TOAEP | Torkel Opsahl Academic EPublisher

POLICY BRIEF SERIES

Three Pivotal Norwegian Cases on Sámi Rights

By Hadi Strømmen Lile

Policy Brief Series No. 156 (2024)

The last few years have been eventful from a Sámi rights perspective, with three cases before the Norwegian Supreme Court attracting significant attention and criticism. First, the Court was criticized for treating Sámi people as children who do not know their own best interest, then widespread civil disobedience erupted because the government failed to implement the Court's decision, and finally eyebrows were raised when the Court recognized traditional Sámi land as state property. Allow me to comment soberly on the three cases in this policy brief, noting that as a Sámi myself it is unavoidable that my rationality and understanding are influenced by my cultural background, as Gadamer suggests.[1]

1. Jovsset Ánte Sara: The Supreme Court Upholds Collective Paternalism, Not Sámi Rights

The first case is essentially about the legality of government decisions that may be labelled as 'collective paternalism'. Can a government deny the right to culture of an individual in the name of the best collective interest of the indigenous group, against the will of the group's own representative bodies? Can governments treat indigenous peoples as children who do not know their own best interest?

On 2 July 2012, Jovsset Ánte Sara, a young reindeer herder, received the administrative decision that there were too many reindeers within the Fálá reindeer herding district, to which his herding unit belonged. The different reindeer units within the district were asked to design a plan for how to reduce the reindeers to an acceptable number. Some but not all the units agreed to spare Sara from reducing his herd: he was a young herder with a small herd, trying to establish himself,[2] and if he had to reduce his herd proportionately, to the same degree as the others, it would become too small to be economically viable.

Section 60(3) of the Reindeer Husbandry Act states that if the number of reindeer "in the siida [reindeer herding district] exceeds the number of reindeer stipulated in accordance with the first and second paragraphs, the siida must prepare a reduction plan. If the siida fails to do this, or if it is not able to carry out the plan, each siida share shall reduce the exceeding number proportionally".[3] As the Fálá district was not able to agree on a plan, everybody, including Sara, was required to reduce their herd proportionately. Both the Sámi Parliament and the Sámi Reindeer Herders Association of Norway wanted the Reindeer Husbandry Act to spare the smaller units, herders with less than 200 reindeers. This was seen as best for Sámi culture and the recruitment of young reindeer herders, based on a recommendation in a 2001 report by a government-appointed expert commission on reindeer herding.[4] However, the government, defying the expert commission, the Sámi Parliament, and the reindeer herders' own representatives, insisted that what was best for the reindeer herders themselves was not to spare the smaller units, but to treat all units equally.[5] The Act was adopted by Parliament without significant debate on this.[6]

Sara argued that the decision to reduce his herd could not be based on Section 60 of the Reindeer Husbandry Act alone, that he had a right to preserve an economically-viable herd, and that a decision to reduce his herd below such a level was in violation of Article 27 of the International Covenant on Civil and Political Rights ('CCPR') and Article 1 of the First Additional Protocol to the European Convention on Human Rights ('ECHR').[7] He won the case both in the Inner Finnmark District Court[8] and in the Hålogaland Appeals Court, the latter emphasizing that the decision to reduce his herd was in violation of CCPR Article 27.[9] The latter is the most fundamental international provision on the protection of minority rights.[10] Following difficult negotiations,[11] Article 27 was adopted providing that persons belonging to ethnic, religious or linguistic minorities "shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

In its 2017 judgment, the Supreme Court of Norway did not agree with the appellate decision. A majority of four judges sided with the government, arguing that CCPR Article 27 does not give a right to individual minority members to make a profit off their business based on their culture.[12] The case was about an internal question of what is best for the Sámi reindeer herders themselves, "not the greater society's interfer-

1 For more on this topic see, for instance, Hans-Georg Gadamer, *Truth and Method*, Bloomsbury Publishing, 2004 (first published in 1960, translated by Joel Weinsheimer and Donald G. Marshall), p. 288.

2 Supreme Court of Norway, *Ministry of Agriculture and Food v. Jovsset Ánte Sara*, Judgment, 21 December 2017, HR-2017-2428-A, paras. 2–7 ('Supreme Court, 21 December 2017') (https://www.legal-tools.org/doc/r643dckx/).

3 Lov om reindrift (reindriftsloven), 15 June 2007, No. 40 of 2007, Section 60 ('Reindeer Husbandry Act') (https://www.legal-tools.org/doc/wswd916c/).

4 "Forslag til endringer i reindriftsloven [Proposal for changes in the Reindeer Herding Act]", 15 March 2001, Norges Offentlige Utredninger ('NOU') No. 2001:35, p. 179 ('NOU No. 2001:35') (https://www.legal-tools.org/doc/t73grloy/).

5 Ministry of Agriculture and Food, "Ot. prp. nr. 25 (2006–2007): Om lov om reindrift (reindriftsloven) [On the Law on Reindeer Husbandry (Reindeer Husbandry Act)]", 26 January 2007, para. 8.18, p. 46 (https://www.legal-tools.org/doc/0rdu5vdo/).

6 See the dissenting opinion of Judge Falch, in Supreme Court, 21 December 2017, para. 130, *supra* note 2.

7 CCPR, 19 December 1966 (https://www.legal-tools.org/doc/2838f3/); ECHR, 4 November 1950, and Protocol 1 (https://www.legal-tools.org/doc/8267cb/).

8 District Court of Inner Finnmark, *Jovsset Ánte Sara v. Ministry of Agriculture and Food*, Judgment, 18 March 2016, TINFI-2015-84532 (https://www.legal-tools.org/doc/y655ocpi/).

9 Court of Appeal of Hålogaland, *Ministry of Agriculture and Food v. Jovsset Ánte Sara*, Judgment, 17 March 2017, LH-2016-92975 (https://www.legal-tools.org/doc/mqao5pb7/).

10 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed., Engel, Rhein, 2005, p. 639.

11 *Ibid*., pp. 638–642.

12 Supreme Court, 21 December 2017, para. 71, see *supra* note 2.

ence with a minority interest that is to be balanced against ICCPR article 27",[13] though "the central authorities in this regard should have listened to the Sami representatives to a greater extent, who must be assumed to know their own business and culture best".[14] That could not, however, be considered decisive for the overall assessment. By first letting the siida itself draw up a reduction plan, the law recognized the Sámi desire for self-determination: "Although the Sami Parliament has not succeeded with its view on all points, the rules implement a substantial degree of self-determination".[15]

In reality, however, each reindeer herding unit within a district represents only itself, and the larger units have an economic interest in not sparing smaller units. If the plan is not unanimous, the government intervenes. Although it was not openly admitted that this concerned the interests of the larger society against those of the minority, the authorities intervened with force to reduce Sara's herd, against the will of the Sámi Parliament and the Sámi Reindeer Herders Association.

In a persuasive dissenting opinion, Judge Falch holds that a possible violation of CCPR Article 27 must be assessed considering (i) whether there occurred a state intervention that qualifies as a denial of the individual's right to culture, and (ii) whether the denial is justified.[16] He concluded that Sara was in effect denied the right to his culture because he was forced to reduce his herd to a level not viable. Although there was some uncertainty whether his problems were the consequence of a lack of resources within the area, and he should have known that a culling could happen, the decision to reduce the reindeers was taken by the state and must be assessed based on its justification.[17] Two cases were particularly important. Referring to the *Lovelace v. Canada* case, the Human Rights Committee ('HRC' or 'Committee') argued in *Kitok v. Sweden* that a "restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole".[18] Judge Falch founded his dissent on this logic.[19] He held that in a case concerning the weight of different interests within the minority, the same is best placed to know what is best for its own culture.[20] He emphasized that the Sámi Parliament is democratically elected by and among the Sámi people in Norway.[21]

The HRC also noted in Kitok that the CCPR requires positive legal measures "to ensure the effective participation of members of minority communities in decisions which affect them".[22] Read together with CCPR Article 1 on peoples' right to self-determination, held up in relation to Article 3 and the preamble of the Untied Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'),[23] there is a case to be made that the government has an obligation to respect the decisions of the representative organs of indigenous peoples in questions that only concern them.

In response to the Supreme Court decision, the President of the Sámi Parliament, Áili Keskitalo, wrote an article in *Kritisk juss* stating that the Sámi people no longer trust the Court, and that something should be done to restore trust.[24] Sara's sister created the artwork *Pile o`Sápmi Supreme* (a hanging carpet of 400 reindeer skulls with a bullet hole), exhibited also at the Venice Biennale.[25]

Sara took the case to the HRC, which asked the government of Norway not to enforce the culling orders while the communication was under consideration by the Committee. According to the Committee, the government had informed them that the order had not been enforced.[26] According to the Sámi Parliament, the government "demanded forced slaughter of his reindeers even before the Committee has considered the complaint".[27] In August 2024, Sara was notified by the HRC that he had won the case against Norway.

The HRC emphasized three main considerations in a conflict between the cultural rights of an individual and that of the group as a whole: (i) whether the limitation is in the interests of all members of the minority; (ii) whether there is reasonable and objective justification for its application to the individuals who claim to be adversely affected; and (iii) whether the limitation is necessary for the continued viability and welfare of the minority as a whole.[28] The Committee concluded that the limitation was done in the best interest of the group, but it was not based on reasonable and objective justifications, and it was not necessary in order to protect the group. The Committee noted that the government-appointed expert commission on reindeer herding had recommended to spare the smaller reindeer herding units, and that it would not have adversely affected the larger units.[29] It was an assessment of what was best for the whole community, supported by both the Sámi Parliament and the Sámi Reindeer Herders Association. The government, the Committee stated, had not demonstrated why the rejection of such a solution was based on reasonable and objective justifications, nor why it was necessary.[30]

2. The *Fosen* Case: The Supreme Court at the Mercy of the Executive

Whereas the *Jovsset Ánte Sara* case caused deep mistrust in the Sámi community towards the Supreme Court, in the *Fosen* case, involving significant economic interests, Sámi reindeer herders won and the Court finally found, in its 2021 judgment, that there had been a violation of CCPR Article 27. The case concerned the expropriation of reindeer herders from their traditional areas, the Fosen district, to allow the licensing and building of the largest windfarm complex in Europe. The land is located within a South Sámi territory, a particularly vulnerable and historically marginalized culture. The legal question was whether the expropriation appraisal was invalid by virtue of CCPR Article 27 and the reindeer herders' right to their Sámi culture, and more specifically whether the wind-farming companies or the state could compensate the reindeer herders in a manner making it possible to preserve reindeer herding. If not, the reindeer herders would have been denied the right to their South Sámi culture. Put bluntly, the case concerned whether it was possible to 'buy them out'. There were two central issues in this regard: (i) Is it possible to combine wind turbines and reindeer herding? (ii) If not, is it possible to compensate the herders, in order to save reindeer herding without removing the wind turbines? The Ministry of Petroleum and Energy granted the license to build large parts of the planned wind-

13 *Ibid*., para. 71.

14 *Ibid*., para. 91 (translation by the author).

15 *Ibid*., paras. 92 and 94.

16 *Ibid*., para. 110.

17 *Ibid*., paras. 119–20.

18 HRC, *Kitok v. Sweden*, Views under article 5, paragraph 4, of the Optional Protocol, UN Doc. CCPR/C/33/D/197/1985, 27 July 1988, Communication no. 197/1985, para. 9.8 ('HRC, 27 July 1988') (https://www.legal-tools.org/doc/n7f8yy/). See also HRC, *Sandra Lovelace v. Canada*, Views under article 5, paragraph 4, of the Optional Protocol, UN Doc. CCPR/C/13/D/24/1977, 30 July 1981, Communication no. 24/1977 (https://www.legal-tools.org/doc/8h9ts1/).

19 Supreme Court, 21 December 2017, para. 125, see *supra* note 2.

20 *Ibid*., para 131.

21 Lov om Sametinget og andre samiske rettsforhold (sameloven), 12 June 1987, No. 56 of 1987, Sections 1–2 ('Sámi Act') (https://www.legal-tools.org/doc/sve347a7/).

22 HRC, "CCPR General Comment No. 23: Article 27 (Rights of Minorities)", UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 7 (https://www.legal-tools.org/doc/0e1a35/).

23 UNDRIP, 13 September 2007 (https://www.legal-tools.org/doc/pan5w8/).

24 Aili Keskitalo, "Sameretten ved inngangen til 2018", in *Kritisk juss*, 2018, vol. 44, no. 1.

25 See the web site of the project *Pile o`Sápmi*; Máret Ánne Sara, *Pile o`Sápmi*, Film, Norway National Museum, 2017; Christian House, "The Sámi Pavilion at the Venice Biennale", *Norwegian Arts*, 14 April 2022.

26 HRC, *Jovsset Ánte Sara v. Norway*, Views under article 5, paragraph 4, of the Optional Protocol, UN Doc. CCPR/C/141/D/3588/2019, 19 July 2024, Communication no. 3588/2019, para. 1.3 ('HRC, 19 July 2024') (https://www.legal-tools.org/doc/ti2t7rxj/).

27 "Statement by Political Advisor Eirik Larsen, Sámi Parliament in Norway", Pre-session Universal Periodic Review Norway, 4 April 2019 (https://www.legal-tools.org/doc/ajihlqr2/).

28 HRC, 19 July 2024, para. 9.5, see *supra* note 26; HRC, *Apirana Mahuika et al. v. New Zealand*, Views under article 5, paragraph 4, of the Optional Protocol, UN Doc. CCPR/C/70/D/547/1993, 27 October 2000, Communication no. 547/1993, para. 9.6 (https://www.legal-tools.org/doc/051omp/), HRC, 27 July 1988, para. 9.8, see *supra* note 18.

29 NOU No. 2001:35, p. 179, see *supra* note 4.

30 HRC, 19 July 2024, paras. 9.7–9.10, see *supra* note 26.

farm before these questions were answered by the Supreme Court – it was simply assumed that the answer to both was 'yes'.[31]

Deliberations before the Frostating Court of Appeal lasted 13 court-days, including two days of inspections on the ground and via helicopter. Ten expert witnesses were interviewed, while a significant number of research reports were assessed. The research included many different methodologies, including GPS-tracking and gathering reindeer herders' experience from different areas beyond Fosen.[32] The Supreme Court held that the Frostating court had a solid, adequate basis for its finding that it is not possible to combine reindeer herding and wind turbines.[33] The Frostating court found that there were no other places to move the reindeers, but that it was possible to save reindeer herding by feeding the reindeers manually, a "measure, which surely is not ideal in a Sami-cultural perspective, [but] will give the herders a guarantee for their herds' survival". It held, with some doubt, "that wind power development in this perspective does not constitute a threat to reindeer husbandry against which it is protected under Article 27".[34]

The Supreme Court rejected this solution, arguing that it was not compatible with Sámi culture, and there was considerable uncertainty as to whether it would be compatible with animal-welfare considerations.[35] Mitigating measures entailing operational reorganization that deviates significantly from the traditional, nomadic reindeer husbandry, such as permanent periods of feeding, cannot render legal a measure that denies the right to culture.[36] Thus, the Court's conclusion was that none of the compensatory solutions presented were acceptable. The decision to grant the license to build the windfarms in Fosen was invalid and a violation of CCPR Article 27.[37]

Following the Supreme Court judgment, nothing happened. The wind turbines were not stopped, but continued to operate.[38] The government stated that the there is no general duty to immediately revoke a decision that has been found to be invalid,[39] and that the case involved very complicated legal questions. The Supreme Court had not explicitly stated that the license was revoked. It had just found the decision to grant it invalid, but that conclusion was only part of the legal premises and not the actual judgement, which was that the appraisal was inadmissible.[40] The appraisal question was rather about the possibility of compensation, but nevertheless the government insisted that it would be possible to compensate and find mitigating measures.[41]

The reindeer herders were strong-armed into renewed negotiations, this time not within the judiciary but with the help of the National Mediator (mandated to mediate solutions between trade unions and employers or employers' associations).[42] In the end, agreements were reached in this post-court, government-led process. Not a single wind turbine is coming down, but the government has promised to find new territory that can be used for reindeer husbandry.[43] If the new territory is adequate and acceptable for the purpose, and there are no strings attached, then there seems to be at least a practicable solution on the table. However, if the new territory is not considered adequate or there are other conditions or issues with its use, how will the situation be solved? Probably with a new case that would end up, once again, before the same Supreme Court.

After an extraordinary 500 days of no visible action from the side of the government and no progress – while the wind turbines continued to operate as if nothing had happened – a group of young Sámis occupied the entrance to the Ministry of Energy. This unleashed the biggest demonstrations and acts of civil disobedience in Norway since the Alta River Dam conflict in Sámi territory further north in the 1980s. The action was co-ordinated by the youth organization of the Norwegian Sámi Association, Nuorat and the environmental youth organization Nature and Youth.[44]

3. The *Karasjok* Case: The Supreme Court Entitles the State

The *Karasjok* case concerns the ownership of the territory of Karasjok, one of the largest municipalities in Norway – a core area of Sápmi, historically under the jurisdiction of Norway, Sweden or Russia – in which the vast majority of inhabitants are and have always been Sámi,[45] and 80 per cent of all inhabitants speak Sámi.[46] Nevertheless, 98.3 per cent of this area (5,361 square kilometres) had been administered as if it belonged to the Norwegian state, before it was transferred to the state-controlled Finnmark Estate in 2006.[47] In 2019, the Finnmark Commission, whose task is to investigate usage and ownership rights to land transferred to the Finnmark Estate,[48] found that (i) the disputed area was collectively owned by the local population of Karasjok, (ii) it had never belonged to the Norwegian state, and (iii) it should therefore not be managed by the Finnmark Estate. The Uncultivated Land Tribunal for Finnmark, mandated by the Finnmark Act (Sections 36–43), reached the same conclusion.

However, in its 2024 judgment, the Norwegian Supreme Court majority found that the Karasjok population does not own the area which belongs to the Finnmark Estate, meaning that it was state-owned land prior to being transferred to the Finnmark Estate in 2006.

There were three normative grounds for ownership in the *Karasjok* case: Norwegian law, Sámi customary law, and international law. The latter includes the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries ('ILO Convention No. 169')[49] and the Treaty concerning the state frontier between Norway and Sweden of 1751[50] (which includes an attachment on

31 Supreme Court of Norway, *Statnett SF v. Fosen Vind DA, Nord-Fosen siida, Sør-Fosen sijte*, Judgment, 11 October 2021, HR-2021-1975-S, para. 10 ('Supreme Court, 11 October 2021') (https://www.legal-tools.org/doc/f2uxsya7/).

32 *Ibid*., paras. 86–92.

33 *Ibid*., para. 92. Eva Maria Fjellheim wrote a critical analysis of how knowledge has been assessed in the case: "Wind Energy on Trial in Saepmie: Epistemic Controversies and Strategic Ignorance in Norway's Green Energy Transition", in *Arctic Review on Law and Politics*, 2023, vol. 14, pp. 140–168.

34 Supreme Court, 11 October 2021, para. 145, see *supra* note 31; see also Frostating Court of Appeals, *Statnett SF and Fosen Vind DA v. Fosen Reinbeitedistrikt Sørgruppen and Nordgruppen*, Reappraisal, 8 June 2020, LF-2018-150314, LF-2018-15023 and LF-2018-150327 (https://www.legal-tools.org/doc/ydu1z93n/).

35 Supreme Court, 11 October 2021, paras. 146–151, see *supra* note 31.

36 Øyvind Ravna, "The Fosen Case and the Protection of Sámi Culture in Norway Pursuant to Article 27 ICCPR", in *International Journal on Minority and Group Rights*, 2023, vol. 30, no. 1, p. 171.

37 Supreme Court, 11 October 2021, paras. 151 and 153, see *supra* note 31.

38 Professor Inge Lorang Backer argued that the wind turbines should have been stopped and that their continued operation is punishable by law, see Inge Lorang Backer, "Fosen-dommen: prosessuelle og forvaltningsrettslige sider", in *Lov og Rett*, 2022, vol. 61, no. 5, para. 4.4; Ronald Ramsdal, "Jusekspert mener Fosen-utbyggerne kan straffes med bøter", *Teknisk ukeblad*, 14 March 2023.

39 Trond Ulven Ingvaldsen and Mathias Rasmussen, Ministry of Petroleum and Energy, "Fosen-saken – svar på henvendelser fra Sametinget [The Fosen case – answers to inquiries from the Sámi Parliament]", Letter, 24 June 2022 ('Letter of 24 June 2022').

40 Simon Piera Paulsen, Marie Elise Nystad and Piera Balto, "Statsråd om Fosen-dommen: Jeg forstår at veldig mange er utålmodige", *Norsk rikskringkasting (NRK)*, 16 December 2021.

41 Letter of 24 June 2022, see *supra* note 39.

42 Lov om arbeidstvister (arbeidstvistloven) [Labour Disputes Act], 27 January 2012, Section 12 (https://www.legal-tools.org/doc/297wyk8e/).

43 Ministry of Energy, "Agreement between Nord-Fosen siida and Roan Vind", Press Release, 6 March 2024; Ministry of Energy, "Agreement between Sør-Fosen Sijte and Fosen Vind", Press Release, 19 December 2023.

44 There are numerous articles on these demonstrations, among the top news stories in Norway in 2023. For example, see Ashifa Kassam, "Demonstration in Oslo seeks removal of windfarms in Indigenous region", *The Guardian*, 11 October 2023.

45 Knut Dørum, Geir Thorsnæs and Svein Askheimer, "Finnmarks historie", *Store Norske Leksikon*, 10 January 2024.

46 Supreme Court of Norway, *Finnmark Estate v. Karasjok Sámi Association et al*., Judgment, 31 May 2024, HR-2024-982-S, para. 6 ('Supreme Court, 31 May 2024') (https://www.legal-tools.org/doc/x1mi2800/).

47 Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark (Finnmarksloven), 17 June 2005, No. 85 of 2005, Section 49 ('Finnmark Act') (https://www.legal-tools.org/doc/kcyitvkp/).

48 *Ibid*., Sections 29–35.

49 ILO Convention No. 169, 27 June 1989 (https://www.legal-tools.org/doc/699b29/).

50 Traktat om grensen mellom Norge og Sverige [Treaty concerning the state frontier between Norway and Sweden], 21 September 1751 (https://www.legal-tools.org/doc/pzi4rdky/).

the rights and duties of Sámi reindeer herders (the Lapp Codicil),[51] provisions on the rights to freely cross the borders and continue reindeer herding in both countries, and rules on which country they should pay taxes to). The normative basis of acquisition, by whom, when, and evidenced by what, had to be determined based on facts and documents dating back more than 300 years.

The Supreme Court's Grand Chamber was split 6 to 5. The majority held that the Karasjok population has not acquired collective ownership of the entire Karasjok area. There was evidence that the area had been massively used by the population, but the population was split up into groups that had used the area in various ways throughout different periods.[52] Because the population as a whole could not prove that it had, as a collective unified group, used the area over a significant period of time in a way that could be assumed to be collective ownership, the area belonged to the state.[53] This did not exclude the possibility that individuals or smaller groups and villages had acquired ownership of smaller areas within the larger Karasjok territory.[54]

The Chamber's minority held that the Karasjok population had acquired collective ownership to the Karasjok territory, based on a common united use of the land.[55] It expressed disagreement with the majority when it "assume[d] that the King [the state] had already acquired property rights to the land in inner Finnmark from 1751. Nor can I see that the state has established property rights at any later stage".[56]

A central legal question concerned the understanding of Article 14 of ILO Convention No. 169: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised".[57] The majority held that the Convention must be interpreted according to Article 31 of the Vienna Convention on the Law of Treaties ('VCLT').[58] But then, in the very next sentence, it declares that there are no international legal sources relevant to the interpretation other than the wording of the treaty itself,[59] based on which it resorted to Norwegian domestic legal sources, among them the 17-year-old preparatory works of the Finnmark Act.[60] How these sources are relevant in light of VCLT Article 31 is not discussed in the judgment, which concludes that the right to ownership has to be assessed according to domestic Norwegian property law.

The minority also found that there are few relevant international legal sources clarifying the wording of Article 14 of ILO Convention No. 169.[61] Having referred to the Court's own jurisprudence and other Norwegian legal sources, the dissenting opinion acknowledges that UNDRIP Articles 25–27 contain relevant norms on indigenous land rights, although the Declaration is not legally binding (noting an earlier judgement saying that the Declaration does not provide anything new *vis-à-vis* ILO Convention No. 169).[62]

We may be inclined to agree that there are few international legal sources substantiating ILO Convention No. 169, but that does not mean that Norwegian legal sources should take the entire space.[63] A treaty is a written agreement between states,[64] and the basic rule of international law is *pacta sunt servanda*, that agreements must be respected. When interpreting a treaty, we try to find evidence (legal sources) that can elaborate what member states agreed to, according to VCLT Articles 31–33. The preparatory works of a Norwegian statute are not an international legal source on what the member states agreed to. It may say something about Norway's state practice. Even though states have a significant margin of appreciation, it is one thing to establish state practice of a single state, and quite another what the legal obligations under the treaty itself are.[65]

4. The State Triggers Further Cases

The three reviewed Norwegian Supreme Court cases tell a story of how difficult it is to protect Sámi rights in a country like Norway, whose government likes to present itself as a champion of human rights, said to be "at the heart of Norwegian foreign policy".[66] Maybe that is not always the case at home in Norway? The *Fosen* case was initially a victory for minority rights, but became a complete nightmare.

The Norwegian government has announced that the main gas production facility in Finnmark will be powered by electricity generated by land-based wind turbines in the area – that this is a key target for Norway in order to fulfil the Paris Agreement.[67] The Sámi Parliament has sued the government for taking such a step – with major consequences for the environment and reindeer herding – without consulting it. The judgment in this important case will significantly affect traditional Sámi life in Norway. Although the Supreme Court is supposed to pronounce "judgment in the final instance",[68] the biology of reindeers will most likely be disputed again and again.[69]

Dr. ***Hadi Strømmen Lile*** *is Professor of law at Østfold University College, Norway.*

ISBN: *978-82-8348-243-0.*
TOAEP-PURL: *https://www.toaep.org/pbs-pdf/156-lile/.*
LTD-PURL: *https://www.legal-tools.org/doc/2dlizzy1/.*
Date of publication: *14 November 2024.*

51 Første Codicill og Tillæg til Grendse-Tractaten imellem Kongerigerne Norge og Sverrig Lapperne betreffende (Lappekodisillen), 21 September 1751 (https://www.legal-tools.org/doc/iifjoi74/).

52 Supreme Court, 31 May 2024, paras. 184–186, see *supra* note 46.

53 *Ibid*., paras. 198–200.

54 *Ibid*., para. 205.

55 *Ibid*., para. 216.

56 *Ibid*., para. 217. It seems unclear whether the majority specifically found that the state had acquired property rights from 1751. However, the consequence of concluding that nobody had acquired property rights to the whole area as a collective unit seem to be that it belonged to the state.

57 ILO Convention No. 169, Article 14, see *supra* note 49.

58 VCLT, 23 May 1969 (https://www.legal-tools.org/doc/6bfcd4/).

59 Supreme Court, 31 May 2024, para. 98, see *supra* note 46.

60 *Ibid*., paras. 102–104; "Den nye sameretten: Utredning fra Samerettsutvalget [The new Sámi law: Investigation by the Sámi Law Committee]", 3 December 2007, NOU No. 2007:13 (https://www.legal-tools.org/doc/5wrubbqp/). Finnmark Act, see *supra* note 47.

61 Supreme Court, 31 May 2024, para. 263, see *supra* note 46.

62 *Ibid*., para. 97.

63 See also Geir Ulfstein, "Uklart om folkeretten i Karasjokdommen", *Rett24*, 18 June 2024.

64 VCLT, Article 2, see *supra* note 58.

65 Richard Gardiner, *Treaty Interpretation*, 2nd ed., Oxford University Press, 2015, p. 267.

66 Government of Norway, "Human Rights" (available on its web site).

67 Government of Norway, "Kraft- og industriløft for Finnmark", Press Release, 8 August 2023.

68 Constitution of Norway, 17 May 1814, Article 88 (https://www.legal-tools.org/doc/a7803b/).

69 See Section 2. above.

TOAEP | Torkel Opsahl Academic EPublisher

Torkel Opsahl Academic EPublisher (TOAEP)
Via San Gallo 135r, 50129 Florence, Italy
URL: www.toaep.org