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AND NATURAL HABITATS

Standing Committee

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**PROVISIONS ON EXCEPTIONS
IN ACCORDANCE WITH ARTICLE 9 OF THE
BERN CONVENTION**

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Expertise by order of Pro Natura /Basel, Switzerland

*Document prepared
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WITH ARTICLE 9 OF THE BERN CONVENTION**



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1. CONTEXT

The Bern Convention regulates the conservation of wild flora and fauna by means of restrictions on their removal and use combined with the obligation to conserve their respective habitats. Particular attention is paid to endangered and vulnerable species. In addition to a general commitment to the contracting parties and regulations concerning the conservation of habitats, the convention contains in its central chapter specific, concrete requirements for the conservation of individual species.

Articles 4 to 7 contain regulations for the conservation of wild flora and fauna; Article 8 prohibits the use of all indiscriminate means of capture or killing and the use of all means which could lead to the local disappearance or severe disturbance of a population of a species.

The Contracting Parties can, under the conditions of Article 9 of the Bern Convention, permit exceptions to Articles 4 to 7 and to the prohibitions on the use of the means listed in Article 8.

This investigation seeks to demonstrate the extent of the ruling on exceptions according to Article 9 of the Bern Convention. A prerequisite for this is first of all is the establishment of the conservation area covered by the Convention. The systems and requirements for the exceptions as set out in Article 9 will be presented subsequently.

To ensure the standard implementation of the regulations for permitted exceptions across the Member States a resolution¹ on the interpretation of regulations for exceptions was worked out in 1993. This contains considerations regarding the application of the list of exceptions. A revised version of the resolution² including subsequent developments is to be adopted at the 2011 meeting of the Standing Committee. This report aims to contribute to this process.

2. BERN CONVENTION

2.1 *General introduction*

The Bern Convention³ counts among the most important conventions on the conservation of flora and fauna as it sets out, for the first time, international legal obligations on parties for the conservation of endangered species and habitats⁴. The Convention was adopted into European law with the Habitats Directive⁵ by the European Union. The Bern Convention was ratified by a total of 50 countries, including Switzerland, Germany, Norway, Iceland and the European Union⁶ (as at August 2011). In contrast to other international conventions the Bern Convention has established clear unequivocal obligations of governments in most requirements and has not limited itself to the otherwise usual call for them to “endeavour” to fulfil the terms of an agreement. These international standards are self-executing, in so far as they are sufficiently clearly defined, so that they can be applied directly by government agencies and by the courts.⁷

2.2 *Aims of the Bern Convention*

The aims of the convention as listed in Article 1 and the principles given in the Preamble are definitive for an interpretation of the Convention.

¹ Standing Committee: Resolution No. 2 (1993) on the scope of articles 8 and 9 of the Bern convention, 1993.

² Directorate of Culture and Cultural and Natural Heritage: Draft Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, T-PVS (2011) 2, 2011.

³ Adopted at Bern on 19 September 1979, entered into force on 6 June 1982.

⁴ See Lyster, S.: The Convention on the Conservation of European Wildlife and Natural Habitats (The „Berne Convention“), in: Lyster, S.: International Wildlife Law, 1993, p. 129 ff; Lasén Diaz, C.: The Bern Convention: 30 Years of Nature Conservation in Europe, RECIEL 2010, 185 ff.

⁵ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, P. 7); see Kokott, J.: Opinion of Advocate General on 20.1.2011 – Case C-383/09, paragraph 5.

⁶ Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (Bern Convention), OJ of 10.02.1982 L 38, p. 1.

⁷ See Verdross, A./Simma, B.: Universelles Völkerrecht, 3. Aufl. (Reprint) 1984/2010, § 864.

The Bern Convention pursues the aim of conservation of wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the cooperation of several states; also the promotion of such cooperation (Article 1(1) of the Bern Convention). The Preamble states “that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations...” The fundamental role played by wild flora and fauna in the conservation of natural habitats as an essential component in the conservation and maintenance of wild flora and fauna is recognised. This approach emphasises the intrinsic value of nature, the need for conservation for the benefit of subsequent generations and an ecosystematic perspective.

The Bern Convention pays particular attention to endangered and vulnerable species, including endangered and vulnerable migratory species (Article 1(2) of the Bern Convention).

Four appendices subdivide, according to the degree of threat, strictly protected and generally protected species of flora and fauna. The Convention comprises the following four appendices:

- Appendix I contains “strictly protected plant species” such as Siberian Wormwood (*Artemisia laciniata*) and Lake Constance Forget-Me-Not (*Myosotis rehsteineri*). The habitats of the listed plants are also to be conserved.
- Appendix II lists “strictly protected animal species” e.g. bear (*Ursus arctos*), wolf (*Canis lupus*), European otter (*Lutra lutra*) and white stork (*Ciconia ciconia*). The habitats of these species are also to be conserved.
- Appendix III contains “protected animal species” whose exploitation is permitted provided the continuing existence of the relevant population is not endangered.
- Appendix IV cites the measures and methods forbidden for the capture and killing of animals.

The Bern Convention also promotes the conservation of endangered natural habitats, see Article 1(1) together with Article 4(4). The Bern Convention defines the term “natural habitat” as “... a biotope, that is a distinctive type of terrestrial or aquatic area distinguished by geographic, abiotic or biotic features, whether entirely natural or modified as a result of human activities”.⁸ In contrast to the strictly protected plant species (Appendix I), the strictly protected animal species (Appendix II), the protected animal species (Appendix III) and the forbidden means and methods of killing, capturing and other forms of exploitation (Appendix IV), the Convention contains no list of the habitats which are to be preserved⁹.

The Contracting Parties of the Bern Convention resolved¹⁰ in 1989 to establish a network of “areas of special conservation interest (ASCIs)”¹¹ Its objectives correspond approximately to the “Natura 2000” network of the Habitats Directive. There are varying conditions attached to the conditions for conservation. Under the terms of the Bern Convention an area does not have to be formally included in a network to benefit from protection. In contrast to this, areas only enjoy strict protection under the Habitats Directive once they have been accepted into the “Natura 2000” network.

⁸ Standing Committee, 1989: Resolution No. 1 (1989) on the provisions relating to the conservation of habitats, No. 1. b.

⁹ A list for the identification of habitats in need of protection and of species whose habitats are in need of protection was included in resolutions passed by the Standing Committee: (Resolution No. 4 (1996) listing endangered natural habitats requiring specific conservation measures) und 1998 (Resolution No. 6 (1998) listing the species requiring specific habitat conservation measures). The lists have to be updated periodically, see T-PVS/PA (2011) 7. .

¹⁰ See Standing Committee: Recommendation Nr. 16 (1989) on areas of special conservation interest, , 1989; Standing Committee: Resolution Nr. 3 (1996) concerning the setting up of a pan-European Ecological Network, 1996; and Standing Committee: Resolution Nr. 5 (1998) concerning the rules for the network of areas of special conservation interest (Emerald Network), 1998.

¹¹ The Emerald network is a network of areas of special conservation interest (ASCIs), which is to be established in the territory of the contracting parties and observer States to the Bern Convention, including, among others, central and east European countries and the EU Member States. For EU Member States, Emerald network sites are those of the Natura 2000 network.

2.3 *Obligations of the Contracting Parties under the terms of Article 2 of the Bern Convention*

Article 2 outlines in general terms the obligations of the Contracting Parties. Its point of reference and benchmark in these matters is the population of wild flora and fauna. Accordingly Contracting Parties “shall take requisite measures necessary to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements of the Bern Convention.

The Convention commits Contracting Parties to pursue measures whereby the aims of the Convention will be achieved. This means that the Contracting Parties must act as necessary to fulfil these aims, although they have some discretion in their choice of necessary measures. However, the extent of this discretion is limited in Chapters II (Conservation of Habitats) and III (Conservation of Species) in that the Convention prescribes certain outcomes or measures:

- In accordance with Article 4 the conservation of endangered natural habitats is to be guaranteed.
- In accordance with Articles 5-8 certain prohibitions are to be imposed.

Contracting Parties must guarantee that the species and their habitats listed in Appendices I-III can be maintained in the long term by these measures. The Preamble of the Bern Convention states in this context “that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations...” Should the species and habitats not be in an appropriate condition to guarantee long term maintenance, then the Contracting Parties must pursue measures to reach the necessary levels, i.e. the populations of the species in question must be able to guarantee long term survival of the species.

It is therefore first of all crucial that information on the current level of wild fauna and flora populations be gained. This calls for statements on the distribution, frequency, distinguishing features, habitat requirements of the species and the causes of threat to them¹². Only once in possession of these data can a judgement be made whether the population of wild flora and fauna is already at a level which corresponds to the ecological, economic and cultural requirements or whether this level is yet to be achieved.

The long-term survival of a species can only be guaranteed if a minimum number of –species-specific – individuals is present (minimum viable population, MVP)¹³. There must be a sufficiently large number of individuals to balance out chance fluctuations in demographic factors with regard to reproduction/propagation and mortality, unforeseeable environmental change, genetic drift and catastrophes¹⁴. The precise MVP of individual species depends on many factors specific to individual species, their conditions and environment; the MVP can often only be approximated¹⁵. It can be assumed that vertebrates with an effective population of fewer than 100 individuals, that is an absolute population of fewer than 1000, are seriously threatened with extinction. In species with extreme fluctuations of population (e.g. invertebrates or annual plant species) a MVP of 10,000 individuals is considered necessary¹⁶.

Such minimal populations can only survive if they have access to sufficiently large habitats of appropriate quality, and exchange, expansion and migration are possible. Exchange between populations of a species is necessary to ensure genetic exchange between different (meta-)

¹² Dietz, M./Meinig, H./Simon, O.: Entwicklung von Bewertungsschemata für die Säugetierarten der Anhänge II, IV und V der FFH-Richtlinie, Natur und Landschaft 2003, 541; Rückriem, C./Roscher, S.: Empfehlungen zur Umsetzung der Berichtspflicht gemäß Artikel 17 der Fauna-Flora-Habitat-Richtlinie, Angewandte Landschaftsökologie Heft 22 (1999), p. 16.

¹³ See: Shaffer, M.L.: Minimum Population Sizes for Species Conservation. *BioScience* 31, 1981, 131–134.

¹⁴ Smith, T.M./Smith, R.L.: *Ökologie*, 6th ed., 2009, p. 834.

¹⁵ Schumacher, A./Schumacher, J., in: Schumacher/Fischer-Hüftle (Eds.), *Bundesnaturschutzgesetz (BNatSchG)*, 2nd ed., 2010, § 1 Rdnr. 75.

¹⁶ Smith, T.M./Smith, R.L.: *Ökologie*, 6th ed., 2009, p. 834.

populations. Without such an exchange there is the risk (especially among small populations) of genetic impoverishment and thus a higher risk of extinction¹⁷.

The definition of “conservation of a species at a favourable status” in Article 1(i) of the Habitats Directive can be used to judge the extent to which the current level of population is able to guarantee the long-term survival of species, as this term corresponds to the expression “Level of Population” as used in the Bern Convention. Article 1(i) of the Habitats Directive defines the “conservation status of a species” as “the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations”. The conservation status is considered favourable when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

The Convention also records locally threatened sub-species varieties or forms.

- The “subspecies” (ssp./subsp.) represents the most significant systematic category beneath a species. The subspecies of a species can be clearly distinguished from each other by a number of characteristics. Different subspecies are always living in different geographical regions or timeframes; in cross breeds fertile hybrids are formed¹⁸.
- The term “variety” (*varietas*, var.) denotes a systematic category beneath a species with lower systematic rank than the subspecies. Varieties only distinguish themselves from a species in only few characteristics; they are not separated from the species by either location or timeframe¹⁹.
- The “form” (*forma*, f.) is the lowest systematic category beneath a species. Forms often differ from the species in only one characteristic. For example, the suffix “*forma domestica*”²⁰ or *forma familiaris*²¹ represents the domesticated form of wild animals.

Consideration must also be given to economic and recreational requirements. The Convention refers to the economic and recreational value of wild flora and fauna – see the Preamble (point 3). The exploitation of particular species is not excluded by the conservation regulations of the Bern Convention. It follows from Appendix III that species which are not subject to the strict protection defined in Appendix II may be exploited in so far as the continued existence of their populations is not endangered. Article 2 lists in its summary of regulations no further economic interests.

2.4 Obligations of the Contracting Parties under the terms of Article 3 of the Bern Convention.

Under the terms of Article 3(1) “each Contracting Party shall take steps to promote national policies for the conservation of wild flora and fauna and natural habitats”. This includes all species of wild flora and fauna. Particular attention is given to endangered and vulnerable species, especially endemic species, since they demonstrate a greater need for protection than less threatened species. Article 3 refers to areas of application for all species and goes beyond those species listed in the appendices of the Bern Convention. The natural habitats of these species are also to be preserved.

The Bern Convention defines the habitat of a species as follows: “habitat” of a species (or population of a species) means the abiotic and biotic factors of the environment, whether natural or modified, which are essential to the life and reproduction of members of that species (or population of

¹⁷ Schumacher, A./Schumacher, J., in: Schumacher/Fischer-Hüftle (Eds.), BNatSchG, 2nd ed., 2010, § 1 Rdnr. 76 f.

¹⁸ Schubert, R./Wagner, G.: Botanisches Wörterbuch, 10th ed., 1991.

¹⁹ Schubert, R./Wagner, G.: Botanisches Wörterbuch, 10th ed., 1991.

²⁰ See *Sus scropha* = wild boar – *Sus scropha forma domestica* = domestic pig.

²¹ *Canis lupus* = Gray wolf – *Canis lupus forma familiaris* = domestic dog.

that species) and which occur within the natural geographical range of the species (or population of that species).²²

Under the terms of Article 3 the scope of the Bern Convention applies also to the conservation of endangered habitats. These are understood as the natural habitats and not man-made parks or gardens, etc.²³. The Convention defines the concept of natural habitat as follows: „natural habitat“ means a biotope, that is a distinctive type of terrestrial or aquatic area distinguished by geographic, abiotic or biotic features, whether entirely natural or modified as a result of human activities.²⁴

“Natural habitats” are to be understood as entirely natural or modified terrestrial or aquatic areas distinguished by geographical, abiotic and biotic features. This can also include biotopes and types of biotop complexes. A natural habitat is considered endangered if its disappearance from its natural area of occurrence is threatened or if it occupies a narrow natural range.

This represents a frame of reference for the respective Contracting Party and requires that the signatories act in respect of both the law (laws and regulations) and also in respect of specialist technical issues (see the obligations of the Contracting Parties in Article 11(1)(b) with reference to the promoting of research). Particular measures result from the following requirements of the Bern Convention.

Under the terms of Article 3(2) each Contracting Party is committed to taking into account the conservation of wild flora and fauna in their planning and development policies and in the measures taken against environmental pollution. This means that the aims of the Bern Convention must be replicated in national laws. The directive focuses on, for example, local infrastructure projects which affect the environment and which can negatively impact on the continued existence of species. This includes the species themselves and their migration routes.

2.5 Conservation of Habitats, Article 4 of the Bern Convention

Under the terms of Article 4(1) of the Bern Convention “each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I [strictly protected plant species] and II [strictly protected animal species], and the conservation of endangered natural habitats. Article 4 (4) contains a concrete obligation for the Contracting Party to pursue specific measures as appropriate and necessary to ensure the conservation of habitats for wild flora and fauna. This can be achieved, for example, by the designation of conservation areas.

The necessity for measures to conserve the habitats of wild flora and fauna arises if the condition of the habitats has already declined or threatens to decline. Such measures must serve the purpose of protecting the habitats of wild flora and fauna and in individual cases to avert any existing threats. From this follows the necessity of ensuring the appropriateness of measures to be taken. The measures necessary to achieve these aims are not only necessary to maintain an existing population, but also serve to maintain the functions of habitats. It can, for example, prove necessary to guarantee or to re-establish the movement of individuals between habitats by means of habitat corridors.

In the event of a natural habitat being endangered, appropriate and necessary legislative and administrative measures must be taken to guarantee the habitat’s survival. It is necessary to establish a national register to record endangered habitat types; this will also serve as a list of those conservation areas identified for the preservation of habitats²⁵.

Under the terms of Article 4(2) of the Bern Convention the Contracting Parties must take account of what is necessary to maintain protected areas as defined in Article 4(1) in their planning and development policies, so that any negative impact on these areas is avoided or kept to a minimum.

²² Standing Committee: Resolution No. 1 (1989) of the standing committee on the provisions relating to the conservation of habitats, 1989, No. 1 a.

²³ See Article 4 (1) of the Bern Convention

²⁴ Standing Committee: Resolution No. 1 (1989) of the standing committee on the provisions relating to the conservation of habitats, 1989, No. 1. b.

²⁵ See Standing Committee: Recommendation No. 3 (1984) of the standing committee on the establishment of national inventories of three types of natural habitat, 1984; see T-PVS/PA (2011) 7, 2011, p 76.

These areas are part of the Emerald Network²⁶; there is a commitment to ensure that the factors giving rise to the designation and conservation of those sites are not adversely affected²⁷. It is therefore a requirement for all planning to establish in advance the impact they would have on protected areas. This can occur, for example, in proceedings at which, in so far as is possible, measures must be taken to avert or reduce any negative impacts and also to bring under consideration alternative courses of action. In this situation the most reasonable course of action should be chosen which will have the least negative impact.

Article 4(4) of the Bern Convention is concerned with the urgent protection of habitats which are important for migratory species as listed in Appendices II and III, these habitats are of particular importance in their proximity to migration routes; as such the conservation of the migration routes is included in these measures²⁸. The Convention does not distinguish here between the species which are defined as strictly protected in Appendix II and the protected species defined in Appendix III. If migration routes have been breached, then particular attention is to be paid to the re-establishment of the entirety of the routes.

2.6 Conservation of endangered plant species under the terms of Appendix I (Article 5 of the Bern Convention)

Under the terms of the Bern Convention each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild plant species as listed in Appendix I.

Article 5 Clause 2 considers an appropriate measure the prohibition of deliberate picking, collecting, cutting or uprooting of such plants. The protection applies to all plant parts and stages of development, for example seeds, fruits, bulbs, tubers and roots. If required, as the most extreme form of conservation, the possession or sale of these species will be prohibited.

2.7 Protection of endangered animal species under the terms of Appendix II (Article 6 of the Bern Convention)

The provisions of Article 6 of the Bern Convention are that each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the strictly protected wild fauna species specified in Appendix II. The convention provides in Article 6(a)-(e) a list of examples, but not an exhaustive list of prohibitions. In practice this means that in addition to the prohibitions listed in Article 6(a)-(e) further examples may be added as necessary to fulfil the aim of maintaining wild fauna and their natural habitats.

2.7.1 Deliberate killing

Under the terms of Article 6(a) of the Bern Convention the deliberate killing of fauna species listed in Appendix II is prohibited. A targeted deterioration of fauna or flora is not a prerequisite to indicate intention. It is sufficient to recognize the deterioration and accept it as a loss. If this proposal is authorised, although it is linked to possible deterioration of the protected fauna and flora or their places for nesting, brooding, living and refuge, then it is authorised in acceptance of any consequences and is thus intentional. The Standing Committee argued that²⁹ “deliberate damage to or destruction of breeding or resting sites” means, subject to relevant provisions of the law of each Contracting Party, any act committed with the intention of destroying or causing harm to breeding or resting sites as defined in Article 6 lit. a above, and any act committed without the intention to cause damage or destruction but in the knowledge that such would probably be the consequences of the act.’

In order to avoid deliberate killing of fauna it is necessary, for example when authorising such interventions, to establish the population status of the relevant species. The appropriate agencies and

²⁶ See Standing Committee: Resolution No. 3 (1996) concerning the setting up of a pan-European Ecological Network, 1996.

²⁷ See Standing Committee: Recommendation No. 16 (1989) on areas of special conservation interest, 1989.

²⁸ See Lyster, S.: The Convention on the conservation of European wildlife and Natural habitats (The „Berne Convention“), in: Lyster, S.: International Wildlife Law, 1993, p. 137 f.

²⁹ Standing Committee: Resolution No. 1 (1989) on the provisions relating to the conservation of habitats, 1989.

the executor of the intervention will thus be informed of the incidence of species and habitats under special protection.

Animals can also die as a result of road traffic collisions and the question therefore arises to what extent, for example, the construction of a road or building constitutes deliberate killing. In resolving this question one must differentiate between the following points:

The realisation of “socially valid risks”, such as unavoidable collisions with animals with road and rail traffic, can only be subject to a prohibition on killing if the risk of killing has increased as a result of the construction of a new road. If “only” individual animals are harmed, it cannot be considered as an infringement against the prohibition on killing, as individual collisions can never be completely ruled out. Other factors may need to be considered if there is a higher probability of large numbers of victims, such as when a road crosses the flight corridor of a low-flying species of bat or the migration corridor of a species of animal. To avoid this becoming reality, measures are needed in such cases to prevent an increase in mortality (e.g. “Flyovers” and guiding structures for bats, ladders and passageways for amphibians). If it not possible to deploy such measures, then the construction of a new road in the hunting ground of low-flying bird species such as barn owls or long-eared owls can constitute a *corpus delicti* with respect to the prohibition³⁰.

2.7.2 *Prohibition of the deliberate capture and keeping of wild fauna as listed in Appendix II*

Capture is defined as any and all physical limitations on freedom of movement completely independent of how long this lasts and whether release was intended at the moment of capture. The scientific ringing of birds is only permitted for individual cases with appropriate evidence to support exceptions. The brief handling of an animal as a means of rescue, for example moving a hedgehog out of a road or transferring amphibians is not considered “capture”. Keeping animals is considered a form of possession.

The capture, injury and killing of animals is not justified if one simply claims that the deed was not committed “deliberately”; in this case the objective evidence of reasonable grounds must be established. The cultivation of agricultural and forestry areas constitutes reasonable grounds with regard to associated harm to fauna and flora. The aim of acquiring the animal does not in itself constitute reasonable grounds, since this (the acquisition) is intended to be prevented by the general prohibition on capture and killing. It must be taken into account whether the intention of acquisition is to be considered reasonable as for example when an animal is removed from the wild for purposes of education.

2.7.3 *Prohibition of deliberate damage to or destruction of breeding or resting sites of the wild fauna species as listed in Appendix II*

The Bern Convention does not define the terms “breeding or resting sites”. This commentary focuses on ecological functionality. In this context a “breeding site” can include locations needed for courtship displays, mating, nest building, laying eggs and brooding and care of young. “Resting sites” are locations in which migratory species such as birds of passage stop in the course of their journeys to rest and recuperate. Areas suitable as resting sites must be located conveniently for the migration route and provide appropriate food and water supplies.

This regulation aims to conserve sites which animals can use during vulnerable phases of their life. Both deliberate damage and deliberate destruction of these sites is addressed.

If the effects of damage continue after the cessation of disturbance (e.g. the abandonment of a nursery roost of bats) or are subsequent to operational activity (e.g. noise emissions from a road) then damage is considered to have taken place.

³⁰ See Kratsch, D. in: Schumacher/Fischer-Hüftle (Eds.), Bundesnaturschutzgesetz (BNatSchG), 2nd ed., 2010, § 44 BNatSchG, Rdnr. 16; and Hänel, K./Reck, H. (Eds.): Bundesweite Prioritäten zur Wiedervernetzung von Ökosystemen: Die Überwindung straßenbedingter Barrieren, 2011, 354 p. + CD.

2.7.4 Prohibition on deliberate disturbance of wild fauna as listed in Appendix III

Under the terms of Article 6(c) the deliberate disturbance of wild fauna, especially during brooding, rearing young and hibernation is prohibited in so far as this disturbance impacts on the aims of this agreement.

The term “disturbance” brings to the fore the potential damage to be caused and threatens the psychological condition of the animal. Disturbance can result from movement, noise or light and can frequently lead to the animal taking flight (harrying/startling/driving away); flight or scaring young is not necessary to prove disturbance. A disturbance is not defined necessarily as conscious and purposeful actions, but embraces every deliberate action which accepts that animals as listed in Appendix II of specially protected wild fauna can be disturbed.

The prohibition on deliberate disturbance applies particularly to the periods which are especially important for the preservation or survival of individual wild species of animal.

2.7.5 Prohibition on deliberate disturbance or deliberate removal of eggs from the wild or the possession of such eggs, even if they are empty.

The prohibition protects against the deliberate destruction or removal of eggs from the wild and applies to the possession of such eggs, whether they are full or empty. The prohibition covers all egg-laying species; in addition to birds these include, for example, reptiles, amphibians, fish or insects. Eggs represent developmental forms of animal species; their removal from the wild can have a negative impact on the reproduction of their species. Since it is not always possible to ascertain beyond doubt whether eggs are empty or whether their removal from the wild took place once they were empty, any deliberate removal is prohibited.

2.7.6 Prohibition on possession and dealing in live or dead animals

The terms of the prohibition on possession and dealing as set out in Article 6(e) applies to all species of wild fauna as listed in Appendix II, whether or not the animals are live, dead or stuffed. The prohibition applies to all types of possession (indirect and direct possession, personal possession and possession by a third party) and includes both taking into possession, i.e. conscious acquisition as well as maintaining possession.

The treatment and processing of those wild fauna species as listed in Appendix II is prohibited, regardless whether animal parts or products are in question. In the treatment of an animal, it retains its intrinsic form (e.g. the preparation of an animal body). Processing the protected object results in a new article being produced (e.g. the installation of ivory keys in a piano, the manufacture of a fur coat); even the working of the surface (e.g. carving a piece of ivory) counts as processing.

This prohibition promotes the effective protection of the species in Appendix II under the terms of the Bern Convention. The prohibition on dealing also includes preparatory discussions, that is offering for purchase or sale, keeping stocks for sale and the transport for sale of animals according to Appendix II.

2.8 Protection of species under the terms of Appendix III, Article 7 of the Bern Convention

Article 7 deals with the protection of the wild fauna species as set out in Appendix III. Under the terms of Article 7(1) each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the protection of the specified wild fauna species. Under Article 7(2) all exploitation of the wild fauna species specified in Appendix III is regulated to ensure that the continued existence of the populations is not endangered; in this respect Article 2 is to be taken into account. Local subspecies, varieties and forms are also included in this protection.

Under Article 7(3) these measures also include, amongst others, the following points:

- closed seasons and/or other procedures regulating the exploitation;
- the temporary or local prohibition on exploitation, as appropriate, in order to restore satisfactory population levels;

- the regulation as appropriate on the sale, keeping for sale, transport for sale or offering for sale of live and dead wild animals.

The specification in Article 7(3) is not exhaustive and can be further supplemented in accordance with the stated aim, that is the guarantee of protection for the wild fauna species in Appendix III. Legislators have both legislative as well as subordinate regulations at their disposal.

2.9 Prohibited means of capture, Article 8 of the Bern Convention

Under the terms of Article 8 the Contracting Parties are forbidden the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species. The prohibition refers specifically to the means specified in Appendix IV such as snares, live animals used as decoys which are blind or mutilated, explosives, traps, poisons and also semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition. Further prohibitions may be added as Article 8 of the Bern Convention does not contain a conclusive list.

The prohibitions on capture and killing according to Article 8 refer to the species of wild fauna specified in Appendix III. Comprehensive protection exists for the species listed under special protection in Appendix II under the terms of Article 6, from which exceptions may be made only under the conditions of Article 9. The restrictions on methods of capture as specified in Article 8 also apply to these exceptions.

Preparatory discussions also fall under this prohibition. Achieving success is not a precondition.

3. PROVISIONS ON EXCEPTIONS IN ACCORDANCE WITH ARTICLE 9 OF THE BERN CONVENTION

3.1 General introduction

In accordance with Article 9(1), the governments under contract may allow exceptions to Articles 4, 5, 6, 7 and to the prohibition against the use of the means designated in Article 8 if

1. no other satisfactory solution is available,
2. the exception will not be detrimental to the survival of the population concerned and
3. at least one justifiable reason in accordance with Article 9(1)(indents 1-5) has been presented.

These prerequisites must be present cumulatively. Both of the first two prerequisites identified present two general requirements ranking higher than the detailed catalogue of exceptions with which the central goals of the Convention are supposed to be attained. They can be described as follows:

1. The avoidance of adverse effects on the protected natural assets has precedence over the permission of an exception. Even if a planned activity constitutes one of the five exceptions mentioned in Article 9(1), an alternative with fewer adverse effects must be sought. As long as there is another satisfactory solution for achieving the purpose of an activity that is presumably associated with negative consequences for natural assets, then the more harmful variant must be avoided.
2. The second prerequisite constitutes a compelling corrective, a ban. Even if the planned activities fall under one of the five exceptions in Article 9(1) and there is no other satisfactory solution, then the exception may not have the consequence that the population suffers damage. This means that the integrity of the protected natural asset has priority.
3. An exception is allowed, therefore, if both the higher ranking demands are observed and one of the reasons from Article 9(1)(indents 1-5) exists:
 - for the protection of the plant and animal world;
 - for the prevention of serious damage to wildlife cultures, livestock holdings, forests, fishing grounds, bodies of water and other property;
 - in the interest of public health and security, the security of air traffic or other higher ranking

public interests;

- for the purposes of research and education, of the replenishment of populations, of resettlement and breeding;
- in order to selectively allow under strictly regulated conditions and in limited range the catching, holding or other reasonable use of certain wild animals and plants in limited numbers.

The Convention considers this catalogue of exceptions to be appropriate and sufficient for introducing a reasonable balance between the goals of the Convention and other interests. The Convention is dedicated to public and private interests, e.g. those associated with the prevention of damage to property. Concerning public interests, it contains in the third indent a general clause. This enables, very generally, the allowance of an exception in the interest of higher ranking public interests. The Convention makes the choice because not all imaginable cases of public interest can be predicted.

The provision on exceptions releases individual actions from adherence to individual laws or prohibitions. As a consequence, the exception must be applied under the simultaneous consideration of the corresponding provision of the law or prohibition. In this the weight that the goals of the Convention have in the actual case must be taken into account. The administration of the provision on exceptions may not lead to the undermining of the laws or prohibitions. The prerequisites of the exception are in total to be laid out narrowly.

As a guideline for the evaluation of the interests pursued by the Convention, the goal setting of the Convention in accordance with Article 1 and the reasons outlined in the preamble can be consulted, cf. those under 2.2. Their weight must in the actual case be assessed.

The Bern Convention pursued the goal of maintaining wildlife plants and animals as well as their natural habitats, especially the species and habitats whose preservation requires the cooperation of several governments, and to promote such cooperation (Article 1(1) of the Bern Convention). In its preamble it states in addition “that wildlife plants and animals represent a natural heritage of aesthetic, scientific, cultural, recreational, economic and individual value that must be maintained and passed on to future generations.”

3.2 Exceptions to Articles 4-8 of the Bern Convention

- Exceptions to Article 4 of the Bern Convention (protection of habitats)

In accordance with Article 4(2) of the Bern Convention any adverse effects on protected areas must be avoided in accordance with Article 4(1) of the Bern Convention, or they must be kept to an absolute minimum. This requires for all forms of development and projects that the effects on the protected areas must be determined in advance; this can take place, for example, in a procedure of one's own choosing. The provision on exceptions in Article 9 concerns the provision that targets a contracting government for fulfilling the requirements of Article 4 of the Bern Convention. Article 4 serves especially to also protect those areas outlined in the appendices II and III that are of importance for migratory species and those that lie in advantageous areas with respect to migration routes for overwintering, gathering, feeding, breeding or moulting.

- Exceptions to Article 5 of the Bern Convention (strict protection of plant species)

In accordance with Article 5 of the Bern Convention every contracting government seizes upon suitable and necessary prescriptions for implementing the particular protection of wildlife plant species outlined in Appendix I. The wildlife plant species outlined in Appendix I are subject to an absolute prohibition against removal. Therefore an approval of an exception is required for every instance of the removal of plants or plant parts of these species. If the contracting party has issued an ownership or commercialisation prohibition, then this can be overruled only with a exception in accordance with Article 9.

- Exceptions to Article 6 of the Bern Convention (strict protection of animal species)

Article 6 concerns the requirements for species protection that the contracting government issues for implementing the protection of animals in accordance with Article 6 of the Convention. Exceptions

to this may be permitted only in accordance with the stipulations of Article 9. Article 6 prescribes a different process by which the contracting party secures the strict protection of wildlife animal species outlined in Appendix II. While in (6a), (6b) and (6d) a comprehensive protection is the aim that also does not allow any legal limitations, (6c) aims for a limitation on all cases that are relevant to the purpose of protection. This means: For (6a), (6b) and (6d) an approval of an exception in accordance with Article 9 of the Bern Convention is always required, if there is any departure from the definition of protection in accordance with Article 6. For (6c) it holds that an intentional disturbance is prohibited if through this the goals of the Convention are in any way affected. If an action is nevertheless to be taken that disturbs the animals, then it requires the approval of the exception in accordance with Article 9 of the Bern Convention. The contracting governments can in accordance with (6e) issue an ownership or marketing prohibition. If this has occurred, then the approval of the ownership or the business activity is required in accordance with Article 9 of Bern Convention.

- *Exceptions to Article 7 of the Bern Convention (protected species in accordance with Appendix III)*

The contracting governments regulate in accordance with Article 7 of the Bern Convention every use of the wildlife animals outlined in Appendix III. Exceptions to these regulations are permitted only within the framework of Article 9.

- *Exceptions to Article 8 of the Bern Convention (prohibited methods of capture)*

In accordance with Article 8 of the Bern Convention the contracting governments prohibit certain methods of capture. This holds on the one hand for the capture or killing of wildlife animal species outlined in Appendix III and on the other for those cases in which in accordance with Article 9 exceptions apply for the species outlined in Appendix II.

Exceptions to these prohibited methods of capture can occur only if other methods do not lead to success. This would in praxis probably seldom be the case.

3.3 Testing of alternative solutions

Article 9(1) identifies as one of the prerequisites for an exception to the scope of protection from the Articles 4-7 and to the prohibition on the use of the means designated in Article 8 that “there is no other satisfactory solution”. This prerequisite implies that even more solutions were taken into consideration and only as it were as an *ultima ratio* is an exception to be made. If another satisfactory solution is possible that does not require an exception to the Articles 4-8, then this must be chosen.

The solutions are to be considered in connection with the goals of the Convention. Depending on the species affected and the reasons for an exception given, very different alternative solutions can be considered. Possible solutions can be alternative locations or routings (of streets, railroads), other dimensions or development plans or alternative activities, processes or methods.³¹ For fending off economic damage, the deterrence instead of the shooting of fish eating birds for the protection of fish stocks, the fencing in of cattle pastures and the employment of guard dogs for protection against wolves, or the protection of bee hives against bears by means of electric fencing can, for example, be taken into consideration. In the same way the promotion of stocks of prey animals can lead to a larger “natural” food supply for large predator animals and with that to a lesser degree of damage to production animals. For the minimization of damage there is also an obligation of participation on the part of the property owner affected. An alternative solution can – especially in combination with damage prevention measures – be found in the compensation for the damages entailed, be it through (governmental) damage compensation payments or through the corresponding insurance programs.

The Bern Convention follows – as illustrated above – the goal of protection of wildlife plants and animals as well as their natural habitats. This is also to be observed when, for example, projects of preferential public interest are to be implemented. In order to be able to exclude any one solution, it must be proven through a study undertaken by the authorities responsible or by the organisation responsible for a project that no other solution would have a less adverse effect on the flora and fauna.

³¹ European Commission: Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, 2007, p. 59.

The reasoning behind the alternative testing is to find a solution that has no or less of an adverse effect. As other satisfactory solutions, alternative locations as well as alternative implementations come into consideration. The identity of the project must, however, remain intact; thus, doing without the implementation of the project does not represent another solution. The term “other satisfactory solution” must be understood against the background of the protection regulations of Article 4-8 of the Bern Convention. If the planning goals can be realized with less invasive intensity or in a more favourable location, then the organisation responsible for the project must make use of this possibility; any degree of discretion cannot be granted in this situation. If a project is possible and reasonable in another location through an altered implementation without substantial adverse effects on this area, then the project manager is obligated to choose this alternative. If only alternative solutions exist that are also associated with adverse effects but less extensive ones, then the reasonable alternative solution must be chosen that comes with the least adverse effects. The effects proceeding out of reasonable alternative solutions must also be determined through the framework of a special test.

An alternative solution is not reasonable if its realisation is objectively impossible or can be realised only with a significant – also financial – increase in expenditure that no longer stands in any relation to the advantages of the protection of nature.³² The project management may only distance themselves from an alternative that is in itself technically possible if this alternative demands a disproportionate sacrifice or will adversely affect other interests of the common good. In accordance with the general principles of law it is reasonable only if the alternative does not overstep the limits of what is appropriate and required for the fulfilment of the goals pursued by the Convention. Location or implementation alternatives that can be realised only with disproportionate expenses can therefore be left out of consideration. The reasonable extent to which avoidance efforts should be carried out may not stand outside of any rational relationship to the gain achieved by them for nature and the environment. The guideline for this is the severity of the adverse effects, the number and significance of, for instance, affected habitat types or species, as well as the degree to which the efforts are irreconcilable with the conservation goals.

3.4 Impact on the population stocks in question

Article 9 mentions as a prerequisite for an exception to Articles 4-7 and to the prohibition against the use of the means designated in Article 8 that the exception does not damage the stock of the population in question. Article 9 provides no further information on this matter. In any case such an exception presupposes that the appropriate authorities are familiar with the actual state of the stock. Otherwise no statement can be made on what impact the exception will have on the population. Under “population” is understood “a group of individuals of a species that forms a potential reproductive community in a delimited area”.³³ Within ³⁴one population there exists one common gene pool³⁵ that as a rule distinguishes itself from other populations.

The Bern Convention pursues as a general goal the conservation of wildlife plants and animals as well as their natural habitats, especially of those species and habitats whose conservation requires the cooperation of several governments. This goal can be reached only if the stocks of wildlife plants and animals exist in a survivable state. This is stated clearly in the preamble as well as in Article 1 of the Bern Convention.

The preamble of the Bern Convention identifies as its intention the following points for the publication of the Convention:

- recognising that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations;
- recognising the essential role played by wild flora and fauna in maintaining biological balances;

³² Cf. Gellermann/Schreiber, Schutz wildlebender Tiere und Pflanzen in staatlichen Planungs- und Zulassungsverfahren, 2007, Schriftenreihe *Natur und Recht*, vol. 7, p. 73.

³³ Smith/Smith, *Ökologie*, 6th ed., 2009, p. 7.

³⁴ Smith, T.M./Smith, R.L.: *Ökologie*, 6th ed., 2009, p. 834.

³⁵ Under “gene pool” is understood the totality of all genes of all individuals of a population at a specific point in time, Smith/Smith, *Ökologie*, 6th ed., 2009, p. 34.

- noting that numerous species of wild flora and fauna are being seriously depleted and that some of them are threatened with extinction;
- aware that the conservation of natural habitats is a vital component of the protection and conservation of wild flora and fauna;
- recognising that the conservation of wild flora and fauna should be taken into consideration by the governments in their national goals and programmes, and that international co-operation should be established to protect migratory species in particular.

For the attainment of these goals the contracting parties are to take measures to maintain or raise the population of wildlife plants and animals to a state that corresponds to the ecological, scientific and cultural demands.

So that the wildlife plants and animals remain in a viable state (for survival) or are able to attain this state and that they are preserved for future generations, it is necessary that they can be found in their natural habitats for the long term, that the natural geographical range of these species does not decrease and that for them a sufficiently large habitat is present for securing the survival of the population of this species.³⁶

Precisely in the case of the endangered species adverse effects on a population or even on a few individuals can frequently lead to the degradation of the stock. Consequently Article 9(1) of the Bern Convention allows an exception only if it does no damage to the “population in question” – that is, to the population affected by the exception. An evaluation of the entire situation of the species in its natural habitat range is not stipulated by the Bern Convention (in contrast to the Habitats Directive). Each population contributes to the realisation of the protection goals of the Convention and is therefore – even with the claims of an exception approval in accordance with Article 9 of the Bern Convention – its stock is to be preserved. As a consequence of an exception, therefore, the stock of the population in question may not suffer any damage. If through the exception the populations of several species protected through the provisions of Appendix I – III are affected, then this naturally holds for all affected species.

For the preservation of the species and their habitats various different specialised criteria on natural protection play a role; these must be addressed with the help of the circumstances of the immediate individual case. Before a judgement on the effect of the planned exception on the population(s) in question can be made, an actual data base must exist that allows access to information on the spatial expansion of the population (and if necessary its delineation over against neighbouring populations), and the size and trend of the stock. Units in which a certain species exhibiting a more or less continual spread so that individuals can interact with each other as often as required for forming a demographic unit are thus to be considered a population.³⁷

If the habitat of a population stretches over one or several political borders, its entire habitat must be considered when issuing an exception. Approximate cumulative effects must be taken into account. This means that a statement on the status of the stock cannot be formulated until the appropriate knowledge of the situation is available and the appropriate cross-border consultations regarding an exception in accordance with Article 9 can be arranged. These consultations are also intended to serve the purpose of preventing a population from unilaterally slipping into distress.

Whether the exception to Articles 4-8 of the Bern Convention results in damage to the population in question is preferentially a question for the experts on nature protection. One must test whether the stock of the population in question will remain stable despite the implementation of the exception. For the question of whether this is warranted, suitable protection and compensation measures may be taken into account, for it makes no difference whether the adverse effects caused by the exception from the beginning are to be judged as negligible or whether they achieve this characterisation only

³⁶ Cf. on this also the definition of a ‘favourable conservation status’ according to Article 1(i) of the Habitats Directive.

³⁷ Linnell/Salvatori/Boitani: Guidelines for designing population level management plans for large carnivores in Europe. A Large Carnivore Initiative for Europe, a report prepared for the European Commission (contract 070501/2005/424162/MAR/B2), 2008, p. 9.

after appropriate preventive measures are taken. If doubts about the effectiveness of protection and compensation measures remain and if damage to a population stock cannot be excluded, then the exception may not be granted.

The question of whether the loss of single individuals or the adverse effect on or loss of habitat damages a population is also to be considered and judged in light of the significance of the population for the preservation of the species in its natural habitat range. The Convention intends – positively defined – to create or preserve a condition that is consistent with the ecological, scientific and cultural requirements. Thus, for the contracting governments this involves more than the mere avoidance of an extinction. All the measures taken in the framework of the Convention must have as their goal to establish or guarantee a state of preservation that makes possible the long-term survival of the population. Especially in the case of species that have not yet attained this “favourable” state of preservation, it is necessary to promote existing populations in this way so that the entire state of the species improves.³⁸ Damage to a stock can therefore not occur until positive trends in the stock are negatively affected. Influences that proceed from an exception may not disturb the species-specific population dynamic to such an extent that the species no longer “forms and will continue to form in the long term a viable element of the natural habitat to which it belongs”.

3.5 Reasons for an exception

3.5.1 General introduction

The claim to an exception through the provisions of Article 9(1) can proceed only if at least one of the reasons for justification outlined in Article 9(1)(indents 1-5) is presented. This enumeration is conclusive; other reasons can not justify an exception to the provisions of Articles 4, 5, 6, 7 and to the prohibition against the use of the means defined in Article 8.

3.5.2 Exceptions to the protection of the plant and animal world

In accordance with Article 9(1) (first indent) an exception “to the protection of the plant and animal world” can be allowed. This formulation holds generally and relates to all wildlife plants and animals that indicate a corresponding need of protection. In need of protection are especially endangered and sensitive species. An indication of endangerment is provided in, e.g. the list of the corresponding appendices of the Bern Convention, of the Habitats Directive, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or the inclusion in the Red List Species. In this regard a regional threat to the stock of a protected species is sufficient.³⁹ Reversals that are not threatening to the stock do not justify an exception; the exception also cannot be applied to widely distributed species.

An exception in accordance with Article 9(1) (first indent) can regularly be made only if – in respect to the specific situation – a greater emphasis is accorded to other interests of species protection. An exception can be taken into consideration if e.g. the presence of a species has a negative impact on other animal or plant species in need of protection. A temporary adverse effect during which the affected animal or plant species regenerates itself in a short time is not sufficient for satisfying the criteria for the existence of an exception, just because it is then to this extent lacking the need of protection. An exception is also only allowed if the intended invasive measures are suitable for securing the protection of the plant and animal world.

An exception in the sense of Article 9 of the Bern Convention can also be allowed for projects that are based on “favourable effects on the plant and animal world”. The condition of the plant and animal world must through the proposal be directly and causally proven to have improved. Thus, the construction of e.g. a so-called “fish ladder” for improving the transmissibility of flowing water can serve the protection of aquatic life. If through this a habitat in the sense of Article 4 of the Bern Convention is adversely affected, this can represent criteria for the existence of an exception. In contrast, proposals that are supposed to improve the condition of the environment but do not have the

³⁸ In this respect a larger population possesses a lower risk of extinction. The expansion of the species into habitats not yet settled or the reintroduction in suitable habitats can also be promoted.

³⁹ Cf. Kratsch, D. in: Schumacher/Fischer-Hüftle (Eds.), Bundesnaturschutzgesetz (BNatSchG), 2nd ed., 2010, § 45 Rdnr. 35.

direct goal to protect the plant and animal world (e.g. installations for generating renewable energy) are not included in the criteria for the existence of an exception. With the regulation on exceptions of Article 9(1)(first indent) the Bern Convention pursues goals for the protection of nature that may not be equated with a diffuse concept of environmental protection. Otherwise one would be forced with wind energy installations to weigh the indirect gain for the plant and animal world (through the contribution to climate protection) against its potential for danger (bird strikes), which contradicts the Convention's nature protection goals and would overstretch the provisions on exceptions.

3.5.3 Exceptions to the prevention of severe damage to wildlife cultures, livestock, forests, fish grounds, bodies of water and other property

A claim to the provisions on exceptions is possible in order to prevent "severe" damage that can ensue to wildlife cultures, livestock, forests, fish grounds, bodies of water and other property. The exception aims with this the avoidance of substantial economic damage. With respect to the question of what constitutes "severe damage" in the sense of the Bern Convention, one must consider the intensity and the duration of the detrimental effect as well as the extent of the destruction or damage caused.⁴⁰ Only the presence or the danger of a substantial deterioration can justify an exception. It is not required that the damage be already present. Rather, it is sufficient if serious damage in all likelihood will occur. Single incidents of damage and minimal amounts of damage do not justify an exception; this would also not be consistent with the Bern Convention.

The contracting governments can issue national regulations in order to more closely determine the presence of serious damage.

3.5.4 Exceptions in the interest of public health and security, the security of air traffic or other high priority public interests

A justification for an exception to the Articles 4 to 7 and to the prohibition against the use of the means designated in Article 8 can be carried out in the interest of public health and security, the security of air traffic or other high priority public interests. The protection of plant and animal species and their natural habitats can collide with important public-law commodities. In these cases the comprehensive protection of Article 4-8 can step back behind the public interests. The reasons for an exception must, however, be narrowly defined.

Impacts on public health and security can, for example, cause the following concerns:

- transmission of disease causing organisms from animals to humans (e.g. rabies, fox tapeworm),
- animal attacks on humans,
- provisions for the protection of coastlines,
- defence against flooding and avalanches,
- national defence,
- as well as the protection of the civil population.

Other high priority public interests can also justify an exception in accordance with Article 9. Among these are e.g. provisions for the mitigation of existing accident prone areas, those that contribute most of all to the avoidance of accidents with death or injury. Provisions of this nature can justify the substantial adverse effect on a habitat or species, if these are based on substantive reasons of public interest. Purely private interests as well as lower priority public interests do not justify an exception in accordance with Article 9.

3.5.5 Exceptions for purposes of research and education, regeneration of stock, and reintroduction and breeding

Research is an intellectual activity with the goal of gaining new scientific findings in a methodical, systemic and testable fashion. An indication of this (but not a prerequisite) is that the

⁴⁰ Cf. Standing Committee: Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, 1993, No. 16.

research is undertaken in an appropriate scientific or commercial institution. Private research falls under the provision on exceptions if the researcher is well grounded in corresponding educational training and an appropriate institution for the investigation, and his research is directed toward having a public effect. Activities of enthusiasts for purposes of hobbies that are not aimed toward gaining new findings do not constitute research.

Exceptions for research purposes can, for example, be justified for the tagging of individuals of a species (attaching rings, transmitters, etc.), as long as these contribute to the improved understanding of their behaviour or for successful reintroduction of a species.⁴¹

The concept of “education” in Article 9 of the Bern Convention is defined as environmentally related education and learning. This encompasses university and school education as well as extra-institutional environmental education offerings. Environmental education has as its goal the “conveyance of information, methods and values, in order to enable engaged and responsible humans in confronting the consequences of their activities in the natural, constructed and social environment and to move them to environmentally just action as a contribution to sustainable development”.⁴² Conceivable exceptions for educational purposes are, for example, the removal of individual plants or plants parts, empty bird eggs or feathers from nature, as well as for the short-term capture of animals for demonstration purposes. In like manner the ownership of stuffed animals or readily recognisable parts of animals can qualify as an exception. Not justifiable for “educational purposes” are the intentional killing and preparation of an animal protected by the Bern Convention, since the goals of species protection must be judged as higher ranking.

The regeneration, reintroduction and breeding of stock constitute measures that counter-act the extinction of plants and animal species and are supposed to secure their long-term survival.

Small, isolated populations can indicate an inbreeding depression and diminished reproductive rates as a consequence of their reduced genetic diversity. A targeted regeneration of stock through the translocation of individuals of another population can under certain circumstances counteract the decline of the population caused by the inbreeding.⁴³ A prerequisite for a successful regeneration of a population is, however, also that a minimally viable population can be established.⁴⁴ Thus, suitable habitat area must, for example, be available in sufficient size.

The re-establishment of a species in an area that once was part of its historical range of distribution, in which, however, it was eradicated or made extinct can as a measure toward protection of a species be successful only if suitable habitat area is available and the factors that led to the extinction of the species in the range of distribution affected are no longer operative.⁴⁵

Along with the aforementioned in situ preservation measures, the breeding of stock and the subsequent extraction can also contribute as an ex situ measure to bringing species up to a survivable level.

For all these preservation measures the removal of individuals (animals, plants) or propagation elements (seeds of plants) from nature is required, for which reason Article 9 provides a possible exception in this regard.

⁴¹ EU Kommission (2007): Leitfaden zum strengen Schutzsystem für Tierarten von gemeinschaftlichem Interesse im Rahmen der FFH-Richtlinie 92/43/EWG, p. 62.

⁴² Bundesweiter Arbeitskreis der staatlich getragenen Bildungsstätten im Natur- und Umweltschutz (BANU) (ed.): BANU Leitlinien zur Natur- und Umweltbildung für das 21. Jahrhundert, 2003, p. 8.

⁴³ Kirchner, T., Die Birkhühner (*Tetrao tetrix*) in der Rhön am Scheidepunkt: Gibt es eine Perspektive für die Leitart des Biosphärenreservats Rhön oder lassen wir sie aussterben? Beiträge RN 6/2009: 160/169.

⁴⁴ Cf. IUCN: IUCN Guidelines for Re-Introductions, Prepared by the IUCN/SSC Re-introduction Specialist Group. IUCN, Gland, Switzerland and Cambridge, UK., 1998, 10 p.

⁴⁵ IUCN: IUCN Guidelines for Re-Introductions, Prepared by the IUCN/SSC Re-introduction Specialist Group. IUCN, Gland, Switzerland and Cambridge, UK, 1998, p. 8.

3.5.6 *How under strictly monitored conditions the selective and limited-scope capture, holding or other reasonable use of certain wildlife animals and plants can be permitted in small amounts*

As an extension of the exception possibilities established in Article 9(1)(indents 1-4) of the Bern Convention, the fifth indent opens the possibility for the contracting governments to also allow under certain prerequisites the “reasonable use of certain wildlife animals and plants” as an additional basis for an exception. Included here is also the capture and holding of animals for use purposes. Under the term “reasonable use” fall numerous other uses; thus, for example, the collecting of medicinal plants or the regulation of populations in the framework of a species management/species protection plan.⁴⁶

An application of this exception is, however, only possible if all mentioned conditions (“under strictly monitored conditions”, “selectively”, “in limited scope”, “in limited amounts”) are met.

The removal of animals or plants may only under “strictly monitored conditions” be permitted. This has as a prerequisite that the responsible authorities in this matter must establish concrete guidelines for their approval of an exception. These must guarantee that through the removal no damage to the stock of the population in question occurs⁴⁷ and the conditions identified in the fifth indent 5 are met. The exception should be spatially and temporally limited (“in limited scope”); a general exception permit may not be granted.⁴⁸ As well, only the removal of “small amounts” may be permitted. The maximal amount removed must be measured in relationship to the size of the population; the removal may not in either a quantitative or a qualitative respect (e.g. with respect to the structure of the population) adversely affect the stock.⁴⁹ The prescription for suitable removal methods is recommended in order to be able to achieve compliance with the criterion regarding “selective” removal. Only methods may be permitted that allow a goal-oriented removal of the affected species. With this the authorization of suitable persons/institutions with expertise in the field is required.

The compliance with the conditions must be strictly supervised. This must be achieved through a suitable monitoring system.

4. REPORTING REQUIREMENT IN ACCORDANCE WITH ARTICLE 9(2) OF THE BERN CONVENTION

According to paragraph 2 the contracting parties are subject to a reporting requirement in the event they have allowed appropriate exceptions in accordance with paragraph 1. The reporting requirement occurs every two years vis-à-vis the Standing Committee. The Committee can perform its duties in accordance with Article 14 of the Bern Convention.

The report must contain all information that is necessary for evaluating the exception permits that have been issued. Paragraph 2, clause 2 provides the contents that this report must contain. Individually these are:

1. the populations that were or are encompassed by these exceptions and, if possible, the number of the affected individuals;
2. the means approved for killing or capturing;
3. the types of risks and the temporal and locational circumstances under which such exceptions were permitted;
4. the agency that is authorized for explaining that the prerequisites for the exceptions are satisfied

⁴⁶ Cf. European Commission: Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, 2007, p. 57.

⁴⁷ This has as a prerequisite an appropriately founded, up-to-date knowledge base on the state of the population of the affected species before the issuing of a permit for an exception.

⁴⁸ Directorate of Culture and Cultural and Natural Heritage: Draft Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, T-PVS (2011) 2, 2011, p. 5.

⁴⁹ European Commission: Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, 2007, p. 56.

and is authorized to summarize conclusions with respect to the means in use, their limitations and the persons assigned with their administration;

5. the measures used for inspection.

Regarding 1.: Required are the following items of information:

- protection status of the affected species,
- number of affected populations,
- size of the affected population,
- the state of preservation,
- if possible, the number of affected individuals,
- description of the tested alternative solutions and justification for its rejection,
- detailed explanation of the determination that the exception has no negative effects on the affected population (including data base, scientific evaluations),
- detailed explanation of the determination that the exception has no negative effects on the entire situation in its natural geographical range (including data base, scientific evaluations).

Regarding 2.: Required are the following items of information:

- identification of the means approved for killing or capturing,
- selectivity of the approved means (were/are other species drawn into its effective range?)
- to the extent that it involved an exception to Article 8 (use prohibition against methods in Appendix IV): Why were these means chosen?

Regarding 3.: Required are the following items of information:

- reason for the exception (what risks or what other reasons identified in Article 9, paragraph 1 made the exception necessary?)
- time period for which the exception was granted,
- spatial limitations of the exception.

Regarding 4.: Required is the identification of the agency responsible for issuing the approval of the exception.

Regarding 5.: inspection measures encompass measures for the inspection of the proper administration of the exception (adherence to the established requirements) as well as those that measure the impact on the affected population (determination of whether the stock of the population was in fact not damaged).

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