

**WOLF (DIS)PROTECTION IN SPAIN:
EXCEPTIONS TO THE RULES IN THE BERN CONVENTION AND IN THE
HABITATS DIRECTIVE
AS A CONSERVATION AND MANAGEMENT TOOL**

**LA (DES)PROTECCIÓN DEL LOBO EN ESPAÑA:
EXCEPCIONES A LAS REGLAS EN EL CONVENIO DE BERNA Y EN LA
DIRECTIVA HABITATS
COMO INSTRUMENTO DE CONSERVACIÓN Y GESTIÓN**

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Date of Reception: May 11th 2021 / Date of Acceptance: June 14th 2021

ABSTRACT: The announcement that Spain will ban wolf hunting throughout its territory has been the trigger to reopen the debate on the wolf and its conservation and management status. In Europe, the unexpected success of wolf conservation policies has led to the wolf being considered a pest and a species detrimental to agriculture and livestock farming. This perception of large carnivores is present in and inspires the reservations and exceptions to the rules of the Bern Convention on the Conservation of European Wildlife and those of the Habitats Directive of the European Union, which provide for different protection statuses and management regimes. Exceptions to these rules allow some states to prohibit wolf hunting and others to allow it in order to avoid escalating conflicts with humans. Although this "biodiversity rule of law"

¹ I would like to thank the two reviewers for their helpful comments and suggestions and professor Sollund for her thorough review and advice. All errors are my own.

guarantees legal protection of the wolf, in practice it has been revealed that legal fragmentation and a serious lack of enforcement threaten the wolf. A study of the application of these exceptions in Spain and the case law of the Spanish courts and the Court of Justice of the European Union suggests that the legalisation of hunting cannot serve to remedy this compliance deficit when there are alternatives. These may include criminal or administrative prosecution of their violation.

RESUMEN: El anuncio realizado por el Ministerio de Transición Ecológica y Reto Demográfico de que España iba a prohibir la caza del lobo en todo su territorio ha sido el detonante para reabrir el debate sobre el lobo y su estado de conservación y gestión. En Europa, el inesperado éxito de las políticas de conservación del lobo ha hecho que sea considerado como una plaga o una especie perjudicial para la agricultura y la ganadería. Esta percepción de los depredadores está presente e inspira las reservas y excepciones a las reglas del Convenio de Berna relativo a la conservación de la vida silvestre y del medio natural en Europa y en la Directiva Hábitats de la Unión Europea que prevén distintos estados de protección y regímenes de gestión. Las excepciones a sus reglas permiten que algunos Estados prohíban la caza del lobo y que otros la permitan con el objetivo de evitar una escalada de los conflictos con el hombre. Aunque el 'estado de derecho de la biodiversidad' que componen estos instrumentos internacionales junto con las normas nacionales, garantiza al lobo una protección legal, en la práctica se ha puesto de manifiesto un grave déficit de cumplimiento que es una de las mayores amenazas para el lobo. El estudio de la aplicación de estas excepciones en España y de la jurisprudencia de los tribunales españoles y del Tribunal de Justicia de la Unión Europea, apuntan a que la legalización de la caza no puede servir para subsanar este déficit de cumplimiento cuando hay alternativas. Entre estas se encuentran la persecución penal o administrativa de la violación de las normas de protección.

RESUM: L'anunci realitzat pel Ministeri de Transició Ecològica i Repte Demogràfic que Espanya anava a prohibir la caça de el llop en tot el seu territori ha estat el detonant per reobrir el debat sobre el llop i el seu estat de conservació i gestió. A Europa, l'inesperat èxit de les polítiques de conservació de el llop ha fet que sigui considerat com una plaga o una espècie perjudicial per a l'agricultura i la ramaderia. Aquesta percepció dels depredadors és present i inspira les reserves i excepcions a les regles de l'Conveni de Berna relatiu a la conservació de la vida silvestre i de el medi natural

a Europa i la Directiva Hàbitats de la Unió Europea que preveuen diferents estats de protecció i règims de gestió. Les excepcions a les seves regles permeten que alguns Estats prohibeixin la caça de el llop i que altres la permetin amb l'objectiu d'evitar una escalada dels conflictes amb l'home. Tot i que el 'estat de dret de la biodiversitat' que componen aquests instruments internacionals juntament amb les normes nacionals, garanteix a el llop una protecció legal, en la pràctica s'ha posat de manifest un greu dèficit de compliment que és una de les majors amenaces per al llop. L'estudi de l'aplicació d'aquestes excepcions a Espanya i de la jurisprudència dels tribunals espanyols i de el Tribunal de Justícia de la Unió Europea, apunten que la legalització de la caça no pot servir per esmenar aquest dèficit de compliment quan hi ha alternatives. Entre aquestes es troben la persecució penal o administrativa de la violació de les normes de protecció.

KEYWORDS: Bern Convention - European Union - Habitats Directive - exceptions, reservations - wolves

PALABRAS CLAVE: Convenio de Berna - Unión Europea - Directiva Hábitats - excepciones - reservas - caza ilegal - crimen ambiental - lobos

PARAULES CLAU: Conveni de Berna - Unió Europea - Directiva Hàbitats - excepcions - reserves - caça il·legal - crim ambiental - llops

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1. INTRODUCTION.

Already in the 20th century, in many European countries, large carnivores such as the wolf, the bear and the lynx were on the verge of extinction or became extinct as a

consequence of active extermination policies or as a consequence of population controls that led to their weakening and extinction. Today the wolf has returned to Norway, Sweden, Finland, Germany, France, Switzerland and Hungary. The map of Europe, like that of Spain, shows a diverse situation in which the wolf recovers thanks to conservation and reintroduction policies and disperses in favourable conditions, despite the fact that the genetics of the species have been affected by population control policies carried out without scientific criteria² and based on political decisions.³ Its adaptive capacity and its interaction with humans have been the subject of multidisciplinary studies of great importance for the understanding of its conservation status and the problems it faces.⁴ As Salvatori and Linnel point out

“This recovery has revealed their extreme ecological adaptability (...). Wolves can basically survive anywhere they can find a source of food, and this can be of various forms, from wild animals, to livestock, to garbage. The only limiting factor seems to be human persecution. As a result the conservation of wolves is less of an ecological issue and more a social issue, strictly linked to the diverse cultural and socio-economic conditions of the areas they inhabit”.⁵

In the last third of the 20th century and well into the 21st century, the unexpected success of policies for the conservation of endangered species and the reintroduction of extinct species has led to them being considered a pest and a species detrimental to agriculture and livestock farming. This perception of large carnivores is present in and inspires the reservations and derogations of States to the Bern Convention on the Conservation of European Wildlife and Natural Habitats adopted by the Council of Europe in 1979 and the Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna (Habitats Directive) adopted by the European Union, which both distinguish different protection status and management regimes, with measures authorising lethal population control or hunting.⁶ Although their legal protection is guaranteed under this 'biodiversity rule of law', in practice there has been a shortfall in compliance with this patchwork of protection regimes and exceptions to the rules, with some countries prohibiting hunting and others allowing it in order to avoid escalating conflicts with humans.⁷ Moreover, in countries such as Spain or

² HINDRIKSON, 2016, pp. 24-25. See as well EPSTEIN, LÓPEZ-BAO, TROUWBORST, & CHAPRON, 2019, p. 961.

³ EPSTEIN, 2013, pp. 549-587, 586 and 587.

⁴ TROUWBORST & FLEURKE, 2019 and LUTE, CARTER, LÓPEZ-BAO, LINNELL, 2020.

⁵ SALVATORI, & LINNELL, 2005, p. 4.

⁶ TROUWBORST & FLEURKE, 2019

⁷ SOLLUND, 2017, and VON ESSEN & ALLEN, 2017.

Norway, there are overlapping regimes that protect the wolf according to its geographical distribution, depending on the protected areas where it is found, either in the Natura 2000 Network (European Union) or the Emerald Network (Council of Europe). The wolf is considered a hunting species whose exploitation is authorised or prohibited according to different criteria that are not exclusively scientific but also political and cultural. Thus, this regulatory and geographical mosaic obeys the different social perceptions of the wolf and their impact on the human environment.

Although the Bern Convention and the Habitats Directive work as communicating vessels, in the case of the Habitats Directive, its regulatory intensity is greater than that of the Bern Convention, as it has been transposed into the legal systems of the Member States and monitored by the EU institutions that ensure compliance by the Member States. However, this has not prevented European legislation from suffering from deficient application.⁸ Moreover, the various reservations and exceptions to the rules advocated by Council of Europe and EU states risk undermining the achievement of the objectives of this European conservation policy framework by subordinating them to their national interests at stake, while using them to legitimise their - in many cases deficient - national conservation policies. The application of these reservations, exceptions and derogations that modify the regulatory intensity of the Bern Convention or the Habitats Directive to the benefit of a greater margin of discretion of the States, have also given rise to an important casuistry on the measures that the State Parties can adopt for the management of wolf populations, ranging from the establishment of lethal control measures to zoning measures of their territories. This peculiar situation of the wolf in Europe has made Salvatori and Linnell state that these factors make it very difficult to carry out the commitment to comply with international regulations.

This international regulatory framework and its exceptions and its application in Spain is the subject of this study, which also considers its application in other European countries such as Norway, Sweden and Finland, where the measures that can be adopted to guarantee their 'favourable conservation status' are increasingly questioned.⁹ Wolf conservation and management policies through population control practices such as lethal control measures or the granting of hunting licences are

⁸ FRIES-TERSCH, SUNDSETH & BALLESTEROS, 2015, p. 37.

⁹ Thus LINNELL, TROUWBORST & FLEURKE consider "a key emerging question is to what extent international legislation provides constraints on the possibilities of individual countries adopting controversial measures such as lethal control" (2017, p. 130).

adopted because of their capacity to "defuse social conflicts" or "limit their recovery to levels below their biological potential",¹⁰ even though they do not meet the scientific criteria necessary to guarantee their favourable conservation status.¹¹ In the case of Norway,¹² Finland and Sweden, the high number of wolves authorised to be killed is due to political rather than scientific decisions taken by their democratic institutions,¹³ with the result that wolf conservation policy changes according to the political party in power, which may sometimes consider that the most appropriate policy is one that authorises wolf hunting to please part of the population.¹⁴ However, Finland and Sweden have had to modify their management models to take into account the Court of Justice of the European Union case law that obliges them to comply with requirements and conditions common to all EU Member States. Norway, which is only bound by the Bern Convention, has seen its management policies criticised by conservation groups because it applies culling measures in its territory that have been considered unsustainable and because it has shifted the burden of wolf conservation to Sweden, where the viable wolf populations are concentrated.¹⁵

The Spanish Ministry of Ecological Transition and Demographic Challenge has announced that it is going to ban wolf hunting throughout its territory,¹⁶ which has

¹⁰ TROUWBORST, 2018.

¹¹ Trouwborst et al. says that "The latest chapter in the Norwegian wolf saga began in summer 2016 when Parliament agreed on a new wolf policy. In the follow-up implementation of this national policy, the relevant Regional Management Authorities earmarked a total of 47 wolves—two-thirds of the national population— for culling in order to reduce sheep depredation, only to see the Climate and Environment Minister reverse this decision and reduce the number of wolves to be killed to 15" (TROUWBORST, FLEURKE & LINNELL, 2017, p. 156).

¹² SOLLUND, 2019.

¹³ TROUWBORST, FLEURKE & LINNELL, 2017, p. 156

¹⁴ Thus EPSTEIN considers Sweden, Finland, and Norway all made significant changes to their domestic wolf management policies to comply with the requirements of these instruments. This has ensured some base level of protection. As we have seen above, however, administrative implementation has varied wildly in the states as they bring similarly worded language into their national law. The reasons for this are differing political understandings of the terms used in and requirements of the legal instruments, as well as different levels of political opposition in the regions where wolves roam. Both supranational legal regimes have made efforts to compel the states to adopt their interpretations, sometimes more or less successfully." (EPSTEIN, 2014, p. 587).

¹⁵ KRANGE, SANDSTRÖM, TANGELAND & ERICSSON, 2017.

¹⁶ Ministerio para la Transición Ecológica y el Reto Demográfico, "El borrador de la Estrategia para la Conservación y Gestión del Lobo propone su inclusión en el listado de Protección Especial", 18 November 2020, <https://www.miteco.gob.es/es/prensa/ultimas-noticias/el-borrador-de-la-estrategia-para-la-conservaci%C3%B3n-y-gesti%C3%B3n-del-lobo-propone-su-inclusi%C3%B3n-en-el-listado-de-protecci%C3%B3n-especial-/tcm:30-517091> and Consulta pública previa sobre el "Proyecto de Orden Ministerial por la que se modifica el anexo del Real Decreto 139/2011, de 4 de febrero, para el desarrollo del Listado de Especies Silvestres en Régimen de Protección Especial y del Catálogo Español de Especies Amenazadas", disponible en https://www.miteco.gob.es/es/biodiversidad/participacion-publica/PPP_Mod_RD139_2011.aspx

triggered a heated debate on the wolf and its conservation and management status in Spain and its Autonomous Communities that has highlighted the antagonistic positions held by the conservationist groups that have promoted this measure and the various associations of farmers and hunters that oppose it.

The regulatory framework for the wolf in Spain is made up of international and European, state and regional regulations and shows how the exceptions to the conservation and management regulations require conditions for their application and compliance in order to guarantee a favourable conservation status, which, as European institutions have pointed out, is deficient. Proof of this is that the Ministry has certified the extinction of the wolf in its protected areas in Sierra Morena, in southern Spain.

In this scenario, the Ministry of Ecological Transition and Demographic Challenge of Spain has carried out a consultation on the future legislative reform that will prohibit wolf hunting throughout Spain as a consequence of its inclusion in the List of Wildlife Species under Special Protection Regime.¹⁷ This legal reform will be accompanied by the adoption of a Strategy of Conservation that is still in the drafting phase.¹⁸ I will refer to both proposals that will mark the changes in the state and regional wolf protection and management policies.

In this study I will also take into account the main role played by social agents as promoters of legislative changes and as necessary collaborators in the enforcement of the wolf regulatory framework. All of them, conservation organisations, individual and collective farmers and hunting associations have critically examined the aspects of wolf management that need to be improved. In some cases, the problems detected have led to the judicialisation of their possible solutions. Thus the courts have recognized the *locus standi* of NGOs, the obligation of the Autonomous Communities to establish wolf conservation plans or the obligation of the public administration to repair damage suffered by livestock farmers. This jurisprudence incorporates a new

¹⁷ Real Decreto 139/2011, de 4 de febrero, para el desarrollo del Listado de Especies Silvestres en Régimen de Protección Especial y del Catálogo Español de Especies Amenazadas, Ministerio de Medio Ambiente, y Medio Rural y Marino, *BOE*, núm. 46, 23 February 2011, Referencia: BOE-A-2011-3582.

¹⁸ Ministerio para la Transición Ecológica y el Reto Demográfico, "El borrador de la Estrategia para la Conservación y Gestión del Lobo propone su inclusión en el listado de Protección Especial", 18 November 2020, <https://www.miteco.gob.es/es/prensa/ultimas-noticias/el-borrador-de-la-estrategia-para-la-conservaci%C3%B3n-y-gesti%C3%B3n-del-lobo-propone-su-inclusi%C3%B3n-en-el-listado-de-protecci%C3%B3n-especial-/tcm:30-517091>

vision of nature conservation and responds to the advances made by the Court of Justice of the European Union, which has contributed to define the open concepts and the conditions to be fulfilled by the exceptions to the rules to protect the wolf. Of particular importance is that the Court of Justice of the European Union (CJEU) has ruled that legalisation of hunting cannot serve to remedy the shortfall in compliance with protection rules, when there are alternatives such as criminal or administrative prosecution of their violation.

2. METHODOLOGY

This article has been developed in the framework of the research project directed by Ragnhild Sollund CRIMEANTHROP, Criminal justice, wildlife conservation and animal rights in the Anthropocene.¹⁹ My aim is to study whether the international and European normative instruments and their regime of exceptions allow the (dis)protection of the wolf, focusing on the case of Spain, but also taking into account its application in other countries such as Norway, Sweden and Finland. To do so, I will use an international legal perspective that also requires multidisciplinary approaches. The examination of the exceptions invoked by these countries will show how they interpret and apply them. This task requires striking a balance between the spirit and purpose of the rule and national interests. These interests, far from being permanent, have undergone an evolution that reflects political, social, cultural, economic and environmental protection conflicts about the wolf.

I will compare the exceptions to the Bern Convention with the exceptions in European legislation and, in particular, with the Habitats Directive.²⁰ In the case of Spain, the Habitats Directive has finally prevailed in some aspects, leaving the reservation made to the Convention inapplicable.²¹ However, Spain keeps the common derogations

¹⁹ Funded by the Research Council Norway, project number 289285. As stated in the presentation of its website, CRIMEANTHROP explores the regulation, rationale behind and enforcement of wildlife conservation, the normative and socio-legal messages of this enforcement, and their implications for wildlife conservation and individual animal welfare), at <https://www.jus.uio.no/ikrs/english/research/projects/crimeanthrop/>

²⁰ As Epstein says, “[t]he EU’s Habitats Directive partially implements the Bern Convention within the EU; the influence of the Convention on the Directive is obvious in its language and structure. But as the EU’s authority has grown, the Habitats Directive has also influenced the development, interpretation, and administration of the Bern Convention”, EPSTEIN, 2014.

²¹ Judgment of the Criminal Court of Avila of June 4, 2020, Roj: SJP 18/2020 - ECLI:ES:JP:2020:18

allowing different conservation regimes for the wolf according to a geographical division of the country that distinguishes the areas north and south of the Douro River.

I will also analyse the context - biological, economic and social - in which this legislation is applied in Spain. To do so, I will review studies that show how the wolf is still rejected by many in Spain but also in Germany,²² Finland,²³ Sweden²⁴ and Norway²⁵. This rejection has contributed to an increase in illegal hunting as reivindication and resistance²⁶ or even as a retaliatory measure against authorities and institutions²⁷. These arguments are shared by farmers and hunters in Norway, Sweden and Finland and now, as well, by Spain.²⁸

Illegal hunting is nowadays the main threat, as the reports on its conservation status point out,²⁹ despite shortage of data.³⁰ This issue can be seen not only from the point of view of the people's rejection of the wolf population's rapid growth or its return to areas from which it had disappeared, but also as a consequence of the lack of prosecution of illegal wolf hunting by the competent authorities and some practices of active toleration and malfeasance associated with management, as detected in Spain. Therefore, I will analyse the relevant Spanish and European jurisprudence on wolf conservation.

²² In the case of Germany, see BRUNS, WALTERT, & KHOROZYAN, 2020 and KÖCK, 2019

²³ In Finland, Hiedanpää and Pellikka concluded that "The institutional setup of wolf protection has been subject to constant perturbations. Order is not given by prevailing institutions; rather, the order emerges as a consequence of various transactions and despite the institutional arrangements that are already in place. The pressure posed by a wolf-critical civil society has pushed governance actors to take piecemeal steps in the direction of the critics' concerns: the yard wolf decree and the admittance by the administration that it was an error to let the wolves expand into SW Finland without first considering the tolerance capacity of citizens", HIEDANPÄÄ, & PELLIKKA, 2017, p. 278.

²⁴ VON ESSEN, HANSEN, KÄLLSTRÖM, PETERSON & PETERSON, 2015.

²⁵ SOLLUND, 2017 & 2020.

²⁶ Skogen, Von Essen & Krange consider that "unwillingness to report is often part of an oppositional stance related not only to wildlife management and conservation, but to contemporary social change in rural areas and perceived societal power relations. It is unlikely that reluctance to report is driven by frustration over inefficient official enforcement. While a political dimension is not always articulated, overlooking it may stoke conflicts and fortify a perception of unjust power relations", SKOGEN, VON ESSEN & KRANGE, 2021, and SKOGEN & KRANGE, 2003.

²⁷ BRUNS, WALTERT & KHOROZYAN, 2020.

²⁸ See the contributions to public consultation made by the the Plataform for the Defense of the Wolf Management, <https://www.club-caza.com/actualidad/archivos/Manifiesto%20en%20defensa%20de%20la%20gesti%C3%B3n%20del%20lobo%20PDF.pdf>.

²⁹ SALVATORI & LINNÉL, 2005. See as well PETERSON, VON ESSEN, HANSEN, & PETERSON, 2019.

³⁰ As is said "Because poaching is illegal, there is strong incentive for poachers to conceal their activities, and consequently, little data on the effects of poaching on population dynamics are available", LIBERG, CHAPRON, WABAKKEN, PEDERSEN, HOBBS, SAND, 2012, p. 910.

For the analysis of these issues, I have compiled and analysed the most relevant reports and studies on large carnivores in Europe, as well as Spanish and European Court of Justice case law. Of particular relevance are the biannual reports of the States Parties on the implementation of the Bern Convention, which list the exceptions to the rules allowing hunting as a tool for carnivore management, as well as the restrictions to the exceptions, considered necessary to avoid inconsistencies with the conservation objectives and obligations of the Bern Convention, as well as with those of the Habitats Directive. I have also reviewed the Spanish jurisprudence invoking the Bern Convention to identify the central issues and problems concerning wolf management and hunting that are dealt with in the administrative and criminal jurisdictions, using the open access database of the General Council of the Judiciary -CENDOJ-.³¹

Regarding the consultation and proposals made by the Ministry of Ecological Transition, I have reviewed the statements of the interested parties, both from nature conservation associations and Spanish hunting associations, in particular those of the Asociación para la Conservación y Estudio del Lobo (ASCEL - Association for the Conservation and Study of the Wolf³²) and the Plataforma for the Defense of the Wolf Management.³³ I have also interviewed several representatives of NGOs, SEPRONA and agents of the environmental administration. I have asked the Ministry of Ecological Transition for the drafts of the future ministerial order and the future Strategy and the reply I have received indicates that they are at an early stage of preparation and therefore these drafts cannot be disseminated. Therefore, I will present a legal and criminological analysis of these instruments in future. In this paper, I will only analyse the consultation and the legal proposal and strategy as part of the social and environmental context of the wolf in Spain.

3. THE LEGAL PROTECTION OF THE WOLF IN SPAIN: INTERNATIONAL AND EUROPEAN REGULATORY INSTRUMENTS

³¹ CENDOJ stands for Center of Documentation of the Judiciary Power in Spain, available at <https://www.poderjudicial.es/search/indexAN.jsp>

³² See <https://loboiberico.com/ascel/>

³³ Plataforma en Defensa de la Gestión del Lobo 'Ganader@ Viv@' which brings together 30 associations including Asociación de Jóvenes Agricultores (ASAJA Nacional); Asociación Agraria de Galicia (ASAGA); Unión de Uniones de Agricultores y Ganaderos; the Union of Cattle Breeders, Farmers and Foresters of the Community of Madrid (UGAMA); the Interprofessional Agricultural Association for Cattle and Sheep (Interovic); the Spanish Association of Beef Cattle Producers (Asoprovac), and the Union of Breeders of Lidia Bulls (UCTL).

Spain is the EU member state where the largest number of large carnivores coexists with humans³⁴ despite the increasing fragmentation of ecosystems and the expansion of agriculture and extensive livestock farming in wolf territories. This poses important challenges from the point of view of its conservation in the light of European and international normative instruments which, beyond being already part of the Spanish legal system,³⁵ also require that their application guarantees a favourable conservation status, which is difficult to achieve given the current wolf conservation and management policies.

Interactions between the Bern Convention and EU legislation have allowed further development of the legal framework for large carnivore conservation in Europe, where management adapted to national circumstances is essential to protect them. The Bern Convention and the soft law instruments adopted by its Standing Committee play the role of a *lex generalis* which is developed by the *lex specialis* adopted by the European Union and its Member States. Thus, the implementation of the Bern Convention by the 27 EU Member States and their institutions has followed the soft law recommendations adopted by the Bern Committees and turned them into binding rules for them in the field of European large carnivore conservation management. In terms of monitoring compliance with this legal framework, the Bern Convention institutions do not exercise their functions in cases where the EU institutions have already done so.³⁶

3.1. The Bern Convention: Reservations and Exceptions to the rules on wolves and other European large carnivores

Like most multilateral environmental agreements (MEAs), the Bern Convention is designed to be incorporated into national law and applied at national or sub-national level, depending on the form of political-territorial organisation of the State Party. Most of the provisions of the Bern Convention grant a wide margin of discretion to the states parties as to its interpretation and application, as well as a framework for differentiation according to their national interests and particular circumstances. In practice,

³⁴ ALONSO IGLESIAS, HEVIA BARCON & MARTÍNEZ LAGO, 2021.

³⁵ For an extensive study of the Spanish legislation transposing international instruments, GARCÍA URETA, 2021.

³⁶ Thus, Epstein reminds that "In 2012, the Bureau of the Bern Convention decided to avoid reviewing complaints pertaining to matters that are the subject of EU infringement proceedings", EPSTEIN, 2014, p. 163.

however, reservations and exceptions produce a fragmented legal landscape in which strict application of the rules coexist with more flexible and tolerant ones that may result in practices that are legal in some countries and not in others, where they may be prosecuted as environmental crimes or administrative offences. The circumstances of each State Party to the Bern Convention may justify different enforcement measures, but this undermines the original objectives of the Bern Convention, which is the conservation of nature in Europe. To prevent abuse in the use of exceptions, some MEAs incorporate mechanisms for their control. As will be seen below, in the case of the Bern Convention, its Standing Committee performs a notarial function of the information that States Parties submit on how they apply the reservations made in their instruments of ratification and the exceptions under Articles 8 and 9 of the Convention. However, as is the case in Spain, and due to the limited resources available to the Bern Convention within the Council of Europe's institutional system, the reports on the maintenance of the species in Europe need urgent updating.

3.1.a. Reservations and exceptions to the Bern Convention rules on wolves and other European large carnivores

As the Bern Convention is a standard-setting instrument intended to be incorporated into national legislation, the possibility to enter reservations³⁷ gives States a wide margin of discretion that will facilitate acceptance of the Convention. Reservations, such as those relating to particular species like the wolf or the bear, can be classified as "reservations made under clauses expressly authorising the exclusion or modification of certain provisions of a treaty".³⁸ In the case of the Bern Convention, the list of reservations for wolves provides for a different protection status according to Appendix II - "strictly protected species of fauna", and Appendix III - "protected species of fauna" -of the Convention. These reservations and exemptions are, as Trouwborst

³⁷ A reservation to a treaty, as defined in the Vienna Convention on the Law of Treaties, "is a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". Reservations to the rules formulated by States Parties to an international convention, while enabling the ratification of treaties by as many States as possible, reveal the different perceptions of the object of the agreement and challenge the ideal vision of a general or common interest, or even the concept of the common heritage of mankind, in this case of a natural heritage, that of Europe and its countries.

³⁸ See the Guide to Practice on Reservations to Treaties adopted by the International Law Commission at its sixty-second session (2010). *A/CN.4/639 and Add. 1*, p. 20.

and Fleurke pointed out, a licence to legally kill these species in a wide variety of cases in the different States Parties to the Convention.³⁹

The Article 9 of the Bern Convention “allows exceptions to the provisions of a number of articles of the Bern 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”.

As established by the Bern Convention Standing Committee,⁴⁰ “[t]he 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. 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”.⁴¹

As the Bern Convention Standing Committee has highlighted “[t]hese two conditions are mandatory and cumulative, but the first raises a difficult problem of interpretation” because “[t]he 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”.⁴² But like the Standing Committee clearly denounces, it “*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*”.⁴³

If the two general conditions are fulfilled, derogations are permitted on the specific non-cumulative grounds listed exhaustively in Article 9:

- i) for the protection of flora and fauna;
- ii) to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;

³⁹ TROUWBORST & FLEURKE, 2017.

⁴⁰ See Standing Committee, Revised Resolution 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, adopted on 2 December 2011, <https://rm.coe.int/168074659c>

⁴¹ Ibidem.

⁴² Revised Resolution 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, adopted on 2 December 2011, <https://rm.coe.int/168074659c>

⁴³ Ibidem.

- 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.

So, the conditions and restrictions seeking to limit States discretionary power are incorporated in the reporting models that they must use to submit the information and data on compliance.⁴⁴ Despite these restrictions,⁴⁵ the leeway granted to the States leaves room for an extensive use of exceptions, since, as the Standing Committee points out, they:

- 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”.⁴⁶

Reporting obligations under Art. 9 cover:

- n° of specimens involved,
- n° of licences,
- reasons for issuing licences,
- methods of capture,
- authorised actions
- and impact on populations.

In practice, an abusive use of these reservations and exceptions by States Parties to the Bern Convention could compromise the favourable conservation status of large carnivores due to the ambiguity of many of the concepts and conditions that make up the management control framework for species and their habitats, such as favourable conservation status. To limit the indeterminacy and ambiguity of the concepts and standards of protection to be achieved, the Standing Committee of the Bern

⁴⁴ Ibidem.

⁴⁵ The Standing Committee also resolved “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;
- 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.

⁴⁶ Paragraph 11, Revised Resolution 2 (1993).

Convention has adopted soft law instruments, such as recommendations and guidelines, which have limited the scope of reservations and exceptions by setting out the conditions and requirements to be met in order to comply with the Bern Convention. However, as I will discuss in the following sections, while the Bern Convention has achieved only limited results in getting its States Parties to adopt common and basic standards of protection, in the EU significant progress has been made in limiting the discretion of Member States thanks to the case law of the CJEU.

The interpretation by national courts of the reservations to the Bern Convention and of the exceptions to Articles 8 and 9 supplementing it shows disparities in practice between states such as Sweden, Norway, Finland and Spain, and even within states with decentralised territorial governance such as Spain, Germany and Belgium. The CJEU has set limits and harmonised the differences in interpretation between the EU Member States that are party to the Bern Convention.⁴⁷ The limited capacities of the Bern Convention to enforce a basic common framework for nature conservation in Europe have become a cause for justified criticism from civil society, which has seen many states use their membership of the Convention to justify the validity and legitimacy of their conservation policies. For example, Sollund considers that "Norway's adherence to the Bern Convention is paradoxical, as it legitimises the state's extinction policy and offers no real protection for endangered species".⁴⁸ Her arguments have been used by the Norwegian NGO NOAH to call for clarification of the role of the Convention's bodies in monitoring compliance with its obligations.⁴⁹ In the same vein, Fauchald et al. have pointed out that "the normative pathway is important mainly as a support for domestic policies that correspond to existing national norms and discourses". For this reason these authors consider "that a high degree of regulatory hardness contributes to increase the level and consistency of implementation."⁵⁰ However, the remedies of the Bern Convention, created outside the

⁴⁷ A recent example of this is the ruling of the CJEU on a preliminary ruling by the French Council of State on the compatibility of the use of non-selective hunting techniques such as glue. In both France and Spain, national courts - including the Supreme Court - had allowed and justified the use of these traditional hunting practices for fringillids as being in line with the Bern Convention or had considered that the nature of the offences to which they would give rise would be administrative rather than criminal. Following the CJEU's ruling, EU Member States will no longer be able to continue to do so, although other States party to the Bern Convention may continue.

⁴⁸ See <https://www.dagsavisen.no/nyemeninger/ikke-lat-som-om-de-er-beskyttet-1.1274268>

⁴⁹ NOAH, Request for clarifications, 22 May 2019, <https://rm.coe.int/letter-from-noah-norway-request-for-clarifications-22-may-2019/16809cdf0b>

⁵⁰ FAUCHALD, GULBRANDSEN, & ZACHRISSON, 2014, p. 250.

treaty at the proposal of the Standing Committee, can only lead to an amicable solution to the problem.

The limited capacity of the Bern Convention also determines a division in the protection of wolves in its member states and in the EU member states where they are to receive greater protection, as will be discussed below.

3.1.b. The application of the Bern Convention in Spain

Spain has been a party to the Bern Convention since 1986, when it also became a Member State of the European Union. Its instrument of ratification includes an exclusion reservation regarding the species listed in Appendix II,⁵¹ so that the wolf, instead of being considered as a species of fauna subject to strict protection, is considered only as a protected species of fauna, among those listed in Appendix III in combination with Annex V of the Habitats Directive. This reservation responds to the different status of conservation of the wolf in the north and in the south of Spain. Thus the wolf is subject to different protection depending on whether it is found to the north or south of the Douro River. Wolves south of the Douro River enjoy strict protection as required by the scientific data. Wolves north of the Douro River are protected just under Appendix III, although this protection is unequal and fragmented, as the Autonomous Communities have established their own wolf conservation and management policies according to their own management competences. The resulting regulatory puzzle can only be understood from the point of view of the flexible regulatory framework of the Bern Convention, but it is more questionable from the point of view of European legislation, especially since the jurisprudence of the CJEU has been limiting the margins provided for the interpretation of the obligations and open concepts, in particular, the concept of favourable status of conservation.

In the case of Spain, the reporting obligations to the bodies of the Convention on the state of implementation and compliance with its provisions and exceptions include the

⁵¹ In this reserve, in paragraph 2 it is stated that "The following species of fauna are reserved: "canis lupus", "sturnus unicolor", "lacerta lepida" and "vipera latasti", "carduelis-carduelis", "carduelis chloris", "carduelis cannabina" and "serinus serinus", included in Annex II as "strictly protected species of fauna", which will be considered by Spain as "protected species of fauna", enjoying the protection regime foreseen in the Convention for the species included in Annex III. Instrument of ratification of the Convention on the Conservation of European Wildlife and Natural Habitats, done at Bern on 19 September 1979, *BOE No. 235*, 1 October 1986, pp. 33547 to 33555.

measures adopted by the Autonomous Communities in which the species are under different protection status, as is the case of the wolf. The last report submitted by Spain in 2011-2012, using the model established by the Standing Committee, shows different applications of derogations and exceptions by the Autonomous Communities, for which Spain is always ultimately responsible as a subject of international law. Since then there is gap in which Spain has failed to comply with its obligations to report on wolf management to the Bern Convention authorities. From 2015 on, the European Commission assumed compliance with this obligation for all its Member States through its reporting tool Habides+ in its platform EIONET.⁵² The information reported by Spain is limited and not as detailed as it was when complying with the Bern guidelines. Information submitted in recent years by Spain shows that the conservation status of the wolf is no longer favourable.⁵³

Thus, in this last period reported 2011-2012, the Autonomous Communities north of the river Douro authorised the killing of wolves with minimal impact on the conservation status of the species in its range (Castilla y León). The authorisation for this lethal control provided for in Article 6 a to f of the Bern Convention does not specify the exceptions relating to the use of means of capture and killing in Appendix IV of the Convention as is also the case in Galicia, using a general reference to Article 8 in both cases. The reason for issuing hunting licences was based on Article 9 on the prevention of serious damage to crops, livestock, forests, fisheries, water and other forms of property.⁵⁴ In other cases, the Autonomous Community authorised the legal killing on the grounds of Article 9 "deliberate damage or destruction of breeding or resting places", thus, the legal killing took place in two consecutive years -in 2011 and 2012- and had a population impact of 39% and 40.5% respectively (Cantabria).⁵⁵ In another Autonomous Community, the individuals were captured and kept for research, education, repopulation, reintroduction or necessary breeding, in accordance with the

⁵² Now the reporting obligations of the EU member states are complied with the on-line tool Habides+. It helps to report "on exceptions granted under Article 9 of the Bern Convention and thus improve the streamlining of this reporting procedure with the reporting on derogations under Article 16 of the Habitats and Article 9 of the Birds Directives of the EU", See <https://www.eionet.europa.eu/> The European Commission sent a note to the institutions of the Council of Europe explaining the functioning of this platform., see <https://rm.coe.int/joint-note-from-the-secretariat-of-the-bern-convention-and-dg-environm/16808e84c8>

⁵³ GARCIA URETA, 2019.

⁵⁴ Spanish Biennial Report 2011-2012, p. 27.

⁵⁵ Spanish Biennial Report 2011-2012, p. 26.

grounds foreseen in Article 9. In this case, it is noted that the number of individuals captured had no appreciable effect on the environment (Galicia).⁵⁶

3.1. c. Is a future reform of the Bern Convention to take account of scientific criteria in wolf conservation and management policies necessary?

The Articles and Appendices of the Bern Convention can be amended through different procedures at the proposal of a State Party or the Council of Ministers of the Council of Europe. In the case of amendments to substantive provisions a qualified majority of its Standing Committee is required, which then have to be accepted unanimously by the Parties. New provisions or a new appendix have not been introduced so far, which is why the third recommended route is that of soft law instruments that can be adopted by the Standing Committee. Therefore, it would be advisable that the Standing Committee of the Bern Convention echoe the new jurisprudence of the CJEU, requesting a report on the conservation status of the wolf and adopting one of its non-binding instruments such as a Resolution or a Recommendation. These soft law instruments, in spite of their limited legal nature, convey normative expectations of compliance in the interpretation and application of the Convention. Such a recommendation would be the only way to influence States Parties to the Bern Convention that are not EU Member States, such as Norway, which could in any case, by virtue of their sovereignty, maintain their wolf management and control policies aiming at the minimum number necessary for conservation.⁵⁷

From past practice, it would be difficult for states parties- such as Norway - to retroactively submit a reservation against the wolf because this would require the acceptance of the other states parties, and in particular the EU. On the other hand, as Y. Eppstein says,

“Since the lists of species and habitats protected through the Emerald Network were enacted through resolutions rather than amendment, they can be changed without the use of the amendment process. These changes will ‘harmonize’ protection under the Bern Convention with that of the Habitats Directive, again

⁵⁶ Spanish Biennial Report 2011-2012, p. 35. The same reason was used to authorise the possession of one individual in Valencia, see p. 42.

⁵⁷ SOLLUND, 2019.

altering the implementation of the Convention according to the wishes of the European Union".⁵⁸

In any of these cases, civil society associations, conservationists and hunters could present their positions on the issue. Dialogue within an institutional framework is the only way to continue the search for solutions. However, this issue will have to be the subject of future research.

3.2. The Habitats Directive

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) is one of the main pieces of EU legislation adopted to comply with the Bern Convention, since the European Union and its Member States are parties.⁵⁹ One of its major achievements has been to attain a high level of harmonisation of Member States' national legislation despite the different perceptions that remain among EU Member States. Its Articles 12 to 16⁶⁰ follow the regulatory model established by Articles 6 to 9 of the Bern Convention.

⁵⁸ EPSTEIN, 2014, pp. 171-172.

⁵⁹ The European Union and its Member States are parties to the Bern Convention under the formula of a mixed agreement, which implies that the Member States negotiated the Convention together with the European institutions and retained their right to preserve their national interests in relation to the occurrence and management of species on their territory.

⁶⁰ Of particular importance is Article 16 which states that: 1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.

3. The reports shall specify:

(a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used;

(b) the means, devices or methods authorized for the capture or killing of animal species and the reasons for their use;

(c) the circumstances of when and where such derogations are granted;

3.2.a. The Habitats Directive and wolf protection in Europe

The Habitats Directive enables the adaptation of its obligations to the national circumstances of EU Member States by allowing derogations from the common regulatory framework. Thus, the wolf is among the "species of Community interest" to be protected but can also be subject to the derogations provided for in Articles 12 to 16 of the Directive. Consequently wolf protection within the EU is carried out through a patchwork of legal regimes transposing the basic wolf conservation obligations and, as already mentioned, overlapping with the rules of the Bern Convention, resulting in "a very complex and fragmented legal landscape" as Trouwborst and Fleurke criticise.⁶¹ This results in that, when a wolf crosses European borders its protection regime changes so that it can be hunted in Poland but not in Hungary. In the case of Spain, it can happen if a wolf crosses the Douro River and would therefore be subject to different regimes of (dis)protection: a wolf can be hunted in Galicia, Asturias, Cantabria but not in Castilla La Mancha or Andalusia, thus dividing the north and south of Spain.

Annex II of the Habitats Directive classifies the wolf as a "priority species" and as one of the "species of Community interest" for which "Special Areas of Conservation" (SACs) must be designated and protected, as part of the Natura 2000 Network.⁶² Under the derogations, however, the Annex II regime does not apply to Finland, Estonia, Greece, Latvia, Lithuania and Spain, north of the River Douro. South of the Douro River, in Sierra Morena, Annex IV applies, however, the Ministry of Ecological Transition and Demographic Challenge (MITECO) has confirmed the extinction of the wolf in this territory, which will lead us to a final reflection on the situation of the wolf and its (dis)protection in this area of Spain.

On the other hand, as also occurs in the case of the Bern Convention, the Habitats Directive offers the possibility to Member States to introduce changes in the protection

(d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry out the task;

(e) the supervisory measures used and the results obtained.

⁶¹ TROUWBORST & FLEURKE, 2017, p. 238.

⁶² In the case of 'generic species', the protection regime is the narrower in scope and more flexible one provided for in Annex V of the Directive. Annex IV of the Directive sets out which species are strictly protected.

regime with the prior authorisation of the European Commission. The European Commission, as the guardian of European legislation, sometimes does not allow changes that would lead to a reduction in protection. This can now be affirmed as an expression of the principle of non-regression that is consolidated in European environmental law. In the case of Spain, the European Commission and the Council rejected proposals to authorise hunting south of the Douro River when the dispersion of the northern population began to be significant. However, the proposal being worked on by the MITECO would mean extending protection, even if exceptions allowing lethal control are introduced as a bargaining chip in the negotiations with Autonomous Communities north of the Douro river and the farmers and hunters associations, in order to reach a wider support for the legislative reform.

The derogations in Articles 12 to 16 of the Habitats Directive multiply the possibilities for Member States' state and sub-state authorities to choose the means to ensure different levels of protection. These derogations also allows them to choose the means of population control through lethal control and hunting licences. However, in the future, the recent case law of the CJEU will make it necessary to comply more scrupulously with the requirements foreseen in these articles, as discussed below.

3.2.b. The case law of the Spanish courts in application of the Bern Convention and the Habitats Directive

Both the Bern Convention and the Habitats Directive have been the normative references of an interesting case law, which invoke them jointly or separately to resolve conservation problems that the affected parties –conservationist associations and associations of farmers- bring before the domestic courts when they consider that the legislation is not adequately applied or does not protect their rights. Thus, the judgments of the administrative jurisdiction in which the Bern Convention or the Habitats Directive are cited are an example of judicialisation of the differences regarding wolf management that has confronted, on the one hand, the central and regional governments and, on the other hand, conservationist organisations such as Ecologistas en Acción, Asociación para la Conservación y Estudio del Lobo (ASCEL) and also stockbreeders' associations and individual stockbreeders. It is necessary to highlight both positive and negative aspects of this jurisprudence.

Of particular importance is the jurisprudence concerning the conditions that the conservation and programmes of the Autonomous Communities must meet in order to comply with the objective of achieving a favourable conservation status. Also noteworthy are the multiple rulings to demand compensation for livestock farmers who have suffered damage due to wolf attacks, which have been the subject of a Supreme Court ruling that unifies them.⁶³

In the first case, administrative jurisprudence has recognised the demands of NGOs for better compliance with the Habitats Directive through improved wolf management, which is the responsibility of the Autonomous Communities. Based on the distribution of competences between the State and the Autonomous Communities, the state legislation, Law 42/2007 of 13 December, on Natural Heritage and Biodiversity, is limited to transposing Directive 92/43/EEC into national law. Its art. 54 "is limited to establish that the management of the exploitation of Annex VI species, among which the wolf is included, is compatible in its maintenance with a favourable conservation status." The achievement of this ultimate objective is the responsibility of the Autonomous Communities, which have not always attained it,⁶⁴ which is the reason for the suspension and annulment of some of their management plans after the NGO ASCEL brought them before the courts.⁶⁵ Moreover, this jurisprudence also addressed the illegal hunting of wolves that is frequent in the course of authorised hunts of other species, albeit to legalise practices such as the shooting of wolves during wild boar hunts.

⁶³ Without being able to elaborate further on these aspects, it should be noted that in Spain, the compensation granted to NGOs is invested in the adoption of wolf management plans. The NGO sector also calls for the compensation received by farmers to be used for a more sustainable management of their extensive farms.

⁶⁴ In its contribution to the first consultation of the MITECO, ASCEL denounced the incompatibility of the status of protected species with all the regional rules allowing the wolf to be killed by hunting and/or controls (management plan of Galicia, management plan of Asturias, management plan of Cantabria, management plan of Álava, hunting and control authorisations of Castilla y León, control programmes of Asturias, extraction quotas of Cantabria, hunting and control authorisations of La Rioja), see ASCEL, "Sugerencias de ASCEL para la participación en la consulta pública del Ministerio de cara a la modificación del estatus legal del lobo en España", 13/02/2021. <https://loboiberico.com/2021/02/13/sugerencia-de-alegaciones-de-ascel-para-la-consulta-publica-del-ministerio-de-cara-a-la-modificacion-del-estatus-legal-del-lobo-en-espana/>

⁶⁵ See the Judgment of the Contentious Administrative Chamber of the High Court of Justice of Castilla y León of 12 December 2019, which annulled the resolution of the Directorate General of the Natural Environment of the Regional Ministry of Development and Environment, which approved the Regional Wolf Management Plan in the hunting grounds located north of the Duero for the 2016-2017, 2017-2018 and 2018-2019 seasons.

In the second case, it should be noted that the Supreme Court (SC) has established case law declaring the right of a farmer to receive individual compensation in a claim for pecuniary liability for damage caused to his livestock farm by wolf attacks.⁶⁶ The SC has recognised the financial liability of the defendant Administration. This is a different case of exception to the rule, since the general regime contained in article 54.6 of Law 42/2007, provides that public administrations cannot be held liable for damage caused by species of wild fauna.⁶⁷

In these cases, farmers claimed their right to defend themselves and their livestock from the wolves and to kill them in this area where wolves are strictly protected. They argued that they were unable to defend themselves against wolf attacks because hunting was prohibited.⁶⁸ However, the Spanish Supreme Court concluded by pointing out: "... when dealing with animal species that enjoy special protection, due to the concurrence of a relevant public interest such as the environmental interest for the conservation and protection of the species, this means that private individuals cannot adopt their own measures, as it is up to the Administration to adopt the most appropriate measures for the conservation of the 'canis lupus' in that area. Therefore, the general regime of patrimonial liability foreseen in article 139 of Law 30/1992 cannot be excluded".⁶⁹ Alternatives to control the wolf are possible, as has been demonstrated by the initiatives taken by farmers who, by recovering traditional practices, have returned to the use of mastiffs to keep the wolf away from their herds. Faced with associations of farmers and hunters who reject formulas to achieve coexistence with

⁶⁶ See Judgment STS 3819/2019 of the Supreme Court of 2 December 2019.

⁶⁷ CASADO, 2020.

⁶⁸ Thus, in its Judgment, the Supreme Court has stated that: "This concern for the conservation and protection of the aforementioned predatory mammal translates, by express mandate of the Habitats Directive, article 12, into a prohibition of any form of deliberate capture or killing, which includes the deliberate disturbance of such species, especially during the periods of reproduction, breeding, hibernation and reproduction. Similarly, article 52.3 of the aforementioned Law 42/2007, with regard to the protection of wild native species, prohibits the intentional killing, harming, or disturbing of wild animals, including live capture, destruction and damage. And article 53 of the same Law, in relation to wild species under special protection, prohibits any action done with the purpose of killing, capturing, pursuing or disturbing them, as well as the destruction or deterioration of their nests, vivariums and wintering or resting breeding areas. Specifically in relation to hunting, article 62 of the aforementioned Law 42/2007 stipulates that under no circumstances may hunting affect species prohibited by the European Union. As mentioned, the wolf populations located south of the river Duero, which enjoy the specific and intense protection directly granted by the aforementioned Community regulation and Spanish law, cannot be the object of hunting activity, unlike what happens with the populations of this predatory mammal located north of the aforementioned river". (...)See Second ground of law, p. 5, of the STS 367/2020 of the Sala Contencioso-Administrativo (Contentious-Administrative Chamber) of 11 February 2020, - ECLI:ES:TS:2020:367

⁶⁹ Ibidem.

the wolf, it is necessary to value the practices of those farmers who are committed to it, with the help of a more effective MITECO. The future reform of MITECO will introduce an additional payment for extensive grazing in areas of coexistence with large carnivores.

3.2. c. Recent case law of the Court of Justice of the European Union

In recent years, the CJEU has ruled on wolf population control policies in Finland, Sweden and Romania, restrictively interpreting the exceptions foreseen in the Habitats Directive and establishing the basic conditions that must be fulfilled for the concept of wolf conservation status to be considered favourable. This recent jurisprudence limits the wide margin of appreciation of the Member States and establishes criteria to be considered in all Member States, and will therefore also influence the protection system of the Bern Convention. These general conditions to be met by exceptions are summarised in the answer given by the CJEU to the question referred for a preliminary ruling by a Finnish court - and it is for the court to check whether they are met in each case:

- it must be duly established that the objective pursued by such exceptions cannot be achieved by another satisfactory solution, since the mere existence of an unlawful activity or the difficulties encountered in monitoring the latter cannot constitute a sufficient element in that regard;
- it must be ensured that the derogations are not detrimental to the maintenance, in a favourable conservation status, of the populations of the species concerned in their natural range;
- the derogations must be subject to an assessment of the conservation status of the populations of the species concerned, as well as of the impact which the derogation envisaged may have on that conservation status, in the territory of that Member State or, where appropriate, in the biogeographical region concerned where the borders of that Member State include several biogeographical regions or, where the natural range of the species so requires, and, as far as possible, on a transboundary basis; and
- all the requirements relating to the selective approach and the limited form of the taking of a limited and specified number of certain specimens of the species listed in Annex IV to that directive must be complied with under conditions of strict control, compliance with which must be demonstrated having regard, in particular, to the level of the population, its conservation status and its biological characteristics.⁷⁰

⁷⁰ Finland was held to be in breach of its obligations under Articles 12(1) and 16(1)(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

Particular attention should be paid to the position adopted by the CJEU with regard to management of hunting aimed at combating poaching. The licensed killing of wolf populations has been a common practice in Norway, Sweden and Finland, justified by the aim of defusing social conflicts. The political and academic debate on this practice has shown that many positions are at stake. The situation in Finland⁷¹ has finally been judicialised with the result that the official position of the Finnish authorities has been refuted with a different interpretation regarding wolf management. Thus, in the question referred for a preliminary ruling in the "Tapiola" case,⁷² the answer given to the Finnish court is of particular significance⁷³ in so far as the CJEU questions the reasoning of the derogation granted.⁷⁴ The Finnish authorities, and in particular the Finnish Wildlife Institute, argued that "it has been demonstrated that management hunting can reduce poaching". On the contrary, the CJEU will uphold the arguments put forward by the NGO Tapiola, the European Commission and the referring court that "there is no scientific evidence to conclude that the legal hunting of a protected species leads to a reduction in poaching to such an extent that overall it has a beneficial effect on the conservation status of the wolf".⁷⁵ Furthermore, the CJEU considers that management hunting as an exception to the prohibition on the deliberate killing of wolves - set out in Article 12(1)(a) in conjunction with Annex IV(a) of the Habitats Directive - cannot be justified or aimed at combating illegal hunting because:

"it has not been duly established that the objective pursued by those derogations cannot be achieved by another satisfactory solution, since the mere existence of an illegal activity or the difficulties encountered in controlling it cannot constitute a sufficient element in that regard".⁷⁶

The CJEU therefore recalls that the Member States have a series of obligations which they must assume in order to comply with the environmental protection rules laid down in the Habitats Directive and which they cannot evade, as it points out in recitals 48, reproduced below:

by authorising the hunting of wolves as a preventive measure 'without it being established that such hunting is likely to prevent serious damage within the meaning of Article 16(1)(b) of that directive'. See Judgment of the CJEU of 14 June 2017, Case C-342/05, Commission v. Finland, ECLI:EU:C:2007:341.

⁷¹ BISI, LIUKKONEN, MYKRÄ, POHJA-MYKRÄ & KURKI, 2010.

⁷² Judgment of the Court (Second Chamber) of 10 October 2019, Case C-674/17, Luonnonsuojeluyhdistys Tapiola Pohjois-Savo - Kainuu ry v Risto Mustonen and Others, Reference for a preliminary ruling from the Korkein hallinto-oikeus, ECLI:EU:C:2019:851.

⁷³ DARPÖ, 2020.

⁷⁴ RUIZ DE APOCADA, 2020.

⁷⁵ Recital 46.

⁷⁶ Ibidem.

48. In the present case, it must be considered that the mere existence of an illegal activity such as poaching or difficulties associated with its monitoring cannot be sufficient to exempt a Member State from its obligation to ensure the safeguarding of species protected under Annex IV to the Habitats Directive. On the contrary, in such a situation, that Member State must give priority to strict and effective monitoring of that illegal activity and implement methods that do not involve failure to observe the prohibitions laid down in Articles 12 to 14 and Article 15(a) and (b) of that directive.

In this regard, it is necessary to emphasise the importance for States to implement environmental legislation which still suffers from a high non-compliance deficit and, where appropriate, to implement the Environmental Crime Directive in such a way that the most serious breaches of this legislation are prosecuted as environmental offences with proportionate, effective and dissuasive penalties.⁷⁷

4. NEW FORMULAS FOR THE COEXISTENCE OF WOLF AND MAN IN SPAIN IN THE 21ST CENTURY

4.1. The Mission to Save the wolf and man in rural Spain

The Bern Convention's Expert Group on Large Carnivores states on its website that "large carnivores are a source of emotions throughout Europe".⁷⁸ In the last year since the public consultations on the wolf hunting ban in Spain started, the contradictory messages sent by the different interest groups are proof of this.

The main threats to the wolf in Spain are the same as in other countries in Europe - and also in the world: firstly, illegal hunting, and then hybridisation with dogs, which endangers their genetic heritage, the removal of carrion from the fields or the decrease in the prey to which they have access, or being run over.⁷⁹ Factors that have also endangered their proper conservation status are the problems of fragmentation and lack of connectivity of populations and their ecosystems due to the "increase of linear barriers such as motorways or railways". Some of these problems are connected to

⁷⁷ FAURE, PHILIPSEN, FAJARDO, et. al., 2016, and GERSTETTER, STEFES, FARMER, FAURE, FAJARDO, KLAAS, VALSAMIS, et al., 2016.

⁷⁸ See <https://www.coe.int/en/web/bern-convention/on-large-carnivores>

⁷⁹ See Sánchez, E. "Las carreteras españolas donde han muerto atropellados 81 lobos en una década. La fundación Lobo Marley y el Observatorio de la Sostenibilidad localizan los 50 tramos más mortíferos para la especie protegida y piden actuaciones", El País, 5 November 2020.

the conflicts in the relationship between wolf and man. Aspects such as enclosure of territories are particularly serious in Spain as a consequence of the overlapping of protected areas in privately owned zones.⁸⁰ In these cases, population management can be subject to different types of measures: the culling of those individuals particularly harmful to livestock through lethal control and the granting of hunting licences or the zoning with electrified fences of areas where wolves are present. Such measures must comply with the requirements of the Bern Convention and the Habitats Directive and, in the latter case, with the interpretation of the jurisprudence of the CJEU.

On the other hand, Spain has moved from active extinction policies to the coexistence of the wolf with man and its conservation with the Law 42/2007 on Natural Heritage and Biodiversity, which transposes European legislation into Spanish law. The situation of the wolf in Spain cannot be explained only in terms of current conservation policies. For centuries, wolf hunting has been encouraged by laws and economic incentives dating back to the 16th century when, in 1542, Emperor Charles V passed the first law on wolves hunting in which we have any reference. It is entitled 'Power of the towns to order the killing of wolves, give a prize for each one, and make the appropriate ordinances about it'. Since then, measures aimed at decimating what were considered harmful species in Spain have been adopted by public authorities well into the 20th century. From 1953 to 1970, the Provincial Boards for the extinction of harmful animals inflicted a tragic toll on species of both mammals and birds, estimating their number at more than 600,000 individuals of different species. Data on the individuals who were killed during these two decades have been traced by scientific doctrine in sources as diverse as the trophy catalogues that were granted at the time.⁸¹ This high number of deaths is the origin of the wolf's decline in southern Spain, which would eventually lead to its extinction when the accumulation of factors would make it impossible to guarantee the survival of packs considered unviable for two decades. The change in public policies begun at the end of the 1960s and were consolidated

⁸⁰ LÓPEZ-BAO, BLANCO, RODRÍGUEZ, GODINHO, SAZATORNIL, ALVARES, GARCÍA, LLANEZA, RICO, CORTÉS, PALACIOS & CHAPRON, 2015.

⁸¹ TROUWBORST, 2014.

with the entry of Spain into the European Economic Community in 1986, which was effectively a before and after in the protection of the environment in Spain.⁸²

However, the coexistence of wolf and man is far from being peaceful, and if anything has been observed in recent years, it is the lack of information, data and transparency on extremely important issues that require a debate with social agents. Among these issues should be:

- the prevalence of illegal wolf hunting,
- changes in wolf behaviour and increased attacks on humans and livestock in free-ranging livestock farming, even though some of them have been staged by farmers as will be discussed below.
- the cases of hybridisation with wild dogs,⁸³ or
- the inadequate or non-existent monitoring of the evolution of wolf dispersion in areas beyond the areas delineated in the separation between the North and South of the Douro River.

These types of issues must be included in the dialogue agenda to be promoted by the Ministry of Ecological Transition with an inter-sectoral roundtable, as it will be the social agents who can contribute their experience and propose the practical improvements possible in order to find solutions. The reality of the so-called 'empty Spain' and the precarious situation faced by farmers and stockbreeders calls for greater dialogue between state and regional public authorities to address the problems and needs arising from the regime of coexistence of wolf and man, especially in those areas of free range livestock farming where zoning out measures such as electric fences or the use of mastiffs have to be applied as has traditionally been done in Spain. Many of these practices can also serve as an example for those countries whose conditions allow these proposals to be adapted.

⁸² Thus J. Esteve Pardo considers that "Hunting has been the object of special attention in Law 42/2007 on Natural Heritage and Biodiversity. This law completely reverses the approach of the 1970 Hunting Law, which, as has already been pointed out, was based on the principle that any wild animal was a potential object of hunting activity", ESTEVE PARDO, 2017, p. 205.

⁸³ On this subject the EU made a statement to the first proposal of a recommendation of the Standing Committee of the Bern Convention: "The EU Parties broadly agree on the need for States to take adequate preventive and mitigation measures addressing hybridization. The EU and its MS overall consider to be of great importance to remove possible hybrids from the wild when appropriately detected as such. Due to the difficulty to visually distinguish them, there is indeed a common concern of using the wolf-dog hybrids as legal loophole to kill wolves illegally", General Secretariat of the Council, Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention): 34th meeting of the Standing Committee (Strasbourg, 2-5 December 2014) - Compilation of EU and its Member States statements/speaking points, 16916/1/14 REV 1, 19 December 2014, p. 5. TROUWBORST, 2014.

4.2. Public consultation on the "Draft Ministerial Order modifying the annex of Royal Decree 139/2011, 4 February, for the development of the List of Wild Species under Special Protection Regime and the Spanish Catalogue of Threatened Species".

The MITECO has carried out a prior public consultation on the "Draft Ministerial Order amending the annex to Royal Decree 139/2011, of 4 February, for the development of the List of Wildlife Species under Special Protection Regime and the Spanish Catalogue of Threatened Species",⁸⁴ which closed on 26 February 2021 and whose results have not yet been presented when this research is closed so it will be the subject of future work of the CRIMEANTHROP project.⁸⁵ The aim of these proposals for a Ministerial Order is to include all Spanish populations of the wolf (*Canis lupus signatus*) in the List of Wildlife Species under Special Protection Regime, as scientific information on its conservation status makes it advisable for it to enjoy a special protection regime. García Ureta has studied data from the EU's EIONET network which shows that the conservation status of the wolf in Spain is now unfavourable.

As stated in the presentation of this public consultation, the aim of the reform is to update this List taking into account the agreements adopted by the State Commission for Natural Heritage and Biodiversity, so that:

"these instruments should include taxa deserving of particular attention and protection on the basis of their scientific, ecological or cultural value, their uniqueness, rarity or degree of threat, as well as those listed as protected in the annexes of the Directives and international conventions ratified by Spain".⁸⁶

This consultation has given rise to the intervention of different social agents with opposing positions, however, their reasons and arguments, which are presented as

⁸⁴ The second final provision of Royal Decree 139/2011, of 4 February, empowers the Minister for Ecological Transition and the Demographic Challenge, within the scope of his competence, to modify the annexes of the List by ministerial order, in order to update them.

⁸⁵ In fact, in May the Ministry decided to restart the process with new proposals and a new consultation. Once this eventful process reaches a final outcome, it will be the subject of another research study for CRIMEANTHROP.

⁸⁶ Ministry for Ecological Transition and the Demographic Challenge, Prior public consultation on the "Draft Ministerial Order amending the annex to Royal Decree 139/2011, of 4 February, for the development of the List of Wild Species under Special Protection Regime and the Spanish Catalogue of Threatened Species", available at https://www.miteco.gob.es/es/biodiversidad/participacion-publica/PPP_Mod_RD139_2011.aspx.

excluding, in many cases should be considered as complementary when looking for solutions to the challenge of making the coexistence of humans and wolves possible. In the case of Spain, humans and wolves share the scenario of 'empty Spain', an increasingly vulnerable and fragmented ecosystem, marked by multiple social, economic and cultural conditioning factors that, far from being ignored, must be incorporated into any proposed solution if it is to last beyond the four-year political mandate. In this regard, Minister Teresa Ribera has pointed out that

"The debate is not about choosing between wolf or livestock, but about how to effectively and fairly guarantee coexistence with livestock farmers in a way that is predictable for the institutions, solvent for the wolf and, above all, in solidarity with families living in areas where there are large predators". (...) We must ask ourselves whether the model we have is that an effective and supportive model, in which the cost of livestock coexistence with large carnivores is borne by society and not only by farmers".⁸⁷

These must be the coordinates of the space for dialogue in which to reach a consensus on any proposal - be it the new Conservation Strategy or the reform of the State and Autonomous Community regulations applicable to wolf conservation and management. If a broad support is not conveyed by this legal reform, it will be blocked in the Congress or the Senate or it will end up with a process of judicialisation of its entry into force and subsequent application. The reasons why several governments of the Autonomous Communities have already promised to challenge the ban on wolf hunting in Spain⁸⁸ relate not only to the ban on wolf hunting *per se*, but also to the exercise of competence for the design of management policies and the provision of exceptions. This is an important issue insofar as the Constitutional Court has already ruled previously on the ownership of competence, attributing general competence to the State but recognising management competences to the Autonomous Communities, which would now revert to the central government as a consequence of

⁸⁷ Presidency of the Government of Spain, "Ribera anuncia la creación de un grupo técnico para trabajar en un modelo armonizado de conservación del lobo y cohabitación con la ganadería extensiva", Thursday 25 February 2021, available at <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/transicion-ecologica/Paginas/2021/250221-lobo.aspx>, last accessed 10 April 2021.

⁸⁸ EFEAGRO, "Once comunidades piden retirar al lobo de la lista de especies protegidas", 21 April 2021, <https://www.efeagro.com> and Navarro, J.: "Las comunidades con más lobos se unen contra la prohibición de cazarlos. Dentro del Gobierno, el ministro de Agricultura también rechaza dar más protección a la especie como promueve el departamento de Teresa Ribera, *El País*, 8 February 2021, <https://elpais.com>

the hunting ban. In many of these Autonomous Communities, the management of hunting activity has been considered a key element due to its economic and social value, and has also been defended as the appropriate instrument for the implementation of population control of wolves.

As the wolf population has grown in countries where it was extinct or where its recovery has multiplied its numbers and dispersal area, man has become the main threat to its conservation. Thus, illegal hunting has been identified by European authorities and experts in the Report prepared for the Council of Europe by Salvatori and Linnell⁸⁹ as an emerging problem in Germany,⁹⁰ France, Italy, Croatia, Greece, Norway and Spain, and inadequate prosecution of the associated crimes has been detected. In the case of Croatia and Finland, moreover, their authorities proposed hunting as a measure to mitigate the problem. This possibility is now also being contemplated by MITECO, as one of the exceptions to be granted to the Autonomous Communities that request it in order to support the regulatory reform. However, the backdrop to the debate is the legalisation of a practice that is now illegal so that it ceases to be a problem, when it has never been a solution for the conservation of the wolf or the improvement of the coexistence of humans and wolves, which has now been recognised by the CJEU in its Tapiola judgment.

Another different issue, which also requires attention from a legal and criminological point of view, is the social acceptance of the regulation finally adopted to establish the wolf protection statute in Spain. In principle, the rejection of this rule may lead to its non-application by the responsible authorities, which could be qualified as active tolerance and, in its case, malfeasance of the public authorities for administrative infractions and environmental crimes. Similarly, its social rejection would lead to an increase in the number of cases of non-compliance by individuals,⁹¹ both natural and

⁸⁹ SALVATORI & LINNELL, 2005.

⁹⁰ Bruns et al. considers that in Germany, “The return of the wolf has seen a revival of conflicts with local human populations, mostly because of livestock depredation (Reinhardt et al., 2012; Morehouse and Boyce, 2017; DBBW, 2019a). (...). After over a century of living without large carnivores, livestock are very vulnerable to wolf attacks due to weakened anti-predator behavior (Florcke and Grandin, 2013) and a paucity of protection measures (Reinhardt et al., 2012). Consequently, negative attitudes towards wolves, especially within the farming community, have provoked illegal retaliatory killing of wolves which poses a big challenge for conservation (Reinhardt and Kluth, 2007; Liberg et al., 2011; Kaczensky et al., 2012; Browne-Nuñez et al., 2015)”, BRUNS, WALTERT & KHOROZYAN, 2002, p. 2.

⁹¹ In the interviews with law enforcement agents and NGO representatives, they considered that –as in the case of the banning of poison, the first reaction will be an increase in illegal hunting as a response or sign of rejection of the measures, and there will follow an acceptance of the new legal situation.

legal persons - poachers and private hunting grounds - who, in contravention of administrative and criminal provisions, carry out illegal wolf hunting practices.⁹² In this case, this increase would add to the black figure of illegal hunting that reports indicate exists all over Europe and which is considered⁹³ the main threat to the conservation of the wolf and which has its origin in the deficient or non-existent application of the biodiversity conservation legislation.⁹⁴ Therefore, in the case of the introduction of the wolf in the list of strictly protected species and the prohibition of wolf hunting in the whole Spanish territory, it is worth asking whether this could increase the crimes associated with wolf conservation and management.

The undergoing prosecution of the most recent case of a complex crime related to wolves has all the ingredients. In the so-called White Fang operation, farmers in complicity with the authorities elaborated a scheme simulating wolf attacks on horses in order to obtain compensation for damage. The corpses of wolves were distributed in a wide area and staged simulating car hits even though necropsies showed that the wolves had been clubbed to death. The Nature Protection Service of the Guardia Civil (SEPRONA) made a statement:

“Regardless of the influence that the total amount of damage attributed to wolves may have on decisions about the maintenance of the wolf population, it is certain that the situation may have had an influence in generating an atmosphere of rejection against the presence of this species, attributing to it the commission of different attacks against livestock that have nevertheless not taken place”.⁹⁵

This case shows both limits and possibilities of the Spanish Criminal Code to prosecute the alleged illegal activities. The killing of wolves will be prosecuted as a crime against fauna of Article 334 but cannot be prosecuted as animal abuse, since this crime only covers domestic animals. Nonetheless, farmers involved in the scheme developed a modus operandi that involved attracting wolves to livestock by baiting them and letting them kill horses in order to obtain financial compensation. Farmers have been charged

⁹² Iglesias, P. “Proteger al lobo generará un furtivismo atroz”, *La Voz de Galicia*, 25.02.2021.

⁹³ SALVATORI & LINNELL, 2005.

⁹⁴ LOPEZ-BAO et alia, 2018.

⁹⁵ SEPRONA, Ministerio del Interior, Dirección General de la Guardia Civil, “La Guardia Civil investiga a 20 personas que reclamaban subvenciones por daños producidos supuestamente por ataques de lobos”, 16 July 2016.

with fraud, crimes against nature in the case of wolves, and with animal abuse in the case of horses.⁹⁶ Environmental agents and the head of the Hunting and Fishing Service of the Principality of Asturias, have been charged with malfeasance.

4.3. The Proposal for a New Wolf Conservation and Management Strategy

The proposal of the Ministry of Ecological Transition for a New Wolf Conservation and Management Strategy is being drafted together with the Autonomous Communities within the Wild Flora and Fauna Committee of the State Commission for Natural Heritage and Biodiversity, fifteen years after the last one was approved. In this sense, it is an urgent update that needs broad political and social support for a future strategy. It must also respond to international conservation expectations as set out in the Biodiversity Strategy approved by the European Commission in May 2020 and which also reflects the EU's ambition to meet the Aichi Targets to expand special areas of conservation in the post-2020 scenario.⁹⁷ Therefore, a central element of the new Strategy has to be the elaboration of a new census of the species to be completed during the years 2021-2022, with a commitment to update it every five-six years and with an annual update of its distribution area.

As stated in the Ministry's proposal, "until 2012-2014 no wolf census had been carried out at national level and only partial estimates were available in the different autonomous communities". This lack of information is also symptomatic of a lack of compliance with some of the obligations assumed by Spain in the framework of the Bern Convention, but also with EU legislation and, in particular, with the Habitats Directive.⁹⁸ Its system based on a conciliatory approach to situations of non-compliance has also relied too much on the European Commission to carry out better monitoring in its areas of competence where it has more effective enforcement mechanisms. However, the European Commission has not opened any proceedings against Spain for non-compliance with the Habitats Directive, whose protection areas

⁹⁶ Ibidem.

⁹⁷ Thus, the Ministry in its proposal points out that "the recent expansion of the species has been noted, fundamentally towards the south of the peninsula (Central System, provinces of Avila, Segovia, Guadalajara and the Community of Madrid) and its demographic dispersion in the north-east, as well as in plain areas of the northern sub-plateau. Apart from the national census work, the sporadic presence of non-breeding wolves (1 or 2 individuals) was noted in the Catalan Pyrenees and in Aragon. On the contrary, it seems clear that the wolf is extinct in Sierra Morena", *loc. cit.*, p. 4.

⁹⁸ GARCÍA URETA, 2020.

include Sierra Morena in the south of Spain for the presence of the wolf. Therefore, one could speak of active tolerance of the violations of the wolf conservation and management rules in the case of the silent extinction of the wolf in Sierra Morena, which the scientific community had already denounced years ago due to the unviable situation of the last wolves in this area. Experts have criticised that in this case we are facing one of the examples of unenforced legislation.⁹⁹ Thus López Bao et al. consider that

“The Sierra Morena wolf case exemplifies how even comprehensive and strict protection laws can be toothless and fail to protect wildlife on a long term perspective when confronted with hostile particular interests; illustrating how legal protection can be an insufficient, albeit necessary, tool when conserving conflicting species. The successful conservation of biodiversity requires adequately monitoring not only the status of species and the effectiveness of implemented conservation interventions but also the enforcement of the rule of law. In the case of wolves in Sierra Morena, proactive measures would include an intensive monitoring program using non-invasive DNA and animal collaring techniques to accurately estimate the number of wolves remaining in this population, an effective strategy to detect and reduce the illegal killing of wolves (including educational programs or generating peer pressure for not poaching wolves) and, possibly, a population restocking. Such law enforcement may also require solving confronted sectoral and private interests”.¹⁰⁰

The extinction of the wolf in Sierra Morena is due to complex causes and has its origin in practices that have not been controlled or stopped despite their harmful effect on the conservation status of the species. The wolf population in this area of Spain was particularly affected by the Extinction Boards for Harmful Animals, which means that the entry into force of the regulations for the protection of the species were insufficient to prevent its disappearance. On the other hand, the impact of game activities in the

⁹⁹ J.V. López-Bao, et al. consider “Despite this comprehensive and strict legal protection, the implementation of recovery actions by Andalusian authorities since 2003 (i.e. implementation of damage prevention measures and compensation systems; Andalusian Wolf Conservation Program; www.juntadeandalucia.es) and the approval by Spanish authorities in 2005 of a short-term recovery goal of 15 packs (Spanish Wolf Working Group 2005), all legally required conservation initiatives, have either failed or not been considered. For example, no population reinforcement has ever been implemented”. LOPEZ-BAO et alia, 2015, p. 2106.

¹⁰⁰ LOPEZ-BAO et alia, 2015, p. 2108.

area¹⁰¹ is also pointed out as one of the reasons for the disappearance of wolves.¹⁰² However, the fact that this has occurred when Spain has been a party to the Bern Convention or a Member State of the EU since 1986 raises the question of whether it is necessary to state that Spain has violated the rules for the conservation of this species despite the recovery plans adopted by the Autonomous Community of Andalusia since 2003 with funding from the European Union. Moreover, it is not only Spain and its autonomous communities that should be targeted, but it should also be noted that this silent extinction of the wolf in Sierra Morena would have taken place under the (non-existent) control of the European Commission. In 2016, the then Commissioner for the Environment Carmenu Vella, answered to one parliamentary question highlighting that: “

“In Spain the wolf population to the South of the Duero River is listed in Annex IV of the Habitats Directive and therefore subject to the strict protection regime under its Article 12. Under Article 16, Member States can nevertheless derogate from this regime, and allow for the capture or killing of wolves, for example in order to prevent serious damages to crops and livestock, provided that there are no alternative solutions and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status. As regards the facts raised by the Honourable Members, the Commission does not currently possess evidence to identify a breach of the Habitats Directive. It will closely monitor the use of derogations in relation to the wolf in Spain, in order to ensure full compliance with the directive. While the Habitats Directive does not explicitly provide for the adoption of recovery plans for the wolf, Member States are required to maintain or restore its populations at a favourable conservation status in its natural range. According to the last report under Article 17 of the directive, the wolf is in favourable conservation status in Spain, except for the relict population of Sierra Morena. The Commission has therefore recently asked the Spanish authorities about the measures adopted for restoring the population of

¹⁰¹ “Despite wolf range here largely occurs in places legally listed as Sites of Community Importance within the Natura 2000 network (under the Habitats Directive) or even nature reserves, the main land use is large fenced private properties (covering 85 % of the estimated wolf range in 2002; Muñoz-Cobo et al. 2002) running recreational big game hunting businesses through intensive game ranching (hunting business started in the 1970s and reached the dominance among land uses in less than 15 years).” LÓPEZ-BAO et alia, 2015, p. 2107.

¹⁰² Thus López-Bao et al. points out that “Although virtually no data have been collected on the strength of the conflict that wolves have likely prompted on big-game raisers, today’s wolf quasi-extinction suggest that the current situation is not only culturally driven, but also as a consequence of the perception that wolves are hardly compatible with this hunting business, in which game ungulates are handled like extensive livestock”, LÓPEZ-BAO et alia, 2015, p. 2018.

Sierra Morena, and it is currently monitoring the adoption and implementation of these measures.”¹⁰³

Ever since then, the wolf has been declared extinct by the MITECO in its first proposal of a draft Wolf conservation and management strategy.¹⁰⁴ It is also relevant to point out whether it would be possible and, if necessary, advisable to reintroduce the wolf in Andalusia. A European Commission's Life project was launched in 2016 and ended in 2020, precisely the year in which the wolf was confirmed to have disappeared. This project has tried not only to recover the memory of the wolf in Andalusia but also to rehabilitate it as a necessary element of future conservation policies for the species and its habitats. Whether the results of this project have as a further objective to facilitate the active reintroduction of the species or the return of the wolf through its dispersal from the north remains to be seen or investigated in further work. This cannot justify the suppression of the protection areas created to preserve it.¹⁰⁵ It is also necessary that the authorities of the Autonomous Communities take responsibility. They have not achieved the objective of wolf conservation in spite of the economic funds received from the EU.

4.4. Crime and punishment of illegal hunting

The illegal hunting of wolves is the elephant in the room. Illegal hunting is the big problem of the wolf that public authorities and European institutions are trying to avoid or, if necessary, to solve by legalising it or considering it as an administrative offence thanks to exceptions to the rules of its prohibition.¹⁰⁶ Thus the accidental shooting of wolves during the authorised hunts of other species is a current practice that is considered as an administrative infringement.

The Environmental Crime Directive requires Member States to prosecute the most serious violations of administrative offences with effective, proportionate and

¹⁰³ Parliamentary questions, Question reference: E-006496/2016, Answer given by Mr Vella on behalf of the Commission, 19 October 2016, E-006496/2016(ASW). The last report is available at http://cdr.eionet.europa.eu/Converters/run_conversion?file=es/eu/art17/envucgusw/ES_species_reports-13910-125043.xml&conv=354&source=remote#1352

¹⁰⁴ Ministerio para la Transición Ecológica y el Reto demográfico, “El borrador de la Estrategia para la Conservación y Gestión del Lobo propone su inclusión en el listado de Protección Especial”, 18.11.2020, www.miteco.es

¹⁰⁵ LÓPEZ-BAO, FLEURKE, CHAPRON & TROUWBORST, 2018.

¹⁰⁶ FUENTES & FAJARDO, 2020.

dissuasive criminal penalties in order to punish the behaviour associated with such offences.¹⁰⁷ Thus, wolf hunting where it is prohibited should be prosecuted as a criminal offence under Article 334 of the Penal Code. However, the numerous cases of illegal hunting that are reported by conservation associations are not always prosecuted due to the difficulties in providing the necessary evidence and the high financial cost.

Currently wolf hunting depending on where and how it is carried out can lead to the application of very different criminal provisions depending on whether it is the hunting of a protected species under Article 334 or the illegal hunting of a non-protected species under Article 335 for lack of a permit from the corresponding Autonomous Community, both being offences relating to the protection of flora, fauna and animals of the Penal Code.¹⁰⁸ The inclusion of the wolf in the List would make Article 334 generally applicable from then on. However, it is questionable whether the sanction foreseen in this article, which contains the basic type of offence, is proportionate, dissuasive and effective, since it contemplates two types of sanctions alternatively and not as a sum, that of deprivation of liberty from six months to two years or a fine from eight to twenty-four months of daily payments, and adding "in any case, special disqualification for profession or trade and special disqualification for the exercise of the right to hunt or fish for a period of two to four years". In practice, these temporary sanctions are statistically short when considering the recidivism of perpetrators in most cases.¹⁰⁹

Initially, with a relevant social impact, a sentence condemned two hunters who, participating in a hunting trip, shot two wolves without recovering their carcasses. Thanks to circumstantial evidence, they were sentenced to imprisonment. This sentence was considered a major breakthrough at the time. However, the convicted persons were acquitted for lack of evidence after a High Court strongly criticised the acceptance of such evidence. Another particular case to highlight is that in the face of facts prosecuted as an environmental crime under Article 336 of the Criminal Code for

¹⁰⁷ See its Article 5 which provides that "Member States shall take the necessary measures to ensure that the offences referred to in Articles 3 and 4 are punishable by effective, proportionate and dissuasive criminal penalties", Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008, p. 28/37.

¹⁰⁸ FUENTES & FAJARDO, 2020.

¹⁰⁹ Ibidem.

the use of poison resulting in the death of wolves, the judge considered that there was no *mens rea* and, therefore, acquitted the defendant.

It is also common in such cases for the judge to consider that it is an administrative offence and, after dismissing the case, to send it to the administrative jurisdiction for non-compliance with hunting regulations. However, in recent years, since the reforms of the Spanish Criminal Code to bring it into line with the requirements of the Environmental Crime Directive, the Spanish courts have handed down convictions that demonstrate the fundamental work carried out by the Spanish Public Prosecutor's Office and the SEPRONA. It should be noted that illegal wolf hunts both north and south of the Douro have been convicted and ancillary offences such as the falsification of documents associated with illegal hunting, such as trophies, have also been prosecuted.¹¹⁰

Recently, criminal proceedings have also been initiated for animal abuse in application of Article 337 of the Penal Code for the death of a wolf cub which, having been captured and retained, would die during its captivity. This specific case also shows how the figure of animal mistreatment that is reserved in the Penal Code for domestic animals can also be applied to wild animals that have been held and subjected to mistreatment, as otherwise, and as mentioned, the mistreatment of wild animals is not covered by animal welfare law in Spain.¹¹¹

¹¹⁰ Ibidem.

¹¹¹ Thus, in an appeal presented by the Asociación Nacional de Animales con Derechos y Libertades and the Federación de Asociaciones de Derecho Animal, the judge stated that despite the cruelty with which a fox was killed, neither articles 335 nor 337 of the Penal Code can be applied. Thus, in Second Ground of his order of dismissal, he states that: The appellants insist that the criminal investigation should continue. Such a claim cannot succeed on the grounds already set out in the appealed decision, previously accepted and reproduced on this procedural occasion, in which nothing can be added without incurring in useless reiteration of what has already been stated by the court. Article 1.1 of our Criminal Code states that "No action or omission shall be punishable unless it is provided for as a crime by law prior to its commission". Article 2.1 states that "No crime shall be punished by a penalty which is not provided for by law prior to its commission" and Article 4.1 of the Criminal Code states that "Criminal laws shall not be applied to cases other than those expressly covered by them". In short, criminal offences cannot be interpreted extensively and the aforementioned bill was obviously not in force at the time of the facts (nor is it currently in force), so that without prejudice to the appropriate administrative sanctions, this criminal jurisdiction has nothing more to do, however unpleasant and cruel the actions of the appellant may be when he attacked and assaulted the animal, which was a wild game animal that did not even temporarily live with man. The fact that the repugnant actions used and visualised in the recording of the CD sent to this court are not typical of the art of hunting does not make the fox one of the species referred to in article 335 of the Penal Code, although they do allow us to speak of the existence of an unjustified inhuman mistreatment of article 337, but on an animal which, at the present time, is outside the scope of its protection as it was neither domestic, nor tamed, nor was it one of those which are usually domesticated (although in the Bronze Age there were cases of domesticated foxes), nor did it live temporarily or permanently under human control, but lived in a wild state, even if the

5. CONCLUSIONS

Exceptions to rules can undermine their normative force and legitimacy. It is therefore necessary that when States are granted the possibility to derogate from the rules of international and European normative instruments on the conservation and protection of habitats and their species - be it the Bern Convention or the Habitats Directive - they must respect basic principles and conditions that guarantee the favourable conservation status of species and ecosystems.

The examination of the reservations and exceptions to the Bern Convention and the Habitats Directive shows how the States in their application have made a very flexible interpretation of their obligations according to their national interests. Thus, for instance, sometimes the invocation of the Bern Convention becomes an attempt to legitimise practices that endanger the species, putting forward cultural reasons and, in the case of the wolf, legalising its hunting to avoid the escalation of social conflicts for which the wolf is blamed.

In practice, the exceptions authorising hunting and other forms of exploitation of the wolf constitute an exception to the rule that can undermine the effectiveness of the conservation regime because instead of following scientific criteria, it responds to the need to guarantee social peace with the wolf, which despite the alternatives, in countries such as Spain, Finland, Sweden or Norway, is attempted achieved by hunting or lethal control. In the case of Spain, this will be the bargaining chip with the 11 Autonomous Communities that refuse to upgrade the protection status of the wolf. Experts of these countries agree on:

“It may be difficult to imagine alternative processes that are perceived as legitimate enough to avoid either cultural backlash when a powerful group is dissatisfied with a decision or retaliatory actions where dissatisfied stakeholders and carnivores share landscapes. But if decision-making processes can progressively improve legitimacy, over time, human-carnivore coexistence may be better tolerated. This optimistic

moment of meeting its painful death was at the mercy of the cruel, shameful and brutal cruelty of the defendant, who was not taking part in any show, not even in a reality show, but the events, as the appellee defended, took place in the open air, in the countryside, spontaneously, without spectators, without any profit motive and without any kind of organisation deliberately predisposed for the dissemination of the images in some kind of public communication, even though they ended up virally disseminated on social networks, without the control of the investigated”, see Auto de la Audiencia Provincial de Huesca, de 5 de Abril de 2019, ROJ: AAP HU 242/2019 - ECLI:ES:APHU:2019:242A

outlook assumes that other sectoral large-scale policies, such as agricultural policies like the Common Agricultural Policy in Europe or the Farm Bill in the U.S., do not undermine the needed increases in equity and security (e.g., for rural livelihoods)".¹¹²

However, the backdrop to the debate is still the problem of illegal hunting, which is the main threat to the wolf and which the states have not solved due to the lack of implementation and enforcement of environmental legislation. In my view, this is the main problem, which must also condition the search for solutions. The States have made the exceptions to the rules of the Bern Convention and the Habitats Directive a way to legalise illegal practices, precisely so that they cease to be a social problem, despite the fact that this has never been a solution for the conservation of the wolf or the improvement of the coexistence of humans and wolves. This problem which the CJEU addresses in its Tapiola judgment must now be seen in a new light and under new conditions, because, as it clearly states: "the mere existence of an illegal activity such as poaching or the difficulties associated with its monitoring cannot be sufficient to exempt a Member State of its obligation to ensure the safeguarding of species protected under Annex IV to the Habitats Directive. On the contrary, in such a situation, it must give priority to the strict and effective monitoring of that illegal activity and implement methods that do not involve failure to observe the prohibitions laid down....".¹¹³ However, as Darpo points out it "we can look forward to more requests for preliminary rulings from the CJEU and subsequent case-law on the matter".¹¹⁴

And already with a view to future research, it is necessary to take into account, as one of the experts interviewed for this research pointed out, that the impact of derogations on species do not take into account their effect on the ecosystem or the special protection area where such derogations apply or on how their conservation status may be affected as a consequence of the management measures adopted.¹¹⁵

The Spanish court rulings citing the Bern Convention are an example of the judicialisation of the differences in the conception of wolf management that has confronted conservationist organisations such as Ecologistas en Acción, Asociación para la Conservación y Estudio del Lobo (ASCEL) and also the associations of farmers and hunters. From the different open cases and the sentences handed down, it is

¹¹² LUTE, CARTER, LÓPEZ-BAO & LINNELL, 2020, p. 7.

¹¹³ Recital 48.

¹¹⁴ DARPÖ, 2020, p. 130.

¹¹⁵ I am most grateful for the comments of J.A. Alfaro, the Spanish representative in EUROPOL.

possible to identify a series of positive elements and others that require a profound social debate in order to reach agreements that must be achieved by civil society and that have already produced positive results with local mediation.

The legal nature and regulatory intensity of the instruments chosen may certainly vary, but their content must be clear and not open to abuse: they may be soft law resolutions and recommendations or, in the case of Spain, a Ministerial Order. In any case, the solution sought should serve to improve the implementation of the 'rule of law of biodiversity', rather than to justify its chronic lack of enforcement or legalising the illegal practices supported by a part of the population.

To conclude, my recommendation can only be to ask the European and national institutions to adopt the necessary normative instruments to transfer this new approach to wolf protection, incorporating the principle of guaranteeing a favourable conservation status and making hunting a solution of last resort once the alternatives to culling have been sufficiently explored and used as a form of conservation and management of the species.

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