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THE MEDITERRANEAN SANCTUARY FOR THE PROTECTION OF MARINE MAMMALS

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The marine area between Sardinia (Italy), Corsica (France), Liguria (Italy) and Provence (France, Monaco), with an extension of 73.000 km², constitutes an ecological identity of an exceptional importance due to its geographical and climatic features and, above all, because its hydrologic dynamic. It is an ecosystem that includes different specific habitats, characterised by a large biological diversity but with a reduced biomass, that it is in fact very sensible to whatever phenomenon of deterioration by pollutants and to whatever human impact, such as overfishing.

This marine area is one of the most important zones of the Mediterranean due to the existence of large concentrations of nutrients in the euphotic layer that leads to the abundance of Euphausiid shrimps (*Meganyctiphanes norvegica*). Hence, it has been possible to record in this marine area twelve species of cetaceans, and at least seven of them concentrate themselves regularly in this area. Some of these species, such as Fin whales (*Balaenoptera physalus*), Striped dolphins (*Stenella coeruleoalba*), Long-finned pilot whales (*Globicephala melas*) have denser populations or at least denser seasonal aggregations in this marine area than in any other Mediterranean Sea area. Moreover, tuna (*Scrombidae*), swordfish (*Xiphias gladius*) and other fisheries resources must also be numbered among the species recorded in this area.

At the end of the 1980's, the United Nations General Assembly, taking into account that the use of driftnets in international fisheries is highly indiscriminate and wasteful, attempted to implement an absolute interdiction of these particular nets. For instance, the United Nations General Assembly Resolution 44/225 of 22 December 1989, recommended a moratorium on all large-scale pelagic driftnet fishing on the high seas by 30 June 1992. Hence, it was expressly recognised that the use of lengthy driftnets implies constant accidental captures of protected species, particularly of some species of marine mammals. At the same time that this worldwide trend against driftnets fishing was initiated, several non-governmental organisations began to claim the prohibition on the use and detention of driftnets for fishing pelagic species in the Mediterranean, particularly in those areas where larger concentrations of marine mammals can be found. Some of these non-governmental organisations drafted different proposals towards this aim, foreseeing the notion of a Mediterranean Sanctuary for the Protection of Marine Mammals. It is worth noting, for instance, that in 1989 the *Téthys* Institute drafted a proposal in order to establish a biosphere reserve in the basin existing between Corsica, Liguria and Provence. In 1992, the 1st International Conference for the Protection of Marine Mammals in the Western Mediterranean proposed the establishment of a protected ecological area, which should be a common area for all the Western Mediterranean Coastal States, in which all of them should proceed jointly towards an ecological management of living marine resources.

These non-governmental proposals were formulated simultaneously to the development of individual action on this matter by the closest Mediterranean coastal States to this special area. Thus, it is worth noting an Italian Decree of 22 May 1991, modified by a Decree of 19 June 1991, by which the Italian Ministry for the Merchant Marine established a "biological protected area ("Sanctuary" for the protection of cetaceans) in the area of the Ligurian Sea between the Mesco crest, the cape Corso and the cape Antibes", delimited by three points fixed by the Italian Decree and the coastline. Inside this Sanctuary, the use of driftnets was forbidden.

The similar individual action followed by these three States paved the way for the subsequent adoption of a Joint Declaration by the same three States establishing a Sanctuary for the Protection of Marine Mammals in the Mediterranean. The Ministry of the Environment of France, the Minister of the Environment and the Minister of Merchant Marine of Italy and the State Minister of Monaco signed at Brussels this Joint Declaration on 22 March 1993.

This 1993 Joint Declaration represents a further step towards a fruitful international co-operation for the protection of marine mammals in the area of the Mediterranean Sea where they concentrate most of their time. It has the form of a statement of principles that must be implemented by the domestic law of the three concerned States. In its preamble, the three State Parties to the 1993 Joint Declaration acknowledged the serious threats existing for marine mammals and their habitats in the Mediterranean, as well as the fact that the waters existing among Corsica, Liguria and Provence are an important area of distribution of these species.

Therefore, the State Parties to the 1993 Joint Declaration established an international marine Sanctuary in the waters between Corsica (France), Liguria (Italy) and Provence (France, Monaco) with the objective of protecting all species of marine mammals. The 1993 Joint Declaration expressly states that the Sanctuary includes the marine internal waters and the territorial seas of the three States, as well as areas of the high seas, being its geographical scope of application very precisely delimited (see Map No. 1). However, the limits of the Sanctuary may be extended by the State Parties to the 1993 Joint Declaration, unless an objection to this extension is made by any one of them.

The three State Parties to the 1993 Joint Declaration undertake, on the one hand, to adopt all measures which are necessary to ensure a favourable state of conservation of marine mammals, in order to protect them and their habitats from all direct and indirect negative impacts. Their state of conservation will be considered favourable when the knowledge of the populations shows that the marine mammals in the region constitute a vital element of the ecosystems to which they belong. For reaching this aim, they establish an international Authority which has the competence of co-ordinating the management of the Sanctuary. The three concerned States will promote, under the co-ordination of the Authority, the carrying out of research programmes aiming at the implementation of the measures adopted pursuant to the 1993 Joint Declaration. These programmes will be implemented at the national, European and international levels. On the other hand, they also undertake to promote campaigns for the information of the public.

Moreover, the 1993 Joint Declaration establishes a set of concrete measures adopted for reaching these aims. Thus, the three State Parties prohibit any deliberate catch or harassment of marine mammals in the Sanctuary. All ships are prohibited from the use and possession of driftnets for fishing pelagic species. Research activities requiring the catching of marine mammals are permitted only if they comply with the objectives of the 1993 Joint Declaration and are subject to authorisation by the national competent authorities. The three State Parties to the 1993 Joint Declaration also undertake to regulate fishing methods which could, after the pertinent scientific assessment is carried out, lead to the catching of marine mammals and affect their food reserves, taking into account the risk of fishing engines being lost or discarded at sea. But this last duty applies only to ships flying their flags. Moreover, off-shore races and marine mammals watching for tourist purposes are to be regulated and, if appropriate, prohibited.

Among these measures, the most important one is, without any doubt, the absolute prohibition on the use and possession on board of driftnets. In the Mediterranean both targeted species of fishes (mostly highly migratory species, such as tuna and swordfish) and non-targeted species (such as marine mammals, birds and turtles) become entangled in pelagic driftnets. Therefore it is specially interesting to point out the novelty of an absolute prohibition of driftnets, as it is embodied in the 1993 Joint Declaration, particularly if compared with partial prohibitions of this kind of non-selective nets, as stipulated, for instance, in the European Economic

Community Regulation No. 345/92 of 22 January 1992 or in the Agreement on the Conservation of Cetaceans of the Black Sea, the Mediterranean Sea and Contiguous Atlantic Area (Monaco, 24 November 1996). Firstly, the 1993 Joint Declaration implies that it is forbidden to use or keep on board any kind of driftnets, whatever their individual or total length may be, while both the 1992 European Regulation and the 1996 Monaco Agreement only prohibit the use of driftnets with an individual or total length larger than 2.5 km. Secondly, on the one hand the prohibition provided for by the 1993 Joint Declaration is intended to apply to all ships, whatever their flag maybe, including the ships flying the flag of a non-State Party to it, and without taking into account whether they are sailing in the internal waters, territorial seas or in the high seas area existing inside the Sanctuary. On the other hand, the 1992 European Regulation applies in the Mediterranean Sea to all ships flying the flag of whatever State, but only if these ships are sailing in the territorial seas of any of its Mediterranean Member States (France, Greece, Italy and Spain); in the Mediterranean high seas, the 1992 European Regulation only applies to ships flying the flag of whatever of the fifteen Member States, but it does not apply to any other ship flying the flag of a different State. Similarly, the 1996 Monaco Agreement only applies in the high seas of the Mediterranean and Black seas to ships flying the flag of any of its State Parties.

In addition to these measures, the State Parties to the 1993 Joint Declaration also undertake to strengthen monitoring in the Sanctuary and to increase the fight against pollution resulting from any source which may have a direct or indirect impact on the state of conservation of marine mammals. The compliance with the provisions of the 1993 Joint Declaration and their control is ensured by the national agencies in charge of maritime surveillance. The three State Parties to it will facilitate each other, if needed, the reciprocal use of ports and airports through simplified procedures.

The signatory ministers of the 1993 Joint Declaration invited the competent authorities of other Mediterranean States to act in a compatible way with the provisions of the 1993 Joint Declaration. This invitation conforms the Aquilles' heel of this original international legal instrument. It is the first time that an international instrument creates a specially protected area lying partly and to a large extent in the high seas and managed by an international Authority. But in the high seas area existing inside the Sanctuary, the measures either provided for by the 1993 Joint Declaration, or adopted in the future by its international Authority, are only legally binding for the three State Parties to this 1993 Joint Declaration. It is not possible to create international duties for third States neither by an international treaty setting forth protective measures for marine mammals, nor by the measures adopted in the future by an international Authority, unless third States consent voluntarily in accepting these measures that restrict high seas fisheries freedom. An international treaty negotiated exclusively among three States cannot, in the high seas, protect marine mammals against activities carried out by ships flying the flag of a State that is not a State Party to the international treaty concerned.

This last assertion means that, in order to provide an effective protection for marine mammals inside the Mediterranean Sanctuary against activities carried out by third States, another legal approach is needed.

In principle, the objective of providing an absolute protection for marine mammals inside the Mediterranean Sanctuary could be reached if France, Italy and Monaco establish economic exclusive zones in the Mediterranean Sea. It must be pointed out that the United Nations Convention on the Law of the Sea allows coastal States or the competent international organisation, to prohibit, limit or regulate the exploitation of marine mammals more strictly than other marine living species in their 200 miles economic exclusive zones and that the waters of the Mediterranean Sanctuary are not found that far. However, until now there is a tacit agreement among the Mediterranean coastal States on the non establishment of economic exclusive zones in this semienclosed sea (Bou, 1998). Therefore, the possibility of establishing these marine zones must be abandoned, despite the fact that the protective measures thereafter adopted, would be legally binding even for third States.

Another legal possibility that would produce a similar result, apparently easier to reach in the short term, consists in converting the Mediterranean Sanctuary for the protection of marine mammals in one of the Specially Protected Areas of Mediterranean Importance (SPAMI) that are scheduled in the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995). If, in the framework of the 1995 Barcelona Protocol, the Sanctuary is included in the SPAMI List, then the protective measures adopted for the marine mammals would be legally binding for all State Parties to the 1995 Barcelona Protocol. It must be underlined that, although the 1995 Barcelona Protocol is not legally binding for third States, it contains different provisions aimed at ensuring that no one, even third States, engages in any activity contrary to its principles and purposes (Bou, 1995).

Taking these data into account, it is worth noting that, on 17 November 1995, the Fourth International Conference for the Protection of Marine Mammals in the Western Mediterranean (RIMMO), held in Antibes (France), adopted a Proposal on a future designation of the waters located between Corsica, Liguria and Provence as a SPAMI, according to the 1995 Barcelona Protocol.

The RIMMO Proposal is a very well structured text. It was drafted in conformity with the Annex to the 1995 Barcelona Protocol containing the Common Criteria for the Choice of Protected Marine and Coastal Areas that Could Be Included in the SPAMI List. But for being successful, this initiative of a non-governmental organisation must solve several obstacles. The first obstacle arises from the fact that the 1995 Barcelona Protocol has not yet entered into force.

Once the 1995 Barcelona Protocol enters into force, the proposal for inclusion in the SPAMI List of an area situated, partly or wholly, on the high seas or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, as it is the case with the Mediterranean Sanctuary, it must be presented jointly by the neighbouring State Parties concerned. This requirement means that a non-governmental organisation, such as RIMMO, is not entitled to officially present a proposal for inclusion of an area in the SPAMI List, although it may promote a similar action taken by States that are State Parties to the 1995 Barcelona Protocol. Thus, for being successful, the RIMMO initiative needs, on the one hand, that the 1995 Barcelona Protocol enters into force, being France, Italy and Monaco State Parties to it and, on the other hand, that these three States back the RIMMO Proposal or another one with similar contents. If this is the case, and after checking that the proposal is consistent with the Common Criteria for the Choice of Protected Marine and Coastal Areas that Could Be Included in the SPAMI List, then the decision to include the Mediterranean Sanctuary in this List shall be taken by consensus by all the State Parties to the 1995 Barcelona Protocol.

Fortunately, some recent developments show that this is what is going to happen. The 1995 Barcelona Protocol has not yet entered into force, but it has been already ratified by Spain, Monaco and Tunis. Other Mediterranean States, and among them France and Italy, will probably ratify it soon, so it is expected that the 1995 Barcelona Protocol will enter into force during 1999. Moreover, last 29 September 1998, Italy prepared a draft Agreement concerning the establishment in the Mediterranean of a Sanctuary for marine mammals (Ministero dell'Ambiente, 1998). The 1998 Italian draft Agreement, that must be negotiated with France, Monaco and the European Community, strengthens the protective measures already included in the 1993 Joint Declaration and broadens its geographical scope of application (see Map No. 1). Pursuant to the Italian draft Agreement, when the 1995 Barcelona Protocol enters into force, the State Parties to the draft Agreement undertake to present the proposal for inclusion of the Sanctuary in the SPAMI List.

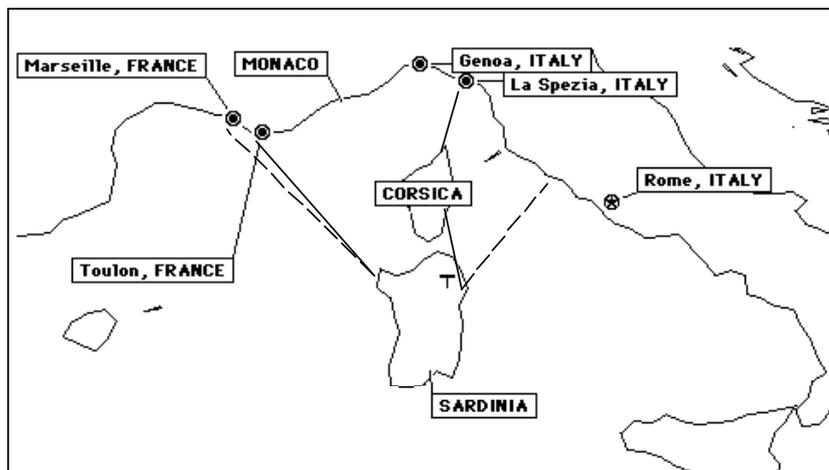
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Map N1: The Mediterranean Sanctuary for the Protection of Marine Mammals



——— Limits of the Sanctuary pursuant to the 1993 Joint Declaration
 - - - - Limits of the Sanctuary pursuant to the 1998 Interim Agreement

1993 Limits: To the West, a line from Point Escampobarion (the western point of Giens Peninsula: 43°01'40"N, 06°06'00"E) to Cape Falcone (40°58'30"N, 08°11'50"E), located at the western extremity of the Asinara Gulf (northern Sardinia). To the East, a line from Cape Corso (43°00'45"N, 09°25'05"E) to point bianca (eastern point of the La Spezia Gulf: 44°09'25"N, 09°58'35"E). To the South, a line from Cape Ferro in Sardinia (41°09'25"N, 09°32'00"E) to Point Chiappa in Corsica (41°35'00"N, 09°22'00"E).

1998 Limits: To the West, a line joining the mouth of the river Rhone (43°20'00"N, 04°50'30"E) and Cape Falcone, located at the western coast of Sardinia (40°58'00"N, 08° 12'00"E). To the East, a line joining Cape Ferro, located in the north-eastern coast of Sardinia (41 °09'0 18"N, 09°31 ' 1 8"E) and Fosso Chiarone, located in the western coast of Italy (42°21'24"N, 11°31'00"E).