

Mandate of the Special Rapporteur on the rights of indigenous peoples

Ref.: AL NOR 2/2021
(Please use this reference in your reply)

30 December 2021

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the rights of indigenous peoples, pursuant to Human Rights Council resolution 42/20.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **the allegations of human rights violations and abuses committed in the implementation of the Øyfjellet Wind Park project by Eolus Vind AB in the Jillen-Njaarke district in Nordland County, Norway.**

According to the information received:

In 2016, Eolus Vind AB was granted a license to build the Øyfjellet Wind Park, a large wind power facility for 72 wind turbines, in a Sami indigenous area of 40 square kilometers in the Jillen-Njaarke district in Nordland County, Norway. This Sami area is vital for the local reindeer husbandry, Jillen-Njaarke Sami reindeer herding district, and includes reindeer migration routes as well as crucial pastures. This license was granted by the Norwegian Water Resources and Energy Ministry (NVE) stating the condition that the construction activities affecting the relocation of reindeer, shall be interrupted during the relocation of reindeer, and a coexistence agreement could be made with the local reindeer herders. Subsequently, NVE decided to implement the environmental, transport and construction plan (MTA plan) for Øyfjellet wind farm.

Allegedly, the Sami indigenous herders from Jillen-Njaarke district have never consented to the implementation of a wind power project in their territories. The Sami indigenous herders from Jillen Njaarke district contested the NVE's license decision to the Oil and Energy Department of Norway (OED); however, OED did not reverse the decision. Information indicates that there were no appeal options for OED's decision on the license, therefore the Sami indigenous herders filed a complaint in the Oslo District Court. In December 2019, a separate complaint concerning the MTA plan was submitted to the OED.

According to Eolus Vind AB, the construction of the wind power plant started in December 2019 and completion is expected by the first quarter of 2022. Information received indicates that the license's conditions were violated, as no agreement was prior to the construction initiated, and the construction activities affecting the relocation of reindeer, interfered the reindeer spring migration in 2020. The Norwegian Water Resources and Energy Ministry (NVE) reportedly gave the Sami herders one month for the spring relocation of about 2100 reindeer, from 10 April to 10 May 2020. The company Eolus Vind AB appealed the decision directly to the Oil and Energy Department of Norway (OED), without considering the NVE Directorate, as required by the

Norwegian Public Administration Act § 32(a).¹

On 8 April 2020, OED changed NVE's decision. The Sami indigenous herders were reportedly given only three days to move the entire reindeer herd. Concerns have been raised that three days were insufficient – the Sami herders did not manage to lead the whole herd down, as Eolus Vind AB recommenced construction before the Sami herders were finished. The Sami indigenous herders therefore filed a complaint against the Øyfjellet Wind Park constructors, alleging breach of license agreements.

In October 2020, the Oslo District Court ruled in favor of the company outlining that the construction did not disturb reindeer herding in the area. The court concluded affirming the validation of the licensing decision, as it did not identify any procedural errors or violation of the Reindeer Husbandry Act of 2007. Concerns have been raised over the ambiguity of the district court decision. Concurrently, when ruling on the feasibility of reindeer husbandry to be performed in an area once the wind turbines are in place, the court implies that the reindeer can be forcibly moved through an area while wind turbines are in operation.

According to information received, the ruling does not comply with the order of Section 22 of the Reindeer Husbandry Act requiring that the reindeer should be able to migrate “freely and unhindered”; and that migration routes of the reindeer husbandry “must not be closed”. Additionally, the court ruling stated that only the Ministry of Agriculture and Food could make a decision on the reorganization of the migration route, however, the court allegedly considers that the reorganization is not necessary, as the reindeer can be possibly forced to migrate through the wind farm. On 9 November 2020, the Sami indigenous herders appealed the Oslo District's decision to the Court of Appeal.

Research and indigenous knowledge demonstrate that the Sami's semi-domesticated reindeer avoid grazing in areas where they can see or hear wind turbines. A project such as Øyfjellet Wind Park would allegedly disrupt the migration of reindeer, especially in the winter, when they are often weakened and at risk, particularly pregnant mothers and newborn calves.

A point of concern is that if the routes are not available or cannot be used, the Sami herders would not be able to get the reindeer to or from winter pasture. This could lead to necessary reduction of the herd, meaning that one or several traditional Sami reindeer herders would no longer have sufficient economic basis for their traditional livelihood. Reportedly, the company did not establish an agreement with the Sami indigenous herders from Jillen Njaarke and did not provide any compensations to them on the wind power project.

According to the information received, extractives activities are already present on 50% of the Sami land in Jillen-Njaarke area. After the implementation and development of the Øyfjellet Wind Park, this percentage would increase to 70%. Research indicates that the development projects already existing in the Jillen-Njaarke district area include hydropower, mining,

¹ § 32. (the addressee, form and contents of the appeal). The notice of appeal shall: a) be lodged with the administrative agency that has made the administrative decision; if an oral appeal is permitted, the notice shall be drawn up in writing by the administrative agency concerned.

electricity lines and railways.²

Concerns have been raised that the last moving path for the reindeer between seasonal pastures in Jillen-Njaarke would disappear due to the construction of the Øyfjellet Wind Park. The cumulative effect of hydropower and wind power developments on the area, allegedly leads to a situation in which regular relocation of the reindeer and moving path between the pastures can no longer be carried out.

While I do not wish to prejudge the accuracy of these allegations, I note with concern the alleged human rights violations against the Sami indigenous peoples. I am particularly disturbed by the reports indicating the Sami's obstruction of the use of the legally-protected traditional migration routes of the reindeer, the lack of good faith consultations, the failure to obtain their free prior and informed consent, and over the significant and irreversible damage that the Øyfjellet Wind Park poses to the Sami lands, resources, culture, language and livelihoods.

In this context, I would like to recall that in November 2019, in her letter to the Foreign Minister, the United Nations High Commissioner for Human Rights recommended that the Norwegian Government protect Sami indigenous peoples' rights to land and resources, giving full effect of the legal recognition of the Saami rights to their lands and resources; preserving culture of the Eastern Sami people, and adopting measures to establish the ability of the Eastern Sami people to conduct their traditional reindeer husbandry. The High Commissioner for Human Rights further recommended that the Government review administrative and legislative mechanisms allowing for extractive activities on Sami lands in order to guarantee adequate consultation with the affected Sami communities, adequate mitigation measures, compensation and benefit sharing.³

I wish to refer to the Report of the Working Group on the Universal Periodic Review in 2019, in which States recommended that the Government adopt legislation that increases the protection of traditional Sami livelihoods, including coastal Sami fisheries and traditional Sami reindeer herding, and further reinforces the principle of free, prior, and informed consent; and ensure uniform procedures for consultations of Sami people in accordance with the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization, article 6, paragraph 1.⁴

I further recall that in January 2019, the Committee on the Elimination of Racial Discrimination (CERD) in its Concluding observations of Norway, expressed concerns about the lack of measures to establish the ability of the Eastern Sami to conduct their traditional reindeer husbandry. The CERD recommended that the Norwegian Government take measures to improve the legal framework on Sami land, fishing and reindeer rights, re-establishing the ability of the Eastern Sami to conduct their traditional reindeer husbandry.⁵

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these

² Source submission.

³ https://lib.ohchr.org/HRBodies/UPR/Documents/Session33/NO/HC_letter_33rdSession_Norway.pdf

⁴ A/HRC/42/3.

⁵ CERD/C/NOR/CO/23-24.

allegations.

As it is my responsibility, under the mandates provided to me by the Human Rights Council, to seek to clarify all cases brought to our attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and any comments that you may have on the above-mentioned allegations.
2. Please provide information on any consultation processes undertaken with the Sami indigenous community prior to the approval of the construction of the Øyfjellet Wind Park project to ensure that the company has engaged in good-faith, meaningful and inclusive consultations with the affected communities in order to obtain their free, prior and informed consent.
3. Please provide information on remedies and just, fair and equitable compensation available for the Sami indigenous peoples, for the lands, territories and resources which they have traditionally owned, and which have been used or damaged without their free, prior and informed consent.
4. Please provide information as to whether the Government of Norway envisages meeting with the local population of Jillen-Njaarke reindeer-herding district, specifically to discuss the impacts of the Øyfjellet Wind Park project and answer all related questions.
5. Please provide information on any steps that your Excellency's Government has taken, or is considering to take, including policies, legislation and regulations to protect against human rights abuses by business enterprises within its territory and/or jurisdiction, and to ensure that business enterprises conduct effective human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their operation, as set forth by the UN Guiding Principles on Business and Human Rights.
6. Please indicate what independent monitoring and complaints mechanisms are envisaged in the context of the proposed project.
7. Please provide information on any steps taken by the Government of Norway to ensure that the affected Sami indigenous community have access to effective, adequate and timely remedies for business related human rights abuses.
8. Please provide information on the status of the license litigation process before the Court of Appeal and the decision on the environmental, transport and construction plan (MTA plan) before the Oil and Energy Department of Norway (OED).
9. Please provide detailed information on any measures adopted by your Excellency's Government to ensure compliance with international human rights obligations; and with the order of the Norwegian Public

Administration Act§ 32(a), as well with the order of Section 22 of the 2007 Reindeer Husbandry Act.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

José Francisco Cali Tzay
Special Rapporteur on the rights of indigenous peoples

Annex

Reference to international human rights law

In relation to the above-mentioned facts and concerns, I would like to draw the attention of your Excellency's Government to its obligations under binding international human rights instruments. Norway has ratified numerous international treaties relevant to the rights of indigenous peoples including ILO Indigenous and Tribal Peoples Convention, 1989, No. 169 (ILO 169), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

In 1990, Norway ratified ILO Convention No. 169 which affirms the rights of indigenous peoples 'to decide their own priorities for the process of development' and to 'participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly' (Art.7(1)). Article 14 (1) mandates recognition of indigenous peoples 'rights of ownership and possession' over the lands they 'traditionally occupy.' This includes 'lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.' Further, Article 17 (3) of ILO 169 affirms that 'persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.'

I furthermore wish to refer to the Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007 with a favourable vote by your Excellency's Government. Article 26 asserts the right of indigenous peoples to 'the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired' and for legal recognition of those rights 'with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.' Article 11 of the UN Declaration protects indigenous cultural traditions, customs and practices including archaeological and historical sites, and artifacts and asks states to provide effective mechanisms for redress, in conjunction with indigenous peoples. Article 23 affirms the right of indigenous peoples 'to determine and develop priorities and strategies for exercising their right to development.'

Article 28(1) states that 'indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.' Article 28(2) furthers this by affirming that 'unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.'

Cultural rights, including the right of all to take part in cultural life without discrimination, the right to access and enjoy cultural heritage, and the right to engage in one's own cultural practices, are guaranteed by many provisions of international law. Such provisions include article 27 of the Universal Declaration of Human Rights; article 15 of the International Covenant on Economic, Social and Cultural

Rights; and related provisions of the International Covenant on Civil and Political Rights.

Specific standards apply to the cultural rights of indigenous peoples. For example, article 31 of UNDRIP, states that “indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, [and] knowledge of the properties of fauna and flora.” Article 25 of the Declaration also states that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Furthermore, Article 32 of UNDRIP asserts that ‘indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources’ and that ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources’. Article 32 also affirms that ‘States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact’.

I would like to highlight the United Nations Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011, and which are relevant to the impact of business activities on human rights. These Guiding Principles are grounded in recognition of:

- a. “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- b. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- c. The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

The obligation to protect, respect, and fulfill human rights, recognized under treaty and customary law, entails a duty on the part of the State not only to refrain from violating human rights, but to exercise due diligence to prevent and protect individuals from abuse committed by non-State actors (see for example Human Rights Committee, General Comment no. 31 para. 8). In accordance with these legal obligations, Guiding Principle 1 reiterates that the State has a duty “to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.” Moreover, Guiding Principle 3 reiterates that States must take appropriate steps to “prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” In addition, this requires, inter alia, that a State should “provide effective guidance to business enterprises on how to respect human rights throughout their operations”. Lastly, in accordance with the right recognized in treaty and customary international law (see

for example ICCPR Article 2 (3), Guiding Principle 25 reiterates that States must ensure that victims have access to effective remedies, also in instances where adverse human rights impacts linked to business activities occur.

I would like to refer to the thematic report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (ref. A/HRC/32/45) and recommendations contained therein elaborating on the duty of States to protect against human rights abuses involving those business enterprises that they own or control. This includes the following considerations:

88. All business enterprises, whether they are State-owned or fully private, have the responsibility to respect human rights. This responsibility is distinct but complementary to the State duty to protect against human rights abuses by business enterprises. This duty requires States to take additional steps to protect against abuses by the enterprises they own or control. This goes to the core of how the State should behave as an owner and the ways in which its ownership model is consistent with its international human rights obligations.

94. States, as primary duty bearers under international human rights law, should lead by example. To show leadership on business and human rights requires action and dedicated commitment on many fronts. It also includes using all the means at the disposal of States to ensure that the enterprises under their ownership or control fully respect human rights throughout their operations. There is untapped potential for State-owned enterprises to be champions of responsible business conduct, including respect of human rights. The Working Group calls on States and State-owned enterprises to demonstrate leadership in this field.