Caught Napping by (Sea) Wolves: International Wildlife Law and Unforeseen Circumstances involving the Killer Whale (Orcinus orca) and the Gray Wolf (Canis lupus)

CHAPTER · APRIL 2015

1 AUTHOR:

Arie Trouwborst
Tilburg University

60 PUBLICATIONS  50 CITATIONS

Available from: Arie Trouwborst
Retrieved on: 27 June 2015
Caught Napping by (Sea) Wolves: International Wildlife Law and Unforeseen Circumstances Involving the Killer Whale (*Orcinus orca*) and the Gray Wolf (*Canis lupus*)

Arie Trouwborst

INTRODUCTION

The problem of unforeseen circumstances provides the angle from which the present chapter approaches the central question of this book – what is wrong with international law? In particular, the chapter focuses on situations where international legal instruments for wildlife conservation are faced with developments that are clearly within their scope of application but were nevertheless unforeseen when the instruments were drafted. International wildlife law covers a subject matter where surprises abound, due to the complexity and unpredictability of nature itself and of human impacts thereon, and the subsequent development of the views of individual states and the international community as a whole. It is therefore essential, not only to anticipate future developments as far as possible, but also to adequately deal with unexpected circumstances that nevertheless present themselves. Combining these two requirements – anticipating and responding to changes – with a sufficiently high and durable level of protection, is quite a challenge.

The analysis below views this problem through the lens of two examples. These involve two distinct wild fauna species, the killer whale or orca (*Orcinus orca*) and the gray wolf (*Canis lupus*). There is an interesting link between these two species, although this was not the principal reason for selecting them. Killer whales and wolves are both top predators in their respective ecosystems, leading complex social lives, and hunting in packs (or, in orca nomenclature, ‘pods’). Indeed, killer whales are sometimes referred to as ‘sea wolves’.  

The first instance considered below is the controversy regarding a killer whale that was rescued from the Dutch Wadden Sea in 2010 and subsequently kept in captivity. This incident clearly brought to the fore that the applicable international legal framework is not tailored to marine mammal rescue operations of this kind. The second example concerns the resilience and adaptability of gray wolves in Europe, which have taken friend and foe by surprise. Aided *inter alia* by legal protection, these large carnivores are staging a remarkable comeback and are returning to areas and countries from which they have long been absent. This unforeseen homecoming gives rise to several pressing issues, including legal ones.

In both cases – and many more examples exist – there is an apparent mismatch between current practical conservation issues and the substance of the applicable legal

---

instruments. In respect of each instance, this contribution concisely explores, in an integrated manner, (i) how it shows that the development in question was unforeseen at the time the rules in question were drawn up; (ii) to what extent this is a problem; and (iii) in what way(s) the problem might be addressed.

AN ORCA OFF TRACK – ASCOBANS AND CETACEAN RESCUE OPERATIONS

The Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)\(^2\) is a subsidiary instrument of the Convention on Migratory Species (CMS).\(^3\) ASCOBANS’ parties are committed to cooperating closely in order to achieve and maintain a favorable conservation status for the species, subspecies, and populations involved.\(^4\) In particular, “each Party shall apply [...] the conservation, research, and management measures prescribed in the Annex” to the agreement.\(^5\) The “Conservation and Management Plan” contained in this annex sets out duties concerning, among other things, habitat protection, targeted killing, fisheries by-catch, and harmful underwater noise.

In the summer of 2010, a distressed and severely starved juvenile female killer whale was found in the Wadden Sea, in Dutch (marine) internal waters, well outside the species’ habitual range. The animal was rescued by a government vessel and successfully rehabilitated at Dolfinarium Harderwijk. An intense debate ensued regarding whether the animal – which had been given the name ‘Morgan’ – ought to be returned to sea or remain in captivity, with proponents of both options basing their arguments on the orca’s best interests. The Dutch authorities opted for permanent captivity, and eventually authorized the animal’s transfer to Loro Parque, a facility located in Tenerife, Spain, affiliated with the well-known SeaWorld aquaria. The legality of this permanent captivity became the object of protracted proceedings before the Dutch courts.\(^6\)

ASCOBANS figures prominently in these proceedings. Killer whales are covered by the agreement,\(^7\) and the Netherlands has been a contracting party since 1994. The compatibility of the Dutch authorities’ actions with their obligations under ASCOBANS has been questioned, both with regards to the whale’s rescue as such as well as its subsequent captivity. Paragraph 4 of the Conservation and Management Plan contained in the agreement’s annex establishes the following duty:

Without prejudice to the provisions of paragraph 2 above, the Parties shall endeavour to establish (a) the prohibition under national law of the intentional taking and killing of small cetaceans where such regulations are not already in force, and (b) the obligation to release immediately any animals caught

---


\(^4\) Art. 2.1.

\(^5\) Art. 2.2.


\(^7\) According to art. 1.2(a) of the agreement, ‘small cetaceans’ encompass all species, subspecies, and populations belonging to the toothed whales (Odontoceti), except the sperm whale (Physeter macrocephalus).
An initial question to be answered is whether the ‘Dutch’ orca’s rescue falls within the scope of the prohibition required under (a). Whereas the formulation “taking and killing” in the English treaty text could generate some ambiguity, the equally authoritative German and French versions clarify that the two actions are not cumulative, and that either action is to be prohibited. ASCOBANS itself lacks a definition of ‘taking’. The agreement is, however, widely assumed to rely on the definitions provided in its parent treaty, the CMS, in cases where it does not itself advance a contrary interpretation of key terms. The convention stipulates that ‘taking’ comprises ‘capturing’, without restricting the latter concept in any way. This is in accordance with the broad interpretation generally accorded to the term ‘taking’ in the context of international wildlife law, as covering all types of anthropogenic removals, whether through directed hunting, targeted captures for aquaria or accidental taking in the form of by-catch. The ASCOBANS text does not truncate the meaning of ‘taking’, except to qualify that the requisite prohibition applies to ‘intentional’ removals only. The orca’s rescue was, of course, a deliberate act, meaning that it fell within the scope of the prohibition called for under paragraph 4(a) of the ASCOBANS annex.

The subsequent question is how the rescue operation relates to any permissible exceptions from the prohibition concerned. Notably, the prohibition of intentional taking is subject to only one such exception, in the form of a reference to paragraph 2 of the same annex, which addresses research. In particular, derogations from the prohibition of ‘intentional taking’ may be granted for the performance of research to “(a) assess the status and seasonal movements of the populations and stocks concerned, (b) locate areas of special importance to their survival, and (c) identify present and potential threats to the different species”. Paragraph 2 further specifies that such research "should exclude the killing of animals and include the release in good health of animals captured for research." According to the text of paragraph 4, the intentional capture of small cetaceans for other purposes – such as recuperation, education, or research that does not fit the description of paragraph 2 – is not permitted. ASCOBANS thus allows for significantly fewer exceptions than, to name two other applicable instruments, the Bern Convention on European Wildlife and Natural Habitats and the EU Habitats Directive. This is not a problem per se, as the taking of stricter protection measures than those prescribed in the latter convention and directive is expressly permitted. It is obviously a problem, however, for the performance of cetacean rescue operations of the kind under discussion here.

The position of stricken cetaceans under ASCOBANS is clearly quite curious. On the one hand, the agreement calls for the prohibition of all intentional taking of small cetaceans, except for certain narrowly defined research ends. On the other hand, it prescribes the immediate release of accidentally caught healthy cetaceans. The intentional capture of sick,
injured or otherwise unhealthy animals is covered by the required prohibition, except in cases of temporary captivity for research purposes, as detailed in paragraph 2. The agreement is silent, however, regarding the unintentional capture of unhealthy cetaceans. National discretion therefore appears to remain intact in such cases.

Returning to the present subject matter, yet another pertinent question concerns the post-capture fate of rescued cetaceans. ASCOBANS does not stipulate anything regarding the fate of stricken animals once they have been captured. This is, of course, hardly surprising in light of the conclusion just drawn regarding the apparent incompatibility of cetacean rescue operations with ASCOBANS provisions. The tenor of paragraph 4 of the annex, however, considered in conjunction with paragraph 2 and the objectives of ASCOBANS, would appear to allow for only one conclusion: rescued animals, particularly when restored to good health, ought to be returned to the wild – just like accidentally-caught healthy animals16 and animals captured temporarily for research.17

In any event, the conduct of scientific research does not seem to provide a viable justification for retaining an animal like orca ‘Morgan’ in permanent captivity. For one thing, the research exception only applies to activities undertaken for the ends outlined in paragraph 2 of the annex to ASCOBANS. As the second half of the same paragraph clarifies, these predominantly concern field research, to be carried out at sea.18 Moreover, the research exception is conditional upon the return to sea of any captured animals involved, "in good health".19 The exemption granted by the Dutch authorities to Dolfinarium Harderwijk under national law, which stipulates that when release is "not possible", rescued cetaceans may be "retained permanently for the purpose of conducting research which is relevant within the framework of obligations imposed by [...] ASCOBANS", is therefore apparently misconstrued.20 The complications raised by this state of affairs are all the greater when considering that research considerations have become the official basis for the Dutch authorities to justify the permanent captivity of ‘Morgan’ and its transfer to Loro Parque. The cover letter accompanying the CITES certificate authorizing the whale’s transfer to Spain, for instance, was granted "under condition that the animal will be kept for research."21

The endurance of national decisions endorsing the orca’s permanent captivity against judicial scrutiny is directly related to an apparent misinterpretation of ASCOBANS by the Amsterdam District Court in December 2012, which was surprisingly endorsed at the highest instance by the Dutch Council of State in April 2014.22 According to the judgments in question, the rescue of the orca did not qualify as ‘intentional taking’.23 Moreover, both courts failed to note the incompatibility of permanent captivity for research purposes with ASCOBANS. On both counts, the findings of the two Dutch courts are rather perplexing in light of the analysis above, and do little to change that analysis’ conclusions.

Thatn cases such as the present, the permanent removal of small cetaceans from wild populations is apparently at odds with the duties of ASCOBANS’ parties is not as such

16 ASCOBANS, annex, para. 4(b).
17 Annex, para. 2.
18 Ibid.: “Studies under (a) should particularly include improvement of existing and development of new methods to establish stock identity and to estimate abundance, trends, population structure and dynamics, and migrations. Studies under (b) should focus on locating areas of special importance to breeding and feeding. Studies under (c) should include research on habitat requirements, feeding ecology, trophic relationships, dispersal, and sensory biology with special regard to reduce such interactions.”
19 Ibid.
20 Exemption under the Flora and Fauna Act, no. FF/75A/2008/064, 3 February 2009, para. 8 (author’s translation; emphasis added).
21 Decision to grant EU CITES certificate 11NL114808/20, 27 July 2011, p. 4 (author’s translation).
22 Amsterdam District Court, 13 December 2012, Cases AWB 11/5030 BESLU and AWB 11/5031 BESLU; Council of State, Administrative Law Department, 23 April 2014, Case 201300892/1/A3.
23 Amsterdam District Court, ibid., para. 3.4.3; Council of State, ibid., para. 8.1.
surprising, given the agreement’s objective of achieving or restoring a favorable conservation status for the species in question. That rescue operations aimed at rehabilitation and subsequent release into the wild are also at odds with ASCOBANS’ obligations is, however, considerably more difficult to assimilate in light of the same objective. After all, such operations would not appear to adversely affect the conservation status of the species involved, but would rather seem to enhance – however marginally – the species’ prospects. In other words, it is a strange phenomenon that ASCOBANS’ parties cannot come to the rescue of orcas or other small cetaceans in trouble without violating their duties under an agreement that is aimed at the conservation of precisely those species.

It is instructive to compare ASCOBANS with another CMS subsidiary instrument, namely, the Wadden Sea Seals Agreement (WSSA).24 This treaty, which was concluded two years prior to ASCOBANS, concerns the protection of harbor seals (Phoca vitulina) in the Wadden Sea.25 It commits its parties (Denmark, Germany and the Netherlands) to prohibiting "the taking of seals from the Wadden Sea."26 Exceptions to this prohibition may only be made, under certain conditions, for research purposes, and in respect of institutions designated for "nursing seals in order to release them after recovery, insofar as these are diseased or weakened seals or evidently abandoned suckling seals."27

It is remarkable that the drafters of ASCOBANS did not adopt a parallel clause. It should be noted in this regard that WSSA negotiations were strongly influenced by the impact of diseases – particularly phocine distemper virus (PDV) – on Wadden Sea seal populations, and that no comparable role was played by the influence of diseases on cetaceans during ASCOBANS negotiations. As reflected in the text of ASCOBANS, its drafters were mainly concerned with habitat protection and with addressing the paucity of data concerning small cetaceans in the region.28 All the same, the absence in the agreement of an exception enabling actions to aid cetaceans that are stranded, lost, sick, wounded, emaciated or otherwise in trouble is striking, especially when considering that all three parties to the WSSA were also amongst the drafters of ASCOBANS two years later. Either way, it would seem that the advantages of including such a clause, and the disadvantages of not expressly regulating the rescue of stricken cetaceans, were simply overlooked at the time.

Also since then, the issue of rescue-and-release operations has commanded only very modest attention at official ASCOBANS meetings, and no resolutions addressing it have been adopted by the meeting of the parties. ‘Morgan’ put its flipper on the spot, however, and there has been some discussion of the issue at recent meetings of the ASCOBANS Advisory Committee.29 If parties do eventually wish to resolve the legal conundrum identified above, and encourage, or at least enable, cetacean rescue operations, it appears that an amendment of the agreement, in particular of paragraph 4 of the annex, would be a pre-condition. After all, as the above analysis indicates, the adoption by the parties of an agreed understanding on the topic would appear difficult without committing a contra legem interpretation.

25 Incidentally, whereas according to art. II(1) the treaty applies exclusively to the harbor seal, the gray seal (Halichoerus grypus) is also dealt with in the management plan adopted under the treaty for the period 2007-2011.
26 WSSA, art. VI(1).
27 Art. VI(2); the same provision adds that seals "which are clearly suffering and cannot survive" may be killed by authorized persons.
29 For further discussion see Trouwborst et al., “To Free or Not to Free?”, note 6 at 132-133; see also the subsequent Report of the 20th Meeting of the ASCOBANS Advisory Committee, Warsaw, 27-29 August 2013.
The focus now shifts from the sea wolf to the land wolf. After being wiped out in large parts of the European continent, wolf populations have rebounded in recent decades. The species is now returning to areas and entire countries from which it had disappeared long ago and where its return, frankly, was no longer expected. This unexpected comeback is raising complex societal questions, including intricate legal issues.

A number of these concern the EU Habitats Directive. This instrument, which contains binding obligations for the 28 EU member states, aims for the maintenance or achievement of a "favourable conservation status" for the species and habitat types it covers. The gray wolf is one of these species. Besides requirements regarding the protection of key sites for wolves as part of the "Natura 2000" network, the Habitats Directive spells out a number of obligations regarding the generic protection of wolves. In the latter sphere, Annex IV of the directive lists species that are to be strictly protected, whereas a more flexible regime applies to species included in Annex V. Wolves fall under one regime or the other, depending on their location.

Whereas the recovery of wolf populations is thus something the Habitats Directive aims for, this recovery has succeeded to a degree that was apparently not anticipated at the time the directive was drafted. There is no better way of demonstrating that the wolf’s European success story has far exceeded the EU legislator’s initial expectations than with reference to the situation in Spain. When the Habitats Directive was drafted, in the early 1990s, Spain harbored a relatively stable wolf population in the northwest of the country and a few dwindling and isolated populations in the south. Of the latter, only the critically endangered Sierra Morena population remains to date, if it has not already become extinct. Annex V status was thought most appropriate for the northwestern population, and Annex IV status for the vulnerable remainder of Spanish wolves. The two annexes apply to Spanish wolves as follows

Annex IV: *Canis lupus* (except the Greek populations north of the 39th parallel; Estonian populations, Spanish populations north of the Duero; Bulgarian, Latvian, Lithuanian, Polish, Slovak populations and Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management)

Annex V: *Canis lupus* (Spanish populations north of the Duero). Greek populations north of the 39th parallel, Finnish populations within the reindeer management area as defined in paragraph 2 of the

---


31 Art. 2.

32 Art. 12-16.

The river Duero was considered apt at the time to demarcate the different legal regimes for wolves in Spain, as the river seemed a natural barrier between the remaining populations. Yet, the choice of this barrier, and the formulations used to describe it in the annexes, emerged problematic, having been overtaken by natural developments. In particular, the drafters of these texts from Annexes IV and V appear to have acted on two assumptions, namely (a) that the northwestern wolf population would not expand across the Duero to the south; and (b) that wolves would not return to eastern Spain, that is, eastward of the Duero’s origin. The wolves themselves have proven both assumptions wrong.

In connection with the first assumption, the animals turned out not to share the EU legislator’s conception of the river Duero as a barrier, and have crossed it southwards. Currently, a growing number of wolves is progressively reoccupying the species’ former haunts to the south of the watercourse. For instance, in 2011, a litter of wild wolf pups was spotted in the Autonomous Region of Madrid, for the first time in roughly 60 years. This ecological development has given rise to certain complications. Specifically, the different legal status of wolves on either side of the river, in what is essentially a contiguous population, is considered problematic by the competent authorities. Hence, the unforeseen wolf comeback on the Duero’s southern banks has prompted several – so far unsuccessful – Spanish attempts to modify the Habitats Directive and extend the Annex V regime to the contiguous wolf population south of the river.

That the second aforementioned assumption has turned out to be ill-founded as well is causing even greater legal issues. The primary question in this regard concerns the legal status of wolves in northeastern Spain, that is, the area east of an imaginary north-south line touching the Duero’s easternmost point, and north of an imaginary eastward extension of the Duero riverbed up to the Mediterranean coast. There was no permanent wolf presence in this area when the Habitats Directive was drafted. Yet, wolves have by now begun to recolonize it. The northwestern wolf population has not only expanded to the south, but also to the east, and wolves have started to resettle the area beyond the Duero’s easternmost point. In other words, more and more wolves are, strictly speaking, no longer "north of the Duero". To complicate things further, ‘foreign’ wolves have been arriving in northeastern Spain from the north. These French wolves descend, in turn, from the expanding Italian population. A tentative population of these wolves has settled in the eastern Pyrenees, on both sides of the French-Spanish border. The legal status of these wolves in northeastern Spain is directly related to the meaning of the phrase "Spanish populations north of the Duero". The directive accords Annex V status to the latter, and Annex IV status to all wolves except those "north of the Duero".

Principally, there appear to be three possible interpretations of the Directive’s wording in this connection. First, the reference to the Duero may be understood as purporting to divide the whole country into a northern and a southern part – even if the river itself does not extend

---

34 The bold print was added by the present author. Other language versions of the Habitats Directive, including the Spanish one, contain identical formulations.
all the way east. Put differently, the river’s rough east-west trajectory is imagined to continue in an easterly direction up to the Mediterranean. According to such an interpretation, Annex IV status would apply to the south of this line, and Annex V status to the north of it. This view is apparently adopted in the section on Spanish wolves in the latest European large carnivore inventory conducted by the Large Carnivore Initiative for Europe (LCIE), as this refers to (a part of) Cataluña as being "north of the river Duero". An evident drawback of this interpretation is that it is not clear at all where the precise dividing line between north and south ought to be drawn. Myriad options exist, for instance a line following provincial or municipal boundaries, or a straight eastward line starting from the easternmost point of the Duero.

Second, "Spanish populations north of the Duero" may be interpreted historically, as a reference to the contiguous northwest Iberian wolf population. This would involve treating the population concerned as a uniform legal unit, in accordance with the presumed original intentions of the Habitats Directive’s drafters. Thus, wolves in northeastern Spain belonging to this northwest Iberian population would be subject to Annex V, whereas the nascent Catalan population and other wolves arriving from France would be subject to Annex IV. There is, however, a downside of a practical nature to this, otherwise not implausible, interpretation. Attaching legal status to particular populations rather than to geographically defined areas is problematic, for the simple reason that wolves do not lead a sedentary lifestyle. Moreover, it may not always be easy or even possible to determine from what population an individual wolf originates without immobilizing it. Finally, this historic interpretation does not resolve the question as to what the legal situation would be when both populations mix, which is a real prospect. One solution for this problem could be that applying Annex V status to all wolves in northeastern Spain would be the most appropriate approach once the northwest Iberian and French populations have become firmly connected.

Third, the phrase "Spanish populations north of the Duero" may be construed narrowly, as actually meaning north of the Duero, and not northeast or even east-northeast of it. This would appear to be the approach most accurately reflecting the ordinary meaning of the text. As one study observes, the Autonomous Region of Cataluña and its wolves are situated neither north nor south of the Duero, but in fact quite a bit east of the river’s origin. This third interpretation would also seem to make the best fit with the teleological approach that permeates the case law of the EU Court of Justice regarding the Habitats Directive. In light of the directive’s overarching objective, the court has interpreted exceptions to the protection of species narrowly, in particular in the context of derogations from strict protection under Article 16 of the directive. It may be expected that a similarly restrictive interpretation would be applied by the court to the geographic limits defined in Annex IV, especially since these are also formulated as exceptions – wolves are subject to strict protection "except the [...] Spanish populations north of the Duero". Upon close consideration one will, nonetheless, detect a blemish on this interpretation as well. Technically, the area lying properly to the north of the Duero is the one between a line running due north from the river’s easternmost point and a line running due north from the river’s westernmost point – that is, the point where the river reaches the Atlantic Ocean. The latter part of such a rigid interpretation is rather problematic. It would entail that wolves in the westernmost part of the

38 Blanco, note 33 at 3.
39 That the plural is used (‘populations’) does not as such appear to pose an obstacle to this interpretation, as the plural is used in a standard manner in respect of all countries mentioned in the sentences delineating the scope of the various annexes, regardless of whether one or more separately distinguishable wolf populations are involved.
40 Lampreave et al., note 37 at 24.
Province of A Coruña and in some small bits of Pontevedra are subject to Annex IV instead of Annex V. It has, however, always been the clear understanding of the Spanish authorities, and apparently also of the European Commission, that wolves in the areas in question, as in the rest of northwestern Spain, are subject to the Annex V regime.

Depending on which of the above interpretations is correct, wolves in northeastern Spain are subject to (a) Annex V; (b) Annex IV or V, depending on the population they belong to; or (c) Annex IV. It is impossible to know the answer with any certainty, however, until the EU Court of Justice pronounces on the matter. This may be a long way off. The matter may, of course, also be settled through an amendment of the notorious text in the annexes. It is, however, unlikely that this will occur in the near future. It is telling that none of the three alternative interpretations discussed above is without shortcomings, or indeed completely consistent. That a single consistent interpretation cannot be construed, reveals the problematic nature of the formulations chosen in the directive’s annexes to delineate the application of the various regimes to Spanish wolves. Most of all, these formulations reveal a certain lack of foresight on the part of the European legislator.

CONCLUDING OBSERVATIONS

As stated at the outset of this contribution, the complexity and unpredictability of nature and of human impacts thereon makes it impossible to completely rule out future surprises when drafting legal instruments on wildlife conservation. A pertinent example is climate change. The ecological ‘mass migration’ which has been set in motion by the currently shifting climatic zones, and other climate change impacts, pose challenges which were not envisaged in the 1970s when many currently existing wildlife conservation treaties were concluded. However, this seems an apt example of a development that was unforeseen at the time because it was in fact to a large degree unforeseeable.

By contrast, the orca and wolf examples analyzed in this chapter stand out because the developments in question were not unforeseeable when the instruments in question were drawn up, but were nevertheless apparently unforeseen by the drafters. When phrasing provisions and picking particular wording, the drafters of ASCOBANS apparently did not stop to think about future cetacean rescue operations (whereas they clearly could have), and the drafters of the Habitats Directive likewise did not stop to think about scenarios of rapidly recovering European wolf populations (whereas again they clearly could have). Undoubtedly, many more of such examples could be identified.

Of course it is easy to make the above observations in hindsight and perhaps this chapter’s title is overly harsh when considering the time pressure and other constraints habitually faced by the drafters of international legal instruments. Also, the analysis in this chapter has not uncovered anything to be wrong with international (wildlife) law as such, other than the plain fact that law is made by humans who sometimes err. Nevertheless, a recommendation logically flowing forth from the above is for drafters of international wildlife instruments, before definitively approving a given text, to ask themselves to what extent their product is likely to defy the tooth of time – and the teeth of the orcas, wolves, or any other creatures the instrument in question is intended to cover.

---