



## **Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats \***

Bern, 19.IX.1979

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I. The Convention on the Conservation of European Wildlife and Natural Habitats, drawn up within the Council of Europe by an *ad hoc* Committee for the Protection of Wild life and adopted by the Committee of Ministers, was opened for signature by the member States of the Council of Europe and non-member States which have participated in its elaboration and by the European Economic Community on 19 September 1979.

II. The text of the explanatory report prepared on the basis of the committee's discussions and submitted to the Committee of Ministers of the Council of Europe does not constitute an instrument providing an authoritative interpretation of the text of the Convention although it may facilitate the understanding of the Convention's provisions.

### **Introduction**

1. On 28 September 1973 (15th Sitting) the Consultative Assembly recommended that the Committee of Ministers "define a coherent policy for the protection of wildlife, with a view to establishing European regulations - if possible by means of a convention - and involving severe restrictions on hunting, shooting, capture of animals needing protection, fishing and egg-collecting, and the prohibition of bird netting" <sup>(1)</sup>.

2. In its Resolution No. 2, based on a report on "the protection of wildlife" presented by the Swiss Government, the Second European Ministerial Conference on the Environment recommended the Committee of Ministers to:

"1. ...

2. set up within the Council of Europe an *ad hoc* committee of experts, with instructions to draft a legal instrument on the conservation of wildlife, with particular reference to migratory species and natural habitats in Europe, which would obviate the difficulties encountered in the implementation of existing conventions; the text to be submitted as soon as possible to the Committee of Ministers of the Council of Europe, who would examine the most expedient procedures for the final adoption of this instrument, preferably by the convening of a conference of government plenipotentiaries."

(\*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

(1) Recommendation 720 (1973) on the results of the European Ministerial Conference on the Environment (Vienna, 28-30 March 1973).

This recommendation was followed by a number of guidelines for the elaboration of such an instrument <sup>(1)</sup>.

3. At its 28th Ordinary Session (June 1976) the Consultative Assembly welcomed Resolution No. 2 of the Second Ministerial Conference and recommended that the Committee of Ministers promptly set up a committee of experts and instruct it to submit a draft convention on the conservation of wildlife in time for the Third European Ministerial Conference on the Environment. The attention of the members of the committee of experts was drawn to the principles set out in the recommendation. Finally, the draft should contain a clause enabling any State outside the Council of Europe to accede <sup>(2)</sup>.

4. At its 259th meeting (June 1976) the Committee of Ministers decided to create an *ad hoc* committee (*ad hoc* Committee for the Protection of Wildlife) to draft a legal instrument on the conservation of wildlife based on the general principles and special provisions suggested by the Second Ministerial Conference on the Environment in its Resolution No. 2 on protection of wildlife.

5. The *ad hoc* committee met under the chairmanship of Ambassador Gunnar Seidenfaden (Denmark); its first meeting was held in November 1976 and was followed by four further meetings. In addition eight meetings of working groups took place.

6. The *ad hoc* committee submitted the text of the draft convention to the Committee of Ministers on 19 December 1978.

7. The Committee of Ministers adopted the text of the draft convention on 18 June 1979.

8. The Convention on the Conservation of European Wildlife and Natural Habitats was opened for signature on 19 September 1979, on the occasion of the Third European Ministerial Conference on the Environment in Bern.

### **General considerations**

9. An effort has been made to draft a text that, whilst taking into consideration the difficulties encountered in the implementation of conventions already existing in this field, would improve the minimum level of nature conservation in Europe and enable the maximum number of States to become Contracting Parties.

10. In order to do this, it was obviously necessary to recognise what is special about wild plants and animals and their conservation needs. It was also felt that, while it was necessary for the Convention to specify purposes and machinery common to all potential Contracting Parties, it must also be drafted in a way that recognises that the species concerned seldom extend to all States of the Council of Europe, that the status of those species, which is often different in different States (being frequent in some and scarce in others, yet deserving of united action for their conservation), will be continuously changing, both naturally and as a result of the action of States under the Convention. Thus it would be necessary to elaborate an instrument that would permit flexibility of action within a common purpose. Such flexibility would need to include the ability to vary the provisions of the convention (the articles as well as the appendices) to meet changing circumstances.

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(1) Second European Ministerial Conference on the Environment (Brussels, 23-24 March 1976) - Conclusions, Council of Europe, Strasbourg, 1976.

(2) Recommendation 783 (1976) on the protection of birds and their habitats in Europe.

11. The species of wildlife found in Europe have in many cases a range that extends well beyond the confines of the membership of the Council of Europe. Many of the conservation problems that are encountered and which call for international co-operation are not capable of solution solely within the membership of the Council of Europe, and the endeavour was accordingly made to draft a text that would encourage other States to become Contracting Parties. In particular, provision was made for such States to have some say in the process of adopting the changes necessary to meet new situations, especially to update the list of species requiring co-ordinated protection but also to improve the capacity of the convention to meet changing circumstances, which, given the nature of wildlife and the problems that arise, cannot be foreseen at the time of concluding the Convention.

12. The Council of Europe has developed considerable expertise in the conservation of nature: this, supported by the wide experience of members of the *ad hoc* committee, has frequently shown the importance of developing wide public understanding of the objectives and programmes of nature conservation and of generally enabling the public to participate in such work. It was vital, therefore, that the text should, as far as possible, avoid technical terms and be in as simple and straightforward a language as is compatible with the precision that is necessary for an international legal instrument.

13. It was agreed to use in the Convention the various categories as defined by the International Union for the Conservation of Nature and Natural Resources <sup>(1)</sup>.

### Structure of the Convention

14. The Convention falls into four parts:

- A. Preamble
- B. (Chapters 1 to V, Articles 1-12): Substantive provisions
- C. (Chapters VI to IX, Articles 13-24): Operational provisions
- D. Appendices :
  - I: Strictly protected flora species
  - II: Strictly protected fauna species
  - I: Protected fauna species
  - IV: Prohibited means and methods of killing, capture and other exploitation.

(1) *Endangered (E)*: Taxa in danger of extinction and whose survival is unlikely if the causal factors continue operating. Included are taxa whose numbers have been reduced to a critical level or whose habitats have been so drastically reduced that they are deemed to be in immediate danger of extinction.

*Vulnerable (V)*: Taxa believed likely to move into the endangered category in the near future if the causal factors continue operating. Included are taxa of which most or all the populations are decreasing because of over-exploitation, extensive destruction of habitat or other environmental disturbance; taxa with populations that have been seriously depleted and whose ultimate security is not yet assured; and taxa with populations that are still abundant but are under threat from serious adverse factors throughout their range.

*Rare (R)*: Taxa with small world populations that are not at present endangered or vulnerable, but are at risk. These taxa are usually localised within restricted geographical areas or habitats or are thinly scattered over a more extensive range.

*Threatened (T)*: Threatened is used in the conservation context for species which are in one of the three categories endangered, vulnerable or rare. Species are marked as threatened where it is known that they are endangered, vulnerable or rare, but there is not enough information to say which of the three categories is appropriate

## Commentary on the Articles of the Convention

### A. Preamble

15. Because of the special nature of the Convention, which should enable the maximum number of States to become Contracting Parties (see paragraph 9), the *ad hoc* committee agreed to propose to extend the traditional introduction of conventions elaborated by the Council of Europe, in order to make it also cover the eventuality that non-member States sign. To this end, and after it had been decided to open the Convention for signature by non-member States and by the European Economic Community, the words "and the other signatories hereto" were added to the first line, the second "considering" meets the same requirement.

### B. Substantive provisions

#### Article 1

16. The aims of the convention are threefold:

- a. to conserve wild flora and fauna and natural habitats;
- b. to promote co-operation between States;
- c. to give particular attention to endangered and vulnerable species, including endangered and vulnerable migratory species.

#### *Paragraph 1*

17. The Convention urges the conservation of all flora and fauna species and their habitats, regardless of their scarcity. Although it is clear that the Convention in principle aims at protecting European indigenous wildlife, it was decided to leave out in paragraph 1 the words "in Europe" or "European" for two reasons:

- i. not to restrict the geographical coverage of the Convention to the European continent, with a view to the fact that many species of flora and fauna of Europe are found outside Europe;
- ii. to include visiting migratory animals that are not confined to Europe.

18. The word "wild" before flora and fauna is meant to exclude animals or plants stemming from bred or cultivated stocks.

#### *Paragraph 2*

19. Following Resolution No. 2 of the Second Ministerial Conference, special attention is being given in the convention to endangered species and migratory species.

20. "Endangered and vulnerable" was introduced to replace the more embracing term "threatened" and thus to bring the terminology more into line with the Washington Convention on international trade in endangered species (3 March 1973).

#### Article 2

21. This article contains a main obligation that follows from the aims stated in Article 1, paragraph 1.

### Article 3

22. Article 3 sets out the general obligation for each Contracting Party to take action individually, with respect to the conservation of wild flora and fauna and all natural habitats in general, by

- a. promoting national conservation policies;
- b. having regard for conservation in regional planning policies and pollution abatement;
- c. promoting education and information.

### Article 4

23. Chapter II, in its one article, deals with the conservation of habitats. This chapter, with Chapter III, which is concerned with the protection of species, together cover the two principal approaches to nature conservation. The experts felt that this article should not be too explicit in order to keep it open for developing co-operation between the Contracting Parties, *inter alia* in respect of the creation of a network of biogenetic reserves, the protection of wetlands, etc.

### Article 5

24. Article 5 is the first one in the chapter dealing with the protection of species; it sets out the obligations for the Contracting Parties regarding the protection of the flora specified in Appendix I.

25. Article 5 only regulates internal commerce in endangered species leaving the regulation of international trade to the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora.

26. It was agreed that "sale" includes "exchange" and "barter".

### Article 6

27. Article 6 sets out the obligations for the Contracting Parties to ensure the special protection of the fauna listed in Appendix II.

28. In drafting the article special attention has been given to avoiding contradiction with parallel provisions in other international legal instruments.

29. The provision under paragraph *b* aims at protecting important fauna sites from adverse influences.

30. The provision under paragraph *c* prohibits any disturbance of fauna specified.

31. It was not thought necessary to specify explicitly that the provisions under *a*, *b* and *c* would not apply in case of self-defence.

32. The provision under paragraph *d* aims specially at putting an end to the taking of eggs for collections. Contracting Parties may make exceptions for existing, recognised collections.

33. By virtue of paragraph *e*, the Convention prohibits both possession of the fauna specified and trade therein within the confines of each Contracting Party, to make protection of these species as complete as possible.

34. This provision does not apply to the possession of and internal trade in animals or parts thereof originating from a territory excluded by a Contracting Party from the application of this convention in accordance with Article 21. For a definition of the term "sale", see paragraph 26 above.

#### **Article 7**

35. This article obliges the Contracting Parties to ensure the protection of the fauna listed in Appendix III. Nevertheless, considering that these species may all, in varying degrees, be legitimately subject to exploitation in a particular State, the Convention does not exclude the possibility for each Contracting Party to authorise such exploitation on condition that this affects only those species not threatened on its territory and that such exploitation does not jeopardise the animal population concerned. In so doing, the Contracting Party must supervise the exploitation and, if necessary, impose stricter measures. The article has been drafted in this way in order to provide States with flexibility with regard to species that may from time to time not be directly threatened.

36. In carrying out this provision Contracting Parties must, in accordance with Article 2, have regard for sub-species and varieties which are at risk locally, without being threatened at European level.

37. The *ad hoc* committee agreed that the terms "sale" and "offering for sale" include "exchange- and "barter".

#### **Article 8**

38. Article 8 bans the use of large-scale and non-selective ways and means of capture and killing of fauna which may otherwise be captured, killed or exploited, or for which an exception has been made by the Contracting Parties.

#### **Article 9**

39. Exceptions from the obligations accepted by Contracting Parties in pursuance of Articles 4 to 8 may be made under two general conditions and certain special conditions. It was considered that the taking or killing of protected fauna for humane or humanitarian reasons was an accepted practice that did not require a specific provision in the Convention and that there might be emergency cases where exceptions would have to be made without all conditions having been fulfilled (e.g. the abatement of rabies).

40. It was agreed that the general condition that the exception must not be detrimental to the survival of the population concerned does not affect the obligation under Article 2 to maintain that population at a level that corresponds in particular to ecological, scientific and cultural requirements.

41. Subject to the conditions outlined in Article 9, exceptions may also be made for construction works, if the provision under Article 3, paragraph 2, has been applied.

42. It was decided that exceptions because of obligations under other existing conventions might be made only in cases covered by Article 12.

43. Every two years Contracting Parties report to the Standing Committee on exceptions made; these reports must contain a scientific assessment of the impact of such exceptions based on the information required in paragraph 2.

### **Article 10**

44. As was requested by the Second European Ministerial Conference on the Environment, particular emphasis is given in the convention to the protection of migratory species by co-operation between the Contracting Parties.

45. Paragraph 2 requires co-operation to ensure that the various measures taken under other provisions of the convention meet the needs of the huntable migratory species in Appendix III.

### **Article 11**

46. Article 11 sets out a number of supplementary obligations for the Contracting Parties, with regard to inter-State co-operation, research, reintroduction and introduction of species and information from the Standing Committee.

47. The study to be made before reintroducing native species presupposes that Contracting Parties inform each other on experiences with similar re-introductions.

### **Article 12**

48. Although in the drafting of the convention special attention has been paid to the compatibility of the provisions of this Convention with those of other international legal instruments which are in force or which might come into force, the *ad hoc* committee thought it useful to make explicit the relations between this Convention and the domestic law of the Contracting Parties and other international agreements.

## **C. Operational provisions**

### **Article 13**

49. It was felt that the aims of the future Convention would more easily be achieved if the representatives of the Contracting Parties had the possibility to meet regularly to develop common and co-ordinated programmes. Much of the responsibility for the functioning of the Convention should be left to those representatives meeting in the Standing Committee in order that the convention would have the flexibility of response to which such great significance was attached.

50. In order to comply with the provision under paragraph 4, the Standing Committee must be set up within one year of the date of the entry into force of the Convention.

51. In Council of Europe Conventions where a committee is to be set up, member States which are not party to the Convention have the right to be represented by an observer. Because of the special nature of the Convention, which should enable the maximum number of States to become Contracting Parties (see paragraph 9), the Standing Committee itself should be entitled to invite any non-member State not a party to the Convention to send an observer to one of its meetings.

52. The decision to admit a body or agency as an observer to a meeting of the Standing Committee lies with the Contracting Parties. This provision has been inspired by Article XI of the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora.

#### **Article 14**

53. One of the main tasks of the Standing Committee is to ensure that the provisions of the Convention and the contents of the appendices meet the changing needs of wildlife. On its establishment, the Standing Committee shall give priority to the review of Appendices II and III and to further consideration of the identification in the Convention of species which may legitimately be exploited.

54. The provision on proposals for the development with States who are not Contracting Parties of agreements that would enhance the effective conservation of species, has been included in order that advantage may be taken of opportunities that may develop from other international legal instruments which might come into force.

#### **Article 15**

55. Committees created in the framework of Council of Europe Conventions report as a rule to the Committee of Ministers.

#### **Article 16**

56. Amendments to the Articles of the Convention may be proposed by Contracting Parties or the Committee of Ministers. They are communicated to all member States of the Council of Europe, to any signatory to this Convention, to any Contracting Party, to any State invited to sign the Convention in accordance with the provisions of Article 19 and to any State invited to accede in accordance with the provisions of Article 20.

57. A distinction is being made in the Convention between amendments to the substantive provisions, which are of a technical nature and which must be adopted by the Standing Committee only, and amendments to the operational provisions which, because of their political and financial implications, require approval of the Committee of Ministers. In both cases, the final acceptance lies with the Contracting Parties, who must decide unanimously.

58. Additional appendices may be proposed by Contracting Parties or by the Committee of Ministers. Their adoption and entry into force are subject to the procedure laid down for amendments to substantive provisions.

#### **Article 17**

59. Amendments to the appendices may be proposed by the Contracting Parties or by the Committee of Ministers. They are communicated to all parties mentioned in Article 16.

60. The procedure for the adoption and entry into force of these amendments differs from the one foreseen for the amendments to the Articles of the Convention. Adoption requires a two-thirds majority of the Contracting Parties in the Standing Committee (instead of the three-quarters majority of the votes cast for amendment of the Articles) and the amendment enters into force for those parties which have not objected, unless one-third of the Contracting Parties have raised objections (instead of requiring unanimous acceptance by Contracting Parties as for amendment of the Articles). This quicker and more flexible procedure has been established because it was thought that modifying the appendices was of a less radical and more urgent nature than amending the Articles.



### **Article 18**

61. The provisions on the settlement of disputes have been inspired by those laid down in other existing Council of Europe instruments: in particular, the draft European Convention for the Protection of International Watercourses against Pollution, the European Convention for the Protection of Animals during International Transport (1968) and the European Convention on the Suppression of Terrorism, of 27 January 1977.

62. In the last sentence of paragraph 2, the expression "the same procedure" means that in this hypothesis, the third arbitrator will be designated by the President of the European Court of Human Rights. The provisions of paragraph 3 have been taken from the corresponding parts of the draft European Convention for the Protection of International Watercourses against Pollution, and the Additional Protocol of 10 May 1979 to the European Convention for the Protection of Animals during International Transport.

### **Articles 19 to 24**

63. These articles are on the whole similar to the usual final clauses in Council of Europe agreements and conventions. Some particular points, however, might be underlined.

### **Article 19**

64. Because of its particular nature which should enable the maximum number of States to become Contracting Parties, it was agreed that the Convention should be open for signature by:

1. the member States of the Council of Europe,
2. the non-member States that have participated at the meetings of the *ad hoc* committee in an observer capacity,
3. non-member States invited by the Committee of Ministers to sign the Convention,
4. the European Economic Community.

### **Article 20**

65. The Committee of Ministers may invite any non-member State to accede, after consultation of the Contracting Parties. Non-member States which before the entry into force of the Convention had been invited to sign, but had not done so, may be invited to accede.

### **Article 21**

66. Since this provision is mainly aimed at territories overseas, it was agreed that it would be clearly against the philosophy of the convention for any Contracting Party to exclude from the application of this instrument parts of its main territory and that there would be no need to lay this down explicitly in the Convention.

### **Article 22**

67. Reservations may be made for species in Appendices I to III and prohibited means and methods of killing, capture and other forms of exploitation in Appendix IV. The prohibition of reservations of a general nature would automatically exclude the possibility for a Contracting Party to reduce its commitments to a level where the Convention would not affect it any more.

## D. Appendices

68. The lists in the appendices include only those indigenous species on which general agreement could be obtained. Rather than attempting to reach agreement on all those species that merit strict protection under this Convention it seemed preferable at this stage to confine recommendations to generally acceptable species, thereby facilitating accession to the Convention, which could thus come into force without undue delay. The lists could be developed further by the Standing Committee, where there would be the opportunity for States to deepen their mutual understanding by working closely together and thus accelerate the effective working of the Convention.

69. It was decided for practical reasons to confine the flora and fauna listed in Appendices I, II and III to the taxonomic level of the species, excluding mention of sub-species, varieties and other taxonomic subordinate levels (one exception being made in Appendix II, see paragraph 78), and essentially those species occurring on the territories of the States that had elaborated this Convention.

70. It was agreed that the Standing Committee should extend the appendices to other groups of flora and fauna (e.g. invertebrate and fish species) at a later date.

71. The lists of species in Appendices II and III are, with some exceptions, based on the following authorities:

- Mammals: "A field guide to the mammals of Britain and Europe", by F. H. van den Brink, Collins, London, 3rd edition, 1973.

- Birds: "Guide des oiseaux d'Europe", by Peterson, Mountfort, Hollom, Géroutet, Delachaux and Niestlé, Neuchâtel, 6th edition, 1972.

- Amphibians and reptiles: "A field guide to the reptiles and amphibians of Britain and Europe", by E. N. Arnold and J. A. Burton, Collins, London, 1978.

72. Several marine mammal species listed in Appendices II or III are subject to international agreements, the compatibility of which with the provisions in this convention has been provided for in Article 12 <sup>(1)</sup>.

### Appendix I

Strictly protected flora species

73. In accordance with Article 5, flora species appearing in Appendix I are to be specially protected. Exceptions from this provision may only be made under the strict conditions set out in Article 9.

74. Appendix I is based on the list of species endangered in the region covered by the Council of Europe, established, at the request of the *ad hoc* committee, by IUCN's Threatened Plants Committee.

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(1) Appendix II: *Thalassarctos maritimus*, *Sibbaldus musculus*, *Megaptera novaeangliae*, *Eubalaena glacialis*, *Balaerla mysticetus*. Appendix III: *Pagophilus groenlandicus*, *Erignathus barbatus*, *Cystophora cristata*. All whales covered by the International Whaling Convention.

## Appendix II

### Strictly protected fauna species

75. In accordance with Article 6, fauna species appearing in Appendix II are to be specially protected. Exceptions to this provision may only be made under the strict conditions set out in Article 9.

76. In establishing Appendix II, account was taken of the lists of mammals, birds, amphibians and reptiles threatened in Europe drawn up by the European Committee for the Conservation of Nature and Natural Resources and subject to various resolutions adopted by the Committee of Ministers of the Council of Europe <sup>(1)</sup>.

77. It was decided to include in Appendix III all European bats (*Chiroptera*) with the exception of *Pipistrellus pipistrellus*.

78. It was agreed to include in Appendix III one sub-species: *Rupicapra rupicapra ornata*.

79. Following the request of the Second Ministerial Conference to make particular reference to migratory birds, nearly all European migratory song-birds (*Passeriformes*) have been included in Appendix II, regardless of their conservation status.

## Appendix III

### Protected fauna species

80. In accordance with Article 7, fauna species appearing in Appendix III are to be protected, but a certain exploitation is possible if the population level permits.

81. All species of birds (with the exception of eleven species), amphibians and reptiles occurring on the territories of the States that had elaborated the Convention and not covered by Appendix II have been included in this appendix.

## Appendix IV

### Prohibited means and methods of killing, capture and other forms of exploitation

82. In listing the means capable of causing local disappearance of or serious disturbance to populations of a species, prohibited in Article 8, special attention was given to avoiding contradiction with parallel provisions in other international legal instruments.

83. An exception on the prohibition of using explosives was made in the case of whale-hunting. Similarly, the prohibition of the use of certain means and methods was limited to those applied for large-scale and/or non-selective capture or killing.

84. For the purposes of the Convention, weapons with a magazine capable of holding more than two rounds of ammunition were defined as weapons which can fire more than three rounds without being reloaded.

85. It was agreed not to prohibit the use of snares if applied for the capture of the species *Lagopus* north of latitude 58°N.

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(1) Resolution (77) 7 on the protection of threatened mammals in Europe. Resolution (73) 31 on birds in need of special protection in Europe. Resolution (78) 22 on threatened amphibians and reptiles in Europe.