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Request for clarifications

NOAH is a Norwegian animal rights organization who engages in the protection of wildlife, including large carnivores such as wolves, bears, wolverines and lynx. With this letter we would like to draw your attention to the high level of conflict in the Norwegian society over the government policy on large carnivores and would like to ask the Secretariat to clarify the role of the Convention organs in ensuring that the Contracting Parties comply with the Convention on the Conservation of European Wildlife and Natural Habitats (the Bern Convention). More specifically we would like to ask about the legal meaning of the decisions of the Convention organs on complaints submitted to them on the possible breaches of the Convention. We would also like to take the opportunity to ask for clarification on some of the statements made by the Secretariat in its letters to the Norwegian government.

1. The legal meaning of not opening a case-file by the Convention organs

All the four large carnivore species found on Norwegian territory are threatened according to the Norwegian Red List of Species approved by an expert committee on mammals in 2015 as follows: *canis lupus* – critically endangered (CR), *ursus actors* – endangered (EN), *gulo gulo* – endangered (EN), *lynx lynx* – endangered (EN). Many people in Norway perceive the government policy that is aimed at keeping the populations of large carnivores at a level where they remain in an endangered or critically threatened status for an indeterminate time, not in line with the Norwegian Biodiversity Act nor the Bern Convention. There are currently two court cases pending where environmental NGOs have challenged the legality of the decisions of the Ministry of the Environment on the killing of wolves in 2017/2018 and 2018/2019.¹

The organs of the Bern Convention have not found a ground to open a file against Norway on the basis of complaints submitted by NGOs to the Secretariat in 1996 (lynx), 1999 (wolf), 2001 (wolf and wolverine), 2009 (all large carnivore species), 2011 (wolf and bear) nor in 2013 (wolf).² In case of the complaints submitted in the years 1999 and 2001, the Standing Committee, and in case of the complaints submitted in 2009 and 2011, the Bureau considered the response by the Norwegian government to the complaints as satisfactory and decided not to pursue the complaints

¹ The first case was brought to the court by WWF-Norway in autumn 2017 against the Ministry's decision to kill 36 wolves in the regions 4 and 5, including two wolf packs Julussa and Osdalen of 19 animals in autumn and winter 2017/2018, and the second case was brought to the court by NOAH in December 2018 to stop the hunt of the Slettås wolf pack of three animals within the wolf zone in winter 2018/2019.

² The complaint submitted by NOAH in 2013 was dismissed by the Secretariat and never came to the consideration by the Bureau, because it contained "similar elements of two previous complaints which have been considered by the Bureau as not relevant." (Letter sent to NOAH by the Secretariat, dated 15 April 2013).

further.³ According to the documents, decisive weight was placed on the fact that the wolf population was on the rise in Scandinavia. It is also important to note here that with regard to the complaints in 2009 and 2011, the Norwegian authorities never gave an elaborate response to the claims made by the NGOs, but instead referred to the reports of the complaints in 1999 and 2001. In 2011, the authorities stated that the policies on large carnivores were being reviewed by the parliament (Stortinget) and that the Secretariat would be informed “*if significant changes of the present national large carnivore management is approved*”.⁴ It is not known to us whether the Norwegian authorities sent any additional letters to the Secretariat on this matter.

Concerning the complaint in 2001, the Bureau held at its meeting in September 2001 that “*the exceptions entered by Norway under Article 9 fell within the Convention's legal framework and that there were no grounds for opening a file, particularly since the Standing Committee had adopted a recommendation on the matter (Recommendation no. 82 (2000)) covering inter alia the situation of the wolf in the south of Fennoscandia*” (our emphasis). At its meeting in May 2001, the Bureau agreed to “*keep a close watch on the measures taken by the Norwegian authorities pursuant to Recommendation no. 82 (2000) which concerned the situation of the wolf in southern Fennoscandia and the need to maintain a viable wolf population*”.

The former Head of the Culture, Nature and Heritage Department of the Council of Europe Mr Eladio Fernandez-Galiano has later said in an interview to the Norwegian newspaper Nationen, published on 19 January 2017,⁵ that there seemed to be no problem with the way the Norwegian authorities have been managing the wolf population and that it is up to the national authorities to decide on the management of the population as long as the management in the respective country did not make exceptions from the Convention that threatened the population to an extent that it might become extinct.

The fact that none of the complaints have resulted in any official critique against Norway has been resorted to by the Ministry of the Environment in the respective court cases in 2017-2018 and 2019 as proof that it has been complying with the obligations under the Bern Convention, with regard to some of the principal aspects of its policy on wolves, such as the geographically differentiated management and the politically agreed wolf population target of maximum six annual litters on the Norwegian territory. In both cases, the national court accepted this fact as supporting evidence of compliance by Norway of its obligations under the Bern Convention, without however undertaking a thorough legal examination to establish compliance between the Convention and the challenged decisions. Also, the statements by Mr Fernandez-Galiano as referred to in the newspaper article in January 2017, were accepted by the courts as supporting evidence to the claim of the authorities that Norway was not in breach of its treaty obligations.

There is certain confusion in the Norwegian society over the purpose and role of Convention in ensuring the protection of the endangered large carnivore species in Norway. As one example, a

³ Here, it is worth noting that just a few weeks after the meeting of Standing Committee in Strasbourg, the City Court of Oslo issued a judgment on 20 December 1999 where it came to the conclusion that the decision of the Ministry of Environment Protection on the shooting of 2 wolves – the same decision that formed the basis of the complaint submitted to the Secretariat - was invalid. The Court found that the condition of “serious damage” was not satisfied as the damages occurred at a few farms only and were not therefore sufficient to justify the decision to kill the wolves. The Court pointed to the need to undertake a more comprehensive evaluation of different interests and considerations where the diversity of species is to be given priority according to the aims of the Wildlife Act, the Bern Convention, and § 110b in the Constitution of Norway.

⁴ Letter of the Norwegian Directorate of Nature Management dated 6 August 2010 (no. 2010/9911), and letter of the Directorate, dated 29 April 2011 (no. 2011/2792).

⁵ <http://www.regjeringen.no/no/dokument/dep/kld/hoeringer/hoeringsdok/2017/forslag-til-endring-av-naturmangfoldloven--18-og-roviltforskriften---lisensfelling-av-ulv/Download/?vedleggId=326598d5-4ae0-4e21-8c6f-5ab348eb572a>

leading scientist in legal sociology of the University of Oslo prof. Ragnhild Sollund published an opinion piece in a national daily newspaper in February 2019 where she expressed concern over the fact that the Norwegian authorities rely upon the Convention to legitimize keeping large carnivore species at an endangered level and where this has received the “blessing” of the Convention bodies.⁶ She argued that because the Convention organs have never openly criticized Norway for its policies on large carnivores, “*the Norwegian authorities seem to speculate that the Bern Convention “lacks teeth”, and concluded: “Norway’s adherence to the Bern Convention is paradoxical as it legitimizes state extinction policy and does not provide real protection to endangered species.”*”.

In light of the above, we would like to ask for clarification on the legal meaning of the decisions of the Standing Committee not to open a case-file against Norway in the years 1999 and 2001, and the decisions of the Bureau in 2009 and 2011, as well as of the general statements about the implementation of the Bern Convention in Norway made by a high official of the Secretariat in 2017. Specifically, we would like to ask for your comments on the following points:

- A. Does the Secretariat, Bureau and the Standing Committee conduct legal assessment of the issues raised in the complaints submitted to them, or is the case-file system directed first and foremost towards finding diplomatic and political solutions?
- B. Does the fact that the complaints against Norway in the years 1999, 2001, 2009 and 2011 did not lead to formally opening a case-file and the fact that no complaint has been submitted against Norway after 2013 mean that Norway is currently complying with its obligations according to the Convention? In other words, is it possible that a Contracting Party is in breach of its treaty obligations without this being established by the Standing Committee, Bureau or the Secretariat?
- C. The geographically differentiated management as it was practiced by the Norwegian authorities at the time when the complaints were submitted did not seem to raise any concerns of its compatibility with the Convention. However, does this fact rule out that geographically differentiated management as it was applied by the Norwegian authorities in 2017 and 2018 and as it is applied currently is not in line with the Convention?
- D. Does the Secretariat undertake on its own initiative assessments on whether a Contracting Party is complying in its general policy or in adopting concrete decisions (for example on the exceptions according to Article 9 of the Convention) with the requirements of the Bern Convention? Has the Secretariat undertaken any such assessments with regard to the policies on the management of large carnivores in Norway? Are the statements made by the former Head of the Culture, Nature and Heritage Department of the Council of Europe Mr Eladio Fernandez-Galiano as published in a Norwegian newspaper in January 2017, to be considered as communicating the results of such assessments?
- E. The decision of the Standing Committee not to pursue the complaint in 2001 was closely related to the adoption of Recommendation No. 82 (2000)⁷ and to keeping a “*close watch on the measures taken by the Norwegian authorities pursuant to Recommendation no. 82 (2000)*” then we would like to know how this “close watch” has been conducted and what are the follow-up results, especially in light of the complaints submitted to the Bern Convention Secretariat in 2009 and 2011?

⁶ <https://www.dagsavisen.no/nyemeninger/ikke-lat-som-om-de-er-beskyttet-1.1274268>

⁷ Recommendation No. 82 (2000) of the Standing Committee (adopted on 1st December 2000) on urgent measures concerning the implementation of action plans for large carnivores in Europe.

Recommendation No. 82 (2000) includes an Appendix “Action Plan for the Conservation of Wolves (*canis lupus*) in Europe” where it is laid down as one of the urgent measures in respect to Norway to identify all potential corridors among population fragments (p 5.1).

Considering the importance of ensuring genetic viability in isolated populations (such as the Scandinavian wolf population), and the crucial role that connectivity between populations plays in this regard – as highlighted also in the Carnivore Guidelines 2008 – we would like to know whether the Secretariat or the Bureau, in conducting the “close watch” also assessed whether the geographically differentiated management by Norwegian authorities was or is in compliance with the Convention, especially with Articles 2, 4 and 6?

2. Request for clarification on certain statements made by the Secretariat concerning interpretation of the Convention

It is a politically set target in Norway that the number of wolves on the Norwegian territory should not be less than four and not more than six litters on an annual basis (which corresponds to around 60 wolves) restricted to an area that constitutes around 5% of the Norwegian territory. This target is not a dynamic target adjusted to the changes in the population status but set as a fixed target due to socio-economic considerations. This means that any growth in the population is aimed to be levelled out by setting annual quotas for wolves that can be killed. These decisions have been based on Article 9(1) sub-paragraph 2 (to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property, transposed to Norwegian law without the qualification “serious”) and in the last two years also on sub-paragraph 3 of Article 9 (other overriding public interests, transposed to Norwegian law as public interests of significant importance).

After the complaint in 2011, the Secretariat sent a letter, on behalf of the Bureau of the Standing Committee, to the Norwegian Directorate for Nature Management “Population targets for wolf and bear in Norway”, dated 15 April 2011, expressing concern over the fact that the wolf had a “critically threatened” (CR) status in the Norwegian Red List of Threatened Species and emphasized that this may be a sign that “*targets need to be more ambitious to improve the situation of the species*”. The Bureau had further stated with regard to Article 2 of the Convention that “*no precise numbers of population can be required from States*”, but encouraged the Norwegian government “*to take into account the objectives of the Convention and aims for targets that would permit those species reach a favorable conservation status*”.

We would also like to refer to a letter dated 17 June 1996 that the Secretariat sent to the Norwegian authorities. In this letter the Secretary General Mr Eladio Fernandez-Galiano pointed out that “*Contracting Parties have clear obligations under the Convention to keep populations of all predator species (listed in both Appendices II and III) out of danger*” and that “*These obligations are not “transferable” to other States through the adoption of common management programmes in other States*”.

We would like to ask for a few clarifications on the statements made in these letters:

A. Does the statement that *no precise numbers of population can be required from States* mean the level provided for in Article 2 cannot be expressed in precise numbers at all?

B. The records of the discussions on the complaints at the Bureau and Standing Committee meetings indicate that increase in the size of the population was the determining factor in deciding on whether Norway was complying with its treaty obligations. By referring to the numbers of population, does the Bureau/Secretariat put greater weight to the demographic viability of the population in comparison to the other factors of population viability, such as genetic and

ecological viability? If yes, on what grounds is demographic viability prioritized over other factors of viability?

C. According to the statements of Mr Fernandez-Galiano to the Norwegian newspaper in 2017 this level needs to be such that the population will not become extinct. On what grounds does Mr Fernandez-Galiano make this statement? How is this statement to be understood in light of the letter sent to Norwegian Directorate for Nature Management in 2011 where Norwegian authorities are reminded of “*targets that would permit those species reach a favorable conservation status*”? It is also relevant to mention here that in the Standing Committee Guidelines No. 2 (1993) and the Standing Committee Recommendation No. 163 (2012) the ecological level in Article 2 has been described respectively as “favorable conservation status” and “satisfactory conservation status”.⁸

D. Is it in accordance with Article 2 of the Convention that the Contracting Party is keeping a large carnivore population on its territory permanently at a critically endangered level (which means that the species has an extremely high risk of becoming extinct), taking into account that there is no agreement on the common management of transboundary population between countries who share this population?

E. Does the fact that individuals of the species wander into the territory from a neighboring country (due to the transboundary nature of the population) mean that the respective sub-population cannot per se be threatened by extinction? Whether and how does this affect the obligations according to Article 2 of the respective country, provided there is no agreement on the common management of transboundary population between countries who share the population?

We hope that you have a chance to provide some clarification on the points and questions above. This would be very helpful.

Yours Sincerely,

(sign.)
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Head of NOAH – for dyrs rettigheter

⁸ In addition, the Carnivore Guidelines adopted by the Large Carnivore Initiative for Europe (LCIE) in July 2008 – that the Standing Committee recommended (Recommendation No. 137 (2008)) to be taken into account as best practice for large carnivore management in Europe – communicate the understanding that “*conservation of large carnivores is more than preventing a species from becoming extinct*” (p 16).