

JUDGMENT

Handed down: 7 February 2018

Case no.: 17-144441AST-HALO

Judges:

Chief Judge	Monica Hansen Nylund
Court of Appeal Judge	Pål Morten Andreassen
District Court Judge	Siri Vigmostad

Lay judges:

Electrical contractor	Halgeir Ringjord
Adviser/Project manager	Hilde Grimstad
Finance officer	Gry Agnete Berglund Brandvoll
Programme manager	André Løvik

I Full appeal

Charged party	SIA North Star LTD	Lawyer Hallvard Østgård
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Prosecuting authority	Troms and Finnmark Public Prosecuting Authorities	Senior Public Prosecutor Lars Fause
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II Full appeal

Charged party	Rafael Uzakov	Lawyer Hallvard Østgård
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Prosecuting authority	Troms and Finnmark Public Prosecuting Authorities	Senior Public Prosecutor Lars Fause
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JUDGMENT

The case is in relation to snow crab catching on the continental shelf in the fishery protection zone around Svalbard.

SIA North Star LTD is a Latvian shipping company that catches crab. The shipping company owns the vessel Senator and two other vessels that are equipped to catch crab.

Rafael Uzakov is 44, and lives in Russia. He used to work for SIA North Star LTD as a captain, but has been unemployed since April 2017.

On 20 January 2017, the Chief of Police of Finnmark issued a penalty notice against the shipping company pursuant to section 61 of the Marine Resources Act, cf. section 27 of the Penal Code, and section 65 of the Marine Resources Act, imposing a fine of NOK 150 000 and confiscation of NOK 1 000 000. At the same time, the Chief of Police issued a penalty notice against Mr Uzakov, imposing a fine of NOK 50 000. The reason for the penalty notice was illegal snow crab catching on the Norwegian continental shelf in the fishery protection zone around Svalbard. Neither the shipping company nor the captain accepted the penalty notice.

Based on his refusal to accept the penalty notice, the captain was indicted by Øst-Finnmark District Court for a violation of:

I Section 61 of the Marine Resources Act

Whereby any person that wilfully or through negligence contravenes provisions laid down in or under section 16 subsection 2 is liable to fines, cf. section 64 subsection 3.

Cf. section 4, Territorial extent

Whereby this Act applies on board Norwegian vessels, within Norwegian land territory with the exception of Jan Mayen and Svalbard, in the Norwegian territorial sea and internal waters, on the Norwegian continental shelf, and in the areas established under sections 1 and 5 of the Act of 17 December 1976 No. 91 Relating to the Economic Zone of Norway.

Cf. section 1 of the Act Relating to Scientific Research and Exploration for and Exploitation of Subsea Natural Resources other than Petroleum Resources

Whereby this Act applies to scientific research of the seabed and its subsoil and exploration for and exploitation of subsea natural resources other than petroleum resources in Norwegian internal waters, in the Norwegian territorial sea and on the continental shelf. The continental shelf is to be understood as the seabed and subsoil of the marine areas extending beyond the Norwegian territorial sea, throughout the natural



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prolongation of the Norwegian land territory to the outer edge of the continental margin, but no less than 200 nautical miles from the base lines from which the breadth of the territorial sea is measured, however, not beyond the median line to another state, unless otherwise can be derived from the rules of international law for the continental shelf beyond 200 nautical miles from the base lines, or from an agreement with the relevant state.

Cf. section 16 subsection 2 (c)

Whereby the Ministry may adopt regulations on the conduct of harvesting operations, including provisions on the prohibition of harvesting in certain areas, of certain species or using certain types of gear.

Cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab, cf. section 1

Whereby there is a prohibition against snow crab catching in the Norwegian territorial sea and internal waters, and on the Norwegian continental shelf by Norwegian and foreign vessels.

Grounds:

Starting on Sunday 15 January 2017 at 10:50 UTC, on the Norwegian continental shelf in the Sentralbanken ocean bank at position 7433, 1N-03541.4E, the fishing vessel Senator C/S YLAC, with Rafael Uzakov as its captain, began catching snow crab by placing snow crab pots in the sea, despite the lack of a dispensation from the Norwegian authorities to catch crab on the Norwegian continental shelf. A total of 13 lines with a total of 2 594 pots were set out until NoCGV Svalbard inspected the vessel on Monday 16 January 2017 at 08:20 UTC.

II Section 36 subsection 1 (a) of the Coast Guard Act

For neglecting to comply with an order given by the Coast Guard.

Cf. section 29 subsection 2 of the Coast Guard Act

Whereby the Coast Guard may order the person in charge of a vessel to stop fishing or catching, and withdraw the trawls or other gear.

Grounds:

On Monday 16 January 2017 at 10:50 UTC, on the Norwegian continental shelf in the Sentralbanken ocean bank at position 7515.7N-03647.6E, as the captain of the fishing vessel Senator C/S YLAC, the Coast Guard ordered him to pull up all of the pots he had set out, cf. point 1; an order he did not comply with.



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Based on the refusal to accept the penalty notice, the shipping company was indicted by Øst-Finnmark District Court for a violation of:

I Section 61 of the Marine Resources Act, cf. section 27 of the Penal Code (2005)

Whereby any person who wilfully or through negligence contravenes provisions laid down in or under section 16 subsection 2 is liable to fines, cf. section 64 subsection 3.

Cf. section 27 of the Penal Code, Penalties for enterprises

When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise is liable to punishment. This applies even if no single person meets the culpability or the accountability requirement, see section 20.¹

“Enterprise” means a company, co-operative society, association or other organisation, sole proprietorship, foundation, estate or public body.

The penalty is a fine. The enterprise may also be sentenced to lose the right to operate, or may be prohibited from operating in certain forms, see section 56, and may be subject to confiscation, see chapter 13.

Cf. section 28 of the Penal Code, Factors in determining whether a penalty shall be imposed on an enterprise

In determining whether an enterprise shall be penalised pursuant to section 27, and in assessing the penalty, considerations shall include

- a) the preventive effect of the penalty,*
- b) the severity of the offence, and whether a person acting on behalf of the enterprise has acted culpably,*
- c) whether the enterprise could have prevented the offence by use of guidelines, instruction, training, checks or other measures,*
- d) whether the offence has been committed in order to promote the interests of the enterprise,*
- e) whether the enterprise has had or could have obtained any advantage by the offence,*
- f) the financial capacity of the enterprise,*
- g) whether other sanctions arising from the offence are imposed on the enterprise or a person who has acted on its behalf, including whether a penalty is imposed on any individual person, and*
- h) whether agreements with foreign states prescribe the use of enterprise penalties.*

¹ Translator's note: The source document contains extraneous numbers which have not been included in the translation.



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Cf. section 4 of the Marine Resources Act, Territorial extent

This Act applies on board Norwegian vessels, within Norwegian land territory with the exception of Jan Mayen and Svalbard, in the Norwegian territorial sea and internal waters, on the Norwegian continental shelf, and in the areas established under sections 1 and 5 of the Act of 17 December 1976 No. 91 Relating to the Economic Zone of Norway.

Cf. section 1 of the Act Relating to Scientific Research and Exploration for and Exploitation of Subsea Natural Resources other than Petroleum Resources

Whereby this Act applies to scientific research of the seabed and its subsoil and exploration for and exploitation of subsea natural resources other than petroleum resources in Norwegian internal waters, in the Norwegian territorial sea and on the continental shelf. The continental shelf is to be understood as the seabed and subsoil of the marine areas extending beyond the Norwegian territorial sea, throughout the natural prolongation of the Norwegian land territory to the outer edge of the continental margin, but no less than 200 nautical miles from the base lines from which the breadth of the territorial sea is measured, however, not beyond the median line to another state, unless otherwise can be derived from the rules of international law for the continental shelf beyond 200 nautical miles from the base lines, or from an agreement with the relevant state.

Cf. section 16 subsection 2 (c)

Whereby the Ministry may adopt regulations on the conduct of harvesting operations, including provisions on the prohibition of harvesting in certain areas, of certain species or using certain types of gear.

Cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab, cf. section 1

Whereby there is a prohibition against snow crab catching in the Norwegian territorial sea and internal waters, and on the Norwegian continental shelf by Norwegian and foreign vessels.

When a penal provision is violated by a person who has acted on behalf of an enterprise, the enterprise is liable to punishment.

Grounds:

On Sunday 15 January 2017 at 10:50 UTC, on the Norwegian continental shelf in the Sentralbanken ocean bank at position 7433, 1N-03541.4E, the fishing vessel Senator C/S/LAC, with Rafael Uzakov as its captain, began catching snow crab by placing snow crab pots in the sea, despite the lack of a dispensation from the Norwegian authorities to catch crab on the Norwegian continental shelf. A total of 13 lines with a total of 2 594



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pots were set out until NoCGV Svalbard inspected the vessel on Monday 16 January 2017 at 08:20 UTC.

The cases were consolidated for joint hearing, and the main hearing was held on 4 May 2017. Øst-Finnmark District Court rendered judgment on 22 June 2017, with the following conclusion of judgment:

I

Rafael Uzakov, date of birth 8 May 1973, is acquitted of a breach of section 36 subsection 1 (a) of the Coast Guard Act, cf. section 29 subsection 2 item II of the indictment.

II

Rafael Uzakov, date of birth 8 May 1973, is convicted of a breach of section 61 of the Marine Resources Act, cf. section 16, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab (For – 2014-12-19-1836), cf. section 1, and is imposed a fine of NOK 40 000 – forty thousand.

III

The company SIA North Star LTD is convicted of a breach of section 61 of the Marine Resources Act, cf. section 16, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab (For – 2014-12-19-1836), cf. section 1, cf. section 27 of the Penal Code (2005), and is imposed a fine of NOK 150 000 – one hundred and fifty thousand.

IV

The company SIA North Star LTD is ordered to accept confiscation by the Norwegian state of NOK 1 000 000 – one million – cf. section 65 of the Marine Resources Act.

V

The company SIA North Star LTD is ordered to pay the costs of the case of NOK 200 000 – two hundred thousand.

SIA North Star LTD has submitted an appeal regarding the assessment of evidence and the application of the law in relation to the question of culpability. Rafael Uzakov has submitted an appeal regarding the assessment of evidence and the application of the law in relation to the question of culpability in relation to item I of the penalty notice. On 26 September 2017, the Court of Appeal decided to refer the appeals to an appellate hearing.

The appellate hearing was held in Tromsø on 17 and 18 January 2018. Rafael Uzakov attended the hearing and testified. Owner and chairman of the board of the shipping company Peteris Pildegovics attended the hearing and testified. Three witnesses were produced and documentation was submitted, as specified in the court records.

The prosecutor submitted in the main the following:



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The snow crab is a sedentary species which lives on the seabed, and which Norway pursuant to article 77 (4) of the United Nations Convention on the Law of the Sea has an exclusive right to exploit on its own continental shelf. The Regulations Relating to the Prohibition against Catching of Snow Crab govern the entire Norwegian continental shelf, including the area in which the indicted parties were catching when they were inspected in the fishery protection zone around Svalbard. Pursuant to section 1 of the Regulations, both Norwegian and foreign vessels must hold a dedicated permit from the Norwegian authorities in order to fish, and the indicted parties operated without such a permit. Both of the indicted parties acted wilfully, and any ignorance of the law was at the very least negligent, cf. section 26 of the Penal Code. The conditions for criminal liability have therefore been met.

The Svalbard Treaty applies within the territorial waters, i.e. within 12 nautical miles, and not in the areas outside it, including the continental shelf. The treaty must be interpreted strictly, according to its wording. There are no grounds for a liberal interpretation, in the sense that the treaty also applies to the rights of the coastal state in the fishery protection zone.

The Regulations Relating to the Prohibition against Catching of Snow Crab nonetheless do not represent a breach of the principle of equal treatment in articles 2 and 3 of the Svalbard Treaty. Norway has the right to regulate catching on the entire continental shelf, also within the scope of the treaty, and there are objective grounds for the prohibition, based on the need for knowledge and sustainable management of a new species in this area. The wording of the Regulations is non-discriminatory, as all catching is prohibited unless a permit has been obtained from the Norwegian authorities. It has not been substantiated that the practice of granting permits is a breach of the principle of equal treatment. The EU has been offered a snow crab catch quota, as part of a quota swap, but has not accepted the offer.

The prosecutor submitted the following statement of claim:

1. *Rafael Uzakov, date of birth 8 May 1973, is convicted of breach of section 61 of the Marine Resources Act, cf. section 4, cf. section 16, cf. section 1 of the Act Relating to Scientific Research and Exploration for and Exploitation of Subsea Natural Resources other than Petroleum Resources of 21 June 1963, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab of 19 December 2014 and subsequent amendments, cf. section 1, and is imposed a penalty in the form of a fine of NOK 40 000.*
2. *The shipping company SIA North Star LTD is convicted of breach of section 61 of the Marine Resources Act, cf. section 4, cf. section 16, cf. section 1 of the Act Relating to Scientific Research and Exploration for and Exploitation of Subsea Natural*



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Resources other than Petroleum Resources of 21 June 1963, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab of 19 December 2014 and subsequent amendments, cf. section 1, cf. sections 27 and 28 of the Penal Code (2005), and is imposed a penalty in the form of a fine of NOK 150 000.

3. *The shipping company SIA North Star LTD is convicted of breach of section 61 of the Marine Resources Act, cf. section 4, cf. section 16, cf. section 1 of the Act Relating to Scientific Research and Exploration for and Exploitation of Subsea Natural Resources other than Petroleum Resources of 21 June 1963, cf. section 1, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab of 19 December 2014 and subsequent amendments, cf. section 1, and section 65 of the Marine Resources Act, and imposed confiscation of NOK 1 000 000 in favour of the State.*

The defence counsel submitted in the main the following:

The snow crab is not a sedentary species pursuant to article 77 (4) of the United Nations Convention on the Law of the Sea, and therefore is not covered by the coastal state's exclusive right to exploit natural resources on the seabed. The Regulations Relating to the Prohibition against Catching of Snow Crab therefore do not have the necessary legal foundation, and are invalid.

It is alternatively submitted that the Svalbard Treaty and the principle of equal treatment, cf. articles 2 and 3, also apply in the fishery protection zone around Svalbard and on the continental shelf, i.e. with the same extent as Norway's assertion of sovereign rights. It is beyond the scope of current international law to strictly or restrictively interpret provisions regarding limitation of sovereignty. The expression "*territorial waters*" in articles 2 and 3 must be interpreted in light of the purpose of the treaty and the considerable development of the rights of the coastal state after 1920, and can no longer be limited to the 12-mile boundary.

The Regulations Relating to the Prohibition against Catching of Snow Crab are clearly being practised in contravention of the principle of equal treatment, as only Norwegian vessels have been granted catch permits since the prohibition was introduced. There is thus no independent meaning in the wording of section 1 not discriminating according to nationality. The Regulations "*effectively*" do not meet Norway's obligations pursuant to international law, and cannot give rise to criminal liability on the part of the indicted parties, cf. section 6 of the Marine Resources Act and Norwegian Supreme Court Reports 2014 p. 272 paragraph 49.



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Translation from Norwegian

In any circumstance the indicted parties acted in negligent² ignorance of the law, pursuant to section 26 of the Penal Code. The captain was aware of the disagreement between the EU and Norway, but had reason to trust the licence that was issued by the Latvian authorities and the information he received from the shipping company. The shipping company acknowledges that there are grounds for imposing a penalty on the enterprise if the catching was illegal. Any confiscation must take into consideration that there is no catch value, and that the shipping company has operated at a loss for the past two years.

The defence counsel submitted a statement of claim for acquittal of the indicted parties.

The Court of Appeal notes:

The following undisputed facts are reproduced here from the judgment of the District Court, and also cover the presentation of the evidence in the Court of Appeal:

On Sunday 15 January 2017, the Latvian crab trawler Senator left Båtsfjord port and sailed towards the crab catching field in the Sentralbanken ocean bank. Sentralbanken is on the Norwegian continental shelf, within the Norwegian 200-mile economic zone, slightly northeast of the so-called Loophole. and within what is called the fishery protection zone around Svalbard.

The Senator was under the Coast Guard's surveillance, and a Coast Guard vessel sailed to the area the Senator was located in shortly after. The next day, 16 January, the Coast Guard boarded the Senator to inspect it. It turned out that the boat had set out a total of 13 lines with a total of 2 594 pots to catch snow crab. The pots had been placed in the Sentralbanken ocean bank, at position 7433, 1N-03541.4E, as described in the penalty notices.

The captain showed the Coast Guard a permit to catch snow crab in the area in question that had been issued by the Latvian authorities on behalf of the EU.

The Coast Guard found that this permit was not valid, in that it believed that only the Norwegian authorities were able to grant such permits. The Coast Guard ordered the catching operations to stop, and ordered the captain to pull the pots out of the sea. There was a discussion between the crew on the Coast Guard and the captain and, after a while, without the pots having been pulled up, the Coast Guard ordered the boat into port in Norway, at first the order was for it to sail into Båtsfjord port, but this later changed to them sailing into Kirkenes port. The vessel was then seized by the police.

² Translator's note. The original document uses the term "aktsom", which is translated as "due care". However, the wording of section 26 is "negligent", and I have therefore followed this wording.



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Further details regarding the validity and significance of the permit/licence issued by the Latvian authorities:

Based on the evidence presented at the Court of Appeal, the Court finds the following fact to have been proved beyond reasonable doubt, in relation to the background for the vessel's permit/licence for snow crab catching in 2017 that was issued by the Latvian fishing authorities, the State Environmental Service:

Permits for fishing and catching in Norwegian areas must always be granted by the Norwegian authorities. The Court of Appeal does not need to take a stand on whether the physical document that grants a vessel permission is normally issued by the Norwegian fishing authorities, the EU or the vessel's flag state. The Court of Appeal finds that in this case it was not striking that the physical licence for the Senator had been issued by the Latvian authorities.

It had been issued as a result of an enquiry from Latvia to the EU, asking for permission to catch snow crab in the fishery protection zone. The European Commission, represented by the Directorate-General for Maritime Affairs and Fisheries, then sent an email to two employees at the Norwegian Directorate of Fisheries on 22 December 2016. The email listed a total of 16 vessels from Poland, Estonia, Lithuania and Latvia, including the vessel Senator, under the following text: *"(p)lease see below the list of vessels having a licence to fish for snow crab in the sea areas around Svalbard. You are kindly requested to transmit this list to your authorities."* A reply to the email was sent on 6 January 2017 which, with reference to section 1 of the Regulations Relating to the Prohibition against Catching of Snow Crab, pointed out that snow crab catching on the Norwegian continental shelf was prohibited for the vessels in question, that Norwegian legislation in this area would be enforced, and that any vessel that fished in contravention of the prohibition would be prosecuted. On the same day, the EU confirmed that the information from Norway had been forwarded to the correct party.

In the afternoon of 12 January 2017, the shipping company SIA North Star LTD sent an email to the general email address at the Ministry of Trade, Industry and Fisheries, informing it that their vessels were ready to begin catching snow crab in the fishery protection zone, and that all of the necessary certificates and licences were in order. They also asked for provision of the coordinates of areas they were not allowed to catch in, and asked whether they were also allowed to catch within the 12-mile boundary from Svalbard and the surrounding islands. The Ministry responded to the enquiry in an email sent in the afternoon of 15 January 2017. It informed them that Norway has exclusive rights to the Norwegian continental shelf, including to snow crab catching, and that this had been communicated to the EU on several occasions, most recently in a memorandum dated 9 January 2017, and that permits for such catching had not been granted to any EU vessels.



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Translation from Norwegian

The shipping company's owner and chairman of the board testified to the Court of Appeal that he was aware that Norway had introduced regulation of snow crab catching on the Norwegian continental shelf in the Barents Sea in 2015. Until then, the shipping company's four vessels had conducted catching operations on the continental shelf in the Loophole, mainly on the Russian side of the delimitation line, but also had conducted some operations on the Norwegian side. The shipping company met with Minister of Fisheries Per Sandberg in January 2016 in relation to the regulation, and discussed the shipping company's ability to obtain a catch permit. At the time, Mr Sandberg expressed doubts as to whether the shipping company would receive a permit. In his testimony, Mr Pildegovics acknowledged that he was also aware of the Norwegian standpoint regarding the scope of the Svalbard Treaty, and that the EU and Norway had different views regarding the ability of foreign vessels to fish and catch in the fishery protection zone around Svalbard. In court, he was unwilling to answer the prosecutor's questions about whether he would have stopped the Senator from its catching operations if he had read the email from the Ministry of Trade, Industry and Fisheries of 15 January 2017 before the vessel departed Båtsfjord quay that day.

When the Senator was inspected by the Coast Guard in the morning of 16 January 2017, the captain handed the inspectors a document called "*Captain's declaration*". Here the captain declared that he was catching snow crab pursuant to a licence from the Latvian authorities for areas I and IIb, including the fishery protection zone around Svalbard, that the licence was based on EU rules approved by the Council of Ministers on 13 December 2016, that the EU had repeatedly informed Norway about its view of the fishing rights of member states in maritime zones around Svalbard pursuant to the Svalbard Treaty, most recently in a memorandum dated 1 November 2016, and that the EU had forwarded the list of vessels holding a licence from the EU to catch snow crab in the Svalbard region to the Norwegian authorities. It concluded with the following:

Based on above, I declare:

My vessel is conducting legal fishing operations and any unjustified interference with it must be considered illegal by the Law of the Sea. Should you, as official representative of Norwegian Government, have any further inquiries or disagreement, it should be addressed to Latvian and EU officials and discussed at the level.

The document was signed by the captain, Rafael Uzakov, who acknowledged in his testimony in the Court of Appeal that he was familiar with the content of the declaration and the content of the documents referred to there. The declaration had been written by the shipping company, and Mr Pildegovics testified that it had been emailed to the vessel on 13 January 2017 for use in the event of an inspection of the vessel, and that the Coast Guard had not been informed about the licences that the EU had granted for the Svalbard region.



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Translation from Norwegian

Following an overall assessment, the Court of Appeals finds it to have been proved beyond reasonable doubt that both the shipping company and the captain considered it to be certain or overwhelmingly probable that the Norwegian authorities had not granted the Senator permission to catch snow crab on the Norwegian continental shelf, including in the fishery protection zone around Svalbard, and that the permit/licence issued by the Latvian authorities would be considered invalid by Norwegian supervisory authorities. Both parties were also aware that fishing and catching without a valid permit were criminal offences pursuant to Norwegian legislation.

Is the snow crab a sedentary species covered by the exclusive rights of the coastal state pursuant to article 77 (4) of the United Nations Convention on the Law of the Sea?

It follows from article 77 (1–3) of the United National Convention on the Law of the Sea that a coastal state has "sovereign" and "exclusive" rights to its continental shelf "for the purpose of exploring it and exploiting its natural resources". Norway's continental shelf extends through and past the entire fishery protection zone around Svalbard, cf. article 76. There is no doubt that the Senator was catching on the Norwegian continental shelf and this is not disputed.

The natural resources are described as follows in article 77 (4):

The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

The question in the matter is whether the snow crab is a "living organism" which "at the harvestable stage" is "unable to move except in constant physical contact with the seabed". The definition depends on an assessment of the species' physical and anatomical properties. Senior researcher Jan Henry Sundet from the Institute of Marine Research has studied crabs in general since 1993, and the snow crab in particular since 2006, and testified before the Court of Appeal as an expert witness. Based on his testimony, the Court of Appeal finds that the snow crab does not have any physical or anatomical properties that allow it to rise up from the seabed on its own or swim. It has negative uplift in the sea and cannot adjust its internal pressure. The exception is when it is a larva, when it floats in the sea, but it is not harvestable at this stage, cf. the definition in article 77 (4). According to Sundet, there is no disagreement among the research communities in Norway, the USA, Canada, Greenland and Russia that the snow crab biologically meets the definition in the United Nations Convention on the Law of the Sea. Sundet also explained that the snow crab roams, and keeps migrating to new areas in the Barents Sea, it moves further down as it ages, it roams to mate and it roams to find food.



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The indicted parties have argued that the snow crab is able to use its feet to lift itself up from the seabed and crawl, for example on the outside of a pot, and that individuals often lie or crawl on top of each other on the seabed, so that each individual is not in constant contact with the seabed. Furthermore that a crab that e.g. has crawled up on a rock on the seabed can lose its grip and fall down and, during the time this takes, will move without being in constant physical contact with the seabed. The Court of Appeal does not doubt this, but this does not alter the anatomy of snow crabs, and the examples require the existence of physical aids, ocean currents, etc. which release the crab from the seabed. In the absence of these factors, there is no doubt that the snow crab cannot move without being in constant physical contact with the seabed.

The indicted parties have also argued that the legal concept "*sedentary species*", as used in the United Nations Convention on the Law of the Sea, does not necessary have the same content as the biological concept. Particular reference was made to the preparatory works to the Geneva Convention (Convention on the Continental Shelf) of 1958, which at the time was the precursor to the United Nations Convention on the Law of the Sea. They have further submitted that migratory species are not considered sedentary, and that state practice is not consistent in terms of recognizing the crab as a sedentary species pursuant to the conventions.

The Court of Appeal's interpretation of the United Nations Convention on the Law of the Sea is based on article 31 (1) of the Vienna Convention on the Law of Treaties, worded as follows in Norwegian Supreme Court Reports 2012 p. 494, paragraph 33:

The assessment must be based on the ordinary understanding of the wording of the convention, read in the context in which it is found and in light of the purpose of the convention, cf. article 31 (1) of the Vienna Convention on the Law of Treaties which codifies general international law on this point. The parties' subsequent practice must also be granted weight if it establishes agreement on the interpretation, cf. article 31 (3 b).

The wording of the United Nations Convention on the Law of the Sea stipulates which living organisms to consider sedentary species. The wording provides a clear starting-point for the assessment of whether the snow crab is part of the resources a coastal state has exclusive rights to on the continental shelf. The snow crab being able to move across not inconsiderable areas, see among others Sundet's testimony and the research results of Russian researchers, does not preclude it from meeting the definition in article 77 (4) of the United Nations Convention on the Law of the Sea. The fact that some definitions of the concept "*sedentary*" exclude migratory or mobile species thus cannot be ascribed independent meaning when interpreting the convention.

The wording in article 77 (4) of the United Nations Convention on the Law of the Sea builds on the wording in article 2 (4) of the Geneva Convention. The preparatory works to the Geneva



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Convention indicate that at the time the states disagreed on which resources and species should be covered by the rights of the coastal state on the continental shelf, and that there was therefore some disagreement regarding the wording of the Convention on this point. However, in the view of the Court of Appeal, these preparatory works – read as a whole – do not provide grounds for a restrictive interpretation of the wording. Nor does the discussion from the 1950s appear to have resumed in connection with the United Nations Convention on the Law of the Sea, which clearly indicates that the text of the Convention must be interpreted based on a natural understanding of the wording.

State practice also indicates some disagreement regarding the crab species that might be covered by article 77 (4) of the United Nations Convention on the Law of the Sea. It follows from a bilateral fisheries agreement between the USA and Japan in 1964 that the states disagreed at the time on the extent to which the king crab was covered by the exclusive rights of the coastal state on the continental shelf. However, Norway and Russia agree that the snow crab is a sedentary species that is covered by the rights, cf. among others the records of the ministerial meeting of 17 July 2015. A letter dated 5 August 2015 from the EU's Director General for Maritime Affairs and Fisheries clearly indicates that also the EU agrees with the view of Norway/Russia. The same is true of Canada, cf. the judgment of 31 January 2003 from the Provincial Court of Newfoundland and Labrador. The contracting parties are thus still far from agreeing that crab species whose anatomy meet the conditions described in article 77 (4) are regardless not meant to be covered by the provision.

Nor does the Court of Appeal find grounds for the indicted parties' submission that the purpose of article 77 (4) in itself must entail a restrictive interpretation of the wording, contrary to how many states interpret it.

It follows from this that Norway, with a legal basis in article 77 of the United Nations Convention on the Law of the Sea has sovereign and exclusive rights to exploit the snow crab, which is a "*sedentary species*", on the Norwegian continental shelf. The consequence is that no party may catch snow crab here without the express consent of the Norwegian authorities, cf. article 77 (2).

There is no doubt that the act described in the penalty notices is a criminal offence pursuant to Norwegian regulation, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab, cf. section 1. Section 1 states, as it did at the time of act, that "*there is a prohibition against snow crab catching in the Norwegian territorial sea and internal waters, and on the Norwegian continental shelf by Norwegian and foreign vessels.*" It is not disputed that the catching occurred on the Norwegian continental shelf, cf. section 1 of the Act Relating to Scientific Research and Exploration for and Exploitation of Subsea Natural Resources other than Petroleum Resources.



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Is the act nonetheless exempt from punishment because the Regulations are contrary to Norway's obligations pursuant to international law?

The Regulations Relating to the Prohibition against Catching of Snow Crab were laid down pursuant to section 16 subsection 2 of the Marine Resources Act. Section 6 of the Act states the following:

This Act is subject to any restrictions deriving from international agreements and international law otherwise.

Section 2 of the Penal Code states the same.

The indicted parties have submitted that the Regulations – in accordance with how the right to a dispensation in section 2 is practised by the Norwegian authorities – are contrary to the requirement of equal treatment in the Svalbard Treaty, cf. articles 2 and 3, and are invalid. The Court of Appeal interprets the submission to mean that section 1 of the Regulations, cf. section 5, with further references to the Marine Resources Act, thus cannot be applied to the indicted parties, and that they must be acquitted.

It follows from article 1 of the Svalbard Treaty that Norway has full and absolute "sovereignty" over the archipelago. The principle of equal treatment of the contracting parties is set out in several of the provisions. In this case, it is particularly article 2 (1–2) that are relevant, which are worded as follows:

Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.

Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any one of them.

The fact that Norway through legislation or quota regulations restricts or prohibits the exploitation of the resources on and around Svalbard – on the grounds of other objective criteria than nationality – thus is not contrary to the principle of equal treatment, cf. among others Norwegian Supreme Court Reports 2014 p. 272, paragraphs 46–48. The principle of equal treatment is elaborated on as follows in paragraph 49:



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When article 2 of the Svalbard Treaty requires measures to be applied equally and "without any exemption, privilege or favour whatsoever, direct or indirect", this must be understood to mean that the treaty also prohibits measures that effectively entail differential treatment on the grounds of nationality. However the principle of equal treatment must also be balanced against the principle of Norway's sovereignty pursuant to article 1 and the need for latitude to manage the natural resources in a fully satisfactory manner. Article 2 (2) illustratively states that Norway has the authority to take "suitable" measures. This supports the view that it is a matter of a considerable margin for discretion. A measure which effectively means that the contracting parties and their vessels are treated differently will therefore only constitute discrimination contrary to the treaty if the measure promotes interests that are irreconcilable with the object and purpose of the Svalbard Treaty, or if it is disproportionate.

Following the presentation of the evidence, the Court of Appeal finds that the Norwegian prohibition against snow crab catching is based on the need for information retrieval and a desire for sustainable management of this relatively new species on the Norwegian continental shelf, including its impact on preservation of important marine resources in the Barents Sea. The right to grant a dispensation from this prohibition is therefore strictly regulated in sections 2–5 of the Regulations. Reference is accordingly made to the witness Mr Sundet's testimony to the Court of Appeal, to the Ministry of Trade, Industry and Fisheries' consultation letter dated 24 October 2014 and to the Directorate of Fisheries' letter dated 12 January 2018 to the lawyer Mr Østgård. The Court of Appeal finds that the general prohibition against the catching of snow crab in section 1 of the Regulations – which applies to both Norwegian and foreign vessels – has objective grounds and is not contrary to the principle of equal treatment in the Svalbard Treaty. Nor has this been submitted by the indicted parties.

It follows from section 2 of the Regulations that the Norwegian fisheries authorities may grant dispensations from the prohibition. The provision is as follows:

A dispensation may be granted from the prohibition against snow crab catching to vessels that have been awarded a commercial catching permit pursuant to the Act Relating to the Right to Participate in Fishing and Hunting for catching outside the territorial waters. If the commercial catching permit is restricted to catches of specific species, a dispensation may only be granted if the commercial catching permit covers snow crab catching. The dispensation will be granted if the following conditions are met:

- Vessels that participate in snow crab catching may be ordered to submit more detailed reports than those kept in the catch logbook if the Institute of Marine Research requires data. One example may be the testing of catches.*
- Observers from the Institute of Marine Research and the Directorate of Fisheries have the right to participate on vessels that catch snow crab free of charge.*



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Applications for a dispensation must be sent to the Directorate of Fisheries.

The requirement of a commercial catching permit pursuant to the Act Relating to the Right to Participate in Fishing and Hunting means that a dispensation from the prohibition against catching can only be granted to Norwegian vessels that are owned by Norwegian citizens or foreigners who are resident in Norway, cf. sections 2 and 5 of the Act Relating to the Right to Participate in Fishing and Hunting. The provision does not grant any vessels the right to a dispensation from the prohibition against catching. The Court of Appeal finds that the decision regarding whether to grant a dispensation in full or in part is at the free discretion of the administration, within the frames of the conditions stipulated in section 2 (1–2) of the Regulations, the purpose of the regulation and the boundaries for abuse of lawful authority.

In connection with the case, the Ministry has stated that dispensations for snow crab catching at present have only been granted to vessels owned by Norwegian citizens, with the exception of five Russian vessels that caught snow crabs in 2016 pursuant to a bilateral agreement between Norway and Russia. The total catch has been set at a maximum of 4 000 tonnes for both 2017 and 2018. Reference is made to the Directorate of Fisheries' letter and the Ministry of Trade, Industry and Fisheries' email of 12 January 2018, both to the lawyer Mr Østgård. There is no evidence to support the assertion that the prohibition was introduced in order to favour Norwegian citizens by means of a dispensation scheme.

However, the Court of Appeal does not find it necessary to discuss the matter of the extent to which section 2 of the Regulations is contrary to the principle of equal treatment in the Svalbard Treaty, as the act in any circumstance is a criminal offence according to the general principles of criminal law.

It is clear that the vessel Senator did not hold a permit from the Norwegian authorities to catch snow crab on the Norwegian continental shelf. The prohibition in section 1 of the Regulations is not contrary to Norway's obligations pursuant to international law, and no vessel, regardless of nationality, has the right to have a dispensation granted. Under these circumstances, it must be clear that the international obligations, in this case the Svalbard Treaty, in themselves cannot suspend a prohibition against fishing, catching or other exploitation of resources that a state has a right – and perhaps also an obligation – to regulate.

In addition, the Supreme Court has affirmed in a number of cases that any party that acts without a valid permit must not be acquitted in any event, even if rejection of an application for a permit is deemed to be invalid or in a situation where such an application would have been granted if a correct decision had originally been made. Reference is made to Norwegian



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Supreme Court Reports (Rt.) 1953 p. 1382, Rt. 1954 pp. 354 and 923, Rt. 1961 p. 494, and Eckhoff/Smith, *Forvaltningsrett*, 10th edition, p. 445.

The Court of Appeal accordingly finds that snow crab catching on the Norwegian continental shelf without a vessel holding a valid dispensation from the prohibition is a criminal offence, regardless of whether the Svalbard Treaty applies in the area in question, and regardless of whether section 2 of the Regulations or its practice represent a breach of the principle of equal treatment. It therefore is not necessary for the Court of Appeal to examine these issues in greater detail.

There is no doubt that Rafael Uzakov acted wilfully, in terms of his catching snow crab on the Norwegian continental shelf in the fishery protection zone around Svalbard. As shown in the discussion above, the Court of Appeal is of the opinion that both the captain and the shipping company's chairman of the board/owner were also aware, or at least considered it to be overwhelmingly probable, that the vessel did not hold a valid permit from the Norwegian authorities to conduct such catching operations. The captain was experienced and was aware of the disagreement between the EU and Norway regarding the rights to snow crab catching on the continental shelf and in the fishery protection zone around Svalbard. In terms of the consequences pursuant to criminal law, the act was at the very least negligent. There is no ignorance of the law that may provide grounds for exemption from punishment, cf. section 26 of the Penal Code and Norwegian Supreme Court Reports 2009 p. 1229, paragraphs 22–24.

The conclusion is that Rafael Uzakov must be convicted pursuant to the penalty notice.

The Court of Appeal finds it clear that there are also grounds for penalising the shipping company with a fine, and that such a penalty should be imposed in this case, cf. sections 27 and 28 of the Penal Code. The shipping company had an active role in terms of starting the catching operations, despite the shipping company's email dated 12 January 2017 to the Ministry of Trade, Industry and Fisheries not having been answered, it was the shipping company that furnished the captain with the "*Captain's declaration*" form, and the owner/chairman of the board was aware that the Norwegian authorities considered the act to be illegal. The consideration of general deterrence clearly calls for a penalty to be imposed on the enterprise.

Sentencing

The determination of the size of the fine to be paid by the captain places particular emphasis on the objective severity of the offence, the level of guilt, the preventive nature of the penalty and to some extent the financial circumstances of the captain. Mr Uzakov has stated that he has had no income since April 2017, after having worked as a captain on crabbing vessels for 12 years. He was fined NOK 20 000 in 2016 for catching king crab on the Norwegian continental shelf in



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the Loophole in the Barents Sea. It has been found that this violation was due to negligence, as the crab pots were on the Norwegian side of the delimitation line.

The Court of Appeal agrees with the District Court that a NOK 40 000 fine is considered appropriate. Further reference is made to the District Court's justification of the penalty on page 21 of the District Court's judgment, which the Court of Appeal concurs with. Pursuant to article 73 (3) of the United Nations Convention on the Law of the Sea, no alternative term of imprisonment is ordered.

The Court of Appeal also agrees with the District Court that a fine of NOK 150 000 should be imposed on the shipping company. In connection with the matter in 2016, confiscation of NOK 61 000 was imposed on the shipping company, but shortly after it violated Norwegian criminal legislation again, this time wilfully. Further reference is made to the District Court's justification on page 22 of the judgment, which the Court of Appeal concurs with.

Confiscation

Pursuant to section 65 of the Marine Resources Act, all or part of the illegal catch and/or gear, objects, property, facilities or vessels that were used in the contravention or the value of this may be confiscated in favour of the State. Confiscation may only take place where it is *"necessary and proportionate"*, cf. Norwegian Supreme Court Reports 2014 p. 996, paragraphs 15–16, and further references. It follows from paragraphs 18–22 that the need for effective control of the management of resources and the preventive purpose of the confiscation are key factors in the determination of whether to impose confiscation. A wilful breach of the prohibition against catching is obviously a matter that undermines the authorities' ability to perform oversight and which in this case must result in confiscation.

In determining the amount to be confiscated, the value of the illegal catch normally provides the starting-point, but this is only a starting-point. *"...[A]n overall assessment of the specific circumstances, particularly the nature of the violation and the financial consequences, the level of blame and the shipping company's financial circumstances"* must be performed, cf.

Norwegian Supreme Court Reports 2003 p. 1543, paragraph 19. The assessment of proportionality must also take consideration of the act being subject to fines amounting to NOK 190 000.

The snow crab catching operations had just begun when the Senator was inspected by the Coast Guard. Thirteen lines with a total of 2 594 pots had been set out. When the vessel was brought in, the pots remained in the sea and were sold later. The value of the illegal catch therefore is not known, but it is found that the potential for illegal gains was considerable. The vessel was rigged for crab catching and production, and had been rebuilt in May 2015. Information has not been provided about the value of the vessel Senator, but Mr Pildegovics stated that another of



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the company's crabbing vessels was sold in 2017 for USD 1.1 million. The amount to be confiscated should also reflect the fact that the shipping company was aware that this catching represented a breach of Norwegian legislation, and that confiscation was imposed on the shipping company as recently as in 2016 due to illegal crab catching. The shipping company having lost great amounts since 2016 due to Russian and Norwegian regulation of crab catching in the Barents Sea cannot have considerable importance attached to it.

Like the District Court, the Court of Appeal finds that the confiscation amount should be set at NOK 1 000 000, following an overall assessment.

Costs of the case

The decision made on the appeal is adverse to the indicted parties, and there are grounds to impose liability for the costs of the case in the District Court and the Court of Appeal, cf. section 436 subsection 2 of the Criminal Procedure Act, cf. subsection 1. Taking the captain's financial circumstances into consideration, the court does not find grounds to impose such liability on him in addition to the fine, cf. section 437 subsection 3. The same is not true for the shipping company. The Court of Appeal finds that liability for the costs of the case, which the District Court set at NOK 200 000, should be maintained, also after the hearing in the Court of Appeal.

The judgment is unanimous.



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CONCLUSION OF JUDGMENT

1. Rafael Uzakov, date of birth 8 May 1973, is convicted of a violation of section 61 of the Marine Resources Act, cf. section 4, cf. section 16, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab of 19 December 2014 with subsequent amendments, cf. section 1, and is imposed a fine of NOK 40 000 – forty thousand.
2. The shipping company SIA North Star LTD is convicted of a violation of section 61 of the Marine Resources Act, cf. section 4, cf. section 16, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab of 19 December 2014 with subsequent amendments, cf. section 1, cf. section 27 of the Penal Code, and is imposed a fine of NOK 150 000 – one hundred and fifty thousand.
3. The shipping company SIA North Star LTD is convicted of a violation of section 61 of the Marine Resources Act, cf. section 4, cf. section 16, cf. section 5 of the Regulations Relating to the Prohibition against Catching of Snow Crab of 19 December 2014 with subsequent amendments, cf. section 1, and section 65 of the Marine Resources Act, and is imposed confiscation of NOK 1 000 000 – one million – in favour of the State.
4. The shipping company SIA North Star LTD is ordered to pay the costs of the case in the District Court and the Court of Appeal of NOK 200 000 – two hundred thousand.

Monica Hansen Nylund

Pål Morten Andreassen

Siri Vigmostad

Halgeir Ringjord

Hilde Grimstad

Gry Agnete Berglund Brandvoll

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*This electronic document is identical to the signed original:
Cecilie Kaknes (sign.)*



True translation certified
Oslo, 27 February 2018

Cristina Pulido Ulvang
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Government authorized translator

