

Arie Trouwborst, Floor M. Fleurke & John D.C. Linnell. 2017. Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd". 20(2) *Journal of International Wildlife Law & Policy*. Forthcoming – accepted for publication 7 February 2017.

Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd"

Arie Trouwborst, Floor M. Fleurke, and John D.C. Linnell*

1. Introduction

In Norway, as in many other countries, a government-sponsored campaign against large carnivores was waged well into the 20th century and eventually led to the disappearance of gray wolves (*Canis lupus*) from the country.¹ By the 1960s, the species was considered functionally extinct both in Norway and neighboring Sweden. In 1971, wolves received legal protection under Norwegian law.² Occasionally in subsequent years, wolves dispersing from the Russian-Finnish population made it into the Scandinavian peninsula. In 1983, in the south-central Swedish-Norwegian border area, two of these immigrants produced a first litter of wild Scandinavian wolf pups again. The Scandinavian wolf population has been growing since, and numbers over 400 individuals today, although only a small part of the population lives on the Norwegian side of the border. The threats faced by Scandinavian wolves include inbreeding, low levels of tolerance by some sectors of the rural public, and high levels of poaching.³

Since the official status of wolves in Norway switched from vermin to a protected species, wolf conservation and management has been an increasingly contested topic in the country, with the controversy generally peaking every time the Norwegian government authorizes a winter wolf hunt.⁴ Whereas some Norwegian citizens would like to see many more wolves in the country than the currently estimated 65-68 animals (plus another 25 wolves or so whose range straddles the Sweden-Norway border), others would rather see

* Arie Trouwborst and Floor Fleurke are both associate professors with the Department of European and International Public Law of Tilburg Law School in the Netherlands. John Linnell is a senior research scientist with the Norwegian Institute for Nature Research (NINA) in Trondheim, Norway. Corresponding author: Arie Trouwborst, Department of European and International Public Law, Tilburg Law School, PO Box 19053, 5000 LE, Tilburg, The Netherlands | a.trouwborst@tilburguniversity.edu.

¹ Håkon B. Stokland, *How Many Wolves Does it Take to Protect the Population? Minimum Viable Population Size as a Technology of Government in Endangered Species Management (Norway, 1970s-2000s)*, 22 ENVIRONMENT AND HISTORY 191, 197-198 (2016).

² For more background on Norwegian wolves and wolf policy, see, e.g., John D.C. Linnell and Henrik Brøseth, *Wolf – Norway*, in Petra Kaczensky et al. (eds.), STATUS, MANAGEMENT AND DISTRIBUTION OF LARGE CARNIVORES – BEAR, LYNX, WOLF & WOLVERINE – IN EUROPE (2013); Yaffa Epstein, *Population-Based Species Management Across Legal Boundaries: The Bern Convention, Habitats Directive, and the Gray Wolf in Scandinavia*, 25 GEORGETOWN INTERNATIONAL ENVIRONMENTAL LAW REVIEW 549; and Stokland, *ibid.*

³ Olof Liberg et al., *Shoot, Shovel and Shut Up: Cryptic Poaching Slows Restoration of a Large Carnivore in Europe*, 279 PROCEEDINGS OF THE ROYAL SOCIETY B 910 (2012).

⁴ See, e.g., this indicative recent sample from one English-language newspaper: Emma Ulven and Tone Sutterud, *Norwegian Court to Rule on Six Men Accused of Illegal Wolf Hunt*, THE GUARDIAN (April 19, 2015); Emma Ulven, *More than 11,000 Norwegians Line Up to Shoot 16 Wolves*, THE GUARDIAN (December 1, 2015); Fiona Harvey, *Norway Plans to Cull More than Two-Thirds of its Wolf Population*, THE GUARDIAN (September 16, 2016); Emma Ulven and Tone Sutterud, *Norway's Wolf Cull Pits Sheep Farmers Against Conservationists*, THE GUARDIAN (September 23, 2016).

them all disappear once more.⁵ The latest chapter in the Norwegian wolf saga began in summer 2016 when Parliament agreed on a new wolf policy. In the follow-up implementation of this national policy, the relevant Regional Management Authorities earmarked a total of 47 wolves – two-thirds of the national population – for culling in order to reduce sheep depredation, only to see the Climate and Environment Minister reverse this decision and reduce the number of wolves to be killed to 15.⁶

One international treaty has been an influential feature in debates on Norway's wolf policy during the past three decades, namely the Council of Europe's 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats.⁷ The discourse has, unfortunately, been affected by some tenacious misunderstandings concerning the compatibility of Norway's constantly evolving wolf policy with the Convention. Our aim in this paper is to reduce the confusion in this regard, in order to promote a constructive and well-informed debate regarding the future of wolf conservation and management in Norway. An added advantage of this focus is that it entails the legal analysis of certain features of the Bern Convention the relevance of which extends far beyond Norwegian wolves, as they apply to European wildlife conservation at large.

2. Norwegian wolves and the Bern Convention

Almost all European countries and the European Union are contracting parties to the Bern Convention, which aims “to conserve wild flora and fauna and their natural habitats,” giving particular emphasis to “endangered and vulnerable species.”⁸ When Norway ratified the Convention in 1986, it did not avail itself of the opportunity to file a reservation with regard to wolves. As the wolf is listed as a “strictly protected fauna species” in Appendix II of the Convention, Norway is under an obligation, *inter alia*, to prohibit any killing of wolves and allow exceptions to this prohibition only when all of three conditions, stipulated in Article 9 of the Convention, are met.⁹ That is, the killing of one or more wolves may only be authorized when (1) this serves one of the purposes enumerated in Article 9 – including “to prevent serious damage to livestock,” “the interest of public safety,” and “other overriding public interests” – and (2) “there is no other satisfactory solution” to achieve the purpose in question and (3) the killing “will not be detrimental to the survival of the population concerned.”¹⁰ Other relevant provisions require Norway *inter alia* to ensure a certain wolf population level, protect wolf habitat, and outlaw particular means of killing.¹¹ To illustrate the practical relevance of the Bern Convention in the Norwegian wolf context, the aforementioned governmental decision to reduce the number of wolves to be killed this winter from 47 to 15 was motivated in part by the requirements imposed on Norway by Article 9 of the Convention.¹²

⁵ Several NGOs have formed with the goal of influencing policy to have no reproducing wolves in Norway. In addition, one mainstream political party also has this goal in their party program.

⁶ Tone Sutterud and Emma Ulven, *Norway Repeives 32 of 47 Wolves Earmarked for Cull*, THE GUARDIAN (December 20, 2016).

⁷ Convention on the Conservation of European Wildlife and Natural Habitats (Bern, Switzerland), September 19, 1979, CETS 104 (hereinafter Bern Convention). For general introductions to the Convention, see Michael Bowman, Peter Davies and Catherine Redgwell, *LYSTER'S INTERNATIONAL WILDLIFE LAW* (2nd ed., 2010), 297-345; and Floor M. Fleurke and Arie Trouwborst, *European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats Directives*, in Louis Kotzé and Thilo Marauhn (eds.), *TRANSBOUNDARY GOVERNANCE OF BIODIVERSITY* (2014), 128.

⁸ Bern Convention, Art. 1.

⁹ *Id.*, Art. 6 and 9.

¹⁰ *Id.*, Art. 9.

¹¹ *Id.*, Art. 2-4, 6, 8, 9 and 11.

¹² See, e.g., Sutterud and Ulven, *supra* note 6.

Despite some treatment of the relationship between Norway's wolf policy and the Bern Convention in the scholarly literature,¹³ several key issues continue to be subject to confusion. Some of this confusion is of the unnecessary type, and this is where we hope to be of service with this paper. Controversy surrounds three aspects of the Convention's interpretation, namely the goals, the procedures and the means of management that can be utilized. We limit ourselves primarily to the first two aspects.

Our primary focus here is not on individual past decisions allowing wolf culling. Rather, we aim to explore certain aspects of Norway's overarching wolf policy. This policy has been characterized by precisely formulated wolf population targets that are strikingly low given Norway's size, abundance of suitable habitat, and low human population density. Since 2004, the total national wolf population goal has been three reproducing wolf packs that are entirely within Norway's borders per year.¹⁴ The distribution range of wolves is, moreover, to remain largely limited to a "designated management area" in southeastern Norway, with this wolf zone presently covering about 5% of the country's total surface area.¹⁵ In June 2016, the Norwegian Parliament slightly adjusted the target to be "four to six" annual reproductions, at least three of which are to be entirely within the Norwegian territory, and the remainder of which may be accounted for by wolf packs with home ranges straddling the border with Sweden (with such border packs counting as half).¹⁶ Wolves up and above of the population target are to be culled by licensed hunters, in the interest of preventing damage to livestock (i.e., sheep).¹⁷ The target thus functions simultaneously as a minimum and a maximum.¹⁸

3. A policy at odds with the Convention?

Intuitively, one would assume such a minimalist policy to be at odds with a wildlife conservation treaty like the Bern Convention. Yet, the Norwegian authorities and certain other stakeholders have long taken the view that it is not. Three arguments in particular have tended to raise their heads in support of this position, namely that (1) the Convention does not prescribe any minimum population level for species; (2) no wolf population increase is required within Norway as long as the Scandinavian population is secure; and (3) Norway has never been formally reprimanded over its wolf policy by the Standing Committee, the treaty body tasked with overseeing the Convention's implementation. A complete analysis of Norway's wolf policy in light of the Bern Convention is beyond the scope of this particular paper, and for the present we limit ourselves to some salient considerations in respect of each of these three arguments.

Our guide in doing so must be the basic rules of public international law on treaty interpretation as codified in the Vienna Convention on the Law of Treaties (VCLT).¹⁹

¹³ See, e.g., Epstein, *supra* note 2; Stokland, *supra* note 2.

¹⁴ See, e.g., Linnell and Brøseth, *supra* note 2.

¹⁵ *Id.*

¹⁶ See the White Paper by the Climate and Environment Department, ULV I NORSK NATUR: BESTANDSMÅL FOR ULV OG ULVESONE, Meld. St. 21 (2015-2016); and the corresponding 'Evaluation' by the Energy and Environment Committee, INNSTILLING FRA ENERGI- OG MILJØKOMITEEN OM ULV I NORSK NATUR, Innst. 330 S (2015-2016) (both in Norwegian). The policy specifies that reproductions outside the wolf zone also count towards the total, and that reproductions straddling the border count with a factor of 0.5.

¹⁷ *Id.*

¹⁸ The minimum would be 3 reproductions entirely within Norway plus 2 border reproductions. The maximum would be 4 Norwegian plus 4 border reproductions; 5 Norwegian plus 2 border reproductions; or 6 Norwegian plus 0 border reproductions.

¹⁹ Convention on the Law of Treaties (Vienna), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (hereinafter VCLT). Also note this article's 'prequel' in which the VCLT interpretation rules were applied to the obligations of another country under another wildlife treaty regarding another large carnivore: Arie Trouwborst,

Whereas Norway is not a party to the VCLT, the main interpretation rules laid down in it are generally regarded as reflecting universally applicable customary international law.²⁰ The principal rule, which certainly reflects customary law, is that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²¹ As the UN International Law Commission has clarified this rule: “When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.”²² In addition to treaty text and objectives, “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;” “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;” and “any relevant rules of international law applicable” may be taken into account, according to the VCLT.²³ Lastly, the original intentions of the parties, as recorded in the treaty’s drafting history, may be considered as a supplementary means when necessary.²⁴ At the very least, one must avoid any interpretation which “[l]eads to a result which is manifestly absurd or unreasonable.”²⁵

4. The population level prescribed by the Convention

Article 2 of the Bern Convention reads:

The Contracting Parties shall take requisite measures 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, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.

Looking at the text of this general provision, it is on the one hand evidently correct to say that it does not prescribe a pre-determined, minimum population level for wildlife species with any degree of precision. On the other hand, it is just as evidently erroneous to say that Article 2 does not prescribe a minimum population level as such. It clearly does, by requiring parties to maintain or achieve a population level which corresponds to, *inter alia*, ecological requirements. As the book *Lyster's International Wildlife Law* puts it, Article 2 “sets a standard at which populations of wildlife must be maintained, or to which depleted ... populations must be adjusted.”²⁶ This reading is reinforced by the Convention’s “object and purpose” of wildlife conservation.²⁷ The formulation of Article 2 also indicates that conservation interests will outweigh economic and recreational interests in case of conflict²⁸

Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species, 2 CORNELL INTERNATIONAL LAW JOURNAL ONLINE 41 (2014).

²⁰ See, e.g., David J. Harris, CASES AND MATERIALS ON INTERNATIONAL LAW (6th ed., 2004) 832-843.

²¹ VCLT, Art. 31(1). The International Court of Justice has repeatedly acknowledged that this constitutes customary international law. See, e.g., *Territorial Dispute (Libyan Arab Jamahiririya v Chad)*, Judgment, ICJ REPORTS (1994) 6, para. 41; *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objections, Judgment, ICJ REPORTS (1996) 803, para. 23; *Kasikili/Sedudu Island (Botswana v Namibia)*, Judgment, ICJ REPORTS (1999) 1045, para. 18.

²² YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1966, 4 (U.N. Pub. Sales No. 67.V.2, Vol. II).

²³ VCLT, Art. 31(3).

²⁴ *Id.*, Art. 32.

²⁵ *Id.*, Art. 32(b).

²⁶ Bowman *et al.*, *supra* note 7, 299.

²⁷ Bern Convention, Art. 1.

²⁸ See also Bowman *et al.*, *supra* note 7, 299 and 320.

(although ecological requirements are put on a par with “cultural requirements”). This is also in line with the Convention’s aims, which are limited to the conservation of wild flora and fauna and their habitats. Generally, the “object and purpose” of the Bern Convention would thus seem to dictate interpretations in favor of wildlife conservation rather than the contracting parties’ room for balancing conservation with other interests, and – to put it plainly – in favor of wild wolves rather than domestic sheep. Significantly, the population standard laid down in Article 2 constitutes an *absolute* minimum, as the Convention does not allow for exceptions in respect of Article 2.²⁹

What a population level corresponding to ecological (and scientific and cultural) requirements amounts to precisely is not defined, but given the Convention’s aims this level “can safely be assumed to be well above that at which a species is in danger of extinction.”³⁰ Indirect evidence supporting this position also flows from Article 7 of the Convention, which contains obligations regarding “protected” (as opposed to “strictly protected”) fauna listed in Appendix III. Exploitation of such species shall be regulated “in order to keep the populations out of danger, taking into account the requirements of Article 2,” and exploitation must be prohibited when this would be necessary “in order to restore satisfactory population levels.”³¹ The Explanatory Report written by the *ad hoc* committee of experts which initially drafted the Convention text explains in this connection that each party may authorize exploitation of Appendix III species “on condition that this affects only those species not threatened on its territory and that such exploitation does not jeopardise the animal population concerned.”³² Furthermore, the level required by Article 2 has been alternatively described as a “favourable conservation status” and a “satisfactory conservation status” by the Standing Committee – the governing body in which all Bern Convention parties are represented and which could therefore furnish supplementary interpretational indicators in terms of “subsequent agreement” and “subsequent practice.”³³ It is also of interest to note that during the 1980s and 1990s Norwegian large carnivore policy documents explicitly linked Norway’s obligations under the Bern Convention to the formalized ecological concept of minimum viable populations – a link which disappeared from Norwegian policy following the return of wolves in 1997/98.³⁴

²⁹ Article 9 only enables derogations from Articles 4-8 (*see also* Bowman *et al.*, *id.*, 320). Incidentally, it would also seem that parties’ obligations under Article 2 cannot be affected by reservations as allowed under Article 22(1). This is a consequence, in particular, of the delimitation made in the latter provision to reservations regarding “species specified in Appendices I to III and/or, for certain species mentioned in the reservation ..., regarding certain means or methods of killing, capture and other exploitation listed in Appendix IV.” Reservations thus presumably affect only the obligations specifically coupled with particular Appendices. As the scope of Article 2 encompasses *all* native wild flora and fauna species, it would be incongruous to assume that Article 22 *would* allow for reservations excluding Appendix I-III species from the scope of Article 2, while *not* allowing for reservations excluding common, unlisted species from the scope of Article 2. Also note that Article 22(1) prohibits “reservations of a general nature.” According to the Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, CETS 104, para. 67, the latter “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.”

³⁰ Bowman *et al.*, *id.*, 300; *also* Chris W. Backes, Annelies A. Freriks and Jan Robbe, HOOFDLIJNEN NATUURBESCHERMINGSRECHT (2nd ed., 2009), 34.

³¹ Bern Convention, Art. 7(2) and 7(3)(b).

³² Explanatory Report, *supra* note 29, para. 35.

³³ *See, e.g.*, Standing Committee Guidelines No. 3 (1993), and Standing Committee Recommendation No. 163 (2012).

³⁴ FORVALTNING AV BJØRN, JERV, ULV OG GAUPE, Innst. S. nr. 182 (1991-1992); OM ROVVILTFORVALTING, St. meld. nr. 35 (1996-1997).

Notably, Article 2 is phrased clearly as an obligation of result rather than effort.³⁵ Again, this reading has been confirmed in the practice of the Standing Committee.³⁶ Thus, parties must do what it takes to ensure that wildlife populations do not fall, or remain, below the prescribed minimum population level. Depending on the circumstances, for populations currently below par this may entail passively allowing for natural expansion or taking active restoration measures. Regarding the former, the Standing Committee has made it clear that the “natural expansion of populations of large carnivores in Europe” is to be expressly welcomed.³⁷ Regarding the latter, the Committee has confirmed that “in many instances wild species which have an unfavourable conservation status (particularly those listed in Appendix II of the Convention) may require special conservation efforts to acquire a population level which corresponds to their ecological requirements, as stated in Article 2 of the Convention.”³⁸ Needless to say, actively suppressing the growth of a population that is *below* the prescribed level runs counter to the obligation imposed by Article 2. Summing up, the requirements imposed by Article 2 should not be thought of lightly.³⁹

Applying this to Norway, where wolves are nationally red-listed as “critically endangered”,⁴⁰ the national policy described above is clearly at loggerheads with Article 2 of the Bern Convention as interpreted in light of the standard rules from the law of treaties.

By way of an additional interpretive exercise, let us assume that actively keeping wolves down to six packs in a small corner of national territory is indeed sufficient for a country the size of Norway to comply with its obligations under the Bern Convention. Comparable standards would then presumably apply to other Convention parties where wolves occur. Thus, Sweden, Germany and France – all of which have seen the return of wolves in recent decades and all of which now have wolf populations numbering in the hundreds (equivalent to many tens of packs) – could also have drawn the line at six packs when wolf numbers started increasing, and still be in line with Article 2 of the Bern Convention. And why indeed would Article 2 stand in the way of countries like Spain and Romania cutting back their wolf populations – which number in the thousands – to six packs each? Along this line of reasoning, the entire European wolf population west of the Russian border could be reduced to one-eighth of its current size without any violation of Article 2 of the Bern Convention occurring.⁴¹ This interpretation would thus, in the language of the VCLT, lead to a result that is “manifestly absurd” indeed.

³⁵ Parties “shall take requisite measures to maintain ... or adapt [etc],” rather than, i.e., “endeavour” to take measures, or take the measures they “deem appropriate.” See also Bowman *et al.*, *id.*; and Backes *et al.*, *id.*

³⁶ See, e.g., Standing Committee Guidelines No. 3 (1993): “The elaboration of recovery plans and their implementation into recovery programmes may be considered as a responsibility of Parties to the convention, according to the provisions of Article 2, which requires Parties to ‘take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds to ecological requirements’. The Standing Committee to the Bern Convention has always followed the principle of ‘obligation of results’ to implement the convention. This implies that Parties are free to choose the mechanisms, procedures and instruments necessary in order to comply with the obligations of the convention, but that they are requested to show that the ‘results’ of their actions satisfy the requirements of the convention: the fact that some populations listed in Appendix II of the convention have proven unsatisfactory conservation status can be sufficient to lead the Standing Committee, in accordance with the objectives of the convention, to urge Parties to take the necessary measures.”

³⁷ Standing Committee Recommendation No. 163 (2012).

³⁸ Standing Committee Recommendation No. 59 (1997).

³⁹ Also Bowman *et al.*, *supra* note 7, 300-301: “Given the many factors which are adversely affecting wildlife populations, the obligations established by Article 2 will not be easy to discharge.”

⁴⁰ Norwegian Red List for Species, version 2015, <http://artsdatabanken.no/Rodliste>.

⁴¹ 25 wolf-hosting Bern Convention parties with six annual reproductions per country amount to 150 annual reproductions, or roughly 1,500 wolves. The latest estimate of the European wolf population west of Russia is 12,000: Kaczensky *et al.*, *supra* note 2.

Finally, we note in passing that the setting of a fixed a priori population *maximum* for wolves (or indeed any other Appendix II species) at whatever level – even if this level were to be well above the one required by Article 2 – appears to sit uncomfortably with the system of strict protection laid down in Articles 6 and 9, which requires any removal of wolves to pass the test of the three conditions of Article 9 on a case-by-case basis.⁴² To say that reconciling any kind of a priori population ceiling with Article 9 is categorically impossible would probably be overstating the issue, but doing so certainly raises significant challenges. More detailed discussion of this complex issue is, however, beyond the scope of this paper.

5. The transboundary population perspective

Now suppose we adopt the *Scandinavian* rather than the *Norwegian* wolf population as a benchmark for judging Norway's performance under the Bern Convention. Would that be in line with the Bern Convention itself and, if so, would this produce a different conclusion concerning Norway's compliance with its treaty obligations? The first of these questions is hard to answer in a conclusive manner at this stage, but the second question ultimately has a straightforward "no" for an answer.

The Scandinavian wolf population is shared between Sweden and Norway, in the same way that most of the other nine European wolf populations are shared between two or more countries.⁴³ For such populations, intergovernmental coordination of conservation and management, adjusted to the level of the transboundary population offers distinct advantages, and has become an increasingly important paradigm in the discourse on the conservation of large carnivores and other transboundary wildlife populations.⁴⁴ The Standing Committee has repeatedly called on parties with a shared large carnivore population, including the Scandinavian wolf population, to adopt and implement a harmonized, population-level policy.⁴⁵ In 2000 it recommended Norway and Sweden to "continue their present policy aimed at the maintenance in the south of the peninsula, of a viable population of wolf shared between the two states, while at the same time minimising conflicts with sheep farming and traditional reindeer herding."⁴⁶

A transboundary population-level approach to large carnivore conservation has been advocated in most detail in the 2008 *Guidelines for Population Level Management Plans for Large Carnivores* (Carnivore Guidelines), a document commissioned and endorsed by the European Commission to guide the application of EU wildlife legislation to large carnivores.⁴⁷ The Guidelines call for the development and implementation, for each distinct

⁴² See also Arie Trouwborst, *Living with Success – and with Wolves: Addressing the Legal Issues Raised by the Unexpected Homecoming of a Controversial Carnivore*, 23 EUROPEAN ENERGY AND ENVIRONMENTAL LAW REVIEW 89, 98-99 (2014).

⁴³ Guillaume Chapron *et al.*, *Recovery of Large Carnivores in Europe's Modern Human-Dominated Landscapes*, 346 SCIENCE 1517 (2014).

⁴⁴ John D.C. Linnell, Valeria Salvatori and Luigi Boitani, GUIDELINES FOR POPULATION LEVEL MANAGEMENT PLANS FOR LARGE CARNIVORES IN EUROPE (2008); John D.C. Linnell and Luigi Boitani, *Building Biological Realism into Wolf Management Policy: The Development of the Population Approach in Europe*, 23 HYSTRIX 80 (2012); Epstein *et al.*, *supra* note 2; Arie Trouwborst, *Global Large Carnivore Conservation and International Law*, 24 BIODIVERSITY AND CONSERVATION 1567 (2015); S.A. Jeanetta Selier *et al.*, *The Legal Challenges of Transboundary Wildlife Management at the Population Level: The Case of a Trilateral Elephant Population in Southern Africa*, 19 JOURNAL OF INTERNATIONAL WILDLIFE LAW AND POLICY 101 (2016); Arie Trouwborst, Luigi Boitani and John D.C. Linnell, *Interpreting 'Favourable Conservation Status' for Large Carnivores in Europe: How Many are Needed and How Many are Wanted?*, 26 BIODIVERSITY AND CONSERVATION 37 (2017).

⁴⁵ See, e.g., Standing Committee Recommendations No. 82 (2000), No. 115 (2005), No. 137 (2008) and No. 163 (2012).

⁴⁶ Standing Committee Recommendation No. 82 (2000).

⁴⁷ Linnell *et al.*, *supra* note 44.

large carnivore population shared by more than one country, of a joint management plan or equivalent formalized cooperative mechanism by the authorities of all countries involved. Each plan is to set objectives for the species concerned at the level of the transboundary population, and to detail what is expected of each participating country to ensure the achievement of those objectives. Each plan would also ensure that maximum allowable 'offtakes' are determined at the level of the transboundary population, and provide a mechanism to divide such 'quotas' amongst the various countries. Overall, the plan would need to ensure that "[a]ll segments of a population ... have stable or positive trends, and not just the population as a whole."⁴⁸

Where a fully-fledged population-level management plan as just described is operational for a transboundary wolf population, it could be argued that this has consequences for the way in which the Bern Convention's provisions are applied to wolves in the countries involved, for instance through adopting the *transboundary* population as a benchmark for judging whether particular derogations under Article 9 would be "detrimental to the survival of the population concerned."⁴⁹ However, population-level management was never intended, and is unlikely to function, as an easy way out in terms of individual parties' obligations towards protected species – and it is by no means certain that the aforementioned interpretation of Article 9 is correct.⁵⁰ A legal analysis commissioned by the Standing Committee in 2005 is instructive in this regard:

From a legal point of view, the matter is clear. Consistent with State sovereignty, each Party has sole responsibility for developing and implementing the measures for species and habitats on national territory that it has accepted under the Convention, including decision-making on possible derogations. These national responsibilities are underpinned by general obligations for international cooperation under the Convention and customary international law. They cannot be delegated because a species or habitat is thriving beyond national boundaries (where the Party concerned has no legal or management powers). For wolves, this means that even if the portion of a population found across an international boundary is secure, this does not justify a derogation if the population on national territory is not viable or where other satisfactory solutions can be found. This approach is supported by all Convention policy documents addressing wolves, which combine recommendations for sub-regional cooperation with individual country-specific actions adapted to national circumstances.⁵¹

Likewise, a Norwegian court ruling of 1999 stated that "Norway is obliged through the Bern Convention to protect wolves *regardless* of the total number of wolves living in Sweden."⁵² We also recall the aforementioned statement in the Convention's Explanatory Report that a contracting party may authorize exploitation of Appendix III species only "on condition that this affects only those species not threatened *on its territory*."⁵³

Similar considerations apply with respect to Article 2. The aforementioned reference by the Standing Committee to "a viable population of wolf shared between" Norway and

⁴⁸ *Id.*, at 22.

⁴⁹ Bern Convention, Art. 9 (emphasis added); *see also* Trouwborst *et al.*, *supra* note 44.

⁵⁰ Linnell *et al.*, *supra* note 44; Trouwborst *et al.*, *id.*

⁵¹ Clare Shine, LEGAL REPORT ON THE POSSIBLE NEED TO AMEND APPENDIX II OF THE CONVENTION FOR THE WOLF (2005), Bern Convention Doc. T-PVS/Inf (2005) 18, at 11.

⁵² Ragnhild Sollund, *With or Without a Licence to Kill: Human-Predator Conflicts and Theriocide in Norway*, in Avi Brisman, Nigel South and Rob White (eds.), ENVIRONMENTAL CRIME AND SOCIAL CONFLICT: CONTEMPORARY AND EMERGING ISSUES (2015) 95 (emphasis added).

⁵³ Explanatory Report, *supra* note 32, para. 35 (emphasis added).

Sweden evidently does not give Norway license to adjust its national wolf population to a fraction of what it would otherwise have needed to be in order to comply with Article 2. The bottom line in this regard is the nature of the international legal system, consisting of independent, sovereign states which can ultimately only be held accountable for their own legal commitments – as indicated also in the long quote above. That system exercises a defining influence on any interpretation of an international treaty like the Bern Convention. Indeed, because of the obvious need to keep states from hiding behind the performance of others, the notion of *shared* rather than *individual* state responsibility for achieving conservation objectives is still in its infancy.⁵⁴ The approach advocated in the Carnivore Guidelines provides an interesting potential exception in this regard, but the legal viability of this approach – and in particular its ability to influence the interpretation of Article 2 (and indeed Article 9) – utterly hinges on the existence of formal safeguards agreed at the intergovernmental level to ensure the observance of the population-level plan concerned and the achievement of its objectives.⁵⁵ Moreover, even with such safeguards in place, it cannot be taken for granted that the existence of a population-level plan would as such lower the standards imposed on Convention parties by Article 2. For one thing, the practice of the Standing Committee with regard to population-level cooperation has hitherto been far too ambiguous to support the latter proposition.⁵⁶

In any event, there *is* currently no Swedish-Norwegian population-level management plan for wolves, and the adoption of such a plan in the foreseeable future appears unlikely.⁵⁷ An apt illustration of this long-standing lack of coordination can be found in the records of the Standing Committee's 2001 meeting, in which the Swedish delegation complained that Norway, by killing ten wolves that year out of a vulnerable Scandinavian population 80% of which was on Swedish territory, had “monopolized the whole potential margin for management.”⁵⁸ If only for this lack of actual intergovernmental cooperation, the concept of transboundary population-level management presently does not in any way lower or otherwise affect the standards to be met by Norway regarding wolves under Articles 2, 6 and 9 of the Bern Convention.

6. The role of the Convention's institutions

The final issue we address is of a more procedural nature. Norwegian wolves have featured on the agendas of the Standing Committee and the Secretariat of the Convention more than once during the three decades that Norway has been a contracting party. This has primarily been the result of Norwegian NGOs filing complaints alleging breaches of the Convention by Norway, as part of the so-called “case-file” procedure. According to this procedure, which has been developed to promote compliance with the Convention, the Standing Committee may

⁵⁴ See also Arie Trouwborst, *The Practice of Shared Responsibility in Relation to Nature Conservation*, in P. André Nollkaemper and Ilias Plakokefalos (eds.), *THE PRACTICE OF SHARED RESPONSIBILITY* (forthcoming, 2017).

⁵⁵ See also Trouwborst *et al.*, *supra* note 44.

⁵⁶ For instance, the Standing Committee has never fully endorsed the Carnivore Guidelines, merely “taking note with interest” of them in Recommendation No. 137 (2008).

⁵⁷ See also Epstein, *supra* note 2.

⁵⁸ Report of the 21st Meeting of the Standing Committee, Bern Convention Doc. T-PVS (2001) 89 (2001), at 27. See also the lengthy discussion in Norway's 2016 White Paper, *supra* note 16, about the two countries' relative shares of the wolf population, with the White Paper concluding that the present division can be justified by the differences in sheep conflict between the countries. Notably, however, there are relatively few sheep within the designated wolf zone; alternative solutions for sheep farming conflicts exist; and with regard to all other wolf-related conflicts – domestic reindeer, fear, conflicts with moose hunting, etc. – the situation is roughly the same in Norway and Sweden.

examine potential violations, including through an on-the-spot appraisal when necessary, and as appropriate recommend a particular course of action to the contracting party involved to resolve the situation.⁵⁹ Norway has so far not been expressly reprimanded for any alleged violation of the Convention regarding wolves.⁶⁰

A few things should be realized, however, to gauge the legal (in)significance of the latter fact. First, the Standing Committee has an ample margin of discretion in deciding which files to open and decisions in this regard may be politically motivated. (A rough but incomplete parallel can be drawn with public prosecutors' discretion under domestic legal systems in selecting which criminal cases to pursue and which to drop.) In general, many more complaints are filed than case-files opened. Second, the Standing Committee has generally tended to operate on the basis of dialogue and diplomacy rather than confrontation. Indeed, its decisions concerning most opened case-files have been recommendatory rather than reproachful, and only exceptionally has it issued clear statements that a breach of obligation has occurred.⁶¹ Moreover, as Epstein observes, the Committee "has been hesitant to even open case files, as doing so brings an adversarial flavor to the conversation."⁶² Third, the Standing Committee is indeed a *political* body, not a *judicial* one. Legally binding statements concerning violations of the Convention can only be issued by domestic courts, by arbitral tribunals established under Article 18 of the Convention (although the latter route of judicial dispute settlement has hitherto been avoided by the parties), and in theory by other international courts and arbitral tribunals.

This is certainly not to say that because the Resolutions, Recommendations, Guidelines and Declarations of the Standing Committee are not legally binding, they are therefore devoid of legal significance. As noted previously, depending on their phrasing and other circumstances, the Committee's acts can have interpretive value as "subsequent agreements" or "subsequent practice."⁶³ It is worth mentioning within this context that the Standing Committee has never actually expressly declared, when considering Norway's wolf policy, that the latter was fully in line with the Convention. In any event, the main point for present purposes is that, in *legal* terms, a decision of the Standing Committee to refrain from opening a case-file does, in and of itself, not signify that no violation of the Convention has taken place.⁶⁴

Another Bern Convention body, its Secretariat, has over the years also played a significant role in the interplay between Norway and the Convention concerning wolves. Furnishing parties with advice regarding their implementation of the Bern Convention has been one of the Secretariat's regular activities, and with its impartial approach and wealth of expertise and experience it has generally been well placed to do so. That said, for present purposes it suffices to clarify that in *legal* terms, statements by the Secretariat do not by themselves put any weight in the scales of the interpretational scheme reflected in the VCLT.

⁵⁹ See also Bowman *et al.*, *supra* note 7; and Fleurke and Trouwborst, *supra* note 7.

⁶⁰ The Register of Bern Convention Complaints (Doc. T-PVS/Inf (2017) 2) records four case-files involving Norwegian wolves – Case-files No. 1999/3, No. 2009/4, No. 2011/2 and No. 2013/3 – none of which have, however, been formally opened by the Standing Committee.

⁶¹ See, e.g., Bowman *et al.*, *supra* note 7, 340-341.

⁶² Epstein, *supra* note 2, 561.

⁶³ VCLT, Art. 31(3). Examples of decisions with apparent interpretive significance are Revised Resolution No. 2 (1993), adopted 2011 and partly bracketed in 2014, addressing the scope of Articles 8 and 9; Recommendation No. 142 (2009), addressing the definition of "invasive alien species" in a climate change context; and Recommendation No. 173 (2014) on hybridization between wolves and dogs. The interpretive significance of the latter Recommendation, for instance, is apparent from the following statement in its Preamble: "Wishing to clarify the meaning of the provisions of the Convention in respect of the problem of wolf-dog hybridisation."

⁶⁴ Also Epstein, *supra* note 2, at 584 (when discussing Norwegian wolves too): "Failure to open a file on the part of the Standing Committee does not, of course, mean that the contested action is compliant with the Bern Convention."

Hence, there is no need here to examine the Secretariat's record regarding Norway's wolf policy in any detail.

7. Conclusions

The above legal analysis, applying nothing but public international law's basic rules of treaty interpretation, strongly suggests that certain basic tenets of Norway's past and current wolf policy are at odds with the country's obligations under the Bern Convention. In particular, the current wolf population target of four to six reproductions appears to be well below the level required by Article 2.

Some of the interpretive issues dealt with above are not yet fully settled. This particularly concerns the role of national versus transboundary population goals *vis-à-vis* some of the provisions of the Bern Convention (although this uncertainty leaves unaffected the above conclusion regarding the incompatibility of Norway's wolf policy with the Convention). Other issues are much less ambiguous. Some of the confusion concerning the requirements imposed by Article 2 of the Convention is clearly unnecessary, and the same is true regarding the *legal* significance of the past involvement of the Convention's Standing Committee and Secretariat with Norway's wolf policy.

Whereas it was not difficult to establish that the current official wolf targets are not in line with Norway's obligations under the Bern Convention, it is much harder to pinpoint how many Norwegian wolf packs *would* satisfy the minimum requirements of Article 2. What is clear, however, is that the higher the number of wolves in Norway is allowed to become, and the more robust the Scandinavian population as a whole becomes, and the better the coordination of wolf management between Sweden and Norway becomes, the easier it will become to satisfy the conditions of Article 9 in cases where Norwegian society deems the killing of wolves desirable.

Although we have addressed a very different subject-matter, our intention with this paper has been of the same kind as that of C.S. Lewis with his book *Miracles* seventy years ago, and it seems fitting somehow to end with this quote of his: "You and I may not agree, even by the end of this book, as to whether miracles happen or not. But at least let us not talk nonsense."⁶⁵

Acknowledgments

AT and FMF were funded by the Netherlands Organization for Scientific Research (NWO), as part of the project *Ius Carnivoris* (project no. 452-13-014, www.tilburguniversity.edu/iuscarnivoris). JDCL was funded by the Research Council of Norway (project no. 251112). Helpful comments and/or information provided by Eladio Fernández-Galiano, Melissa Lewis, Elvira Martínez Camacho, and Katrin Vels are gratefully acknowledged.

⁶⁵ C.S. Lewis, *MIRACLES* (1947).