

Some legal reflections on the fate of JJ4, the Italian brown bear that killed a jogger, and the EU Habitats Directive: Donaldson and Kymlicka's wild animal sovereignty theory put to the test?

Hendrik Schoukens*

1. Introduction

On the fateful morning of April 7, 2023, Andrea Papi, 26, went out for a morning jog in the mountainous region near his village, Caldes, in the Trentino Region in Italy. He never returned home from his run. After his family notified the rescue forces of his absence, a search team was finally able to retrieve his molested body.¹ The deep wounds to his neck, arms and chest indicated that he had been mauled by a brown bear, identified by the police as JJ4. Papi was the first person in the modern history of Italy to be killed in a brown bear attack.² In Trentino, the lethal encounter between a Eurasian brown bear (*Ursus arctus*) and a jogger sparked controversy about the presence of brown bears in the Italian Alps.³

In the immediate wake of the attack, the provincial governor Maurizio Fugatti issued an order for JJ4 to be captured and killed.⁴ Yet some animal activists maintained that JJ4 was innocent, as they claimed tests showed the culprit was male, and launched several appeals against the cull order.⁵ A local Italian Court initially reasoned that the order was legal, among others because merely capturing the bear and fitting a radio collar would not guarantee human safety. Most importantly, the Court also held that

* Hendrik Schoukens is professor of environmental law at Ghent University and a practising lawyer at the Bar of Brussels (Belgium).

¹ 'Bear kills jogger on woodland path in northern Italy', <https://www.theguardian.com/world/2023/apr/07/bear-kills-jogger-on-woodland-path-in-northern-italy>, accessed 15 December 2024.

² 'One month after fatal bear attack, bears' presence in Italian Alps is contested', https://www.lemonde.fr/en/environment/article/2023/04/30/one-month-after-a-fatal-attack-the-bear-s-presence-in-the-alps-of-northern-italy-is-under-contention_6024850_114.html, accessed 15 December 2024.

³ For more background: 'The Alpine row over 'problem bears'', <https://www.bbc.com/future/article/20230627-the-alpine-row-over-problem-bears>, accessed 15 December 2024.

⁴ 'Bear captured in Italy after killing Alpine jogger Andrea Papi', <https://www.bbc.com/news/world-europe-65309686>, accessed 15 December 2024.

⁵ 'Bear held for killing jogger in Italy is innocent, say animal activists', <https://www.theguardian.com/world/2023/may/09/bear-held-for-killing-jogger-in-italy-is-innocent-say-animal-activists>, accessed 15 December 2024.

it appeared reasonable to kill dangerous bears rather than keeping them in captivity for life, partly because the bear sanctuary did not have sufficient space to keep additional bears and because in any event, bears born in the wild and accustomed to ranging over areas of hundreds of square kilometres cannot enjoy the same conditions in a restricted area.⁶ In July 2023, however, the Italian Council of State overturned the local court's ruling and amended its previous order in part by suspending the cull order of JJ4, thereby keeping the bear alive in captivity to protect public safety.⁷ In particular, the decision to cull the brown bear was illegal in light of the protection duties described in Articles 12-16 of the Habitats Directive.⁸ The Council held that the provincial authority had not properly assessed other, less intrusive and cruel alternatives when issuing the order to kill JJ4. The absence of adequate facilities to accommodate the bear cannot justify a measure that infringes on the proportionality principle and risks authorising the indiscriminate use of the extreme measure of killing a specimen of a protected species, the Council held.⁹ In light of the persistent discord between the local court and the Italian Council of State, the matter has now been sent to the European Court of Justice (CJEU) for further clarification on the need to prioritise capture and permanent captivity over killing a dangerous brown bear.¹⁰

These high profile court cases take place against the backdrop of what some have dubbed the 'wildlife comeback in Europe'¹¹, with large carnivores recovering their populations in human-dominated landscapes across Europe.¹² However, while wolves returned to many 'lost grounds' by themselves, partly due to changes in land use, land abandonment in rural areas and increased legal protection, other large carnivores were actively helped by humans. For instance, the recovery of the dwindling

⁶ Tribunale Regionale di Giustizia Administrative della Regione autonoma Trentino – Alto Adige/Südtirol (2023) order no. 39/2023. In its subsequent interim order no. 50/2023 the same court also dismissed that association's action on other grounds, thereby refuting that the order violated the conditions set out by EU environmental law.

⁷ Italian Council of State (2023) nos. 2915, 2918, 2920/2023 (Italian Council of State 2023).

⁸ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206, 7-50,

⁹ Italian Council of State 2023.

¹⁰ Pending cases with nos. C-24/24, 25/24, 26/24 and 27/24, lodged on 15 January 2024 and referred by the Tribunale Regionale di Giustizia Administrative della Regione autonoma Trentino – Alto Adige/Südtirol on 20 December 2023.

¹¹ See for instance: Stefanie Deinet and others, *Wildlife comeback in Europe. The recovery of selected animal and bird species* (2013) <https://www.nabu.de/imperia/md/content/nabude/europa/130925-studie-wildlife-comeback-in-europe.pdf>, accessed 15 December 2024.

¹² Guillaume Chapron and others, 'Recovery of large carnivores in Europe's modern human-dominated landscapes' (2014) *Science* 1517.

population of brown bears in the Northern Italian Alps is the immediate result of deliberate reintroduction actions by the Italian authorities.¹³ In the context of the EU-funded *LIFE Ursus reintroduction* project¹⁴, 10 brown bears were translocated from Slovenia to the Northern Italian province of Trentino between 1999 and 2002. Thanks to this programme, the isolated colony of brown bears was able to recover to a population of over 100 in less than 15 years.¹⁵ The recent surge in human-bear incidents, however, prompted arguments that not enough wilderness remains in that area for people and bears to coexist. Several ‘Italian’ bears showed behaviour which was deemed unusual for bears. They were dubbed ‘problem bears’.¹⁶ Rather than avoiding humans, they become adapted to human activities. Typically, these bears are habituated to people and food-conditioned.¹⁷ In 2006, the exploits of the brother of JJ4, JJ1, better known as ‘Bruno’, caused a lot of buzz in the media. He had wandered across the Alps to Austria and into Germany, where he was the first wild brown bear to be sighted in over 170 years. However, JJ1's dietary preferences for cattle and beehives prompted the local German authorities to order his capture or cull, as he was believed to be a threat to humans. In spite of several attempts to capture JJ1 alive, he was ultimately fatally shot in Bavaria.¹⁸ His younger brother JJ3 allegedly also showed an aggressive character. After he had crossed the border into Switzerland in 2008, he was killed there.¹⁹ Because of all the problems that were arising with her offspring, Jurka, the mother of JJ1 and JJ3, was put in captivity in Italy.²⁰ In early 2024, local

¹³ For more background, see: ‘Northern Italy's ‘problem bears’ show the challenges of rewilding carnivores’, <https://www.nationalgeographic.com/travel/article/north-italy-bears-rewilding-controversy>, accessed 15 December 2024.

¹⁴ See: https://web.archive.org/web/20090327045029/http://www.orso.provincia.tn.it/storia_arco_alpino/progetto_reintroduzione/, accessed 15 December 2024.

¹⁵ ‘Animal rights activists decry brutal killing of a bear by Italian forestry police’, <https://www.theguardian.com/world/2024/feb/07/animal-rights-groups-decry-brutal-killing-of-bear-by-italian-forestry-police>, accessed 15 December 2024.

¹⁶ In a 2015 report, focusing on dealing with bear incidents, the term ‘problem bear’ is defined as ‘a bear involved in repeated bear incidents’. In turn, the term ‘bear incident’ is defined as ‘an occurrence that involved a human-bear conflict or episodes where bears caused property damage, obtained anthropogenic food, killed or attempted to kill livestock or pets, or were involved in vehicle collisions’. See: Aleksandra Majić Skrbinšek and Miha Krofel, *Defining, preventing, and reacting to problem bear behaviour in Europe*. Institute of Applied Ecology (European Commission 2015).

¹⁷ Ibid. 13-14.

¹⁸ ‘Bavarian hunters kill Bruno the bear’, <https://www.theguardian.com/world/2006/jun/26/animalwelfare.germany>, accessed 15 December 2024.

¹⁹ https://web.archive.org/web/20110614145248/http://www.uvek.admin.ch/dokumentation/00474/0_0492/index.html?lang=en&msg-id=18286, accessed 15 December 2024.

²⁰ https://en.wikipedia.org/wiki/Bear_JJ1, accessed 15 December 2024.

authorities tracked and killed M90, a tagged brown bear in Val di Sole, following frequent reports of encounters on hiking trails and even in residential areas. The provincial authorities held that M90 had become 'excessively confident' and recommended removing the brown bear as soon as possible.²¹ Responding to the tragic death of her child, the mother of Andrea Papi recently declared they did not want JJ4 to be killed, claiming that culling the bear would not bring her son back. However, in a letter sent out by her lawyer, she blamed the *LIFE Ursus reintroduction* project for failing to control the brown bear population.²²

This article uses the ongoing legal battle on the fate of JJ4 and her siblings as a case study to analyse the precise application of the conservation duties enshrined in the Habitats Directive in light of Sue Donaldson and Will Kymlicka's wild animal sovereignty theory.²³ Donaldson and Kymlicka argue that wild animals should have a right to lead self-determined lives both as individuals and as sovereign communities²⁴, and appears alien to the above-mentioned application of the protection regimes enshrined in the Habitats Directive to brown bears. Authors like Martin Drenthen have argued that the Habitats Directive neatly fits into the so-called the 'Stewardship Model'²⁵, which is based on the idea that animals are vulnerable and nature protection involves creating wildlife sanctuaries within the boundaries of which endangered species are expected to be protected from human activities.²⁶ Drenthen persuasively argues that large carnivores such as wolves do not fit into this model, since they have a degree of agency and might even be dangerous for humans. In doing so, he puts forward Donaldson and Kymlicka's wild animal sovereignty theory as an alternative model to the more dominant approaches, which see humans as stewards of vulnerable and endangered species and appear to be reflected in many existing conservation laws, such as the Habitats Directive.²⁷ On the surface, the latter assumption is reasonable, since Donaldson and Kymlicka's theory is premised on the idea of wild animals such as

²¹ Ibid.

²² 'I beg you not to kill the bear that killed my son', <https://tvmnews.mt/en/news/i-beg-you-not-to-kill-the-bear-that-killed-my-son/> accessed 15 December 2024.

²³ Sue Donaldson and Will Kymlicka, *Zoopolis. A Political Theory of Animal Rights* (OUP 2011) 156-209.

²⁴ Ibid.

²⁵ Martin Drenthen, 'Coexisting with Wolves in Cultural Landscapes: Fences as Communicative Devices' in Bernice Bovenkerk and Jozef Keulartz (eds), *Animals in Our Midst: The Challenges of Co-existing with Animals in the Anthropocene* (Springer 2021) 431-432.

²⁶ Ibid.

²⁷ Ibid.

brown bears being regarded as sovereign in their habitats, as the bears are capable of pursuing their own good and shaping their own communities.²⁸ Since the Habitats Directive compels Member States to designate protected sites and is primarily aimed at protecting ‘vulnerable’ animals against harmful human intrusions and actions, it seems to perfectly fit the ‘stewardship’ bill. This article will nevertheless try to refute this understanding of the Habitats Directive, in light of recent court decisions of the CJEU on the human-carnivore coexistence, and argue that this case law indirectly provides room to acknowledge brown bears as sovereign beings and goes beyond the classic stewardship-approach.

While Donaldson and Kymlicka’s wild animal sovereignty theory has received some criticism²⁹, this article assumes that it can still serve as a useful lens to analyse recent case law developments regarding large carnivores before the CJEU. In literature, Donaldson and Kymlicka’s theory has already been used as a model to propose amendments to existing legislation to see the sovereign nature of wild animals better operationalized.³⁰ However, this article opts for a more nuanced approach and tries to develop the argument that the interpretation given by the CJEU to the *existing* protection and conservation duties for brown bears already partially implements Donaldson and Kymlicka’s theory. In doing so, this article partly builds on the previous analyses of Yaffa Epstein³¹, Eva Bernet Kempers³², Hendrik Schoukens³³ and Veerle Platvoet³⁴, among others, who carried out similar analyses, viewing the existing conservation regimes included in the Habitats Directive as implicit rights for wild

²⁸ Donaldson and Kymlicka (n 23) 170.

²⁹ One line of criticism states that Donaldson and Kymlicka’s political theory of animal rights is problematic because it entails that not all animals have the same rights (see: Alasdair Cochrane ‘Cosmozoopolis: the Case Against Group-Differentiated Animal Rights’ (2013) *Law, Ethics and Philosophy* 127). Other authors have put forward that Donaldson and Kymlicka’s sovereignty claims are beside the point because, it is argued, sovereignty is closely linked to the individual human capability to develop, pursue and revise their own take on what they perceive as ‘good’ (Bernd Ladwig, ‘Against Wild Animal Sovereignty: An Interest-Based Critique of Zoopolis’ (2015) *Journal of Political Philosophy* 282).

³⁰ See for instance: Pablo P. Castello, ‘A Strategic Proposal for Legally Protecting Wild Animals’ (2022) *Journal of International Wildlife Law & Policy* 103.

³¹ Yaffa Epstein and Hendrik Schoukens, ‘A positivist approach to rights of nature in the European Union’ (2021) *Journal of Human Rights and the Environment* 205.

³² Yaffa Epstein and Eva Bernet Kempers, ‘Animals and Nature as Rights Holders in the European Union’ (2022) *Modern Law Review* DOI: 10.1111/1468-2230.12816

³³ Hendrik Schoukens, ‘Do wolves own property in the EU? On John Locke, the Habitats Directive and animal property rights’ in Jenny Garcia Ruales and others (eds), *Rights of Nature in Europe. Encounters and Visions* (Routledge 2024) 139.

³⁴ Veerle Platvoet, ‘Wild Things: Animal Rights in EU Nature Conservation Law’ (2023) *Journal of International Wildlife Law & Policy* 79.

animals, such as brown bears. All these authors have concluded that, at least implicitly and to a certain degree, the Habitats Directive indirectly seems to recognise some legal rights of certain strictly protected species, such as wolves, although they reached different conclusions, with Platvoet for instance holding that these preliminary fundamental animal rights, which can be identified in the Habitats Directive, are a by-product of the anthropocentric value of biodiversity and cannot be framed as a support for a rights-based approach to animal rights.³⁵

However, none of the above-mentioned analyses used the explicit and more elaborate perspective of Donaldson and Kymlicka's wild animal sovereignty theory as a specific benchmark. And, most importantly, Donaldson and Kymlicka deliberately opt to not limit their approach to certain inviolable rights owed to all animals but argue that we have distinct obligations to different groups of animals, depending on the kind of membership they enjoy in different animal or human communities. Since Donaldson and Kymlicka have repeatedly referred to cases of human-wildlife conflict in their work³⁶, including the case of brown bear JJ1, 'Bruno', this article chooses to use their wild animal sovereignty theory as the lens to further the ongoing debate on the articulation between the Habitats Directive and the human-carnivore coexistence. The fact that Donaldson and Kymlicka approach wild animals such as wolves and bears as 'political' actors also aligns with much of the recent political debates on the place of wild animals in the European landscape, both from a fact-based and from a legal perspective. In a 2019 article on the conservation of wolves in Scandinavia, *The Atlantic* described the grey wolf as the 'most political animal'³⁷, yet in light of the recent experiences with brown bears in Trentino, the baton of 'most political animal' in the EU will probably soon be passed on to the brown bear.

The decision to focus this analysis on the case law of the CJEU with respect to the Habitats Directive has some limitations. Whereas this choice is justifiable from a legal perspective, as pursuant to the EU Treaties the CJEU is responsible for a uniform application and interpretation of EU law, the author is very much aware of the fact that the practical application of the Habitats Directive might substantially differ from what

³⁵ Ibid.

³⁶ Donaldson and Kymlicka (n 23) 292.

³⁷ 'The most political animal', <https://www.theatlantic.com/science/archive/2019/04/norway-divided-over-countrys-wolves/587302/>, accessed 15 December 2024.

the CJEU decrees. Furthermore, the CJEU often leaves it up to the national courts to further apply the protection rules, as clarified in its preliminary reference rulings, to the situation at hand. In the context of this article, an extensive analysis of national case law regarding the protection of the brown bear was evidently not feasible. However, it is obvious that several Member States explicitly authorise culling practices, also in the context of brown bears, that might stand at odds with the recent decisions of the CJEU.³⁸

This article opts for the following structure. The main tenets of Donaldson and Kymlicka's wild animal sovereignty theory are sketched in *section 2*, whereas the general distribution of the brown bear in the EU and the available science as to human-bear conflicts are described in *section 3*. Subsequently, *section 4* outlines the general conservation duties that apply to brown bears, as enshrined in Articles 6, 12(1) and 16(1) of the Habitats Directive. In *sections 5, 6 and 7*, I look into the extent to which the protection and conservation duties towards large carnivores such as brown bears allow them to function as sovereign beings in line with Donaldson and Kymlicka's sovereignty model for wild animals. In *section 8*, I review the extent to which animal welfare considerations play a key role when removing so-called 'problem bears' from the wild. Specific consideration is given to the permanent captivity vs lethal removal dilemma, which also emerged in the case of JJ4. *Section 9* of this article addresses the wider implications of the restoration duties, as also put forward in the recently adopted EU Nature Restoration Law³⁹, for the long-term survival of communities of brown bears on the edges of human-dominated landscapes.

2. Donaldson and Kymlicka's wild animal sovereignty theory

Before diving deeper into the protection and conservation regimes applicable to brown bears in Europe, a further outline of Donaldson and Kymlicka's political theory of animal rights, and in particular their argument that wild animals possess a so-called

³⁸ See for instance: Romania to step up cull of brown bears after <https://www.theguardian.com/world/article/2024/jul/15/romania-to-step-up-cull-of-brown-bears-after-hiker-killed>, accessed 15 December 2024.

³⁹ Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 (2024) OJ L 29 July 2024 (EU Nature Restoration Law).

framework of sovereignty, which assumes that they have a claim over territory and a right to live their own lives, is instrumental.

2.1. General considerations

In their renowned book *Zoopolis*, Donaldson and Kymlicka depart from the existing approaches to animal protection, such as the welfarist, ecological and basic rights theories, and put forward a different avenue for animal advocacy, based on the premise that animals should not merely be protected but should be able to shape society as well.⁴⁰ They discard welfarist approaches, since this view, while opposed to certain forms of cruelty, still takes for granted that animals can be used for human interests.⁴¹ The so-called 'ecological approach' entails a direct focus on healthy ecosystems, which seems to leave the interests of individual specimens, for instance of non-endangered species, out of the equation.⁴² However, this approach is also dismissed for its failure to take into account the interests of the individual specimens of species.⁴³ Donaldson and Kymlicka accept that the so-called 'animal rights approach' might usher in a new era for animal protection, since certain 'inviolable rights', such as the right not to be owned or killed, are the only effective protection schemes that take into account the interests of individual animals.⁴⁴ That said, the authors claim that animal rights activists have put a lot of focus on the negative rights that result from their rationale, for instance the right not to be owned, killed, confined and tortured, but have stated little about the positive obligations of humans toward animals. In particular, they challenge the main pathways that have sprung from the animal rights movement.⁴⁵

More importantly, Donaldson and Kymlicka are highly critical of the abolitionist approach, which seeks to directly challenge the current paradigm of animal domination, among others by completely removing us, humans, from the picture. Not only in our role as owners and overlords, but also as stewards, for instance.⁴⁶ Donaldson and Kymlicka take issue with the assumption shared by many abolitionists

⁴⁰ Donaldson and Kymlicka (n 23) 3.

⁴¹ Ibid 4.

⁴² Ibid 3.

⁴³ Ibid 4.

⁴⁴ Ibid 4.

⁴⁵ Ibid 95.

⁴⁶ Ibid 86-88.

that humans can eventually be fully separated from animals, as this seem to negate what they dub the ‘relational duties’ we owe animals. In their view, it is simply impossible to create a space where humans live completely separated from other animals, be it domestic or wild animals.⁴⁷ Donaldson and Kymlicka stress the importance of ‘dependence’ by pointing out that, for instance, domesticated animals have become fully dependent on humans.⁴⁸ By focusing on the obligations that humans have toward animals, Donaldson and Kymlicka’s theory assumes ‘that animals – like humans – possess not only certain basic universal rights in virtue of their intrinsic moral status, but also certain kinds of membership rights that flow from the way they belong to or relate to different communities’.⁴⁹

2.2. Domestic, wild and liminal animals

In *Zoopolis*, Donaldson and Kymlicka divide animals into three distinct categories – wild, liminal and domestic – according to their needs, interests and what relationship with human communities might benefit them.⁵⁰ In contrast to the more well-established theories on animal rights, they put most emphasis on what specific kind of relationship other animals want to have with us. They outline different variations on a certain citizenship theory.

For wild animals, such as brown bears, both authors propose a so-called sovereignty framework, which assumes that these animals should be considered sovereign over their own habitats.⁵¹ Underpinning this rationale is the finding that wild animals are capable of pursuing their own good and shaping their own communities. Donaldson and Kymlicka put forward that sovereignty, as a political tool, would protect these animals from human-related threats such as hunting, habitat destruction and certain indirect impacts, e.g. pollution and climate change.⁵²

⁴⁷ Ibid 87-88.

⁴⁸ Ibid 84.

⁴⁹ Sue Donaldson and Will Kymlicka, ‘A Defense of Animal Citizens and Sovereigns’ (2013) *Law, Ethics and Philosophy* 143-144.

⁵⁰ Donaldson and Kymlicka (n 23) 66-67.

⁵¹ Ibid 170-171.

⁵² Ibid 156-157.

Domesticated animals like dogs, pigs, horses and cows have shared a long history of both exploitation and domestication by humans. They are dependent on humans for their survival, both as individuals and as species. Thus, Donaldson and Kymlicka argue, they should also have ‘co-citizenship’ in our human societies. According to the authors, these animals should be able to benefit from care and protection if they choose to. Yet they should also be able to autonomously choose which life to live: either they opt for co-citizenship or they move to another territory, free from human interference.⁵³

Liminal animals like pigeons, rats and urban foxes, by contrast, have a foot in both worlds, Donaldson and Kymlicka state. Although they do not necessarily have direct relationships with humans, as is the case with domesticated animals, they still depend on human presence and/or settlements.⁵⁴ Consequently, Donaldson and Kymlicka qualify them as so-called ‘co-residents’ of human settlements, even though they are positioned outside our shared scheme of cooperation. Such liminal animals should be rewarded what they dub ‘denizenship’, that includes both elements of wild animals sovereignty and domesticated animal citizenship.⁵⁵

2.3. Wild animal sovereignty

Donaldson and Kymlicka’s wild animal sovereignty theory is based on the assumption that like human animals, wild animals need sovereignty in order to live autonomously. They make the explicit comparison with (human) nation states, where the principle of non-intervention involves the right of every sovereign state to conduct its affairs without outside interference. When humans visit the territory of wild animals, they should behave like visitors or tourists in a foreign country.⁵⁶ In particular, the recognition of the sovereignty of territorial-based animal communities entails that ‘the (animal) people inhabiting the territory have a right to be there and to determine the shape of their communal life; and that they have the ability to do so. This recognition means that a sovereign community has the right to be free from colonisation, invasion,

⁵³ Ibid 154-155.

⁵⁴ Ibid 66-67.

⁵⁵ Ibid 243-247.

⁵⁶ Ibid.

and exploitation on the one hand, and also from external paternalistic management on the other.’⁵⁷

The wild animal sovereignty theory implies that ‘(w)ild animals have legitimate interests in maintaining their social organisation on their territory, they are vulnerable to the injustice of having alien rule imposed on them and their territory, and sovereignty is an appropriate tool for protecting that interest and vulnerability to injustice’.⁵⁸ According to Donaldson and Kymlicka, animals are to be treated as sentient beings with their own needs and interests which are to be met on their territory. Thus, wild animals’ territories are to be protected not merely from an anthropocentric perspective, but essentially in light of the needs of the animals concerned.⁵⁹ Human activities that are authorised in such areas can only take place if they respect the needs of these species.⁶⁰ In addition, wild animals should be granted unobstructed and unlimited entry to and presence in their natural habitat area. In other words, the balance is fundamentally shifted. The wild animal sovereignty theory entails that wild animals such as brown bears are granted the right to use their habitats at their own discretion without any major obstacle from the human perspective. Lastly, Donaldson and Kymlicka put forward that no major intervention in the internal workings of animal communities can take place that compromise their autonomy.⁶¹ In some instances, however, positive assistance duties might arise, for instance to help wild animals in the event of natural disasters or harmful human activities.⁶²

3. The comeback of the brown bear in Europe

In the early 1980s, the brown bear was virtually extinct in Northern Italy. Only a small, isolated population of the Marsican brown bear (*Ursus arctos arctos*) managed to survive, with a range restricted to the Parco Nazionale d'Abruzzo, Lazio e Molise and the surrounding region in Italy.⁶³ However, over the next decades, sustained recovery policies achieved the unthinkable, managing to revive a dwindling population of

⁵⁷ Ibid 170-171.

⁵⁸ Ibid 174.

⁵⁹ Ibid.

⁶⁰ Ibid 194-195.

⁶¹ Ibid 197-198.

⁶² Ibid 187.

⁶³ For more information, see: https://en.wikipedia.org/wiki/Marsican_brown_bear, accessed 15 December 2024.

brown bears in an area where large carnivores had disappeared for more than half a century. In order to fully grasp the possible alignment between the existing conservation duties under EU law, applicable to brown bears in the EU, and Donaldson and Kymlicka's wild animal sovereignty theory, it is important to outline the applicable reference state in the EU, including the Italian 'success story' in terms of bear reintroduction in Trentino and recent experiences in human-bear coexistence.

3.1. Against the odds

The brown bear is a large bear native to Eurasia and North America. Brown bears derive more than half of their nutritional needs from plant matter, yet also feed on small mammals, fish, ungulates such as deer and moose, and carrion. Whereas their diet clearly makes them omnivores, in the public perception they are still being viewed as carnivores. Even at policy level, this is the case, as is attested by their inclusion, for instance, in the Large Carnivore Initiative for Europe⁶⁴, which explains why also in this article they are further referred to as 'carnivores'. The main habitat of brown bears is confined to forests. When standing upright, they can easily reach a height of between 1.70 and 2.20 metres, which is taller than most human beings.⁶⁵ Depending on the meteorological conditions, their habitat and the available food resources, their weight varies between 100 and 350 kilos.⁶⁶ Approximately 2000 years ago, the original brown bear population in Europe ranged from tens of thousands to over 100,000 individuals.⁶⁷ However, as a result of extensive persecution during several centuries, even millennia, in combination with habitat loss due to deforestation and fragmentation caused by urbanisation and agricultural expansion, the brown bear's range in Europe became restricted to less populated, mountainous and forested areas at the fringes of the human-dominated landscapes in Europe.⁶⁸ Although the precise date of extinction varied by country, the brown bear became in general extinct in Western Europe during the past millennium (or even earlier, as was the case in the British Isles (at least 1,500 years ago) and in Denmark (4,500 years ago)).⁶⁹

⁶⁴ See: <https://www.lcie.org/> accessed 15 December 2024.

⁶⁵ See: <https://www.euronatur.org/en/what-we-do/bear-wolf-lynx/bears-in-europe/profile-brown-bear-ursus-arctos>, accessed 15 December 2024.

⁶⁶ Ibid.

⁶⁷ <https://vividmaps.com/bears-in-europe/>, accessed 15 December 2024.

⁶⁸ <https://wilderness-society.org/brown-bear-in-europe/>, accessed 15 December 2024.

⁶⁹ Ibid.

Today, Europe's remaining population of brown bears amounts to approximately 20.000 bears and is divided into 10 subpopulations.⁷⁰ The highest population density of brown bears outside Russia is currently found in the Carpathian Mountains, with a population of circa 6000 individuals in Romania and more than 1000 individuals in Slovakia. Major populations also still exist in the Western Balkans, with substantial populations present in Slovenia and Croatia, as well as in Scandinavia. In the latter region, more than 3000 bears are currently present in Sweden, 1000 in Finland and 150 in Norway.⁷¹ Bear populations in the Alps, the Pyrenees, the Apennines and on the Iberian Peninsula are generally speaking more isolated and all highly endangered, even though some modest recovery stories exist. For instance, in the Cantabrian Mountains in northern Spain, the number of brown bears has been steadily increasing since the late 1990s.⁷² And in the context of this article, it is important to reiterate that brown bears managed to recolonize part of the Northern Italian Alps, with a current population of more than 100 bears present in the province of Trentino.

3.2. Human-bear interactions

Donaldson and Kymlicka's wild animal sovereign theory is based on the premise that the flourishing of individual wild animals cannot be fully distinguished from the flourishing of communities. In this regard, the theory has of course significant implications for human-wildlife interactions.⁷³ Before addressing the legal questions that might arise in this respect, a clear understanding of the most common interactions and conflicts between humans and bears is important. In the course of history, bears and humans have indeed regularly come into conflict, mostly as a result of human encroachments on the bears' habitats. The increased fragmentation of their habitats brings bears into closer contact with human food resources, including livestock. Until the entry into force of the recent protection laws, the default option in case of conflicts was to eliminate the bears.⁷⁴

⁷⁰ <https://www.lcie.org/Largecarnivores/Brownbear.aspx>, accessed 15 December 2024.

⁷¹ https://en.wikipedia.org/wiki/Eurasian_brown_bear, accessed 15 December 2024.

⁷² <https://geographical.co.uk/wildlife/the-return-of-spains-brown-bears>, accessed 15 December 2024.

⁷³ Donaldson and Kymlicka (n 23) 167.

⁷⁴ Ibid 197 et seq.

Today, however, human-bear conflicts are diverse and most often related to bears' opportunistic feeding habits. Free or easy access to anthropogenic food, such as garbage and offal, is singled out as one of the most common causes for human-bear conflicts, leading to the emergence of so-called 'problem bears'.⁷⁵ While normal bears avoid humans, problem bears no longer avoid densely populated human settlements in their search for easily accessible food resources.⁷⁶ By and large, however, the number of problem bears often remains fairly limited when compared with the total population of bears in an area.⁷⁷ As mentioned, several reports have explicitly tagged the brown bears Jurka, and her offspring, among which JJ4, as 'problem bears' in the Italian province of Trentino.⁷⁸

Humans are not part of the diet of bears and bears do not prey on humans.⁷⁹ More generally speaking, livestock depredation is indeed by far the most frequent type of human-bear conflict in Europe.⁸⁰ Yet in sharp contrast to other large carnivores in Europe, such as wolves and lynx, lethal injuries may occur when bears attack humans. As illustrated by the recent fatal encounter between JJ4 and a jogger in Northern Italy, attacks may have serious consequences, both for humans and bears. Brown bears are the only large mammals for which attacks on humans have repeatedly been reported in Europe.⁸¹ Since human-bear incidents are often highly sensationalized in the media, the impression is created that the likelihood of a lethal encounter is higher than the objective reality. However, bears are generally shy animals that are likely to be afraid of people. In Sweden, with a population of several thousands of bears, there is about one attack every year. Two fatal encounters with humans took place in the past 15 years.⁸² In Romania, a country with an even bigger bear population of about 6000

⁷⁵ Majić Skrbinišek and Krofel (n 16) 14.

⁷⁶ Ibid.

⁷⁷ Ibid 13.

⁷⁸ Ibid 13 (with the further references).

⁷⁹ 'The Alpine row over 'problem bears'' (n 3).

⁸⁰ Alberto Fernandez-Gil and others, *Large Carnivore Management Plans of Protection: Best Practices in EU Member States* (Brussels 2018), 19.

⁸¹ Ibid.

⁸² Torfinn Gustafsson B.M., Anders Eriksson M.D, 'Fatal Eurasian Brown Bear Attacks—Two Swedish Fatalities in Modern Times' (2015) *Journal of Forensic Sciences* 1658.

individuals, 11 fatal attacks have been reported over the same period.⁸³ Bears have severely injured 274 people in Romania over the last 20 years.⁸⁴

Global studies on the nature of bear attacks have demonstrated that when a bear attacks, it is usually in defence against a perceived attack.⁸⁵ The probability of such an attack is heightened by the presence of cubs or a carcass used by a bear or, for instance, the proximity to a den or the presence of dogs.⁸⁶ As mentioned, habituation and conditioning to anthropogenic food are the main drivers behind the emergence of bears that are becoming increasingly conscious of the positive side of being close to humans and their anthropogenic food resources.⁸⁷ While brown bears that become used to human presence generally display less dangerous behaviour to humans per encounter, the number of encounters between bears and humans can substantially rise.⁸⁸ Consequently, on average, the risk of dangerous encounters increases in the context of habituated bears, when compared to non-habituated bears.⁸⁹ The case of Jurka, the mother of JJ4, partially seems to illustrate these findings. According to local reports, Jurka repeatedly walked into villages to raid chicken coops and beehives. Jurka and her cubs were allegedly responsible for more than half of all the bear-related damage in the area where she lived in Trentino.⁹⁰ Even attempts to scare her off with dogs did not yield any immediate result. These bears seem to have learned that humans are not by definition dangerous and, in any event, an easy source of food.⁹¹ Whereas the behaviour of the offspring of Jurka, such as JJ4, seems to indicate that the offspring of female bears that become habituated to people might retain this lack of fear towards humans⁹², this is not backed up by conclusive scientific studies.⁹³

Lastly, it should be noted that scientific reports have revealed that lethal management of brown bears has generally little to no effect on the amount of livestock

⁸³ 'Danger zone: Romania to get tough on bears following deadly mauling', <https://www.euronews.com/my-europe/2024/07/11/danger-zone-romania-to-get-tough-on-bears-following-deadly-mauling>, accessed 15 December 2024.

⁸⁴ Ibid.

⁸⁵ 'The Alpine row over 'problem bears'' (n 3).

⁸⁶ Fernandez-Gil and others (n 80) 17-18.

⁸⁷ Majić Skrbinšek and Krofel (n 16) 13-15.

⁸⁸ Majić Skrbinšek and Krofel (n 16) 13 (with more references).

⁸⁹ Ibid.

⁹⁰ 'The Alpine row over 'problem bears'' (n 3)

⁹¹ Ibid.

⁹² Majić Skrbinšek and Krofel (n 16) 13.

⁹³ Ibid.

depredation.⁹⁴ Translocation of brown bears to other areas may yield positive results, some studies in North America suggest.⁹⁵ Be that as it may, the available literature seems to suggest that a better management and protection of livestock (including beehives), including the setting up of adequate and accessible financial compensation schemes, is a better and more effective way to limit the impact of brown bears.⁹⁶ Lastly, several scientists also found that habitat destruction (for instance when constructing new roads and human settlements) further contributes to an increase of human-bear conflicts.⁹⁷

4. The legal benchmark: the existing protection regimes for brown bears in the EU

Before delving deeper into the concrete connection between Donaldson and Kymlicka's wild animal sovereignty theory and the applicable conservation duties for brown bears put forward by EU law, a more general overview of the applicable legislation is presented. This allows us to review to what extent the application of protection regimes, in general terms, directly or indirectly grants wild animals like the brown bear the inviolable right to not be harmed or killed for our benefit, as put forward in Donaldson and Kymlicka's theory.

4.1. General principles

In view of its limited range and dwindling population numbers in the second half of the 20th century, the brown bear has been included as a strictly protected species in several legally binding tools in Europe, including the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).⁹⁸ The brown bear is included in Appendix II to the Bern Convention, which implies that, pursuant to Article 6, deliberately capturing, killing or disturbing these species and/or

⁹⁴ Adrian Treves and others, 'Predator control should not be a shot in the dark' (2016) *Front Eco Enviro* 380-388.

⁹⁵ See for instance: 'Translocation is a viable option for bears', <https://blogs.illinois.edu/view/7447/506225907>, accessed 15 December 2024.

⁹⁶ Ann Eklund and others, 'Limited evidence on the effectiveness to reduce livestock predation by large carnivores' (2017) *Sci* 2097 <https://doi.org/10.1038/s41598-017-02323-w>.

⁹⁷ Marcus Elfström and others, 'Does despotic behaviour of food search explain the occurrence of problem bears in Europe' (2014) *The Journal of Wildlife Management* 881-893.

⁹⁸ Bern Convention on European Wildlife and Habitat (1979).

their refuge areas and habitats is prohibited.⁹⁹ Only under very strict conditions can derogations from these protection rules be authorized by the State Parties to the Bern Convention.¹⁰⁰

Having ratified the Bern Convention, the European Community - later the European Union - decided to further implement and operationalise its international commitments by adopting the Habitats Directive in the year 1992, the general objective of which is to 'contribute towards ensuring biodiversity through the conservation of natural habitats and wild fauna and flora in the European territory of the Member States'. Measures taken pursuant to the directive shall be designed to maintain at or restore to favourable conservation status natural habitats and species of wild fauna and flora of Community Interest.¹⁰¹ By requiring Member States to take such measures for species listed in its annexes, the Habitats Directive lays down a set of robust protection and restoration duties for those habitats and species of European importance. The brown bear is listed in both Annex II and Annex IV, implying that it is the beneficiary of conservation measures in the field of habitat protection¹⁰² as well as protection against more direct threats¹⁰³, such as hunting and disturbance.¹⁰⁴

4.2. Protected sites for brown bears

Since the brown bear is included in Annex II to the Habitats Directive, Member States are required to designate protected sites for this species, which at least cover the core parts of their natural habitats.¹⁰⁵ These sites are dubbed 'Special Areas of Conservation' (SAC), and, together with the 'Special Protection Areas' (SPAs), they constitute the so-called Natura 2000 network. The creation of an EU-wide network of protected sites is one of the major achievements of the Habitats Directive. At present,

⁹⁹ Article 4 also includes some provisions on the protection of the wider habitats, also for Appendix II species, such as the brown bear.

¹⁰⁰ Article 9(1) Bern Convention.

¹⁰¹ Article 2(2) Habitats Directive.

¹⁰² Laid down in Article 6 Habitats Directive.

¹⁰³ For a general analysis of the rules on strict species protection, see: Hendrik Schoukens and Kees Bastmeijer, 'Species protection in the European Union: How strict is strict?' in Charles-Hubert Born and others (eds), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (Routledge 2015) 121.

¹⁰⁴ Laid down in Article 12(1) Habitats Directive.

¹⁰⁵ For a more comprehensive analysis: Arie Trouwborst, 'Managing the Carnivore Comeback: International and EU Species Protection Law and the Return of Lynx, Wolf and Bear to Western Europe' (2010) 22(3) *Journal of Environmental Law* 347.

the Natura 2000 network covers 18% of the EU's land area and more than 8% of its marine territory, constituting the world's largest network of protected sites.¹⁰⁶

Once designated, SACs are subject to the application of the three-tiered conservation duties described in Article 6 of the Habitats Directive. First, Article 6(1) of the Directive lays down a binding legal duty for Member States to take proactive management measures, including restoration actions if need be, for the designated SACs on their territories.¹⁰⁷ Second, Article 6(2) provides for a non-regression obligation, stipulating that Member States need to take appropriate action to avoid the further deterioration of natural habitats and the disturbance of species. This provision is interpreted by the CJEU as an obligation of result.¹⁰⁸ The scope of said provision is large, encompassing ongoing uses,¹⁰⁹ activities that are not subject to a prior notification¹¹⁰ or permit and recently authorised plans or projects.¹¹¹ It is to be regarded as a catch-all provision, primarily aimed at achieving a standstill in terms of degradation of natural habitats.¹¹² Article 6(3), in turn, determines the procedural and substantive criteria to be observed when permitting plans and projects which could have an impact on the integrity of Natura 2000 sites. These plans and projects first need to undergo a so-called appropriate assessment, which needs to have an exclusively ecological focus, detailing the potential direct and indirect (cumulative) effects of the intended activities.¹¹³ A derogation from the above-mentioned conservation duties may exceptionally be granted if certain strict conditions are fulfilled. If no other realistic and less harmful alternative exists, a plan or project to which an imperative reason of overriding public interest (IROPI) can be attributed can nevertheless be authorised. In addition, proactive compensation actions need to guarantee that the overall integrity of the Natura 2000 network is not compromised. For spatial developments, only imperative reasons of overriding public interest can be invoked.¹¹⁴

¹⁰⁶ For an update of the exact number and surface of the network, see: <https://www.eea.europa.eu/data-and-maps/dashboards/natura-2000-barometer>, accessed 15 December 2024.

¹⁰⁷ Case C-848/19 *Commission v. Greece* (2020) ECLI:EU:C:2020:1047, para 49 *et seq.*

¹⁰⁸ See, for instance, Case C-559/19 *Commission/Spain* (2021) ECLI:EU:C:2021:512.

¹⁰⁹ See, for instance, Case C-404/09 *Commission/Spain* (2011) ECLI:EU:C:2011:768.

¹¹⁰ Case C-241/08 *Commission/France* (2010) ECR I-01697, para 62.

¹¹¹ Case C-226/08 *Stadt Papenburg* (2012) ECLI:EU:C:2010:10, para 49.

¹¹² See, more extensively, Hendrik Schoukens, 'Non-Regression Clauses in Times of Ecological Restoration Law: Article 6(2) of the Habitats Directive as Unusual Ally to Restore Natura 2000?' (2017) *Utrecht Law Review* 124.

¹¹³ Case C-441/17 *Commission/Poland* (2018) ECLI:EU:C:2018:255.

¹¹⁴ Case C-182/10 *Solvay* (2012) ECLI:EU:C:2012:82.

4.3. Strict protection duties for brown bears beyond protected sites

Protection duties for mobile carnivores such as brown bears are not confined to the boundaries of the designated protected sites and that only population-management approaches apply. In addition, Member States are required to establish a system of strict protection for the endangered species listed in its Annex IV, including the brown bear. This set of protection rules needs to contain a ban on all forms of deliberate killing of these species in the wild¹¹⁵, on the deliberate disturbance of these species, particularly during the breeding, rearing, hibernation and migration periods,¹¹⁶ as well as on the deterioration or destruction of breeding sites or resting places.¹¹⁷ Starting with the landmark ruling in *Commission v Greece (Caretta caretta)*, the CJEU has consistently reiterated that Article 12(1)(a) of the Habitats Directive does not only require Member States to faithfully and precisely implement the protection duties in their national or regional legislation¹¹⁸, but also obliges them to effectively apply them, for instance, when assessing decisions on activities that might lead to a transgression of the protection duties.¹¹⁹

As to the requirement to prohibit the ‘deliberate’ killing and disturbance of the species, the CJEU has repeatedly highlighted that prohibited ‘deliberate’ acts are to be understood as actions by a person who is aware that these actions will lead to the killing or disturbance of a strictly protected species, or who at least consciously accepts the possibility of such an offence.¹²⁰ The CJEU has consistently reasserted the wide scope of these protection schemes, stressing that ongoing recreational activities¹²¹, forestry practices¹²² and agricultural activities¹²³ also fall within this scope.¹²⁴ Even

¹¹⁵ Article 12(1) (a) Habitats Directive.

¹¹⁶ Article 12(1) (b) Habitats Directive.

¹¹⁷ Article 12(1)(d) Habitats Directive.

¹¹⁸ See for instance: Case C-6/04 *Commission/UK* (2005) ECLI:EU:C:2005:626.

¹¹⁹ See for instance: Case C-103/00 *Commission/Greece* (2002) ECLI:EU:C:2002:60; Case C-340/10 *Commission/Cyprus* (2012) ECLI:EU:C:2012:143.

¹²⁰ See among others: Case C-221/04 *Commission v Spain* (2006) ECLI:EU:C:2006:329, para 71-74 and, more recently: Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen* (2021) ECLI:EU:C:2021:166, para 52-54.

¹²¹ See for instance: Case C-504/14 *Commission/Greece* (2016) ECLI:EU:C:2016:847

¹²² See for instance: Case C-441/17 *Commission/Poland* (2018) ECLI:EU:C:2018:255 and, more recently: Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen* (2021) ECLI:EU:C:2021:166, para 52-54.

¹²³ See for instance: Case C-383/09 *Commission/France* (2011) ECLI:EU:C:2011:369.

¹²⁴ Schoukens and Bastmeijer (n 103) 138-141.

lawful activities resulting in the deliberate damaging or destruction of breeding sites and resting places are covered by the protection regime.¹²⁵ Only under limited circumstances can a derogation be granted and the strict prohibitions bypassed, subject to the strict criteria set forth by Article 16(1) of the Habitats Directive. These justification grounds relate for instance to public safety¹²⁶ and other imperative reasons of overriding public interest, damage to crops or livestock,¹²⁷ research purposes or the interests of other endangered species. In addition, it needs to be demonstrated that a less damaging alternative is not available, and that the derogation does not compromise the long-term survival of the species.¹²⁸

4.4. Inviolable rights for brown bears?

It could be easily inferred from the aforementioned protection duties that the Habitats Directive clearly falls short of the inviolable animal rights that Donaldson and Kymlicka advocate.¹²⁹ These authors contend that accepting animals as persons with ‘basic’ rights, entails that they ‘own equal and inviolable rights to life and liberty, which prohibits harming them, killing them, confining them, owning them, and enslaving them’.¹³⁰ On the surface, the Habitats Directive clearly does not explicitly grant certain ‘basic’ rights, such as the right to not be harmed or killed, to wild animals like brown bears. However, as has already been argued by authors like Epstein and myself¹³¹, this explicit absence is misleading since, as is evident from the analysis above, the Habitats Directive indirectly bestows such basic rights on wild animals like brown bears that correspond to the (human) duties owed to them. Applying a Hohfeldian lens, it indeed appears self-evident that strictly protected species, including brown bears, have certain basic rights, such as the right to not be killed, not be disturbed during mating and not have their resting places destroyed. These rights correspond to strictly interpreted duties on the part of humans, such as the prohibition to kill brown bears, which may not be infringed for mere economic reasons.¹³² It has been submitted that further parallels between these basic rights and ‘human rights’, such as the right to life

¹²⁵ Case C-6/04 *Commission/UK* (2005) ECLI:EU:C:2005:626, para 79.

¹²⁶ Article 16(1)(c) Habitats Directive.

¹²⁷ Article 16(1)(b) Habitats Directive.

¹²⁸ Schoukens and Bastmeijer (n 103) 140-144.

¹²⁹ Donaldson and Kymlicka (n 23) 40.

¹³⁰ *Ibid.*

¹³¹ Epstein and Schoukens (n 31) 226.

¹³² *Ibid* 212.

and even the right to property¹³³, can be drawn. Accordingly, Epstein and Kempers argue that ‘if laws protect animals and nature at least in part for their own sake (...) concrete legal obligations towards them should be understood as legal rights’.¹³⁴

Even the fact that these ‘indirect’ rights are not absolute should not be used as an argument to deny their recognition as ‘inviolable rights’ as put forward by Donaldson and Kymlicka. Indeed, although the human right to life is approached as an inviolable right, killing another human being may be legal if it’s done out of self-defence or necessity.¹³⁵ As is obvious from the above-mentioned case law, derogations from these indirect rights can only be granted under very restrictive conditions. Additionally, as is obvious from the recent decisions of the CJEU that will be analysed more in depth below in light of the other tenets of Donaldson and Kymlicka’s wild animal sovereignty theory, mere utilitarian interests are not sufficient to grant a derogation.

That said, some authors, including Platvoet, still stress that these legal rights for wild animals, that are strictly protected under the Habitats Directive, are a mere by-product of the anthropocentric value of biodiversity. In particular, she argues that the human protection duties, which I will further discuss below, are not grounded in the interest or well-being of animals. Instead, they are based on the interest of humanity in biodiversity. She states that the Directive does not explicitly recognise the intrinsic value of wild animals such as the brown bear. The strict protection duties, as enshrined in Article 12, can merely be qualified as ‘a right’ bestowed upon a certain number of individual animals so that the species is not under threat.¹³⁶ I do not fully agree. This approach might be correct when it comes to certain species listed in Annex V, such as pine martens (*Martes martes*), which can be killed or captured as long as this ‘exploitation’ does not compromise the maintenance of the species at a favourable conservation status. Article 14 of the Habitats Directive indeed merely compels Member States to ‘take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status’, which seems to grant the Member States the possibility of justifying the exploitation of

¹³³ Schoukens (n 33).

¹³⁴ Epstein and Kempers (n 32) 1343.

¹³⁵ Donaldson and Kymlicka (n 23) 41.

¹³⁶ Platvoet (n 34) 89-94.

species, including the hunting, as long as it does not compromise its conservation statuses. Such ‘weaker’ protection duties for Annex V species, which are merely aimed at population management, clearly fail to meet the standard of inviolable rights as put forward by Donaldson and Kymlicka. Even when the CJEU has recently clarified that the restriction of hunting for Annex V species might also oblige Member States to restrict or outright prohibit hunting in light of the unfavourable conservation status of a species¹³⁷, this does not seem to offset the absence of more clear-cut protection duties aimed at the protection of individual specimens of the species listed in Annex V. Such a disclaimer is evidently also in order for species not listed under the Habitats Directive¹³⁸, since their protection is merely guaranteed as a side-effect of other, more general conservation duties aimed at the protection of ‘ordinary’ nature.¹³⁹

In the context of this article, however, the focus is on Annex IV species such as the brown bear, for which the Habitats Directive does not merely provide population-based management through the designation of SACs, but also strict protection at individual level. Moreover, the mere fact that in the Italian context, the culling decisions already focus on the capturing and/or killing of individual brown bears, such as JJ4, seems to indicate that. If the individual did not matter, the n one might have issued more ‘blanket’ culling decisions. In addition, one should not ignore that the Habitats Directive is also to be interpreted in light of Article 13 of the Treaty on the Functioning of the EU (TFEU), which explicitly acknowledges animals as sentient beings and stipulates that their welfare is to be considered. The Convention on Biological Diversity¹⁴⁰, which recognises the intrinsic value of nature in its preamble, also presents itself as a binding benchmark in this respect. In other words, the main elements of Donaldson and Kymlicka’s wild animal sovereignty theory are indirectly present in the wider legal framework within which the Habitats Directive is to be interpreted and applied.

¹³⁷ Case C-436/22 *Asociación para la Conservación y Estudio del Lobo Ibérico (ASCEL)* (2024) ECLI:EU:C:2024:83, para. 69.

¹³⁸ Platvoet (n 34) 94-98.

¹³⁹ See for instance as regards the protection of ‘ordinary’ or ‘commonplace’ nature: Geert Van Hoorick, ‘Biodiversity outside protected areas. An outlaw waiting to be saved’ in Born (n 103) 452.

¹⁴⁰ Rio de Janeiro, 5 June 1992, 1760 UNTS 79.

5. Boundaries and territory: brown bears as sovereign beings at the edges of a human-dominated landscape?

While we have already established that brown bears may have their ‘inviolable rights’ recognised in Article 12 of the Habitats Directive among others, this does not *ipso facto* mean that they are regarded as ‘sovereign’ as put forward by Donaldson and Kymlicka. In this section, I will analyse to what extent large carnivores, including brown bears, are approached as mere passive objects or rather as sovereign, independent beings whose agency and ecological needs also guide the application of protection and conservation schemes. This constitutes a necessary next step, since Donaldson and Kymlicka have placed great emphasis in their wild animal sovereignty theory on what they call ‘the facts on the ground’¹⁴¹, which implies that we should refrain from allocating habitats to wild animals by arbitrarily drawing lines on a map, which fails to provide a viable land base for the animal community in question. Donaldson and Kymlicka place great value on the emerging scientific knowledge regarding ‘animal geography’, i.e. the knowledge of the nature and the extent of animal habitats.¹⁴² They argue in particular that ‘(o)ur political boundaries for sovereign animal communities can be mapped onto ecologically-based boundaries to ensure the viability and stability of sovereign animal communities. Our decisions about which lands to ‘rewild’, which lands to share in stable symbiotic relationships, and which lands to maintain under more extensive human development and management can be informed by our growing understanding of ecosystems’.¹⁴³

5.1. Protected sites for brown bears, but linked to their needs and desires?

Whereas Donaldson and Kymlicka’s wild animal sovereignty theory leaves little to no room for the establishment of parks or other spaces where humans retain a certain degree of sovereign authority and act as stewards over wild animals, they do not advocate a system of strict nature reserves where nature and humans are separated.¹⁴⁴ Accordingly, both authors do not rule out cases of ‘shared and overlapping sovereignty’ between wild animals and humans. They advocate a more ‘multilayered conception of

¹⁴¹ Donaldson and Kymlicka (n 23) 192.

¹⁴² Ibid 195.

¹⁴³ Ibid.

¹⁴⁴ Ibid 190-191.

sovereignty’, which takes into consideration ecological viability, animal mobility and the possibility for sustainable and cooperative parallel co-habitations.¹⁴⁵ When allocating certain swaths of land to wild animals, they make the needs of these animals a priority. On the surface, this seems to clash with the rationale underpinning the Habitats Directive, which does seem to demand from Member States that they designate protected sites (Natura 2000) and manage them as stewards. However, in spite of Donaldson and Kymlicka’s critical appraisal of traditional approaches to national parks or other protected spaces, recent case law regarding the designation and protection duties that apply in the context of the Natura 2000 network appears to partly acknowledge the sovereign nature of wild animals, including brown bears.

A first potent illustration of this thesis is offered by the CJEU’s case law on the designation duties, which delineates the discretion for Member States when designating SACs under the Habitats Directive. In most national regimes, authorities possess a large degree of freedom when designating national protected sites, often avoiding areas which they want to economically develop in future years. In sharp contrast, the designation duties included in the Habitats Directive seem to be based on ecological criteria for the designation of SACs for brown bears, for instance.¹⁴⁶ In Annex III to the Habitats Directive, the criteria are outlined for the designation of Natura 2000 sites for Annex II species such as brown bears. Member States need to take into account, among other things, the size and density of the population of the species present on the site in relation to the populations present on the national territory, the degree of conservation of the features of the habitat which are important for the species concerned and the restoration possibilities, and the degree of isolation of the population present on the site in relation to the natural range of the species. In addition, a global assessment of the value of the site for the conservation of the species concerned is needed.

At face value, these criteria seem to be at least partially aligned with the concept of ‘ecologically-based boundaries’ put forward by Donaldson and Kymlicka.¹⁴⁷ When confronted with a persistent tendency on the part of national authorities to ignore

¹⁴⁵ Ibid 191.

¹⁴⁶ Articles 4 and 5 Habitats Directive.

¹⁴⁷ Donaldson and Kymlicka (n 23) 192.

ecological evidence as to the eligibility of certain sites for obvious economic reasons, the CJEU has consistently ensured that the rules of the game are respected in this regard, even when the socio-economic stakes are high, as is the case when protected sites are designated in port areas.¹⁴⁸ In other words, mere economic or ‘human’ considerations cannot prevail over ecological knowledge regarding the habitat needs of protected species when drawing boundaries for the SACs. In a case concerning the designation of SACs in the context of an economically important estuary and port area, the CJEU held that, if Member States were permitted to invoke economic reasons for not designating the most suitable habitats for the species, the overarching conservation objective of the Habitats Directive would be compromised.¹⁴⁹ When screening the designation policies under the Birds Directives, the CJEU admitted the use of scientific reports, such as the *Inventory of Important Bird Areas in the European Community*, as a benchmark for checking a Member State’s compliance with EU law-based duties for the designation of protected sites (SPAs).¹⁵⁰ If Member States decline to designate sites that have been included in this atlas of important bird areas or in other valuable ecological documents, they can only do so relying on other, possibly more recent environmental studies regarding the presence and the habitat needs of the protected species. So far, few Member States have succeeded in doing so, which indicates the limited room for allowing economic arguments to override ecological considerations in the context of designation policies.¹⁵¹

Thus, the obligation to designate SACs, as stipulated in the Habitats Directive, is not explicitly based on anthropocentric views on the desirability of nature conservation, but is to a large extent predicated on the ecological needs of the species, for instance brown bears, for which the sites have to be designated. In other words, the core habitats of brown bear populations that are situated in areas which may for instance be instrumental for future mining activities, have to be designated in principle. Economic considerations cannot prevail over ecological studies regarding the habitat requirements of brown bears, which may come down to prioritizing the biological needs of brown bears over short term-economic aspirations of humans active in the same area. The occurrence of predation on livestock and even dangerous encounters

¹⁴⁸ Case C-44/95 *R v Secretary of the State for the Environment* (1996) ECLI:EU:C:1996:297, para 27.

¹⁴⁹ *Stadt Papenburg* (n 111) para 31-33.

¹⁵⁰ Case C-3/96 *Commission/the Netherlands* (1998) ECLI:EU:C:1998:238, para 68–70.

¹⁵¹ Case C-418/04 *Commission v Ireland* (2007) ECLI:EU:C:2007:780.

between bears and humans does not seem to alter this rationale. In other words, to simply eradicate the brown bears in Trentino because of the problematic behaviour of some individuals, such as JJ4, does not seem to be the default legal option.

In this light, I submit that the designation obligations for brown bears (and other animals) contained in the Habitats Directive cannot be perceived as a classic exercise in human management or stewardship with an exclusive focus on human needs and a tendency to isolate populations in ‘paternalistically’ designed nature reserves. They indeed leave ample room for prioritising ecological needs, even of large carnivores like brown bears. Moreover, the CJEU has in its subsequent case law underlined the flexible and dynamic nature of the selection duties by pointing out that the Member States are required to re-evaluate their designation policies with a view to continuing to monitor results and scientific studies. In its prominent 2006 decision in *Commission v. Austria*, the CJEU held that ‘(t)he obligation to classify is not limited by the state of scientific knowledge at any given time’.¹⁵² Thus, if scientific studies reveal that the core populations of protected species, such as brown bears, have moved to neighbouring areas, these zones may need to be designated as SAC in due course so as to include them in the Natura 2000 network. This dynamic rationale is closely linked to Donaldson and Kymlicka’s understanding that ‘any conception of boundaries must take into account the facts of migration’.¹⁵³ For instance, assuming that a growing population of brown bears is recolonising neighbouring valleys, this may constitute a valid argument to advocate an extension of the designated protected sites. Of course, such expansionist claims need to be substantiated by sound evidence as to the importance of the new sites for the survival of the brown bears, for instance.¹⁵⁴ Recent case law does moreover attest to the fact that restoration possibilities need to be taken into account when designating SACs and/or SPAs. For instance, when areas that have at present little ecological value are instrumental to the further recovery of a population of brown bears, this may be a persuasive reason to include them as SACs in the Natura 2000 network.¹⁵⁵

¹⁵² Case C-209/04 *Commission/Austria* (2006) ECLI:EU:C:2006:195, para 43.

¹⁵³ Donaldson and Kymlicka (n 23) 188.

¹⁵⁴ Hendrik Schoukens and Hans Woldendorp, ‘Site selection and designation under the Habitats and Birds Directives: a Sisyphean task’ in Born (n 103) 45.

¹⁵⁵ Case C-281/16 *Vereniging Hoekschewaards Landschap* (2017) ECLI:EU:C:2017:774, para 36-38.

This surprisingly dynamic ‘ecological lens’ not only prevails when it comes to designating core habitats as protected sites, but also when interpreting the conservation schemes that are applicable in this context. Limiting habitat encroachments and other intervention was identified as one of the main tenets of Donaldson and Kymlicka’s wild animal sovereignty theory. I argue that the application of the protection duties enshrined in the aforementioned Articles 6(2) and 6(3) of the Habitats Directive is, at least in theory, capable of putting the ecological needs of the endangered species and their core habitats at the forefront of the decision-making process regarding potentially damaging activities such as mining operations. It appears that the CJEU is increasingly willing to opt for an approach that takes into the account the interests of ‘sovereign communities’, especially when reviewing the acceptability of human activities such as hunting, resource extraction and pollution. Like Donaldson and Kymlicka¹⁵⁶, the CJEU does not seem to be willing to confine the application to the boundaries of existing SACs but offers room for a more landscape-wide application of conservation duties.

A case in point is the CJEU’s decision in the so-called ‘Alto Sil’ case against Spain, which explicitly revolved around the survival of an isolated population of brown bears in the Cantabrian mountains.¹⁵⁷ The ‘Alto Sil’ site has been designated in the Habitats Directive among others because it was the core of the last remaining populations of brown bears in the country. A number of open-cast coal mining projects have a negative impact on the ‘Alto Sil’ site. This caused a loss of habitat for the brown bear, specifically in the Leitariegos corridor area. According to the environmental studies that could be consulted by the CJEU, the bears move 3.5 to 5 kilometres away from the areas impacted by the noise and vibrations caused by the mining operations, which prevents them from having access to that corridor or makes access much more difficult for them, although the corridor is a north-south transit route of critical importance for the western population of the species¹⁵⁸. The Court also refers to another study, confirming that the Leitariegos corridor, with a width of 10 kilometres, is a transit route of great importance for the western population of the species, allowing in particular communication between two very important pockets of reproduction. The

¹⁵⁶ Donaldson and Kymlicka (n 23) 192.

¹⁵⁷ Commission/Spain (n 109).

¹⁵⁸ Ibid para 188.

report states that the risk of deterioration and closure of this corridor constitutes one of the main threats for the re-establishment of the Cantabrian brown bear in that it might result in the western population being fragmented into two sub-populations and even in the species finally being divided into three populations.¹⁵⁹ Consequently, the CJEU concludes that the noise and vibrations caused by the ‘Feixolín’, ‘Fonfría’ and ‘Ampliación de Feixolín’ open-cast mines and the closure of the Leitariegos corridor due to the presence of those mines constitute disturbances of the ‘Alto Sil’ site, which is of significant importance for the conservation of the brown bear.¹⁶⁰ This decision not only underscores the potentially large territorial scope of the conservation duties linked to SACs, it also highlights another key aspect of Donaldson and Kymlicka’s wild animal sovereignty theory, i.e. the corridor rights of sovereign animals. ‘Animals need corridors through regions of intensive human settlement in order to be able to respond flexibly to population pressures’¹⁶¹, they submit. And this is exactly what the CJEU appears to be doing in this case.

But there is more. Even though the mining operations predated the designation of those areas as SACs, the CJEU nonetheless held that Spain failed to comply with its conservation duties, referred to in Article 6(2) of the Habitats Directive vis-à-vis this large carnivore.¹⁶² In other instances, the CJEU highlighted that the precautionary principle is to be applied when assessing the acceptability of human activities, including large-scale infrastructure projects, with a potential impact on the core habitats of large carnivores.¹⁶³ If scientific reports attest that the numbers of a population of large carnivores are dwindling, then it is up to the national authorities to explain why such impacts are nevertheless acceptable in light of the conservation objectives for the large carnivore species. *In dubio pro orso*, the benefit of the doubt goes to the brown bear, whose interests are also to prevail when weighed against even long-term economic interests.¹⁶⁴ The so-called site-specific conservation objectives serve as a crucial instrument in this respect and, pursuant to the Court’s case law, they need to be based on scientific information regarding the importance of the site for the

¹⁵⁹ Ibid para 189-190.

¹⁶⁰ Ibid para 191.

¹⁶¹ Donaldson and Kymlicka (n 23) 189-90.

¹⁶² Commission/Spain (n 109) para. 163-171 and 185-191.

¹⁶³ See for instance (yet unsuccessful): Case C-308/08 *Commission/ Spain* (2010) ECLI:EU:C:2010:281, para 21-24.

¹⁶⁴ Case C-127/02 *Waddenzee* (2004) ECLI:EU:C:2004:482, para 56-59.

long-term survival of the species and their habitats on the site in question. Such science-based conservation objectives are specific and precise, so as to be used as a binding benchmark not influenced by economic and/or other anthropocentric considerations.¹⁶⁵

In addition, the conservation duties enshrined in Article 6 of the Habitats Directive are not exclusively focused on maintaining the status quo. They may also force authorities to go beyond that. When a population of brown bears is on the verge of extinction, additional restoration measures are to be adopted in order to stave off further degradation, as required in light of Article 6(2) of the Habitats Directive. Moreover, pursuant to Article 6(1) of the Habitats Directive, Member States need to take conservation measures in order to maintain and, if necessary, restore the species to a favourable conservation status. Accordingly, it can be concluded that the supposedly anthropocentric stewardship model put forward by the system of area protection in the Habitats Directive still seems to push Member States towards an approach that is primarily focused on the ecological needs and behaviours of brown bears rather than human concerns.¹⁶⁶ This perfectly ties in with the idea of shared and overlapping sovereignty put forward by Donaldson and Kymlicka, who argue that, while some strict territorial separation should exist – for instance, wilderness areas with restricted access for humans – there should also be more multi-layered dimensions with overlapping claims, accommodating migration patterns of certain species.¹⁶⁷ As SACs, and the Natura 2000 network in general, are not conceived as strict nature reserves, where all human activities are by nature prohibited, they do offer room for this type of more flexible habitat conservation, which may also encompass much-needed corridor zones for large carnivores.

5.2. ... and beyond?

Being more dynamic and species-focused than often perceived, the conservation duties that apply to SACs remain focused on the preservation of the core habitats of

¹⁶⁵ See more extensively: Hendrik Schoukens, ‘Science and the interpretation of the Habitats Directive by the Court of Justice of the EU: 2+2=5’ in Andrew Jackson (ed), *Nature Law and Policy in Europe* (Routledge 2022) 161.

¹⁶⁶ For a similar finding, see: Epstein and Schoukens (n 31) 226.

¹⁶⁷ Donaldson and Kymlicka (n 23) 191.

endangered species such as brown bears. Moreover, they also put forward a more population-based approach to the conservation of large carnivores. This preliminary finding may clash with the explicit rejection by Donaldson and Kymlicka of the so-called ‘ecological approach’, since the application of said conservation duties might favour the protection and restoration of ecosystems, of which brown bears are an inherent part, over saving the lives of individual animals of endangered or even non-endangered species.¹⁶⁸ At present, there are no concrete indications of practices in which the welfare of individual brown bears is sacrificed with reference to the importance of the wider ecosystems in which they are present. That said, as argued above, individual brown bears are also strictly protected by virtue of Article 12(1) of the Habitats Directive. The individual matters, as was illustrated by a ruling of the CJEU on the compatibility of Swedish forestry practices with the strict protection duties prescribed by the Birds and Habitats Directive. In this ruling, the CJEU dismissed population-based interpretations of the strict protection duties and held that for instance, the prohibition to kill wild birds in the EU is also applicable to bird species whose populations are not declining.¹⁶⁹ Since the protection duties of Article 12(1) are not restricted to the boundaries of the Natura 2000 network, this implies that brown bears cannot be treated as ‘outlaws’ once they move beyond the designated SACs. Differently put, the presence of large carnivores, even bears, in areas close to human settlements is not necessarily to be treated as a legal anomaly. In line with Donaldson and Kymlicka’s theory, this evidently provides ample room for balancing the interests of sovereign animals and potentially overlapping human claims.¹⁷⁰

A recent Romanian wolf case offers some interesting insights into the precise repercussions of the aforementioned rationale. In this case, the CJEU was asked to delineate the exact territorial scope of the human protection duties vis-à-vis a grey wolf that had been straying into a Romanian village and was captured and subsequently relocated by the local authorities. Romania argued that it was entitled to lawfully remove a wolf from human settlements, as the wild animal had no right to be there in the first place. However, the CJEU noted in its decision that the protection duties provided for by Article 12(1) of the Habitats Directive were not limited to wilderness

¹⁶⁸ Ibid.

¹⁶⁹ Cases C-473/19 and C-474/19 *Föreningen Skydda Skogen* (2021) ECLI:EU:C:2021:166.

¹⁷⁰ Ibid 190-191.

areas:¹⁷¹ the wolf was protected wherever the wolf was present during the course of its natural behaviour.¹⁷² Although species such as grey wolves are protected ‘in the wild’ according to Article 12(1) of the Habitats Directive, this does not mean that they lose their protected status once they enter human settlements. The result is that, in practical terms, wolves have the liberty to roam through human settlements. Or, to use Donaldson and Kymlicka’s terminology, they are approached as sovereign individuals rather than passive objects. Interestingly, the CJEU also clarified that the concept of ‘habitat of a species’, which is defined in the Habitats Directive as the ‘environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle’, is not to be regarded as ‘a territory with fixed and immutable boundaries’.¹⁷³ Likewise, the CJEU explained that protected sites, which also have to be designated for grey wolves (as was the case for brown bears, see *supra*) in accordance with Article 4 of the Habitats Directive, only cover some of the core parts of the natural habitats of species that range over wide areas, such as grey wolves.¹⁷⁴

To be more precise, the CJEU stressed that Article 12(1) of the Habitats Directive is not confined to the notion of ‘natural range’ nor ‘does it lay down a system of protection for specimens of protected animal species according to the location, place or habitat where those species are situated at a particular time’.¹⁷⁵ According to the CJEU:

the protection provided for in Article 12(1) of the Habitats Directive does not include limits or boundaries and, therefore, the view cannot be taken that a wild specimen of a protected animal species located in the vicinity of or within areas of human settlement, crossing such areas or feeding on resources produced by humans is an animal which has left its ‘natural range’, or that that range is incompatible with human settlements or man-made developments.¹⁷⁶

Along similar lines, the CJEU clarified that the concept of ‘natural range’ is an inherently dynamic concept.¹⁷⁷ The view that wild specimens of strictly protected

¹⁷¹ Case C-88/19 *Alianța pentru combaterea abuzurilor* (2020) ECLI:EU:C:2020:458, para 38–39.

¹⁷² *Ibid.*

¹⁷³ *Ibid* para 36.

¹⁷⁴ *Ibid* para 37.

¹⁷⁵ *Ibid* para 43.

¹⁷⁶ *Ibid* para 39.

¹⁷⁷ *Ibid* para 40–42.

species have left their ‘natural range’ whenever they settle in urban settlements or grow dependent on food produced by humans cannot be upheld, according to the CJEU with respect to grey wolves.¹⁷⁸ Interestingly, the Court also pointed out that a different interpretation, whereby areas of human settlement are excluded from the protection provisions, would run counter to the objective of the directive. In this respect, the CJEU underlined the fact that in a number of regions of the EU, grey wolves live in areas occupied by humans.

More specifically, according to the CJEU, ‘the development of infrastructure, unlawful logging, farms and some industrial activities have contributed to putting a strain on the wolf population and its habitat’.¹⁷⁹

While the CJEU did not explicitly acknowledge the wolves as ‘sovereign beings’, the focus on the wolf’s needs supports the broader claim that the EU legal system currently treats natural entities as independent beings, whose interests are not necessarily overruled when weighing their protection against countervailing human concerns. Moreover, the CJEU’s explicit considerations closely resemble Donaldson and Kymlicka’s wild sovereign approach, which urges us to take into account the ‘historic injustice’ inflicted upon wild animals, meaning that we should explicitly acknowledge that ‘(h)umans have drastically invaded and compromised wild animal habitat’.¹⁸⁰

Although the above-mentioned case law explicitly relates to wolves, which clearly present less danger to human than bears, its rationale still seems to apply to the latter as well. Legally speaking, brown bears straying into human settlements are not by default ‘outlawed’. Granted, if they show problematic behaviour they can still be translocated, removed or relocated through the application of the derogation scheme provided for in the Habitats Directive, but only as an exceptional measure or last resort.

The latter was also explicitly stressed by the CJEU in the Romanian wolf case, where the CJEU held the following:

¹⁷⁸ Ibid para 45–49.

¹⁷⁹ Ibid para 50.

¹⁸⁰ Donaldson and Kymlicka (n 23) 193.

the capture and transport of a specimen of a protection animal species covered by the prohibitions laid down in Article 12(1) of the Habitats Directive can (...) be justified only if they are covered by a derogation adopted by the competent national authority pursuant to Article 16(1)(b) and (c) of that directive, based *inter alia* on public safety grounds.¹⁸¹

However, the clear-cut default position appears to be that large carnivores can coexist with humans. This also explains why other large carnivores such as wolves, which are more adaptive and flexible than bears, have been able to recolonise much of their former territories in Western Europe, including in human-dominated landscapes like Belgium and the Netherlands, for instance. Legal research has also revealed that practices like creating carnivore-free zones or the erection of fences are therefore manifestly illegal in light of the protection duties included in Article 12(1) of the Habitats Directive, as they limit the free movement of large carnivores., such as wolves and brown bears.¹⁸² After all, it is up to the wolf or, as the case may be, the brown bear to determine whether he wants to recolonise certain lost grounds, as the legal protection scheme remains ‘glued’ to the large carnivore’s presence, even if it overlaps with human-dominated areas. This perfectly ties in with Donaldson and Kymlicka’s sovereignty model, as it highlights the right to self-determination of wild animals like brown bears.¹⁸³

6. Cooperation between sovereign communities: how to deal with problem bears?

Even though I have indicated some unexpected synergies between the protection duties applicable to brown bears and their habitats on the one hand and Donaldson and Kymlicka’s wild animal sovereignty theory on the other hand, no extensive analysis of the application of the available derogation clauses has been carried out. For instance, Article 16(1) of the Habitats Directive also grants Member State some room to authorise, under exceptional circumstances, the capture and removal of individual

¹⁸¹ *Alianța pentru combaterea abuzurilor* (n 171) 56.

¹⁸² Arie Trouwborst, ‘Wolves not welcome? Zoning for large carnivore conservation and management under the Bern Convention and Habitats Directive’ (2018) *Review of European, Comparative and International Law* 306.

¹⁸³ Donaldson and Kymlicka (n 23) 191.

'problem bears' that directly or indirectly impact human activities, such as livestock herding. If applied leniently, these derogation clauses may seriously impact the possible overlaps between the conservation duties for brown bears, as stipulated in the Habitats Directive, and the wild sovereignty model put forward by Donaldson and Kymlicka.

Assuming that such derogations may for instance include blanket authorisations, authorising the indiscriminate killing of bears in an area where humans are subjectively threatened by 'problem bears' or where significant livestock predation take place, this would underscore the intrinsically anthropocentric nature of the Habitats Directive after all. However, if the prevailing approach were to be that derogations are treated as exceptional measures, with a preference for non-lethal interventions and a mandatory individual assessment of potentially harmful specimens of large carnivores, as was illustrated by the (provisional) outcome of the legal proceedings related to the fate of JJ4, a more nuanced understanding would arise. The latter would not necessarily be contrary to the wild sovereignty model advocated by Donaldson and Kymlicka, especially since these authors also underline that the sovereignty enjoyed by wild animals is not absolute and leaves some, albeit limited room, for setting certain barriers inherent to the presence of human settlements in a certain area.¹⁸⁴ Indeed, while the authors have vigorously criticised the culling of Bruno, the brother of JJ4, by German authorities over what they refer to as an 'alleged risk posed by a single (...) bear (...), when he wandered down from the Italian Alps'¹⁸⁵, they also did acknowledge that, at different stages of human history, 'humans have had to harm and/or kill animals in order to survive'.¹⁸⁶ They explicitly reject an approach whereby the smallest risk posed by animals is used as an excuse to 'eliminate the risk, even the most lethal measures', by referring among others to the 'en masse' killing of coyotes that pose a negligible risk to humans.¹⁸⁷ However, they do seem to leave some leeway, especially when wild animals pose an immediate lethal risk to humans.

¹⁸⁴ Ibid 170-171.

¹⁸⁵ Ibid 292.

¹⁸⁶ Ibid 41.

¹⁸⁷ Ibid 198.

6.1. Removing dangerous and human-conditioned brown bears

As illustrated by the fate of Andrea Pati, brown bears can pose a real threat to humans in some instances. Although we have already established that brown bears do not generally predate on humans, lethal encounters do happen, also in Europe. As recently as in July 2024, a 19-year-old female hiker was mauled to death by a brown bear in Romania, which prompted the Romanian Parliament to authorise the culling of almost 500 bears this year in a bid to control the protected species' 'overpopulation'.¹⁸⁸ In Northern Italy, similar arguments have been used in the sometimes heated societal debate that has arisen in the wake of the death of Andrea Papi.¹⁸⁹

As such, Article 16(1)(c) of the Habitats Directive, which explicitly refers to 'public health and safety', seems to allow authorities to issue derogations to remove bold and potentially dangerous brown bears. Even so, the available guidance documents of the European Commission seem to favour non-lethal interventions focused on the individual specimens of brown bears that are responsible for the fatal accidents. In the European Commission's 2021 Guidance document on the strict protection of animal species of Community interest under the Habitats Directive, an explicit reference can be found to the German guidelines to deal with bold or unusually behaving wolves, which favour preventative and non-lethal actions as a logical starting point.¹⁹⁰ After it has been ascertained that an individual wolf appears to be attracted by humans (or dogs), a gradual approach is to be observed, which is contingent on the seriousness of the incidents recorded. This may vary from removal of certain easily accessible food resources and aversive conditioning to, in a worst-case scenario, (lethal or non-lethal) removal of the wolf.¹⁹¹

Such a gradual approach also seems to be the default option when dealing with dangerous, inquisitive and bold brown bears. This also appears to be in line with the case law of the CJEU when it comes to the second precondition referred to in Article 16(1), namely that 'there is no satisfactory alternative'. Therefore, recourse to Article

¹⁸⁸ See (n 38).

¹⁸⁹ 'The Alpine row over 'problem bears'' (n 3).

¹⁹⁰ European Commission, *Guidance document on the strict protection on animal species of Community interest under the Habitats Directive* (Brussels 2021) 106.

¹⁹¹ *Ibid.*

16(1) derogations must remain a last resort and, in principle, preference is to be given to the preservation of EU protected species over general economic interests.¹⁹² Moreover, recent rulings of the CJEU regarding nature protection underscore that the fact that an alternative may cause greater inconvenience¹⁹³ or implies more financial repercussions¹⁹⁴ is not sufficient to render it unsatisfactory. Even a reference to long-standing traditions may no longer be a plausible justification in this respect.¹⁹⁵ The best available science is to be used as default option.¹⁹⁶ Since scientific studies have already repeatedly revealed that lethal management of large carnivores does not have a tangible impact on the number of dangerous human-bear encounters, the scientific case for indiscriminate culling appears to be weak, at best.

An effective implementation of the requirement to assess whether no other satisfactory alternatives exist, in line with the CJEU's case law, implies that the first priority in dealing with problematic human-bear interactions needs to be to try to change this behaviour, for instance by using several types of non-lethal deterrents. As noted by the Commission in its 2021 Guidance document, only 'when such alternative solutions have been considered and have proved not to be satisfactory, or feasible in the specific case, may a derogation be granted'.¹⁹⁷ As a result, indiscriminate culling practices seem unlawful, even in a context of fatal encounters between humans and bears. This is perfectly in line with Donaldson and Kymlicka's statement that humans do not have the right to 'eliminate' the general risks posed by the presence of wild animals, such as brown bears, in what they refer to as 'overlapping zones' between sovereign wild animal communities and humans.¹⁹⁸ That said, under EU law, the removal of individual bears which have been identified as being responsible for dangerous encounters with humans can, if properly motivated and in the absence of other alternative scenarios, be considered lawful. As mentioned, Donaldson and Kymlicka also accept that humans and wild animals should establish a relationship based on similar claims to authority. This might entail that wild animals that visit human settlements are free to move around, but should not be tolerated at all costs when

¹⁹² Ibid 55.

¹⁹³ Case C-79/03 *Commission v Spain* (2004) ECLI:EU:C:2004:782, para 27.

¹⁹⁴ Case C-399/14 *Grüne Liga Sachsen* (2016) ECLI:EU:C:2016:10, para 44-46.

¹⁹⁵ Case C-900/19 *One Voice* (2021) ECLI:EU:C:2021:211, para 36 and 43.

¹⁹⁶ Case C-674/17 *Luonnonsuojeluyhdistys Tapiola* (2019) ECLI:EU:C:2019:851, para 41

¹⁹⁷ European Commission (n 190) 105.

¹⁹⁸ Donaldson and Kymlicka (n 23) 202.

displaying problematic behaviour.¹⁹⁹ Yet, in the context of a permitted removal, the duty to give preference to less intrusive options²⁰⁰, if available, seems to favour the non-lethal capture of a potentially dangerous brown bear over its killing. This rationale also swayed the Italian Council of State to quash the decision to kill JJ4, since it explicitly stressed the importance of the proportionality principle.²⁰¹

6.2. Culling bears to prevent damage to livestock, not the default option!

A similar picture also arises when Member States want to grant derogations to prevent serious damage by brown bears to livestock. While the CJEU has accepted that an operationalisation of this justification ground, contained in Article 16(1)(b) of the Habitats Directive, does not necessarily require the damage to the livestock to have occurred, it does require that sufficient proof is provided that all necessary preventative measures had been implemented to deter large carnivores, such as brown bears, from attacking livestock or beehives in the first place. Research indicates that the most effective way to mitigate depredation is the use of guard dogs and fences.²⁰² In other words, if such measures have not been taken, derogations granted for the removal of brown bears do not appear to be legal. Indiscriminate killings also appear to be unlawful. As early as in 2007, Finland was held accountable by the CJEU for the culling of wolves, for which damage to livestock was invoked, as this measure was insufficiently based on scientific evidence backing up its effectiveness. Indeed, the Finnish culling did not allow individual ('culprit') wolves to be targeted, but rather came down to the indiscriminate killing of wolves who happened to be present in the area where livestock predation took place.²⁰³

In a 2024 decision on the legality of an Austrian decision to cull a wolf that had killed several sheep, the CJEU clarified that Article 16(1)(b) of the Habitats Directive does not cover future indirect damage to livestock that is not attributable to the individual wolf that is the subject of a derogation.²⁰⁴ The decision also stated that, when determining whether there is a satisfactory alternative to culling wolves, economic

¹⁹⁹ Ibid 170.

²⁰⁰ Ibid 203.

²⁰¹ Italian Council of State 2017.

²⁰² Fernandez-Gil and others (n 80) 20.

²⁰³ Case C-342/05 *Commission/Finland* (2007) ECLI:EU:C:2007:341.

²⁰⁴ Case C-601/22 *Umweltverband WWF Österreich* (2024) ECLI:EU:C:2024:595, para 73-74.

considerations, such as the potentially high costs of preventative measures needed to protect herds, e.g. erecting fences and the use of sheepdogs, may play a role. However, such implications may not be decisive elements. In the words of the Court ‘it cannot be accepted that another satisfactory alternative may be rejected at the outset solely on the ground that the economic cost of its implementation might be too high’.²⁰⁵ If such economic considerations are nonetheless important, they cannot jeopardise the objective of the Habitats Directive, i.e. keeping and/or restoring endangered species, such as wolves, in a favourable conservation status.²⁰⁶ The Court concluded that the economic cost of an alternative to killing a large carnivore, such as a wolf, should be weighed against the ecological cost of killing that specimen. These recent decisions clearly limit the options for Member States to authorise lethal management of large carnivores, such as brown bears, that might be preying on livestock. The focus is placed on implementing and facilitating effective preventative measures to prevent brown bears from causing such damage in the first place. The worth of an individual specimen of a species is also to be taken into account. The fact that the Court prepared to carry out a strict review of an authorisation to cull one single wolf inevitably leads to that conclusion.

6.3. Tolerance hunting as a (no) go zone?

One specific way of dealing with the presence of large carnivores like brown bears is the concept of ‘tolerance hunting’, a technique that has gained a lot of traction in Scandinavia.²⁰⁷ It is based on the idea that this will increase tolerance to the presence of wolves and bears and decrease the number of conflicts between large carnivores and livestock keepers. However, the scientific underpinning of this policy shift appears to be uncertain.²⁰⁸ Predation rates furthermore have no linear relationship with the abundance of predators, but are often more closely linked to subtle factors such as their complex social system and social behaviour and population dynamics.²⁰⁹ In addition, it is clear that such culling practices clearly are at odds with Donaldson and

²⁰⁵ Ibid para 81-85.

²⁰⁶ Ibid.

²⁰⁷ See for more background: Yaffa Epstein, ‘Killing Wolves to Save Them? Legal Responses to ‘Tolerance Hunting’ in the European Union and United States’ (2017) *RECIEL* 19.

²⁰⁸ Adrian Treves and others, ‘Longitudinal Analysis of Attitudes towards Wolves’ (2013) *Conservation Biology* 315.

²⁰⁹ Robert B Wielgus and Kailey A. Peebles ‘Effects of Wolf Mortality on Livestock Depredations’ (2014) 9(12) *PloS ONE* e113505.

Kymlicka's understanding of the cooperation between humans and other sovereign communities of wild animals. Most tellingly, they hold that 'humans do not have the right to eliminate the general risks posed by the presence of wild animals in overlapping zones'.²¹⁰

In its 2019 decision on the compatibility of Finnish tolerance hunting practices with Article 16(1)(e) of the Habitats Directive, the CJEU did not hesitate to put science back at the heart of the debate by urging national courts to scrutinise the scientific underpinnings of tolerance hunting.²¹¹ In *Tapiola*, at stake was the legality of derogation permits granted in the 2015-2016 hunting year, which led to the killing of over 14% of the entire wolf population in Finland (up to 44 individuals of a population of between 275 and 310 wolves), including numerous breeding individuals. It is clear that such hunting practices amount to what Donaldson and Kymlicka, might reject as 'en masse' killings, aimed at creating the illusion of a risk-free society with a more limited impact from large carnivores. Although the Court did not outright reject tolerance hunting as being incompatible with Article 16(1) of the Habitats Directive, the list of conditions to be observed is so long that it remains doubtful whether such practices might ever be deemed compatible with the strict conditions of this article. In particular, the CJEU held that:

it is for the national authority to support, on the basis of rigorous scientific data, including, where appropriate, comparative data on the effects of hunting for population management purposes on the conservation status of wolves, the proposition that hunting for population management purposes is actually capable of reducing illegal hunting to such an extent that it would have a net positive effect on the conservation status of the wolf population, whilst taking account of the number of derogation permits envisaged and the most recent estimates of the number of wolves taken illegally.²¹²

Additionally, the CJEU underlined the need for 'the best relevant scientific and technical evidence' to prove that the objective pursued by tolerance hunting cannot be

²¹⁰ Donaldson and Kymlicka (n 23) 202.

²¹¹ Luonnonsuojeluyhdistys Tapiola (n 196) para 67.

²¹² Ibid para 45.

achieved by any other means, such as a more effective enforcement of the Habitats Directive.²¹³ As in other cases, the CJEU reiterated the importance of the precautionary principle.²¹⁴ Adding to the other stringent conditions, the CJEU stated that if:

after examining the best scientific data available, significant doubt remains as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation.²¹⁵

In this regard, attention needs to be paid to the biological characteristics of the population, such as the reproduction rates and the annual mortality.²¹⁶ Finally, the CJEU also stressed the importance of the principle of selectivity, which entails that in this context as well, indiscriminate killings are not permissible. In particular, selectivity requires that only certain individuals can be targeted and other, more important individuals, such as alpha males or reproductive individuals, should be excluded.²¹⁷

Again, we notice a clear willingness on the part of the CJEU to fully engage with the need for science-based decision-making in the field of species protection, as well as the importance of taking into account the biological features of the large carnivore species as a benchmark, in order to ensure that the targeting and/or removing of certain individuals does not interfere with the survival chances of the local population.²¹⁸ In other words, while the in-principle yet conditional approval of practices such as tolerance hunting seems to support the idea that human exceptionalism still prevails via the backdoor of Article 16(1)(e) of the Habitats Directive, the concrete interpretation that has to be given to the derogation clauses, even in a context of dangerous and bold carnivores, appears to be surprisingly less

²¹³ Ibid para 59.

²¹⁴ Ibid para 48-50.

²¹⁵ Ibid para 66.

²¹⁶ Ibid para 73.

²¹⁷ Ibid para 74-78.

²¹⁸ The scale of the assessment also needs to take into account the local population, see very recent: Umweltverband WWF Österreich (n 204) para 56-60.

anthropocentric. This illustrates that the Habitats Directive, at least for Annex IV species, cannot simply be set aside as a stewardship model, especially since the interests of individual specimens of large carnivores are to be taken into account. This, in turn, is not too far removed from the model of wild sovereignty put forward by Donaldson and Kymlicka. And even if a removal is, objectively speaking, necessary to safeguard human interests, such derogations still seem to focus on non-lethal alternatives. This restrictive interpretation of Article 16(1)(e) of the Habitats Directive effectively rules out complete extermination campaigns and provides additional leverage for the long-term sovereign status of existing bear populations in the EU.

7. The individual and his or her feelings count: damaged brown bears as co-members or citizens of our society?

Having duly established that the current interpretation of the conservation and protection duties toward strictly protected species under EU law, such as brown bears, also indirectly recognises their sovereign status, other, more complex issues are still left unaddressed. For instance, even if the removal of a potentially dangerous brown bear may in some instances be considered legal, is there a duty to transfer it to a refuge? Article 16(1) of the Habitats Directive does not explicitly state that keeping an animal in permanent captivity is preferable to killing it, which led the local Italian court to declare the decision to cull JJ4 legal. However, as mentioned in the introduction, the Italian Council of State opted for an opposite view, since it was of the opinion that the application of Article 16(1) of the Habitats Directive should lead to a prioritisation of non-lethal alternatives. It stated that the transfer of JJ4 to a refuge might be a more reasonable alternative, which was not fully taken into account by the local Italian authorities. As argued by Donaldson and Kymlicka, ‘it is always a violation of the basic rights of wild animals to remove them from the wild and forcibly confine them – as pets or zoo exhibits’.²¹⁹ However, they do provide some room to balance the sovereign rights of wild animals and overlapping human presence, especially when these wild animals present an immediate and direct risk to the safety of a human being.²²⁰ They also acknowledge that, for wild animals that are disabled because of road accidents, humans do have a ‘duty to provide them with appropriate care in some

²¹⁹ Donaldson and Kymlicka (n 23) 204.

²²⁰ Ibid 202.

sort of refuge'.²²¹ This comes with a disclaimer, since Donaldson and Kymlicka hasten to add that such refuges need to be designed to effectively meet the needs of the 'disabled animals', which implies certain guarantees in terms of providing food, shelter, care, freedom of movement, etc.²²² However, the question whether Donaldson and Kymlicka would consider refuges a 'last resort' alternative for aggressive brown bears that might pose a concrete danger to humans remains open.

How would the CJEU deal with such complicated legal and ethical questions? At first glance, the approach of the Italian Council of State seems to be reasonable. The mere fact that some alternatives to culling JJ4 are more costly as they may include the transfer to expensive bear refuges cannot be used as an argument to render them unreasonable from the outset. This appears to be in line with recent case law of the CJEU, in which it was explicitly stated that animal welfare considerations are to be taken into account when granting derogations under the applicable EU nature conservation law.²²³ When reviewing the alleged absence of alternatives for the practice of glue hunting in light of Article 9 of the Birds Directive, the CJEU recently used Article 13 of the TFEU (recognising animals as sentient beings) as an interpretation standard. The Court held that the consequences of glue hunting for the species in terms of the harm caused to the birds captured are important considerations as well.²²⁴ Even though glue hunting can in principle be considered a 'non-lethal' method of capture, animal welfare considerations still play a vital role as a benchmark.²²⁵ The Court concluded that it is highly likely that despite being cleaned, the birds captured sustain irreparable harm since lime is capable, by its very nature, of damaging the feathers of any bird captured.²²⁶

Against this backdrop, it is not farfetched to see the CJEU declare in its future decision on the fate of JJ4 that there is a clear priority in dealing with problem bears in light of Article 16 of the Habitats Directive. A ruling of the Court in which it concludes that captivity should still take priority over killing a large carnivore might indeed be a plausible outcome. However, such an outcome means that the dangerous bear would

²²¹ Ibid 204.

²²² Ibid.

²²³ Case C-900/19 *One Voice* (2021) ECLI:EU:C:2021:211.

²²⁴ Ibid.

²²⁵ Ibid para 64.

²²⁶ Ibid para 65.

be kept in captivity permanently. The question therefore may arise whether the prospect of keeping a wild specimen of a large animal in captivity effectively constitutes an alternative that is less ‘intrusive’ in light of Article 16(1) of the Habitats Directive, even taking into account animal welfare considerations. In this respect, it is important to recall that the fight against keeping wild animals in captivity constitutes one of the clear-cut objectives of many animal rights and welfare activists around the globe. As a result, it is somehow paradoxical that a life in captivity for JJ4 might be the ultimate result of legal actions that have been initiated by several animal welfare NGOs. Even if the refuge to which the bear is moved is relatively spacious and known for its good treatment of wild animals, it somehow still remains a contradictory outcome. That said, Donaldson and Kymlicka do not seem to completely rule out the usage of wildlife refuges as a last resort option when dealing with ‘disabled’ wild animals, either.²²⁷ This might also imply that such bears, rather than being perceived as members of an autonomous community, would become co-members and citizens of our community, as is the case with other domesticated animals, such as dogs and pigs.²²⁸ It equally entails that they should be able to enjoy care and protection, taking into account their specific interest, and be spared from harm.²²⁹

8. A binding duty to recover dwindling bear populations: working towards flourishing bear communities?

Another paradox that needs to be tackled is the question what future lies ahead for large carnivores, such as brown bears, in a human-dominated landscape. This question is already giving rise to heated debates in the context of less dangerous carnivores such as wolves, as illustrated by the European Commission’s proposal to downlist the protected status of wolves under the Bern Convention.²³⁰ In December 2024, the Standing Committee of the Bern Convention voted in favour of this proposal, which highlights the shifting political realities when dealing with the presence of large

²²⁷ Donaldson and Kymlicka (n 23) 204-205.

²²⁸ Ibid 204.

²²⁹ Ibid 132.

²³⁰ European Commission, *Proposal for a Council Decision on the position to be taken by the EU at the Bern Convention*, https://environment.ec.europa.eu/publications/proposal-council-decision-position-be-taken-eu-bern-convention_en, accessed 15 December 2024.

carnivores in the EU.²³¹ When confronted with deadly bear attacks, politicians are tempted to opt for more drastic solutions, such as massive eradication campaigns, aimed at seriously reducing the populations of bears in an area or even the complete removal of the species. Although such proposals are manifestly flouting the aforementioned protection schemes, since they go counter the CJEU's decision in *Tapiola* regarding tolerance hunting, they are increasingly popular. For instance, the summer of 2024, a Romanian law was adopted that authorised the killing of almost 500 bears in 2024 in order to respond to the outcry after a deadly attack on a 19-year-old hiker.²³² On a more fundamental level, however, the question arises how Member States need to contemplate the long-term survival of brown bears at the edges of human-dominated landscapes. Are Member States under the legal duty to restore populations of large carnivores to their former glory or are they merely required to do the bare minimum, i.e. avoiding imminent extinction? If so, this would be in line with Donaldson and Kymlicka's wild sovereignty model, for even though it would be premised on a population-based approach, it still opens the door for more ecological viability, human and animal mobility as well as cooperative parallel co-habitations.²³³

8.1. The favourable conservation status as ecological benchmark?

In theory, the Habitats Directive puts forward a clear-cut reference scenario to be used as a benchmark when drafting conservation and recovery plans for large carnivores, i.e. the so-called 'favourable conservation status' (FCS). This is a legal-ecological concept explicitly defined by Article 1(i) of the Habitats Directive.²³⁴ Pursuant to the latter provision, the conservation status of a species encompasses 'the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2'. In addition, the conservation status of a species will be regarded as 'favourable' according

²³¹ 'Bern Convention Standing Committee approves EU proposal to modify wolf protection' <https://www.coe.int/en/web/portal/-/bern-convention-standing-committee-approves-eu-proposal-to-modify-wolf-protection> accessed 15 December 2024.

²³² See (n 37).

²³³ Donaldson and Kymlicka (n 23) 191 and 203.

²³⁴ See more extensively: Yaffa Epstein, 'Favourable Conservation Status for Species: Examining the Habitats Directive's Key Concept Through a Case Study of the Swedish Wolf' (2016) *Journal of Environmental Law* 221; Arie Trouwborst, Luigi Boitani and John D.C. Linnell, 'Interpreting 'favourable conservation status' for large carnivores: how many are needed and how many are wanted?' (2016) *Biodiversity and Conservation* 37.

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

In other words, when a species, such as a population of brown bears, finds itself in an unfavourable conservation status, a Member State has the obligation to implement restoration actions. This thesis has been widely accepted in the available legal literature, even though the word ‘restoration’ is in itself not featured in Article 12(1) of the Habitats Directive.²³⁵ Such restoration actions may include reintroduction efforts, as was the case in Northern Italy when Slovenian brown bears were reintroduced. The fact that reintroduction efforts are instrumental in staving off the imminent extinction of isolated populations of brown bears had already been demonstrated in France. In the early 20th century, around a hundred brown bears were living in the mountains of the French Pyrenees. The population was gradually decimated by hunting and habitat destruction, pushing them to the brink of extinction. In spite of the introduction of legal protection instruments, the last bear in the Central Pyrenees had disappeared by 1991. After the reintroduction of bears from Slovenia, the population has slowly recovered to 70 individuals over the past decades, a successful example of a restoration story. However, in light of the increased protests of some farmers against the presence of bears, the French government faltered in its restoration actions in 2016, which ultimately prompted several environmental NGOs to go to court. In 2018, the administrative court of Toulouse condemned the French government for not doing enough to achieve the favourable conservation status for the brown bear in the Pyrenees.²³⁶ Social and economic considerations, linked to the contestation amongst (some) local interest groups, did not sway the Court from ordering the French government to invest in long-term restoration measures.²³⁷

²³⁵ See for instance: Hendrik Schoukens, ‘Saving the Common Hamster from extinction through the Habitats Directive: a mandatory recovery effort, a remediation of past non-compliance or an exercise in futility?’ (2017) *Nordic Environmental Law Journal* 57.

²³⁶ Administrative court of Toulouse (2018) nos. 150.1887 and 150.2320.

²³⁷ *Ibid.*

That said, the application of the concept of FCS is predicated on a multitude of elements, which evidently require considerable scientific input in order to be identified and operationalised.²³⁸ It is for ecological scientists to determine whether a species is ‘a viable component of its natural habitat’, what reference scenario is to be used to determine whether a population will be able to maintain itself ‘on a long-term basis’ and when a species is capable of ‘maintaining itself’. At least, that is the case when we assume that political and economic considerations are left out of the equation. In its case law, for instance in cases revolving around the extinction of wild hamsters, the CJEU used the concept of ‘minimum viable population’ (MVP) as a benchmark to assess whether a Member State is doing enough to restore dwindling populations of endangered species, including brown bears.²³⁹

At first glance, invoking this concept when evaluating whether Member States are doing enough to save hamsters makes perfect sense, as it is a popular concept to measure the survival chances of endangered species. In 1981, Shaffer defined the concept of MVP as ‘the smallest isolated population having a 99% chance of remaining existent for 1000 years despite the foreseeable effects of demographic, environmental and genetic stochasticity, and natural catastrophes’.²⁴⁰ However, it is generally accepted that MVP can be determined in numerous ways. Today, one of the most prominent methods to establish MVPs are so-called population viability analyses (PVA), which use demographic and environmental information to project future population dynamics.²⁴¹ Another method to estimate MVPs consists in determining the minimum area that a population needs to inhabit in order to escape environmental catastrophes.

In the context of this paper, it suffices to point out that the determination of the favourable conservation status for large carnivores is in essence an ecological exercise, which again seems to underscore the fact that the conservation duties enshrined in the Habitats Directive are not merely based on a human-centred approach to nature conservation. This thesis seems to be endorsed by a recent Opinion of Advocate-

²³⁸ Epstein (n 234).

²³⁹ Case C-383/09 *Commission v France* (2011) ECR I-04869.

²⁴⁰ Mark L. Shaffer, ‘Minimum viable populations for species conservation’ (1981) 31 *Bioscience* 131.

²⁴¹ Lochran W. Traill and others, ‘Pragmatic population viability targets in a rapidly changing world’ (2010) *Biological Conservation* 29.

General Kokott on the management of the wolf populations in Estonia. Whereas these populations are only subject to the weaker protection duties under Article 14 of the Habitats Directive, the Advocate General nonetheless underscored the relevance of the conservation status when applying these more lenient conservation duties. Even in this respect, the Advocate General clarified that the conservation status of a population of wolves cannot be considered ‘favourable’ merely because additional protective measures for the species or a larger population could give rise to conflicts with regional or local characteristics, or economic, social and cultural requirements.²⁴² That said, it has never been the explicit objective of the European legislator to increase a species population to its historical levels.²⁴³ Nor does the Habitats Directive require the entire territory of Member States to be rewilded to the so-called pristine state of a few thousand years ago. For instance, Member States like Belgium or the Netherlands, where brown bears have not returned over the past decades, are not legally required to re-establish populations of brown bears in their heavily urbanised and densely populated areas. However, the historical distribution and potential range are to be taken into account when determining the favourable conservation status, which explains why the recovery of populations of brown bears in areas where they had been only recently wiped out, such as the Alps and the Pyrenees, may still qualify as mandatory restoration duty.²⁴⁴ This of course does not necessarily mean that the same population numbers need to be reached as in earlier days. The human settlements that have emerged over the past centuries can equally be taken into account. Even so, all these flexibilities do not alter the fact that policies should primarily be aimed at achieving robust and resilient populations of large carnivores, including brown bears, in areas like Trentino and the Pyrenees. This again attests to the potential, at least in theory, of aligning it with the idea that wild animals such as brown bears are to be treated as sovereign beings. Even though respecting sovereignty entails that humans should be very cautious when intervening in nature, Donaldson and Kymlicka recognise that ‘time-limited acts of assistance’ do not undermine the ability of wild animals to ‘flourish’ as autonomous communities.²⁴⁵

²⁴² Opinion Advocate General Kokott, Case C-629/23 *Eesti Suurkiskjad* (2024) ECLI:EU:C:2024:1029.

²⁴³ Epstein (n 234) 239.

²⁴⁴ Hendrik Schoukens, ‘Towards a Legally Enforceable Duty to Restore Endangered Species under EU Nature Conservation Law – On Wild Hamsters, the Rule of Law and Species Extinction’ in Jerzy Jendroska and Magdalena Bar (eds) *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia 2017) 331.

²⁴⁵ Donaldson and Kymlicka (n 23) 187.

8.2. The EU Nature Restoration Law as additional lever?

This implicit restoration rationale was made explicit with the adoption of the much-discussed EU Restoration Law in June 2024²⁴⁶, which is premised on the need to restore biodiversity and nature across the EU, as the protection of nature and preventing its further degradation would not suffice to address the current biodiversity crisis. The overall objective of the EU Nature Restoration Law is that Member States introduce effective and area-based restoration measures which will cover at least 20% of the Union's land and sea areas by 2030 and all ecosystems in need of restoration by 2050.²⁴⁷

The ecosystem-specific restoration targets in particular may be very useful for the long-term preservation of endangered species, particularly large carnivores such as brown bears, who have suffered significantly over the past centuries as a result of habitat fragmentation. Pursuant to Article 4, habitat restoration measures are required for habitats of species listed in the annexes to the Habitats Directive, including the brown bear, in particular actions needed to improve the quality and quantity of those habitats, for instance by re-establishing them, and to enhance connectivity, until sufficient quality and quantity of those habitats is achieved.²⁴⁸ Some justification grounds are provided that can be invoked by Member States to justify the non-achievement of certain restoration objectives, for instance force majeure, including natural disasters.²⁴⁹

The further operationalisation of the restoration targets is to take place through the adoption of national restoration plans, the quality of which is to be assessed by the European Commission and which need to be revised every ten years.²⁵⁰ When adopting such national restoration plans, attention could also be paid to the 'social, economic and cultural requirements, regional and local characteristics and population density', while leaving sufficient leeway in dealing with large carnivores in human-

²⁴⁶ EU Nature Restoration Law.

²⁴⁷ Article 1(2) EU Nature Restoration Law.

²⁴⁸ Article 4(7) EU Nature Restoration Law.

²⁴⁹ See for instance: Article 4(16) EU Nature Restoration Law.

²⁵⁰ Article 14-18 EU Nature Restoration Law.

dominated landscapes.²⁵¹ During the negotiation process of the past few years, however, several amendments have been proposed, among others by the European Parliament, to substantially weaken the binding restoration mandates that are present in the law.²⁵² Whereas the bulk of the restoration duties has remained unaffected, some of these amendments were finally implemented in the final version of the EU Nature Restoration Law. For instance, it is now explicitly stipulated that the restoration actions need to prioritise habitat types not in a good condition located *in* Natura 2000 sites and only after 2030 need to go *beyond* these protected sites²⁵³, which might hamper the setting up of more landscape-wide restoration actions aimed at connecting isolated populations of brown bears in the short run. In addition, a so-called emergency brake was included, allowing the postponement of the restoration targets in the event of so-called exceptional socioeconomic circumstances.²⁵⁴ However, in order to be applied, a relatively high threshold needs to be met, whereas it remains doubtful whether the recovery of a population of large carnivores might ever give rise to ‘severe Union-wide consequences for the availability of land required to secure sufficient agricultural production for Union food consumption’.²⁵⁵

In sum, the EU Restoration Law still supports the restoration rationale for endangered species present on our continent, including brown bears. It still has the potential to facilitate more large-scale and landscape-wide restoration, which will also be crucial for the sustainable recovery of brown bears on the European continent, in line with Donaldson and Kymlicka’s wild sovereignty approach. For, even though the law can be easily set aside as a typical example of the ecological approaches that were criticised by Donaldson and Kymlicka, since they do not place explicit emphasis on the intrinsic value of individual bears but focus on population-based recovery, it still is an essential lever to ensure the long-term presence of brown bears in the EU. Without such comprehensive restoration actions, the leeway for brown bears to act as mobile, sovereign animals will be extremely limited in most Member States. It might be the ultimate instrument to ensure a long-term ‘flourishing’, as advocated by Donaldson and Kymlicka, of brown bears on the European continent.

²⁵¹ Article 14(16) c EU Nature Restoration Law.

²⁵² For a critical discussion, see: An Cliquet and others, ‘The Negotiation Process of the EU Nature Restoration Law Proposal’ (2024) *Ecological Restoration* <https://doi.org/10.1111/rec.14158>.

²⁵³ See Article 4(1) last sentence EU Nature Restoration Law.

²⁵⁴ Article 27 EU Nature Restoration Law.

²⁵⁵ *Ibid.*

9. Outlook

Starting from the tragic death of Andrea Papi, this article presented a comprehensive assessment of the Habitats Directive, as interpreted in the recent case law of the CJEU, in light of Donaldson and Kymlicka's wild animal sovereignty theory. Its principal aim was to establish that, in sharp contrast to what is sometimes assumed, the Habitats Directive can no longer be set aside as a classic illustration of the stewardship model, which neglects the sovereign status of wild animals. The interpretation given by the CJEU to several key provisions, such as Articles 6, 12 and 16 of the Habitats Directive, seems to reassert at least some of the basic principles of Donaldson and Kymlicka's wild animal sovereignty theory, since it seems to allow for a fair reallocation of harms and benefits between the sovereign communities.²⁵⁶ The recent case law of the CJEU on the coexistence between wolves and humans indirectly acknowledges the agency and mobile nature of wild carnivores. Rather than excluding them from urban environments, it explicitly takes into account the human encroachment on their habitats over the past centuries, as an argument to accept their presence in an urban context. Furthermore, the recent case law not only explicitly fleshes out our human duty to limit our degradation of the habitats of large carnivores, but also stresses the positive human obligations that ensure the long-term flourishing of sovereign communities of brown bears in the EU. Whereas part of this case law might still put a lot of emphasis on the importance of a more population-based approach to bear protection, it does not fully rule out the basic needs and interests of the individual brown bears. Even though the Habitats Directive and Donaldson and Kymlicka's wild animal sovereignty theory might not be a perfect match, and this analysis mainly focused on Annex IV species, such as the brown bear, they appear to have more in common than expected.

Even if ample examples exist of national culling practices which do manifestly flout the interpretation given by the CJEU to the protection duties vis-à-vis large carnivores such as the brown bear, it is clear that at some point the rationale of the EU judges will trickle down to the national large carnivore policies throughout Europe. At any rate,

²⁵⁶ Donaldson and Kymlicka (n 23) 170-171.

the nuanced approach put forward by the CJEU in its case law regarding large carnivores, such as brown bears and wolves, seems to incrementally implement Donaldson and Kymlicka's idea of accepting to 'live with reasonable risks from the presence of wild animals'.²⁵⁷ It can be concluded that the precise articulation in the recent rulings of the CJEU of the reciprocal duties between human and brown bear communities, while not being free from criticism, has many similarities to the principles of equity, reciprocity and compensation that, according to Donaldson and Kymlicka, should govern the interaction between sovereign human and wild animal communities.²⁵⁸

The recent case law can, if not countered by further political attempts to weaken the protection duties enshrined in the Habitats Directive, help to find a delicate balance between the long-term recovery of endangered populations of brown bears in the European landscape and respect for the humans still living in these remote and increasingly depopulated swaths of our territory. The mere fact that complex, novel legal questions may arise, as indicated by the captivity-related welfare issues that may pop up if non-lethal removal actions are to prevail, underscores the truly dynamic nature of the very delicate conversation between humans and wild animals that is taking place within the context of the Habitats Directive. The CJEU will possibly provide even more guidance as to the integration of animal welfare concerns into large carnivore management in the pending court case on the fate of JJ4, which might help to further clarify the precise nature of the terms of cooperation between human and other sovereign communities of wild animals in the EU.

²⁵⁷ Ibid 205.

²⁵⁸ Ibid 170-171.