

The Supreme Court of Norway - Judgment - HR-2017-2257-A

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Keywords	Criminal law. International law. Catching of snow crab.
Summary	<p>A Lithuanian vessel had been catching snow crab on the Norwegian continental shelf in the Loophole, without a Norwegian permit. The Supreme Court concluded, like the Court of Appeal, that the act committed was punishable under the penal provision in the Maritime Resources Act section 61, cf. section 16, cf. Regulation on the Prohibition against Catching of Snow Crab section 1. The Norwegian participation in the Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries (the NEAFC Convention) did not involve consent to a vessel with a Lithuanian permit catching snow crab in the Loophole. The provisions on control measures in the Northeast Atlantic Fisheries Commission's NEAFC Scheme did also not involve consent. Norway was thus not subject to any obligation under international law to accept catching of snow crab in the Loophole from a Lithuanian vessel without a Norwegian permit, see the Maritime Resources Act section 6.</p>
Proceedings	The Supreme Court HR-2017-2257-A, (case no. 2017/1570), criminal case, appeal against judgment.
Parties	<p>I. A (Counsel Per S. Johannessen) v. The public prosecution authority (Senior public prosecutor Lars Fause).</p> <p>II. Arctic Fishing (Counsel Oddbjørn Slinning) v. The public prosecution authority (Senior public prosecutor Lars Fause).</p>
Author	Justices: Falch, Bull, Indreberg, Webster, Chief Justice Øie.
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- (1) Justice **Falch**: The case concerns catching of snow crab on the Norwegian continental shelf in the Loophole of the Barents Sea. The question is whether the penal provisions in the Marine Resources Act prohibiting such catching without a Norwegian permit are contrary to international law to which Norway is bound under the Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries (the NEAFC Convention).
- (2) Arctic Fishing is a Lithuanian shipping company engaging in catching of snow crabs, among other species. The company owns and manages the vessel Juras Vilkas. A was the master on board the vessel.
- (3) On 18 July 2016, the Commissioner of the Finnmark Police issued a confiscation fine against Arctic Fishing of NOK 2 500 000 for violation of the Marine Resources Act section 61, cf. section 16, cf.

Regulation on the Prohibition against Catching of Snow Crab, section 1. On the same day, the Commissioner also issued a fine against A of NOK 15 000 for violation of the same provisions. The grounds are described as follows in both fines:

«During the period 25 May to 16 July 2016, A, the master of Juros Vilkas reg no KL 874, caught a total of 80 340 kilos of snow crab on the Norwegian continental shelf without a permit. The value of the catch was NOK 2 530 710.»

- (4) The fines were not accepted. They were then forwarded to Øst-Finnmark District Court, which, on 29 November 2017, gave judgment concluding as follows:
 - «- A, born 0.0.1960, is acquitted.
 - Arctic Fishing is acquitted.»
- (5) The District Court found proved that the vessel had been catching snow crab in the Loophole in the Barents Sea on the Norwegian side of the demarcation line towards Russia, as described in the fines. But the District Court concluded that this was not punishable, as it took place in accordance with a permit issued by Lithuanian authorities. The prohibition in the said Regulation was thus not applicable as it is «contrary to Norway's obligations under the NEAFC Convention and the NEAFC Scheme of Control and Enforcement, see the Penal Code (2005) section 2».
- (6) The Commissioner appealed the judgment to Hålogaland Court of Appeal. The appeal concerned the application of the law. On 28 June 2017, the Court of Appeal gave judgment concluding as follows:
 - «The District Court's judgment as well as the main hearing is set aside for both defendants.»
- (7) The Court of Appeal held that the District Court's judgment was based on incorrect application of the law. The reason given was that the NEAFC Convention does not restrict the rights granted to the State Parties under the United Nations Convention on the Law of the Sea (UNCLOS). It gives Norway an exclusive right to the resources on the continental shelf. Hence, there is no conflict between the Norwegian rules and the NEAFC Convention.
- (8) *Arctic Fishing and A* have appealed the judgment to the Supreme Court contending that the District Court's judgment must be upheld. The appeal concerns the application of the law. The core argument is that snow crab catching is comprised by the NEAFC Convention, and that the affiliated NEAFC Scheme of Control Enforcement (the NEAFC Scheme) is applicable for such catching when it takes place on the continental shelf outside the economic zone. Then, it follows from the NEAFC Scheme Article 4 that the vessel's flag State issues the catch permits, which Norway is obliged to respect.
- (9) *The prosecution authority* contends that the Court of Appeal's judgment is correct. Neither the NEAFC Convention nor the NEAFC Scheme restricts Norway's sovereign rights on its own continental shelf under the UNCLOS Article 77.
- (10) **I have concluded** that the appeals must be dismissed.
- (11) It cannot be doubted that the catching described in the fines, and which the District Court has found proved, is punishable under Norwegian rules. Section 1 of Regulation on the Prohibition against Catching of Snow Crab, as it read in 2016, sets out that «[i]t is prohibited for Norwegian and foreign vessels to catch snow crab in Norwegian maritime zones and internal waters, and on the Norwegian continental shelf». The fishing took place on the Norwegian continental shelf, see the Submarine Resources Act section 1. Pursuant to the Regulation section 2, Norwegian fishery authorities may grant exemptions from the prohibition. But no such exemption had not been granted to Juros Vilkas.
- (12) The penal provision is set out in the Marine Resources Act section 61, which states that «[a]nyone who willfully or through negligence contravenes provisions laid down in or under sections ... 16 ...» is liable to fines or to a term of imprisonment of not exceeding one year. The relevant Regulation has been adopted in accordance with the section 16 of the Act.

- (13) The question is therefore whether the act committed is not punishable nevertheless, because the rules are contrary to Norway's obligations under international law. The Marine Resources Act section 6 reads:
- «This Act applies subject to any restrictions deriving from international agreements and international law otherwise.»
- (14) The same is set out in the Penal Code (2005) section 2.
- (15) It is therefore necessary to verify if there are rules in international law preventing Norway from punishing Arctic Fishing and A for the acts described.
- (16) The catching took place in the Loophole, which is the term for an international maritime zone in the Barents Sea. The zone is demarcated by the Norwegian and the Russian economic zones and by the fisheries protection zone around Svalbard. The western part of the Loophole is on the Norwegian side of the maritime demarcation line towards Russia, drawn in accordance with the demarcation line agreement between Norway and Russia from 2010. That is where the catch was taken.
- (17) Juras Vilkas caught snow crabs (*Chionoecetes opilio*), a relatively new species in the Barents Sea. Commercial catching has been carried out since 2013, which is said to be first year Norwegian fisheries authorities permitted snow crab fishing in the Loophole. The snow crab lives on the sea floor. The parties agree that it is a so-called «sedentary species», i.e. an organism which, at the harvestable stage, is unable to move except in constant physical contact with the seabed. From now on, I will base my opinion on this consensus.
- (18) In my discussion regarding international law, I take as a starting point the *UNCLOS* from 1982, to which Norway became a party in 1996. Pursuant to its Article 77 no. 1 to no. 3, the coastal State exercises «sovereign» and «exclusive» rights over its continental shelf «for the purpose of exploring it and exploiting its natural resources». Norway's continental shelf extends through and beyond the Norwegian part of the Loophole, see Article 76 and the recommendation of the Commission on the Limits of the Continental Shelf from 2009.
- (19) The natural resources are described as follows in Article 77 no. 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.»
- (20) It follows from what I have said that Norway, under *UNCLOS*, has a sovereign and exclusive right to exploit the snow crab – a «sedentary species» – on the Norwegian side of the Loophole. The parties agree on that. The consequence is, pursuant to Article 77 no. 2, that no one may catch snow crab in this part of the Loophole without «express consent» from Norway.
- (21) The parties disagree as to whether Norway has given such consent through its participation in the *NEAFC Convention*.
- (22) The *NEAFC Convention* – the Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries – was entered in 1980 and changed in 2006, with effect from 2013. Norway has ratified the Convention and entered into it together with Russia, the European Union (EU), Iceland and Denmark on behalf of the Faeroe Islands and Greenland. Lithuania, where Juras Vilkas was registered and had obtained its permit, derives its rights under the Convention from the EU.
- (23) In the *NEAFC Convention's* preamble, the Contracting Parties are «recognising» the relevant

provisions of the UNCLOS. This must entail that the NEAFC Convention is based on the rules of the UNCLOS with respect to the coastal State's sovereign and exclusive rights, including the requirement for express consent set out in the mentioned Article 77 no. 2. In my view, this suggests that the NEAFC Convention must be read so as to imply that the rights of the parties under the UNCLOS to natural resources on their respective continental shelves are maintained, unless otherwise clearly stated in the NEAFC Convention or in rules provided in accordance therewith.

- (24) The purpose of the NEAFC Convention is, pursuant to Article 2, to «ensure the long-term conservation and optimum utilisation of the fishery resources» in the Convention Area. The area comprises pursuant to Article 1 a, the Northeast Atlantic Sea from south of Spain to north of Greenland and Svalbard, and extends all the way to the coastal lines of the Contracting Parties. The fishery resources comprised are defined in Article 1 b so that they also include sedentary species. These species were included with the amendment implemented in 2013. Snow crab catching in the Loophole is thus within the Convention's area of application.
- (25) The NEAFC Convention itself contains no rules on fishing activities. However, it contains rules in Articles 5 and 6 that allow the Commission established under Article 3 – the Northeast Atlantic Fishery Commission – to give recommendations on fishing activities in the Convention Area. These recommendations will be binding on the parties according to the procedure set out in Article 12.
- (26) The decision-making process varies to a large extent depending on whether the recommendation concerns fishing activities within or outside the parties' jurisdiction. *Within* a party's jurisdiction, the party in question must have requested the recommendation, see Article 6, and the party may object within a certain period of time after the recommendation is affirmed, with the effect that it does not become binding, see Article 12 no. 3. When these rules are complied with, it must be assumed that such express consent has been given as required in the UNCLOS Article 77 no. 2. Recommendations that are to apply *outside* the parties' jurisdiction do not require a prior request from a party, see Article 5, but it does not bind the party objecting within a certain period of time, see the Article 12 no. 2.
- (27) No binding recommendation is provided regarding snow crab catching under the NEAFC Convention Article 6, which is not provided under Article 5, either. And Norway has never requested that a recommendation must be given with respect to such fishing. This means that Norway, on these grounds, has not consented to any vessel fishing snow crab in the Loophole under a Lithuanian permit.
- (28) I will now turn to the *NEAFC Scheme*, which was adopted by the NEAFC Commission in 2007. I take it that the rules have been given in accordance with Article 8 of the NEAFC Convention, although this is not set out in the NEAFC Scheme itself. The said Article 8 authorises the Commission to give recommendations «concerning measures of control relating to fisheries», which become binding under the procedure set out in Article 12. This implies that although the NEAFC Scheme is not a convention in itself, Norway becomes bound under international law by its rules to the extent they are implemented within the scope and procedures established by the NEAFC Convention.
- (29) The NEAFC Scheme sets out in Article 2 that it applies to «all vessels used or intended for use for fishing activities conducted on fisheries resources in the Regulatory Area.» This area is described in Article 1 b as the parts of the Convention Area that «lie beyond the waters under the fisheries jurisdiction of Contracting Parties», which indicates that it applies for the maritime areas outside of the parties' economic zones. Sedentary species are included through Article 1 c. This may suggest that the NEAFC Scheme, according to its contents, is applicable in the Loophole, also to catching of snow crab. However, I will not take a final stand with respect to this issue. It is not necessary for reaching the result I have arrived at.
- (30) The NEAFC Scheme contains a number of rules on the information cooperation between the Contracting Parties, various measures of control the Contracting Parties must implement, as well as requirements for their surveillance and inspection of the fishing activities that are being carried out and the catch delivered. Rules are also provided on which measures the Contracting Parties must

implement if they suspect illegal fishing activities.

- (31) The appellants are asserting Article 4, in particular no. 1 a. The rule can be found in Chapter II on «Control Measures» and reads as follows:
«1. Each contracting Party shall:
a. authorize the use of fishing vessels flying its flag for fishing activities only where it is able to exercise its responsibilities in respect of such vessels;»
- (32) Here, a *restriction* is established to the flag State's right to issue catch permits to vessels: The flag State must desist from issuing such a permit if it is not able to exercise effectively its responsibilities in respect of the vessel concerned. The rule thus establishes, in conformity with its headline, a *control measure* that the flag State must implement before issuing fishing permits. The rest of Article 4 contains more duties assumed by the flag State at this stage.
- (33) I cannot see that there is basis for reading more into the provision – apart from its wording – as the appellants are actually contending. The provision gives no exhaustive regulation of the Contracting Parties' right to issue catch permits in the Regulation Area. The restriction to which the parties might otherwise be bound, such as the UNCLOS, are not affected. In my view, this implies that the Contracting Parties, by adopting the NEAFC Scheme Article 4, *did not* give the consent required under the UNCLOS Article 77 no. 2 in order for anyone to exploit natural resources on their respective continental shelves.
- (34) I can also not see that state practice exists, changing this understanding of the NEAFC Scheme. It is correct, as the appellants have pointed out, that the Regulation on the Prohibition against Catching of Snow Crab was not applicable for the continental shelf until 22 December 2015, and some catching did take place before that on the Norwegian side of the Loophole, also from foreign vessels. But this does clearly not oblige Norway or other Contracting Parties to continue to accept such catching without the coastal State's consent. In 2015, moreover, Norway, Russia and the EU expressed that the coastal States, as set out in the rules I have reviewed, have a right alone to exploit the snow crab on their respective continental shelves. And I cannot see that the response that the EU Commission gave to the European Parliament on 15 June 2017 implies that the EU has assumed a different view on this issue now.
- (35) On these grounds, I have concluded that Norway is not bound by any obligation under international law to accept catching of snow crab in the Loophole from a Lithuanian vessel without a Norwegian permit. The Regulation on the Prohibition against Catching of Snow Crab must therefore apply according to its contents.
- (36) This implies that the District Court's judgment is based on an incorrect application of the law. Thus, the Court of Appeal was correct when setting aside the District Court's judgment. The appeals must therefore be dismissed.
- (37) I vote for this

judgment:

The appeals are dismissed.
- (38) Justice **Bull**: I agree with the justice delivering the leading opinion in all material aspects and with his conclusion.
- (39) Justice **Indreberg**: Likewise
- (40) Justice **Webster**: Likewise
- (41) Justice **Øie**: Likewise

(42) Following the voting, the Supreme Court gave this

judgment:

The appeals are dismissed.