# SUPREME COURT OF NORWAY

On 14 February 2019, the Supreme Court composed of Chief Justice Øie and the justices Matningsdal, Endresen, Møse, Webster, Matheson, Kallerud, Bergsjø, Falch, Bergh and Berglund gave judgment in

**HR-2019-282-S, (case no. 18-064307STR-HRET), criminal case, appeal against judgment:**

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| A<br>SIA North Star Ltd | (Counsel Hallvard Østgård) |
| v. | |
| The public prosecution authority | (Public prosecutors Lars Fause and Tolle Stabell) |

(1) Justice **Berglund:** The case relates to punishment for catching of snow crab on the Norwegian continental shelf in the Svalbard Fisheries Protection Zone without a permit from Norwegian authorities.

(2) Before the lower courts, a central issue was whether the defendants should be acquitted since the principle of equal rights under Article 2 of the Svalbard Treaty had been violated. However, before the Supreme Court, the case has been limited for the time being only to the issues addressed by the court of appeal. This means that the Supreme Court is only to assess whether the snow crab is a sedentary species and whether catching it is punishable regardless of the application of the Svalbard Treaty in the relevant area, and regardless of whether the legal basis for exemption in section 2 of the Regulations on the Prohibition against Catching of Snow Crab (the Snow Crab Regulations) or the practicing thereof contravenes the Treaty's principle of equal rights.

(3) SIA North Star Ltd. is a Latvian shipping company engaging in snow crab catching. It owns the vessel *Senator* and two other vessels equipped for this activity. A is a Russian citizen and was captain onboard *Senator* when the relevant catching took place.

(4) On 16 January 2017, while *Senator* was operating in the crab-fishing field on the so-called Central Bank, the vessel was boarded by the Norwegian Coastguard for inspection. It was then positioned in the Svalbard Fisheries Protection Zone, on the Norwegian continental shelf.

(5) During the inspection, it was revealed that *Senator* had put out a large number of crab pots. The captain presented a Russian permit to catch snow crab. The vessel did not hold a Norwegian permit. The Coastguard found that only Norwegian authorities could issue such a permit, and ordered the catching stopped and the vessel brought to shore in Kirkenes.

(6) On 20 January 2017, the Chief of Police in Finnmark issued a penalty notice against the shipping company and the captain for illegal snow crab catching on the Norwegian continental shelf in Svalbard Fisheries Protection Zone, see section 61, cf. section 16 subsection 2 (c) of the Marine Resources Act and section 5, cf. section 1 of the Snow Crab Regulations. The shipowner was given a corporate fine of NOK 150 000 and a confiscation order of NOK 1 000 000. The captain was fined with NOK 50 000. The penalty notices were based on the following:

> **"From Sunday 15 January 2017 at 10:50 UTC, on the Norwegian continental shelf on the Central Bank …, the fishing vessel *Senator* C/S YLAC with A as captain, initiated snow crab catching by placing snow crab pots into the sea, despite the lack of a permit from Norwegian authorities to catch crab on the Norwegian continental shelf. A total of 13 chains with a total of 2 594 pots had been put out before the Svalbard Coastguard carried out the inspection of the vessel on Monday 16 January 2017 at 08:20 UTC."**

(7) The penalty notice issued against A also related to violation of section 36 subsection 1 (a) the Coastguard Act for disrespecting the Coastguard's order to remove the pots.

(8) Neither SIA North Star Ltd. nor A accepted the penalty notices. The cases were thus presented before the court, and the penalty notices took the place of indictments, see section 268 of the Criminal Procedure Act.

(9) The cases were joined into one hearing in the district court. On 22 June 2017, Øst-Finnmark District Court gave judgment concluding as follows:

> **"I** **A, born 00.00.1973, is acquitted of violation of section 36 subsection 1 (a), cf. section 29 subsection 2 of the Coast Guard Act - count II of the indictment.**
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> **II** **A, born 00.00.1973, is convicted of violation of section 61, cf. section 16 of the Marine Resources Act, cf. section 5, cf. section 1 of the Regulations on the Prohibition against Catching of Snow Crab (For-2014-12-19-1836) and sentenced to pay a fine of NOK 40 000.**
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> **III** **SIA North Star LTD is convicted of violation section 61, cf. section 16 of the Marine Resources Act, cf. section 5 cf. section 1 of the Regulations on the Prohibition against Catching of Snow Crab (For-2014-12-19-1836), cf. section 27 of the Penal Code (2005) and sentenced to pay a fine of NOK 150 000.**
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> **IV** **SIA North Star LTD is to accept confiscation by the Norwegian state of NOK 1 000 000, see section 65 of the Marine Resources Act.**
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> **V** **SIA North Star LTD is to pay the costs in the case of NOK 200,000."**

(10) The district court concluded that the snow crab is a sedentary species under the United Nations Convention on the Law of the Sea (UNCLOS), and that Norway has an exclusive right to exploit it, see Article 77. It was also concluded that the Snow Crab Regulations

would contravene the principle of equal rights under the Svalbard Treaty "if the Treaty [could] be invoked in the case". However, the district court found that the Svalbard Treaty does not apply beyond Svalbard's territorial border of 12 nautical miles; hence, it does not apply where the catching took place.

(11) A was acquitted of violation of the Coastguard Act as the circumstances under which the pots were removed were unclear. This issue is settled with a binding effect, and the acquittal had the result that A's fine was reduced to NOK 40 000.

(12) SIA North Star Ltd. and A appealed to Hålogaland Court of Appeal against the findings of fact and the application of the law in the determination of guilt.

(13) On 7 February 2018, the court of appeal gave judgment concluding as follows:

> **"1. A, born 00.00.1973, is convicted of violation of section 61, cf. section 4, cf. section 16 of the Marine Resources Act, cf. section 5, cf. section 1 of the Regulations on the Prohibition against Catching of Snow Crab of 19 December 2014 with subsequent amendments, and sentenced to pay a fine of NOK 40 000.**
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> **2. SIA North Star Ltd is convicted of violation of section 61, cf. section 4, cf. section 16 of the Marine Resources Act, cf. section 5, cf. section 1 of the Regulations on the Prohibition against Catching of Snow Crab of 19 December 2014 with subsequent amendments, cf. section 27 of the Penal Code, and sentenced to pay a fine of NOK 150 000.**
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> **3. SIA North Star Ltd is convicted of violation of section 61, cf. section 4, cf. section 16 of the Marine Resources Act, cf. section 5, cf. section 1 of the Regulations on the Prohibition against Catching of Snow Crab of 19 December 2014 with subsequent amendments, cf. section 65 of the Marine Resources Act, and sentenced to pay NOK 1 000 000 to the Norwegian treasury.**
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> **4. SIA North Star Ltd is to pay costs in the district court and the court of NOK 200 000."**

(14) The court of appeal also concluded that the snow crab is a sedentary species. However, the court of appeal found that it was unnecessary to consider whether the principle of equal rights in the Svalbard Treaty had been violated. The court concluded that snow crab catching without a permit on the Norwegian continental is punishable under general criminal law principles even in the absence of a valid legal basis for rejecting a permit application.

(15) SIA North Star Ltd. and A have appealed against the court of appeal's judgment to the Supreme Court. The appeals relate to the application of the law in the determination of guilt, both with regard to whether the snow crab is a sedentary species and with regard to whether the Svalbard Treaty's principle of equal rights has been violated.

(16) Before the lower courts, the defendants also asserted that they had acted in excusable ignorance of the law. This did not succeed. The court of appeal considered it proven that the defendants had wilfully acted without a Norwegian permit, and that they knew that this was an offence under Norwegian law. This part of the court of appeal's judgment has not been appealed.

(17) On 4 June 2018, the Supreme Court's Appeals Selection Committee granted leave to appeal. The decision sets out the following:

> **"The hearing by the Supreme Court will only focus on whether the snow crab is a sedentary species giving Norway an exclusive right to exploit it under UNCLOS Article 77, and whether snow crab catching on the Norwegian continental shelf without the vessel having obtained valid exemption from the prohibition is punishable regardless of the application of the Svalbard Treaty in the relevant area, and regardless of whether section 2 of the Regulations on the Prohibition against Catching of Snow Crab, or the practicing thereof, contravenes the principle of equal rights. There will be no hearing of the issue regarding the Svalbard Treaty's geographic area of application until such clarification is required."**

(18) Following the oral hearing on 30 and 31 October 2018, the Supreme Court, sitting as a division of five justices, decided that the case should be heard by a larger number of justices, and the Chief Justice referred the case to a grand chamber under section 6 subsection 2 of the Court of Justices Act.

(19) The composition of the grand chamber was decided by drawing of lots in accordance with rules of procedure adopted on 12 December 2007 under section 8 of the Courts of Justices Act. Justices Normann and Arntzen were recused from the drawing due to justifiable grounds for exemption, see the Supreme Court decision HR-2018-2300-J.

(20) In a notice of 14 December 2018 from the Director of Public Prosecutions, it was stated that Deputy Attorney General of Civil Affairs Tolle Stabell had been appointed by the Ministry of Justice and Police Security to conduct the case before the Supreme Court on behalf of the prosecution authority as further instructed by the Director of Public Prosecutions, see section 77 of the Criminal Procedure Act. It was also set out that the Director of Public Prosecution had appointed him as co-prosecutor in the case. In a notice of 19 December 2018, Counsel Hallvard Østgård on behalf of the defendants submitted a motion for disqualification against Tolle Stabell, see section 60, cf. section 55 last subsection of the Criminal Procedure Act. On 9 January 2019, the Supreme Court sitting as a grand chamber ruled that Tolle Stabell should not be disqualified, see HR-2019-34-S.

(21) *A and SIA North Star Ltd.* contend:

(22) The snow crab is not a sedentary species under UNCLOS Article 77 (4). The provision must be read in light of the Vienna Convention on the Law of Treaties. The principles set out therein, including the meaning of wording, context and object, as well as the preparatory works to UNCLOS and the Continental Shelf Convention of 1958, support the defendants' view that the snow crab is not a sedentary species. State practice does the same.

(23) The Snow Crab Regulations only apply on the continental shelf and not in Norway's economic zone or in the Svalbard Fisheries Protection Zone. If the snow crab is not a sedentary species, the catching of it is not covered by the Regulations' area of application. Article 96 of the Norwegian Constitution and Article 7 of the European Convention of Human Rights thus preclude punishment.

(24) In any case, the defendants must be acquitted because the Snow Crab Regulations contravene the principle of equal rights in the Svalbard Treaty, as only Norwegian vessels may obtain a permit to catch snow crab. The Regulations in their entirety must therefore be set aside in accordance with section 6 of the Marine Resources Act and section 2 of the Penal Code. When a penal provision is in conflict with international law, it is of no

relevance that a person acting without a permit is generally not acquitted according to national case law.

(25) A and SIA North Star Ltd. have submitted this prayer of relief:

> **"The defendants are to be acquitted."**

(26) *The public prosecution authority* contends:

(27) The snow crab is a sedentary species under UNCLOS Article 77 read in conjunction with the interpretation principles in the Vienna Convention.

(28) However, it is not decisive for the case whether the snow crab is a sedentary species. The catching took place in the Svalbard Fisheries Protection Zone, where Norway has exclusive rights of regulation of all species, both in the water column and on the continental shelf. The Snow Crab Regulations apply to all catching in this area.

(29) Norway's exclusive right to exploit the snow crab on the continental shelf entails that catching is subject to a permit from Norwegian authorities, which the vessel lacked. It follows from long-standing case law that the court in a criminal case is not to decide on a preliminary basis (*"prejudisielt ta stilling til"*) whether such a permit should have been given. This principle also applies in the event of alleged violation of international law. The defendants can thus be punished regardless of whether the exemption rule in section 2 of the Regulations or the practicing thereof should violate the Svalbard Treaty's principle of equal rights.

(30) The public prosecution authority has submitted this prayer for relief:

> **"The appeals are to be dismissed."**

(31) *My view on the case*

(32) I have concluded that the appeals cannot succeed.

(33) The case relates to punishment for catching of snow crab (*chionoecetes opilio*), a species living in cold waters. The crab is a relatively new species in the Barents Sea where it was first registered by Russian scientists in 1996. Eight years later, it was caught for the first time in the Norwegian part of the Barents Sea, while commercial catching was initiated around 2013.

(34) In January 2017, *Senator* was catching snow crab on the Central Bank, in an area on the Norwegian continental shelf in the Svalbard Fisheries Protection Zone. The vessel had a permit from the EU represented by Latvian authorities, but not from Norwegian authorities. The Coastguard inspected the vessel, and it turned out that 13 chains of a total of 2 594 crab pots had been put out. Since the vessel did not have a Norwegian permit, the activity was disrupted and the vessel ordered ashore.

(35) *The Snow Crab Regulations*

(36) Snow crab catching is governed by the Snow Crab Regulations, adopted with legal basis in section 16 subsection 2 (c) of the Marine Resources Act. The purpose of this Act is to ensure sustainable and economically profitable management of wild living marine resources, see section 1. Snow crab catching is regulated due to the need for a proper system until more knowledge on the snow crab's effect on the ecosystem has been obtained and a comprehensive management plan can be prepared. The exploitation of snow crab is based on the principle of sustainable harvesting, see the circular letter of 24 October 2014 from the Ministry of Fisheries and Coastal Affairs on the regulation of snow crab catching.

(37) As a starting point under Norwegian law, Norwegian and foreign vessels are prohibited from catching snow crab, see section 1 of the Snow Crab Regulations. The Regulations have been amended several times, and as at the time the act was committed, the Regulations of 19 December 2014 no. 1836 applied, where section 1 reads:

> **"It is prohibited for Norwegian and foreign vessels to catch snow crab in Norwegian deep marine territories and internal waters, and on the Norwegian continental shelf. For Norwegian vessels, the prohibition also applies on other countries' continental shelf."**

(38) Under section 2 of the Snow Crab Regulations, an exemption can be granted from the general prohibition in section 1. The exemption provision reads:

> **"Exemption can be granted from the prohibition against catching snow crab to vessels that have been issued a commercial licence under the Participation Act to harvest outside of the territorial water. If the commercial licence is limited to catching of certain species, exemption can only be granted if the licence includes snow crab catching. Exemption is granted on the following terms: …"**

(39) As it appears, an exemption requires that the vessel "has been issued a commercial licence under the Participation Act to harvest outside of the territorial water". The Act on the right to participate in fishing and hunting (the Participation Act) contains a number of conditions for obtaining a commercial licence. Under section 5, such a licence can only be issued to a person who is a Norwegian citizen or equal to a Norwegian citizen, and this is the condition that forms the basis for the appellants' contention that the Snow Crab Regulations contravene the Svalbard Treaty. It is also a requirement that parts of the crew are living in a coastal municipality or a neighbouring municipality, see section 5 (a); that fishery or catching has been carried out earlier, see section 6; and that the vessel has a certain standard, see section 8. An application for a commercial licence may be rejected if the vessel has previously breached fishery legislation, see section 7.

(40) Even if a vessel meets the requirements in section 2 of the Snow Crab Regulations, it has no legal right to exemption for such catching; hence, the use of "may". Yet, as at 4 October 2018, all vessels meeting the requirements had – according to information provided – been issued a permit to catch snow crab.

(41) Any contravention of the prohibition against snow crab catching is punishable under section 61 of the Marine Resources Act, to which a reference is made in section 5 of the then Regulations, currently section 8.

(42) According to their wording, the Snow Crab Regulations relate to harvesting in Norwegian marine territories, in internal waters and on the continental shelf. At the same time, the Marine Resources Act, the legal basis for the Regulations, sets out that it applies subject to

any restrictions deriving from international agreements and other international law, see section 6. The same is set out in section 2 of the Penal Code, that criminal legislation applies subject to the limitations that follow from international law.

(43) Consequently, it must be determined whether the snow crab catching, *under international law*, is comprised by the costal state's rights related to the continental shelf.

(44) It follows from UNCLOS Article 77 that the coastal state has a sovereign and exclusive right to exploit natural resources on the shelf, including sedentary species. If the snow crab is comprised by this term, no one can catch snow crab on the continental shelf without an express permit by the coastal state, here Norway.

(45) *Is the snow crab a sedentary species under UNCLOS?*

(46) UNCLOS Article 77 reads:

> **"Rights of the coastal State over the continental shelf**
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> **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.**
>
> **3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.**
>
> **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."**

(47) The content of Article 77 (4) is of particular significance here; is the snow crab a sedentary species?

(48) I will base my further interpretation of this provision on the Vienna Convention on the Law of Treaties. Although this Convention has not been acceded by Norway, its principles have long been applied as customary international law, see the Supreme Court judgment HR-2017-569-A paragraph 44, summarising the principles as follows:

> **"The Convention must be interpreted in accordance with the principles in the Vienna Convention of 23 May 1969. The starting point is the natural understanding of the wording, read in the context in which it is placed and in light of the objective of the Convention, see the Supreme Court judgment in Rt. 2012 page 494 paragraph 33. It is set out in Articles 31 and 32 of the Convention that other sources of law will have limited relevance to the interpretation. This entails that there is little room for a dynamic interpretation"**

(49) These principles entail that a treaty's own definition of the words and expressions used in the text will have to form basis for the interpretation of the treaty's wording.

(50) The court of appeal has described the snow crab and its attributes as follows:

> **"Senior scientist Jan Henry Sundet of the Institute of Marine Research has been researching crabs in general since 1993 and snow crabs in particular since 2006, and gave a statement as an expert witness before the court of appeal. The court of appeal concludes, based on his statement, that the snow crab does not have physical or anatomic attributes that enable it to lift itself up from the seabed or swim. It has a negative buoyancy in the sea and cannot adjust the pressure from within. The exception is as a larva; then it floats in the sea, but is not harvestable, see the definition in Article 77 (4). According to Sundet, there is no disagreement among scientists in Norway, USA, Canada, Greenland and Russia that the snow crab, biologically, fits the definition in UNCLOS. Sundet also explained that the snow crab wanders and constantly spreads to new areas in the Barents Sea, it wanders deeper as it gets older, it wanders to mate and it wanders to find food.**
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> **The defendants have contended that the snow crab is able to use its feet to lift itself from the seabed, and crawl for instance outside of a pot, and that the individuals often lie or crawl on top of each other on the seabed, so that they are not in constant contact with the seabed. Also, a crab that has for instance crawled up on a rock on the seabed may slide off it, and during the time this takes, it will move without being in contact with the seabed. The court of appeal does not doubt that, but it does not change the snow crab's anatomy, and the examples require physical instruments, streams in the sea or similar, which detaches the crab from the seabed. In the absence of such instruments, there is no doubt that the snow crab is unable to move without being in constant physical contact with the seabed."**

(51) Both defendants contend that the central term in UNCLOS Article 77 (4) is "sedentary species", which, in semantic terms, means that the organism stays in one place – it is immobile. It is pointed out that "sedentary" is included in the text for a reason, and must be given weight. Material from Russian and Canadian scientists shows that the snow crab each year is able to move across large areas, which means that it is not sedentary. It is also contended that the context supports such an interpretation, hence the use of "immobile", "unable to move" and the requirement of "constant" physical contact with the seabed.

(52) I agree that the semantic meaning of "sedentary" is close to "immobile" or "attached". But the word cannot be read in isolation. With reference to what I have already said about the meaning of a treaty's own definitions of words and expressions, I note that UNCLOS Article 77 (4) gives a further explanation – "that is to say" – of what the term sedentary includes. According to the wording, it includes species that are *either* immobile *or* unable to move without being in constant physical contact with the seabed or the subsoil. This is what sedentary species means under the Convention. The biological definition of sedentary or the general semantic meaning of the term is therefore of less interest.

(53) As I see it, the wording in Article 77 (4) suggests that the issue of review is *the snow crab's natural pattern of movement*. It is not disputed that the crab mainly wanders on the seabed. The crab's ability to climb on rocks and pots – and on other crabs – and the fact that it during short periods may drift with the water flows if it should slide off rocks etc., does not change the fact that the crab, by nature, is dependent on being in constant physical contact with the seabed in order to move.

(54) Furthermore, nothing in the wording suggests that the mobile species must be stationary. It is therefore irrelevant if individuals of a species, at the time of harvesting, are able to move across large areas, as long as they are then in constant physical contact with the seabed.

This must apply even if they move from the jurisdiction of one coastal state to that of another.

(55) Such an interpretation is also supported by the Convention read in context. It sets out expressly that both immobile species and species that move in constant contact with the seabed are sedentary. It is difficult to see which species would be comprised other than the entirely immobile ones, if such a narrow interpretation as the appellants promote should be taken into account. The option "constant physical contact with the seabed" would then be superfluous.

(56) I also believe it must be assumed that the definition of sedentary was included to eliminate species that had alternative natural ways of moving than by constantly touching the seabed.

(57) With my interpretation of the wording and the context, it is not necessary to discuss the preparatory works to UNCLOS or previous conventions. I will therefore confine myself to pointing out that they do not form a clear picture. Nor is there any reason to further discuss state practice, but I mention briefly that also the EU, Russia and Canada under various circumstances have held that the snow crab is a sedentary species within the meaning of the Convention.

(58) Considering the snow crab's natural pattern of movement in conjunction with the wording in UNCLOS Article 77 (4), I find it clear that the snow crab is a sedentary species comprised by the coast states' exclusive right to exploit the natural resources on the continental shelf. The consequence is that the international law reservation in section 6 of the Marine Resources Act does not preclude that the catching of snow crab requires a permit from Norwegian authorities. Hence, it is not necessary to examine the prosecution authority's other submissions with regard to this issue.

(59) *Is the act punishable regardless of whether the Snow Crab Regulations contravene Norway's obligations under international law?*

(60) The next question is whether snow crab catching is punishable regardless of the application the Svalbard Treaty in the relevant area, and regardless of whether the basis for exemption in section 2 of the Snow Crab Regulations or the practicing thereof contravenes the Treaty's principle of equal rights.

(61) By way of introduction, I note that the prohibition against catching of snow crab has been violated according to its wording, and that the necessary requirements for determining guilt have been met. The question is whether there is still a basis for exempting the defendants from punishment.

(62) The defendants claim they must be acquitted because the Snow Crab Regulations, as they are worded and practiced by Norwegian authorities, contravene the principle of equal rights in the Svalbard Treaty. Special emphasis is placed on the fact that exemption from the prohibition in the Regulations can only be granted to Norwegian citizens and to foreign nationals residing in Norway. The defendants have not applied for an exemption, but argue that an application would have been rejected the way the Regulations are worded and practiced, and that such a rejection would have been in contravention of international law. It is held that section 2 of the Penal Code and section 6 of the Marine Resources Act preclude punishment in such cases.

(63) The basis for exemption under criminal law must, if any, be either that there exists a general reason for exemption or that the specific act is not illegal because the regulation in question contravenes international law.

(64) I will start by a giving short description of the Svalbard Treaty.

(65) Article 1 in the Svalbard Treaty establishes Norway's sovereignty over the archipelago. Article 2 subsections 1 and 3, and Article 3, contain rules on the equal rights of the "High Contracting Parties".

> **"Art 2.**
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> **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 re-constitution 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.**
>
> **…**
>
> **Art 3.**
>
> **The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality."**

(66) The Treaty establishes that Norway is to manage the natural resources and assumes that the High Contracting Parties comply with the rules that are implemented to fulfil this task. It is therefore clear that the Treaty gives Norway a right to enforce a regulatory system under which unauthorised catching is punishable, as long as such a system is practiced in a non-discriminatory manner, see the Supreme Court judgment Rt-2006-1498 on the omission to keep a catch log.

(67) As it appears from the legal framework I have described, a management system has been established by the Snow Crab Regulations under which a permit is required for anyone who wishes to catch snow crab. Unauthorised catching is punishable, regardless of nationality. No one has a legal right to a permit. To obtain an exemption, various requirements must be met, and the wording of the provision suggests that the granting of such an exemption is left to the authorities' discretion. I add that even if one meets the basic requirements for a commercial licence, which is necessary to obtain a permit to catch snow crab, such a permit is not automatically issued. Previous violation of fishery legislation may, for instance, form a basis for refusal.

(68) Norway enters into various agreements with other states, also the EU, relating to fishery in the Barents Sea, and catch quotas are established and distributed for certain species. However, during the time *Senator* was catching, no agreement existed between Norway and the EU on the catching of snow crab or on distribution of quotas.

(69) I now turn to considering what is applicable *Norwegian internal criminal law* in cases where the person acting does not have the necessary permit.

(70) According to the general provision in section 167 of the Penal Code, "[a]ny person who exercises a profession or operates an enterprise without holding the necessary official permit or authorisation, or who falsely purports to hold such permit or authorisation shall be subject to a penalty of a fine or imprisonment for a term not exceeding six months". This means that if snow crab catching had not been regulated by specific penal provisions, the act in this case could have been punished under section 167. There are also other penal provisions in specific legislation under which a person acting without a necessary permit can be punished.

(71) Any person who continues to carry out activities that require a permit after having had his or her application refused, acts without holding the necessary official permit within the meaning of the penal provision. This applies even if the refusal contains such errors that it must be considered invalid. The principle that an invalid permit cannot lead to acquittal in such cases is well known in Norwegian case law and established in several different legal areas. I refer to Supreme Court judgments Rt-1953-1382 (trucking licence), Rt-1954-354 (elk hunting licence), Rt-1954-923 (travel agency licence) and Rt-1961-494 (taxi licence). All rulings rest on the basic view that a person who has an obligation to apply for a permit cannot, unpunished, act as if a licence or a permit were granted, regardless of whether the refusal contains errors. Nor is it possible in such cases to obtain a decision on a preliminary basis on underlying issues of validity in the criminal case. As a general rule, any person who finds that a permit has been unfairly refused must bring a civil action to have the refusal declared invalid. I add that the same principles must apply if a permit has not been sought. A hypothetic refusal cannot lead to a better legal position than an actual refusal.

(72) In the event of an individual decision, that decision may under the circumstances be a nullity which the party is not obliged to comply with unless he or she has a duty of obedience. That is not the situation here. I will therefore not assess how the courts in a criminal case should handle objections against the validity in such cases.

(73) Nor is there any reason to assess how the situation would be if a decision had been made allegedly constituting violation of basic human rights or abuse of power. Although the appellants contend that the Snow Crab Regulations entail an intentional discrimination in contravention of the Treaty, no abuse of power has been asserted. In my view, it is unnatural to characterise a practice associated with judicial disagreement on Norway's obligations under international law as abuse of power. In this case, it is clear that Norwegian authorities find that the Svalbard Treaty does not apply in the relevant area, while the authorities of several other countries are of a different opinion.

(74) I also note that we are not dealing with a type of self-enforcement that may be considered legal under section 19 of the Penal Code. Under that provision, an act that would otherwise be criminal, is lawful when the "entitled person acts to restore an unlawfully altered state, and it would be unreasonable to wait for assistance from the authorities". The case at hand falls outside the area of application of that provision, as it can only be asserted by "the entitled person", i.e. the person who holds the substantive right, see Proposition to the Odelsting No. 90 (2003-2004) page 422 first column. This is not the case if the self-enforcement takes the form of an act being committed without the necessary permit. Such

cases have the same legal position as when the self-enforcement results in the establishment of new rights, where section 19 cannot be invoked as a basis for exemption from punishment.

(75) It can be derived from this review of Norwegian internal law, that if the defendants had been Norwegian, they would have been punished for having caught snow crab without a valid exemption from the prohibition. They could not have invoked any general grounds for exemption or other basis for impunity.

(76) The question is whether the result must be a different one, because the case relates to foreign nationals claiming that the principle of equal rights in the Svalbard Treaty has been violated. In my view, it must be determined whether the principle of equal rights precludes the application of the Norwegian rules such that they must be considered to contravene international law.

(77) The Marine Resources Act, the legal basis for imposing punishment for snow crab catching, contains a provision on the application of international law in section 6. It reads:

> **"This Act applies subject to any restrictions deriving from international agreements and international law otherwise."**

(78) The provision is general and applies in the areas of both criminal and civil law, including administrative decisions. A similar provision is found in section 2 of the Penal Code, which relates to criminal legislation in general. Both provisions are an expression of sector monism, which implies that Norway's obligations under international law are incorporated in a certain area. In the event of a conflict between Norwegian and international law, Norwegian law must be interpreted restrictively or be set aside. Whether such a conflict exists is not solved by section 6 of the Marine Resources Act or section 2 of the Penal Code.

(79) The defendants have emphasised that current case law relates to internal administrative-law areas, while the Snow Crab Regulations relate to issues under international law. In my opinion, this cannot be decisive. The principle that no person can, unpunished, act as if a permit had been granted is fundamental in a society based on the rule of law, see Andenæs, *Alminnelig strafferett* (General criminal law), 6th edition 2016 page 175. In my opinion, this principle also applies in areas governed by international law.

(80) As I see it, it cannot be derived from the Svalbard Treaty or other sources of international law that the courts in a criminal case like the one at hand must decide on a preliminary basis whether an exemption should have been granted, as long as there is an alternative legal possibility to obtain an efficient review of the disagreement on the obligations under international law. If there are several acceptable procedures, it must be up to the individual country to decide which procedure to employ. Under Norwegian law, an issue of conflict between Norwegian public administration and international obligations should be solved through a civil action. This is not an unreasonable system. If the party succeeds with a civil claim, the party may – if the general conditions are otherwise met – demand compensation for economic loss and coverage of costs. A civil judgment declaring a regulation invalid will also give Norwegian authorities the possibility to amend the rules in accordance with international law while at the same time taking into account other concerns, such as protection of natural resources.

(81) I add that Article 13 of the European Convention on Human Rights and relevant case law from the European Court of Human Rights support the view I have accounted for. Article 13 establishes that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority …". As pointed out in the Supreme Court's plenary judgment on long-staying children, Rt-2012-1985 paragraphs 84 and 85 with references to the Grand Chamber rulings by the Court of Human Rights in *Kudla v. Poland* and *Kuric and others v. Slovenia*, each state may organise this review as it deems appropriate. It is unlikely that an international treaty such as the Svalbard Treaty, which does not have an individual petition system, should contain stricter requirements on this point than the Convention on Human Rights.

(82) Overall, I find that neither section 6 of the Marine Resources Act, section 2 of the Penal Code nor the Svalbard Treaty can be interpreted to mean that Norway – in a case like this – is precluded from punishing foreign nationals who, for commercial purposes, act without a permit where a permit is required for everyone. Nor does it appear from international law that a decision on a preliminary basis must be given on the question of exemption in a criminal case. I emphasise that in a case like the one at hand, where both the shipowner and the captain would have been punished also if they had been Norwegian, there is no discriminatory treatment based on nationality.

(83) Consequently, I agree with the court of appeal that the defendants can be punished irrespective of whether the Svalbard Treaty applies to snow crab catching in the relevant area. Furthermore, it is irrelevant whether the basis for exemption in section 2 of the Snow Crab Regulations is in conflict with the Treaty. What ultimately justifies punishment of the defendants is that the Svalbard Treaty's principle of equal rights has not in any case been violated, since everyone – also Norwegian citizens and companies – can be punished for catching snow crab in the area without a permit from Norwegian fishery authorities. The defendants did not hold such a permit.

(84) I vote for this

J U D G M E N T :

The appeals are dismissed.

(85) Justice **Matningsdal:** I agree with the justice delivering the leading opinion in all material respects and with her conclusion.

(86) Justice **Endresen:** Likewise.

(87) Justice **Møse:** Likewise.

(88) Justice **Webster:** Likewise.

(89) Justice **Matheson:** Likewise.

(90) Justice **Kallerud:** Likewise.

(91) Justice **Bergsjø:** Likewise.

(92) Justice **Falch:** Likewise.

(93) Justice **Bergh:** Likewise.

(94) Chief Justice **Øie:** Likewise.

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

J U D G M E N T :

The appeals are dismissed.