

## Hålogaland Court of Appeal - Judgment - LH-2017-45056

Instance	Hålogaland Court of Appeal – Judgment
Date	2017-06-28
Published	LH-2017-45056
Key words	Criminal law. International law. Infringement of Section 61, cf. Section 16 of the Maritime Resources Act, cf. regulation on the prohibition of harvesting snow crabs.
Summary	<p>A Lithuanian shipping company and its skipper were, based on not accepted orders of collections and fines respectively, indicted for illegal harvesting of snow crabs on the Norwegian continental shelf outside the 200-mile limit in the Loop Hole in the Barents Sea. Both of the defendants were acquitted by the District Court due to alleged conflict between the regulation and the NEAF Convention. The Court of Appeal found that the District Court’s judgment was based on the wrong application of the law, and that the regulation was neither in breach of the Convention on the Law of the Sea nor the NEAF Convention. Furthermore, the Court of Appeal concluded that Norway has jurisdiction to enforce its sovereign rights on the continental shelf, including by implementing criminal proceedings against foreigners who infringe these rights. The District Court’s judgment with main proceedings was repealed.</p>
Case procedure	Øst-Finnmark District Court TOSFI-2016-127201 – Hålogaland Court of Appeal LH-2017-45056 (17-045056AST-HALO). Appeals to the Supreme Court allowed (HR-2017-1935-U) then rejected; see judgment HR-2017-2257-A. (New hearing in the District Court; TOSFI-2018-4794)
Parties	Limited appeal I: The chief constable of Finnmark against Arctic Fishing (Attorney at Law Oddbjørn Slinning). Limited appeal II: The chief constable of Finnmark against A (Attorney at Law Vidar Zahl Arntzen).
Author	Appellate Judge Monica Hansen Nylund, Presiding Court of Appeal Judge Dag Nafstad, Appellate Judge Synnøve Nordnes.
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The case concerns the harvesting of snow crabs on the Norwegian continental shelf in the Loop Hole in the Barents Sea.

Arctic Fishing is a Lithuanian shipping company that operates within fishing and harvesting. 18 July 2016, the chief constable of Finnmark, under the provisions of Section 65 of the Maritime Resources Act, issued a collection order against the company of NOK 2,500,000. The basis for the order was illegal harvesting of snow crabs on the Norwegian continental shelf in the Loop Hole. The collection amount was set to correspond to the value of the harvest.

A is 57 years old and lives in Lithuania. He worked as a skipper at Arctic Fishing. The chief constable of Finnmark issued an order against him on the same day, a fine of NOK 15,000.

None of the orders were accepted, and both the shipping company and the skipper were indicted to Øst-Finnmark District Court based on this for infringing:

**Section 61, cf. Section 16 of the Maritime Resources Act, cf. Regulation relating to the prohibition against harvesting of snow crabs Section 1**

*for having harvested snow crabs on the Norwegian continental shelf.*

**Basis:**

*During the period between 25 May to 16 July 2016, A as skipper on the ship Juras Vilkas, reg. no. [no], harvested a total of 80,340 kg of snow crabs on the Norwegian continental shelf without permission. The value of the harvest was NOK 2,530,710.*

The cases were united for a joint hearing, and on 24 January 2017, Øst-Finnmark District Court pronounced a judgment with the following conclusion of the judgment:

- A, born 0.0.1960, is acquitted.
- Arctic Fishing is acquitted.

The District Court has reasoned its acquittal as such:

*The NEAF Commission has the administrative right in the “Loop Hole”, cf. Article 3 no. 2 of the NEAF Convention and the NEAFC Scheme of Control and Enforcement Article 1 (b). Norway has given its consent to the NEAFC Scheme of Control and Enforcement, and is therefore obliged to respect the licences and permissions that are issued pursuant to the NEAFC’s administrative regime, including on the Norwegian continental shelf in the “Loop Hole”. The Court finds it undoubtful, as well as undisputed, that Juras Vilkas was harvesting snow crabs in the Loop Hole pursuant to a license, issued in line with the guidelines set by the NEAF Convention and the NEAFC Scheme of Control and Enforcement. The Court concludes that the national prohibition against harvesting snow crabs on the Norwegian continental shelf in the Loop Hole is inapplicable in this case, as the prohibition is in conflict with Norway’s commitments pursuant to the NEAF Convention and the NEAFC Scheme of Control and Enforcement, cf. Section 2 of the Penal Code (2005).*

In addition, the Court states the following relating to the application of Norwegian penal legislation:

*The part of the ocean floor that is on the westside of the dividing line of the Loop Hole belongs to the Norwegian continental shelf. This is undoubtful, but in any case, the Court refers to the area being acknowledged to be on the Norwegian continental shelf with recommendations from the “Commission on the Limits on the Continental Shelf” of 27 March 2009, cf. Article 76 of the Convention on the Law of the Sea. The point of departure pursuant to Section 4 of the Penal Code (2005) is that the penal legislation applies in Norway and on Norwegian territory. It may be questioned whether the penal legislation is applicable to acts committed by foreign-registered vessels on the Norwegian continental shelf, cf. Section 4, second paragraph, letters a to c of the Penal Code (2005) and Article 77 of the Convention on the Law of the Sea. However, the Court finds it to be inexpedient to go into more details on this ....*

The chief constable of Finnmark has, for both the defendants, appealed the application of law relating to the guilt issue. In the Court of Appeal's decisions of 30 March 2017, the appeals were referred to an appeal negotiation.

The appeal negotiations were held in Tromsø on 15 June 2017. None of the defendants attended. Such documentation as stated in the court record was submitted.

The **prosecutor** argued that the District Court's application of the law is incorrect, both as regards the validity of harvesting snow crabs in the relevant area, and the application of Norwegian penal legislation. As regards the issue of the validity of the regulation, it is argued that there is no conflict between the Convention on the Law of the Sea and the NEAF Convention, or between the Maritime Resources Act and the NEAF Convention. The NEAF Convention has never given a recommendation to harvest snow crabs in the Loop Hole, cf. Article 6 of the Convention, and state case-law from Norway, Russia and the EU support the prosecutor's opinion that neither the Convention on the Law of the Sea nor the NEAF Convention give any other coastal state rights to such harvest.

There is double authority for Norway's access to implement criminal proceedings for the illegal harvesting. Reference is made to Section 61, cf. Section 4 of the Maritime Resources Act, cf. regulation Section 1, cf. Article 77 of the Convention on the Law of the Sea and Section 6 of the Penal Code, cf. Article 77 of the Convention of the Law of the Sea.

The **prosecutor** laid down a plea for the District Court's judgment to be rejected.

The **defendants** argued that the District Court's application of the law is correct. It was argued that the NEAF Convention has priority over the Maritime Resources Act, and that the regulation on the prohibition against harvesting snow crabs in the Loop Hole must be waived because there is a conflict, cf. Section 6 of the Maritime Resources Act. Arctic Fishing got permission from Lithuanian authorities pursuant to the system of the Convention, and the harvest has been carried out pursuant to the permit. Russia has now suggested to change the NEAF Convention, which shows that the country has assessed this as necessary to prevent conflicts between the sources of law, and will therefore give the coastal state access to prosecute the party that is infringing on the coastal state's rights pursuant to Article 77 of the Convention on the Law of the Sea.

There is in any case no authority to prosecute foreigners who are infringing Norway's exclusive rights to harvest snow crabs on the continental shelf in the Loop Hole. Article 77 of the Convention on the Law of the Sea does not give Norway the right to or duty to prosecute, cf. the condition on this in Section 6 of the Penal Code. Section 4 or 5 of the Penal Code also do not allow for this. Article 92 no. 1 of the Convention on the Law of the Sea sets requirements to the authorisations that may restrict the rule that it is the flag state that has jurisdiction over vessels on the open sea. Such authority does not exist.

Both **defence counsels** laid down a plea for the appeal to be rejected.

## The Court of Appeal remarks:

Pursuant to the District Court's judgment and the parties' agreement, the Court of Appeal bases itself on the following:

*The company Arctic Fishing operates within the fishing industry and inter alia owns the vessel "Juras Vilkas", which is used for harvesting crabs. A is a skipper and was the captain of Juras Vilkas in 2016. This was the first time A was going to harvest crab.*

*On 31 December 2015, the Latvian Ministry of Agriculture and Fisheries issued a license to Arctic Fishing pursuant to the NEAF Convention, which gave Juras Vilkas the permission to harvest snow crabs on the Norwegian side of the dividing line in the Loop Hole. The license was valid from 1 January 2016 to 31 December 2016.*

*Juras Vilkas, with crew, was in Båtsfjord during the spring of 2016 to prepare for the sailing and harvesting pursuant to the issued license. The ship, with crew, sailed to Kirkenes, inter alia to pick up oil, before the sailing went to the harvesting area in the Loop Hole. No harvesting was done during this sailing, it was only done once the vessel had arrived by the harvesting area in the Loop Hole, and fish pots were set out in chains to harvest snow crabs.*

*After finishing the harvesting assignment, Juras Vilkas docked in Båtsfjord on the morning of 15 July 2016 to unload. Meanwhile, the Coast Guard had received a request from the Coast Guard base on Sortland, which requested an inspection of Juras Vilkas to find out whether they had harvested snow crabs in the Loop Hole. The Coast Guard boarded the vessel for inspection after it had docked in Båtsfjord. The Coast Guard was presented with the harvesting record and the vessel's electronic ship's logbook, where it was stated that Juras Vilkas had harvested snow crabs on the Norwegian continental shelf in the Loop Hole. A was given the status as suspect and he was given his rights. The Coast Guard carried out additional inspections by collecting evidence and data information from the period of time Juras Vilkas had been in the relevant area to harvest. The police were called in and subsequently, interrogations of A were carried out.*

*The Court finds it undoubtful that Juras Vilkas, with A as skipper, during the period from 25 May 2016 to 13 July 2016, harvested 80,340 kg of snow crabs on the Norwegian continental shelf in the "Loop Hole". Furthermore, the Court finds it undoubtful that the value of the harvest was NOK 2,530,710.*

The case for the Court of Appeal raises two questions. Firstly, if there is any conflict between Article 77 of the Convention on the Law of the Sea, the NEAF Convention and the regulation relating to the prohibition against harvesting snow crabs Section 1, on the Norwegian continental shelf outside of the economic zone of the Loop Hole, so that the regulation must be waived due to our international commitments, cf. Section 2 of the Penal Code and Section 6 of the Maritime Resources Act. Secondly, the case raises questions relating to the event there is authority to prosecute foreigners operating illegal harvesting in this area.

## **The validity of the regulation of 19 December 2014 no. 1836 relating to the prohibition against the harvest of snow crabs**

The Loop Hole is the designation of an international ocean area in the Barents Sea, which in the south borders to both Norwegian and Russian economic areas, and east in the fishing protection zone by Svalbard. The disposal of the continental shelf in the Loop Hole, including outside the states' economic zones, is divided between Norway and Russia by the borderline agreement from 2010, cf. determined pursuant to Article 83, cf. Article 76 of the Convention on the Law of the Sea.

Article 77 no. 1 and 2 stipulate the following:

- 1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.*
- 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.*

Pursuant to Article 77 no. 4, the natural resources included in no. 1 inter alia include "*living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil*".

The parties agree that the snow crab is such a sedentary species, and that the Convention on the Law of the Sea gives Norway an exclusive right to harvest on the Norwegian part of the shelf, including beyond the 200-mile limit. The Court of Appeal bases itself on this.

The NEAF Convention (Convention on the future multilateral collaboration related to fishing in the North East Atlantic Sea) became effective 17 March 1982, and is based on inter alia Article 118 of the Convention on the Law of the Sea. The introduction to the NEAF Convention states that the parties shall comply with relevant decisions in the Convention on the Law of the Sea – "*(r)ecognising the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 ...*". Pursuant to Article 2, the purpose of the Convention is sustainable exploitation of the fishing resources in the areas that are part of the Convention,

including the Loop Hole. The Convention is enforced by the North East Atlantic Fisheries Convention, cf. Article 3 and 4, which consists of representatives from several countries, including Norway, Russia and the EU.

Article 5 contains provisions on the procedure for when the Commission shall give recommendations for fishing outside the member states' jurisdiction. Such recommendations shall be given when a proposal for fishing achieves a qualified majority when the member states vote. For the Commission to be able to give recommendations on fishing within one of the member states' jurisdiction areas, however, Article 6 states that the member state in question asks for permission and that the state then agrees to the Commission's recommendation.

After processing the evidence, the Court of Appeal bases itself on Norway, pursuant to Article 77 of the Convention on the Law of the Sea, having the exclusive right to harvest snow crab on the Norwegian part of the continental shelf in the Loop Hole. Furthermore, Norway has never asked the NEAFC to give recommendations for any such harvest, cf. Article 6 of the NEAFC. There is also no documentation that the Commission has ever given such recommendations for the area in question. However, there is documentation that the Commission – after several proposals from the EU during 2015 – has rejected giving recommendations to harvest snow crabs in the Loop Hole. When hearing the last proposal during the fall of 2015, which originally came from Latvian authorities, reference is made in letters from both Norwegian and Russian authorities to the NEAFC, to Article 77 of the Convention on the Law of the Sea, and to the fact that the Commission cannot give recommendations to harvest sedentary species on the continental shelf in the Loop Hole without permission from the coastal state. It can be seen that the EU agrees in a letter of 5 August 2015 from the EU's fishing director, where all the member states are asked to revoke issued licenses for harvesting snow crabs in the Loop Hole, and not issue new ones. Lithuanian authorities were in addition, by a letter of 29 December 2015 from the Norwegian embassy, explicitly informed of Norway's sovereign rights to sedentary species on the continental shelf in the Loop Hole.

The regulation on the prohibition of harvesting snow crabs on the Norwegian continental shelf is founded in Section 16, second paragraph letter c) of the Maritime Resources Act. The law applies with the limitations that may follow from international agreements and international law in general, cf. Section 6. The coastal state's sovereign rights on the continental shelf is clearly stated in Article 77 of the Convention on the Law of the Sea, and inter alia includes harvesting snow crabs. Both the Norwegian and the Russian continental shelves in the Loop Hole have been established as is specified in the Convention. The introduction of the NEAFC also states that it shall be second to the rights that are established through the Convention on the Law of the Sea. For the relevant matter, the harmonisation between the Conventions is carried out by determining different conditions for the competence of the Commission, depending on whether proposals for recommendations outside or inside of one of the member states' jurisdiction areas are submitted, cf. Articles 5 and 6 of the NEAFC. In the latter case, the coastal states' exclusive rights pursuant to Article 77 of the Convention on the Law of the Sea are maintained. The Court of Appeal bases itself on both Norway, Russia and the EU agreeing on the understanding of the regulations, and that the NEAFC does not limit the rights that have been established through the Convention on the Law of the Sea. The fact that Russia recently submitted a proposal for a specified provision to be included in Article 4 of the NEAFC Scheme of Control and Enforcement, can under the circumstances not be used to support that Russia is currently unsure of its rights on the continental shelf in the Loop Hole.

The Court of Appeal believes there is no conflict between the prohibition against harvesting snow crabs on the Norwegian continental shelf in the Loop Hole and international agreements or international law in general. The District Court's judgment is therefore based on an incorrect application of the law as regards the relationship between the NEAFC, the Convention on the Law of the Sea and the regulation on the prohibition against harvesting snow crabs.

Considering the case's further hearing, and the premises of the District Court, together with the parties' procedures during the appeal negotiations, the Court of Appeal finds reason to also assess the issue of applying Norwegian penal legislation when infringing Norway's sovereign rights in this area.

## **The application of Norwegian penal legislation on the continental shelf outside of the economic zone in the Loop Hole**

The case concerns the infringement of Section 61, cf. Section 16, second paragraph letter c) of the Maritime Resources Act, cf. the regulation on the prohibition against harvesting snow crabs. The law inter alia applies to the Norwegian continental shelf, cf. Section 4, and it applies to everyone, including foreigners, cf. Section 5. The same is stated in Section 1 of the regulation.

Part 1 of the Penal Code applies with the limitations that may follow from other law, cf. Section 1 of the Penal Code. The Maritime Resources Act is a special act with priority over the Penal Code. The limitations specified in Sections 4-6 in the Penal Code concerning local and personnel application, are therefore insignificant in this case.

The Maritime Resources Act applies with the limitations that follow from international agreements and international law in general, cf. Section 6. Thus, the question is whether the Maritime Resources Act's local or personnel application area shall be limited because of this. In St.prp.no.37 (1995-1996) page 53, which was submitted to the Storting in connection with the ratification of the Convention on the Law of the Sea, the department, in line with previous statements from the International Law Commission, based itself on the expression "*sovereign rights*" in Article 77 undoubtedly also including jurisdiction to prosecute any infringements of the state's rights pursuant to the article.

The Court of Appeal cannot find that the Convention on the Law of the Sea or international law in general contain limitations in the coastal state's right to enforce and prosecute infringements of the sovereign rights following from Article 77. In relation to this, the defence counsel have referenced Article 92 no. 1, cf. Article 78 of the Convention on the Law of the Sea, after which it is the flag state that has jurisdiction of vessels on the open sea, and where exceptions from this require explicit authorisation. Article 92 stipulates that this rule applies unless otherwise "*explicitly sanctioned by international treaties or in this Convention*". The Court of Appeal agrees with the prosecutor's office that the state's rights pursuant to Article 77 includes an explicit exemption from Article 92. From the wording in Article 77 no. 1 and no. 2, the need to give the rights following from the provision real content and protection, it is unlikely that the coastal state is supposed to be without effective tools to be able to enforce them. In that case, it would mean that foreign vessels and installations could easily infringe on the rights of the state unless the flag state had its own sanctions, and interest in, pursuing the act. The rights in Article 77 being illusory is unlikely to be in line with the intention.

Pursuant to this, the conclusion is that the District Court's judgment is based on an incorrect application of the law, and that the judgment with main proceedings shall be revoked for both of the defendants, cf. Section 345, second paragraph, second sentence of the Criminal Procedure Act, cf. Section 347, first paragraph.

The judgment is unanimous.

### *Conclusion of judgment:*

*The District Court's judgment with main proceedings is revoked for both of the defendants.*