis</i> populations.	As above. For methods, use of nets and traps specified for <i>Accipiter gentilis</i> .	
	III	2003-4; 2005-6	Same in both reports with more individuals in 05-06. General exceptions for different groups of species. Limitation of <i>Lynx lynx</i> , <i>Phoca vitulina</i> and <i>Halichoerus grypus</i> populations; regional differences in hunting periods for some mammals and birds; a list of some fishes and insects without protection; and the hunting of small number of birds.	Research and public health purposes.	

	IV	2003-4	Artificial light sources (some mammals); Traps (<i>Accipiter gentilis</i> and <i>Corvidae</i>); Semiautomatic weapons with more than two rounds of ammunition <i>Cervidae</i> ; Aircraft and moving motor vehicles (different species).	Usually prevention of damage in crops, livestock, etc.	
	IV	2005-6	As above + use of snares to capture of 1000-1500 individuals of <i>Vulpes vulpes</i> and <i>Lagopus muta</i> (limited impact on latter's population).	Prevention of damage in crops, livestock, etc.	
Switzerland	II	2003-6	1 licence to kill <i>Canis lupus</i>	Prevention of serious damage to crops, livestock, etc	Combined report
	III	2003-6	3 species named but exceptions not specified.		for both periods:
	IV	2003-6	Illuminating targets in <i>Sus scroffa</i>	Prevention of serious damage to crops, livestock, etc.; use of nets in birds for research purposes.	general lack of information
The Netherlands	II	2003-4	30 species (mainly amphibians and mammals)	Destruction of sites for public health interests (amphibians); capture for research (other species). Means of capture: basically traps and hands.	Exceptions for birds not specified but fully detailed
	III	2003-4	45 species, mainly mammals	Research, education, repopulation and introduction.	in reports on EU birds Directive.
Turkey	II	2005-6; 2007-8	From 2005 on, some carnivore species. Highest number of licences for <i>Capra aegagrus</i> (367 individuals killed in 2007-8).	Protection of flora and fauna; permission for small-scale exploitation.	
United Kingdom	I	2003-4	12 species	Research	Generally detailed
		2005-6	12 species. Higher number of licences e.g. for <i>Luronium natans</i> . High number of individuals e.g. <i>Gentianella anglica</i> (208). 2 more species mentioned in the detailed exceptions for each region but not in the summary report.	Research	exceptions for each region and relevant authority.
	II	2003-4	40 species, mainly mammals (Chiropters and Cetaceans). High number of licences (50-100) and individuals (100-10000).	Mainly for research, protection of flora and fauna and public health interests (sometimes all together). Actions: mostly destruction of sites, capture and/or disturbance (methods of capture basically nets, traps and hands).	
	II	2005-6	Similar number of species. Higher number of licences and individuals e.g. for Chiropters (2923 licences in general: 23,118 individuals of <i>Plecotus austriacus</i>) and <i>Triturus cristatus</i> (4265 licences and 237, 4815 individuals).	As above. Additional methods included artificial light sources.	

	2003-4	<u>Falconry</u> : general lack of information: only mentioned number of birds in captivity and captured each year (16 species, 2 individuals in captivity for each).		Not well indicated but seemed to cover only the Isle of Man region.
	2005-6	<u>Falconry</u> : 19 species in total with 1-10 birds in captivity. Mostly imported except for 4 species 100% captured from the wild in Isle of Man (including <i>F.columbarius</i> : estimated wild population zero).	Only controls involved keeper registration	Also covered Jersey. More info on Isle of Man: for Jersey, only stated birds in captivity.
III	2003-4	20-35 species described, mostly mammals. High number of licences for killing <i>Meles meles</i> (about 4000 individuals).	Reasons mainly focused on research purposes. Most actions involved capture and trade. Scotland: reasons for exceptions focused on means of capture (basically nets and traps) although most were allowed (i.e. use of nets in amphibians or fish)	
	2005-6	20-35 species. High number of licences for: destruction of breeding sites and disturbance of <i>Meles meles</i> (around 1000); <i>Muscardinus avellanarius</i> (around 800); <i>Potamobius pallipes</i> (around 400).	Research, as above. Most actions based on kill and disturbance. Scotland (as above).	
IV	2003-4	11 species, mainly mammals (high number of Chiropters individuals captured).	Mostly captured for public health interests. Methods not described, only actions like habitat disturbance.	Some exceptions from App.II & III
	2005-6	30 species, mainly mammals (high number of Chiropters individuals captured).	Increase in small exploitation licences and research. Methods used were basically traps; some nets; some Chiropters were euthanized in England.	should have been reported as App.IV exceptions as some capture means not allowed

ANNEX 2



Convention on the Conservation of European Wildlife and Natural Habitats

Standing Committee

Draft Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, adopted on ... December 2010

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;

RECOMMENDS that the Contracting Parties bring the appended document, which contains useful information 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 shall 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 for example:

- a. Information on the conservation status of the derogated species;
- b. Special justification for derogation for a species in an unfavourable conservation status;
- c. Alternative solutions considered and scientific data used to compare them;
- 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 forbids, in respect of the species specified in Appendices III and II (in the case of exceptions under Article 9), 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 means forbidden, to Appendix IV of the Convention, which lists means and methods of hunting and other forbidden forms of exploitation, in respect of both animals and birds.

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

- a) Explosives are prohibited "except for whale hunting";
- b) Nets and traps are prohibited "if applied for large-scale or non-selective capture or killing";
- c) Snares are not 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) The capture and killing 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 clearly defined 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 must 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. Thus, for example, in the case of the first derogation under Article 9 (1), "for the protection of flora and fauna", alternatives must be taken into consideration which are likely to cause as little damage as possible to flora and fauna. 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, 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 on derogations based on the last indent, states spontaneously the motive for the derogation.

8. If the two general conditions indicated at paragraph 10 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 12 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 possibility of strictly controlling the use of the means of capture or killing;
- 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 indicated in paragraph 10 above and the special characteristics indicated in paragraph 14 above:

- a) May be decided by a Contracting Party for any reason which to it seems valid (for instance, hunting, recreation, etc) and without any reason having to be given;
- b) May not necessarily be temporary, in other words they may be granted permanently, or at the very least 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. When it comes to interpreting the conditions themselves, however, regard may be had to the state of populations of species. The expression "small numbers" may thus be construed in the light of the state of preservation 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, ie:

- a) The provision "under strictly supervised conditions" means that the authority granting the exception must possess the necessary means for checking on such exceptions either beforehand (eg, a system of individual authorisations) or afterwards (eg, effective on-the-spot supervision), or also combining the two possibilities;
- b) 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. The expression "judicious exploitation" denotes that any taking, keeping or killing allowed by way of an exception must be "reasonable", as distinct from any "excessive" action that would prejudice the conservation of the populations concerned in favourable conditions. The expression "exploitation" refers to any activity other than the taking and keeping of individuals of a species, such as the taking of eggs, the use of down, selling, and the offensive viewing of animals by tourists, etc. Such exploitation must nonetheless be "judicious", ie carried out in a reasonable manner, without any excessive action liable to prejudice the conservation of the populations of the species concerned in favourable conditions;

- c) The expression "to a limited extent" suggests that the means authorised should not be general, but should be limited in both space and time;
- d) 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. Although not related to Article 8, 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, eg "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, the bodies responsible for interpreting these conventions have powers to establish whether a particular case 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 worrying question that 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, in the latter case, the exceptions must be proportional: the fact that an isolated farm sustains damage would not 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.



Convention relative à la conservation de la vie sauvage
et du milieu naturel de l'Europe

Comité permanent

Projet de révision de la Résolution n° 2 (1993) relative à la portée des articles 8 et 9 de la Convention de Berne, adoptée le ... décembre 2010

Le Comité permanent de la Convention relative à la conservation de la vie sauvage et du milieu naturel de l'Europe, agissant en vertu de l'article 14 de la Convention ;

Considérant qu'il est utile de clarifier davantage les conditions prévues par l'article 9 pour l'octroi de dérogations et pour la présentation du rapport biennal sur ces dérogations ;

RECOMMANDE aux Parties contractantes de porter à la connaissance de tous ceux qui, dans leur ordre interne, sont appelés à appliquer ou interpréter la Convention, le document ci-joint qui contient des éléments utiles pour apprécier la portée de l'article 9 ;

DECIDE qu'à l'avenir le rapport biennal que les Etats sont tenus de soumettre en vertu de l'article 9 sur les dérogations faites aux articles 4, 5, 6, 7 et 8, portera exclusivement sur :

- a. les exceptions de portée générale;
- b. les exceptions individuelles si elles sont tellement nombreuses qu'il en résulte une pratique généralisée;
- c. les exceptions individuelles concernant plus de dix individus d'une espèce;
- d. les exceptions individuelles concernant les individus de populations d'espèces en danger ou vulnérables.

DECIDE que, au regard des procédures et lignes directrices couramment en vigueur au sein d'autres *fora*, les rapports sur les dérogations apporteront, le cas échéant, des informations complémentaires pour faciliter la compréhension de la justification de ces dérogations, ainsi que l'évaluation de leur impact, y compris par exemple :

- a. Des informations sur le statut de conservation de l'espèce concernée par la dérogation ;
- b. Une justification spécifique pour une dérogation concernant une espèce ayant un statut de conservation défavorable ;
- c. Les solutions alternatives prises en considération, ainsi que les données scientifiques utilisées pour les comparer ;
- d. Les résultats des dérogations mise en œuvre, y compris toute mesure de compensation prise, le cas échéant.

Annexe à la Résolution N° 2

Interprétation des articles 8 et 9 de la Convention de Berne

I. MOYENS DE CAPTURE ET DE MISE A MORT INTERDITS

1. L'article 8 de la Convention interdit pour les espèces visées à ses annexes III et II (en cas de dérogation conforme à l'article 9), l'utilisation :

- a) de tous les moyens non sélectifs de capture et de mise à mort ;
- b) des moyens susceptibles d'entraîner localement la disparition des populations d'une espèce ; et
- c) des moyens susceptibles de troubler gravement la tranquillité des populations d'une espèce.

2. L'article 8 fait référence, parmi les moyens interdits, à l'annexe IV à la Convention qui énumère des moyens et méthodes de chasse et autres formes d'exploitation interdites, qu'il s'agisse de mammifères ou d'oiseaux.

3. Il y a lieu de noter que certains des moyens interdits en vertu de l'annexe IV ne sont pas interdits de façon absolue, mais seulement dans certaines circonstances. Ainsi, en vertu des notes de bas de page, il est indiqué que :

- a) les explosifs sont interdits "excepté pour la chasse aux baleines" ;
- b) les filets et les pièges-trappes sont interdits "si appliqués pour la capture ou la mise à mort massive ou non sélective" ;
- c) les collets ne sont pas permis "excepté Lagopus nord de latitude 58° Nord".

II. DEROGATIONS PREVUES PAR L'ARTICLE 9

4. L'article 9 permet de déroger à un certain nombre d'articles de la Convention et, en particulier, d'accorder des dérogations pour :

- a) la capture et la mise à mort des espèces strictement protégées énumérées aux annexes I et II ; et
- b) l'utilisation de moyens non sélectifs de capture et de mise à mort et des autres moyens interdits à l'article 8, en ce qui concerne les espèces énumérées aux annexes II et III.

5. La possibilité de déroger aux articles de la Convention est soumise à deux conditions générales bien précises et les raisons spécifiques non cumulatives pour lesquelles la dérogation peut être accordée sont énumérées de façon restrictive par l'article 9.

6. Les deux conditions générales devant être remplies sont :

- a) qu'il n'existe pas une autre solution satisfaisante ; et
- b) que la dérogation ne nuise pas à la survie de la population concernée.

7. Ces deux conditions sont impératives et cumulatives mais la première pose un problème délicat d'interprétation.

L'existence d'une autre solution satisfaisante doit être en effet appréciée en fonction des alternatives disponibles qui, à leur tour, dépendent de la finalité de la dérogation tout en respectant la condition que la survie de la population ne soit pas menacée. Ainsi, par exemple, dans le cas de la première dérogation indiquée par le paragraphe 1 de l'article 9, "intérêt de la protection de la flore et de la faune", il faut examiner les alternatives susceptibles de causer le moins de dommage possible à la flore et à la faune sauvages. Dans le cas du dernier alinéa dudit paragraphe, puisque la finalité des dérogations n'est pas indiquée dans l'article 9 et que les Etats sont libres de décider pour quelles raisons les dérogations peuvent être accordées, il leur incombe également de s'assurer que la condition "autre solution satisfaisante" est remplie. Le Comité Permanent de la Convention de Berne ne pourra, dès lors, vérifier cette condition que si l'Etat, en présentant son rapport sur des dérogations accordées en vertu du dernier alinéa du paragraphe 1, indique de sa propre initiative la finalité de la dérogation.

8. Si les deux conditions générales mentionnées au paragraphe 10 ci-dessous sont remplies, les dérogations sont admises :

- i) dans l'intérêt de la protection de la faune ;
- ii) pour prévenir des dommages importants aux cultures, au bétail, aux forêts, aux pêcheries, aux eaux et aux autres formes de propriété ;
- iii) dans l'intérêt de la santé et de la sécurité publiques, de la sécurité aérienne, ou d'autres intérêts publics prioritaires ;
- iv) à des fins de recherche et d'éducation, de repeuplement, de réintroduction ainsi que pour l'élevage ;
- v) pour permettre, dans des conditions strictement contrôlées, sur une base sélective et dans une certaine mesure, la prise, la détention ou toute autre exploitation judicieuse de certains animaux et plantes sauvages en petites quantités.

9. Or, une différence importante existe entre, d'une part, les raisons indiquées sous 12 i) à iv) ci-dessus et, d'autre part, l'alinéa v). En effet, alors que dans le premier cas la Convention précise la finalité qui justifie la dérogation (protection de la flore et de la faune, prévention de dommages importants aux cultures, intérêt de la santé, etc.), elle se limite dans le deuxième cas à préciser les caractéristiques des moyens à utiliser, sans indiquer le but dans lequel la dérogation est accordée.

10. Ces caractéristiques sont :

- la possibilité de contrôler strictement l'utilisation du moyen de capture ou de mise à mort ;
- le caractère sélectif du moyen employé ; et
- le nombre limité des individus dont la prise, la détention ou l'exploitation sont permises.

11. De la différente nature des dérogations contenues dans le dernier alinéa du paragraphe 1 de l'article 9, il découle que ces dérogations, si elles répondent aux conditions générales indiquées au paragraphe 10 ci-dessus et aux caractéristiques indiquées au paragraphe 14 ci-dessus peuvent :

- a) être décidées par une Partie contractante pour toute raison qui lui semble valable (par exemple, chasse, récréation, etc...) et sans devoir justifier du motif ;
- b) ne pas être temporaires, en d'autres termes, peuvent être accordées de façon définitive ou, tout au moins, être renouvelées périodiquement.

Il est à estimer que, du point de vue juridique, l'application des conditions prévues à l'article 9 est la même quelles que soient les espèces sans qu'une distinction ne puisse être faite selon les annexes dans lesquelles elles sont prévues. Cependant, dans l'interprétation des conditions elles-mêmes, compte pourra être tenu de la situation des populations des espèces. L'expression "petite quantité" pourra ainsi être appréciée en fonction de l'état de conservation de la population de l'espèce concernée.

12. Il s'ensuit de ce qui précède que dans le cas de cette dérogation, le Comité permanent de la Convention de Berne n'est pas appelé à vérifier le bien-fondé de la finalité de la dérogation, mais à s'assurer que les autres conditions sont remplies à savoir :

- a) La condition "dans des conditions strictement contrôlées" signifie que l'autorité qui accorde la dérogation doit posséder des moyens de contrôler son application, soit a priori (par exemple, système d'autorisations individuelles), soit a posteriori (par exemple, surveillance efficace sur le terrain), ou encore en combinant ces deux possibilités ;
- b) L'expression "sur une base sélective" pose des problèmes délicats d'interprétation en raison d'une contradiction apparente avec le libellé de l'article 9, étant donné qu'elle se prêterait au paradoxe suivant : les dérogations aux interdictions d'utiliser les moyens non sélectifs mentionnés à l'article 8 sont permises à la condition que la capture se fasse sur une base sélective. En réalité cette contradiction cesse d'exister si l'alinéa en question est interprété de façon suivante : le moyen non sélectif peut être utilisé mais aux fins de permettre la "prise, détention ou toute autre exploitation judicieuse" sur une base sélective. En d'autres termes, le moyen utilisé doit permettre, soit de garder des individus des espèces visées ("sélection") et de libérer sans dommage les individus des espèces non visées, soit d'éviter par des techniques appropriées que des individus des espèces visées soient capturées, soit encore une combinaison des deux. L'expression "exploitation judicieuse" indique que la dérogation doit conduire à une prise, détention ou mise à mort "raisonnable", c'est-à-dire contraire à tout "excès" qui nuirait au maintien dans des conditions favorables des populations concernées. L'expression "exploitation" vise toute activité autre que la prise et détention des individus d'une espèce, par exemple, la prise des oeufs, l'utilisation de duvet, la vente, le tourisme de vision, etc. Toutefois, cette exploitation doit être "judicieuse", c'est-à-dire être effectuée de façon raisonnable, sans excès pouvant nuire au maintien dans des conditions favorables des populations de l'espèce concernée.
- c) L'expression "dans une certaine mesure" indique que le moyen permis ne doit être général, mais limité dans l'espace et dans le temps ;
- d) L'expression "petites quantités" est plus difficile à interpréter, surtout si elle devait être considérée d'un point de vue global. En effet, comment définir "petites quantités" au niveau d'un pays ou d'une région ? En revanche, si elle doit s'appliquer à l'individu qui bénéficie de la dérogation, l'expression acquiert une signification dans la mesure où le moyen ne doit pas permettre des prélèvements massifs d'individus de l'espèce visée. Certes, du point de vue global, la phrase introductive du paragraphe 1 de l'article 9 est toujours applicable étant donné que le nombre de personnes bénéficiant de la dérogation ne doit pas être tel qu'il nuit "à la survie de la population concernée" .

13. Bien que sans relations avec l'article 8, le paragraphe 1 de l'article 9 pose un problème très délicat dans son troisième alinéa, à savoir l'interprétation de l'expression "autres intérêts publics prioritaires".

14. En effet, l'expérience des autres conventions internationales (Convention européenne des droits de l'Homme comprise) montre, pour la détermination de la portée de concepts analogues - par exemple "ordre public" - qu'il est extrêmement difficile, voire impossible, de donner une signification générale et a priori à de tels concepts.

15. En revanche, les organes chargés de l'interprétation de ces conventions ont le pouvoir de vérifier si un cas d'espèce est justifié par la motivation invoquée, dans notre cas "autre intérêt public prioritaire". Par conséquent, le Comité permanent de la Convention de Berne pourra, si la motivation en question devait être invoquée, juger, à la lumière de l'ensemble des dispositions de la Convention, le bien-fondé de la dérogation. En cas de difficultés, l'article 18 pourrait être appliqué.

16. Une autre question délicate posée par l'article 9, paragraphe 1, deuxième tiret, est l'interprétation de l'expression "dommages importants" (aux cultures, au bétail, aux forêts, aux pêcheries, aux eaux et aux autres formes de propriété). Si par dommage on entend un préjudice causé à une personne en raison de dégâts causés aux éléments de son patrimoine indiqués dans l'article 9, paragraphe 1, deuxième tiret, comme il semble légitime de le faire, l'adjectif "important" doit être évalué en fonction de l'intensité et de la durée de l'action dommageable, des liens directs ou indirects entre l'action et les résultats, des dimensions de la destruction ou de la détérioration causée. Bien entendu, l'adjectif "important" ne requiert pas que le dommage soit causé à une zone géographique étendue, l'élément patrimonial affecté pouvant dans certains cas ne porter que sur une zone géographique limitée (par exemple, une région), voire à une exploitation ou à une groupe d'exploitations déterminées. Toutefois, dans ce dernier cas, les mesures de dérogation doivent être proportionnelles, le fait qu'une exploitation isolée subisse un dommage ne justifiant pas la capture ou la mise à mort d'un espèce sur un territoire très étendu, à moins qu'il n'y ait raison de croire que les dommages pourraient s'étendre à d'autres zones.