UNDRIP, ILO-169 and ICCPR Article 27 in the Supreme Court of Norway

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1. Introduction[1]

Recognized as an indigenous people and a minority by both Norwegian authorities and international treaty bodies, the Sámi people are rights holders under several international legal instruments.[2] Frequently referred to are their rights under the UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[3] ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (ILO-169),[4] and Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR).[5] Here, I examine how the Supreme Court of Norway treats them when dealing with cases involving Sámi rights.

My research aim is to identify positive and negative trends in the Supreme Court's legal approach when it encounters these international legal instruments. Development has naturally taken place; just as human relationships evolve over time, a jurist's relationship with legal sources is constantly transforming. It is particularly after the turn of the millennium that the Supreme Court has encountered our three subjects of investigation. Belonging to the field of international indigenous and minority law, which has been (and still can be said to be) a unfamiliar area of law for Norwegian jurists, these instruments can be said to have presented unique challenges for the Norwegian legal system.

In the above-mentioned order, the international legal instruments are presented and examined separately. Comparisons are made continuously. I devote most space to ICCPR article 27, which the Supreme Court for the first time considers violated in HR-2021-1975-S (Fosen).

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[1] This article is based on a presentation I held at Advokatforeningen Tromsø krets' *Juslunch* May 10, 2022, and is aimed at students and others who wants to learn about the state of Sámi rights in Norwegian law. The source material has not been updated since the time of my presentation. This article is originally written in Norwegian (titled: "Hvordan forholder Høyesterett seg til urfolkserklæringen, ILO-169 og SP artikkel 27?", but has been translated to English by use of ChatGPT.

[2] St.meld. nr. 52 (1992–1993) Om norsk samepolitikk p. 21, St.meld. nr. 55 (2000) Om samepolitikken pp. 3 and 23, RT-2001-769 (Selbu) (p. 791), HR-2021-1975-S (Fosen) (para. 101), Länsman et al. v. Finland (CCPR-1992-511) (para. 9.2) and ILO, «Observation (CEACR) - adopted 1995, published 82nd ILC session (1995)», ILO, u.å., https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P13100_COUNTRY_ID:2139363,102785 (read June 5, 2023).

[3] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), New York City, September 13, 2007, A/RES/61/295.

[4] ILO Convention no. 169 on Indigenous and Tribal Peoples in Independent Countries (ILO-169), Geneva, June 27, 1989 (Entry in to force: September 5, 1991).

[5] International Covenant on Civil and Political Rights, New York City, December 16, 1966 (Entry in to force: March 23, 1976).

2. UNDRIP

2.1 General information about the declaration

UNDRIP was adopted by the UN General Assembly on September 13, 2007. 144 states voted in favor of the declaration, including Norway. Eleven states abstained from voting, while Australia, Canada, New Zealand, and the USA chose to vote against it. However, these four settler states have recently changed their stance and do now express support for the declaration.[6]

The rights recognized UNDRIP "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the word" (Article 43). The 46-article declaration recognizes important rights for indigenous peoples, e.g. cultural, non-discriminatory and educational rights. Article 3 is particularly important, as it grants indigenous peoples the right to self-determination. Considering that nothing in the declaration should be understood as challenging the sovereignty of states (Article 46(1)), it is an *internal* right to self-determination. This means that indigenous peoples have the right to determine their own economic, social, and cultural affairs, but not to establish their own state.

UNDRIP is not legally binding in itself for Norway or other states. It is not a treaty that states can ratify. Nevertheless, it is possible to argue that at least some of the provisions of the declaration are legally binding for all states, as they are considered to reflect *customary international law*.[7] According to Article 38(1)(b) of the Statute of the International Court of Justice (ICJ Statute),[8] customary international law is a formal source of law in international law. In short, it would strengthen the legal status of UNDRIP if its provisions were deemed to reflect customary international law.

Immediately after the adoption of UNDRIP, the International Law Association (NGO) appointed a committee to examine the declaration's status in international law.[9] The committee's final report was presented for discussion and adoption in 2012. It states that UNDRIP "as a

[6] See the historical overview in UN, «United Nations Declaration on the Rights of Indigenous Peoples», u.å., https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (read June 5, 2023).
[7] Susann Funderud Skogvang, *Samerett*, 3. edition, Oslo 2017 p. 118, S. James Anaya og Luis Rodríguez-Piñero, «Part I The UNDRIP's Relationship to Existing International Law, Ch.2 The Making of UNDRIP», Jessie Hohmann and Marc Weller (eds.), *The UN Declaration on the Rights of Indigenous Peoples, A Commentary*, Oxford University Press 2018, pp. 38–62 (p. 62). DOI: https://doi.org/10.1093/law/9780199673223.003.0020. For their claim, Anaya and Rodríguez-Piñero refer to International Law Association, Conclusions and Recommendation of The Committee on the Rights of Indigenous Peoples, 75th Conference, Resolution No. 5/2012, Sofia 2012 para. 2.
[8] Statute of the International Court of Justice, San Francisco, 26. juni 1945 (Entry in to Force: October 24, 1945).
[9] International Law Association, Rights of Indigenous Peoples: First Report, Conference, Rio de Janeiro 2008.

whole cannot yet be considered as a statement of existing customary international law".[10] However, the committee believes that several of the declaration's provisions have already achieved such status, including the right to self-determination in Article 3.[11] It can also be noted that international treaty bodies, such as the UN Human Rights Committee (HRC), have referred to the declaration in their statements on individual complaints.[12] In sum, UNDRIP is an important instrument in international indigenous law.

2.2 The declaration in the Supreme Court of Norway

UNDRIP is mentioned in two judgments by the Supreme Court of Norway: HR-2018-456-P (Nesseby) and HR-2021-1429-A (Saarivuomi).[13] In the latter, the declaration is only referred to, along with other international legal instruments, to emphasize the special legal protection of Sámi reindeer husbandry.[14] In the Nesseby case, however, the Supreme Court, in plenary, makes some interesting statements about the declaration. The issue in the case is whether the local population or the Finnmark Estate has the right to manage a substantial land area in Nesseby municipality. Here, the declaration is mentioned for the first time ever by the Supreme Court:

> The UN's Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted at the UN General Assembly in 2007, must be regarded as a central document within indigenous law, as it reflects the international law principles in the field and gained support from a large number of states. In 2014, the states confirmed their support of the Declaration through a General Assembly Resolution (69/2 Outcome document). However, the Declaration does not have direct relevance to the issues at hand. It is not legally binding, and the scope of its provisions does not seem wider than the scope of the provisions in binding conventions, primarily the ILO Convention no. 169.[15]

As indicated by the phrase "as it" (in the authoritative Norwegian version the phrase "blant annet" is used, which translated into English means "among other things"), the Supreme Court does not provide a *complete* explanation of why it considers UNDRIP as "a central document within indigenous law". Only two reasons are highlighted: First, that the declaration "reflects the international law principles in the field". It is interesting that the Court uses the term "international law principles" instead of "customary international law". It is reasonable to

[10] International Law Association (2012) para. 2.
[11] International Law Association (2012) para. 4.
[12] Tiina Sanila-Aikio v. Finland (CCPR-2668-2015) (para. 6.6).
[13] In HR-2017-2428-A (para. 26) the appellant refers to the declaration in his comments, but the Supreme Court do not mention it in its decision.
[14] HR-2021-1429-A (Saarivuomi) (para. 61).
[15] HR-2018-456-P (Nesseby) (para. 97). Translated provided by the Supreme Court of Norway.

interpret “international law principles” as referring to general principles of law, which, at least theoretically, are distinct from customary international law. Although general principles of law are a formal source of law in international law, as stated in Article 38(1)(c) of the ICJ Statute, they may have a lower status as legal sources compared to customary international law.[16] Furthermore, the Court remains silent on the *extent* to which the declaration reflects such “international law principles”. Does it apply to the declaration “as a whole” or only parts of it?

The second reason why the Supreme Court considers the declaration important within indigenous law is that it has “gained support from a large number of states”. The Court does not comment on whether the declaration’s large support is evidence of the existence or emergence of what it refers to as “international law principles”.[17] Nevertheless, it is undisputed that the extensive support for the declaration makes it important within indigenous law.

Despite the Supreme Court's initial positive remarks on the importance of UNDRIP, the court does not find the declaration to “have direct relevance to the issues at hand”. The given justification for this is interesting: First, the Court states that the declaration "is not legally binding." It is correct that the declaration *in itself* is not legally binding. The problem is, however, that the Court two sentences earlier has recognized that the declaration “international law principles”, which are legally binding. It is therefore difficult to reconcile these two statements. Second, the Court claims that "the scope of its provisions does not seem wider than the scope of the provisions in binding conventions, primarily the ILO Convention No. 169." This claim is incorrect. There are provisions in the declaration that go beyond their counterparts in ILO-169. For example, while Article 10 of UNDRIP establishes an absolute requirement for obtaining free, prior, and informed consent (FPIC) from indigenous peoples before relocating them, Article 16(2) of ILO-169 does not. However, it is possible that the Court's statement not is meant as a *complete* comparison of the substantive content of the two international instruments but is limited to the provisions that are specifically relevant to the Nesseby case.

Considering that UNDRIP has only been referred to in a few Supreme Court judgments, it is difficult to trace any clear trends in the Court's approach to the declaration. However, I can comment on the court's initial encounter with the declaration in the Nesseby case. The first and

[16] The Supreme Court of Sweden uses a phrase that is similar to “international law principles” in the Girjas case. The Court addresses ILO-169 article 8(1) as a general principle of international law (“allmän folkrättslig princip”), se Høgsta domstolens judgment January 23, 2020, mål nr. T 853-18 (Girjas) (avs. 130).

[17] In an advisory opinion, ICJ “notes that “General Assembly resolutions General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”, see Legality of Nuclear Weapons, Advisory Opinion (ICJ Reports 1996 s. 254–255 (avs. 70)). ISBN 92-1-070743-5.

most important point is that the declaration is recognized as a central document in indigenous law, and therefore also for Sámi law in Norway. The second point is the Court's statement about the declaration reflecting "international law principles". However, the latter point loses some of its strength due to the Court's later inconsistent statement that the declaration is "not legally binding". In the future, it is important for the Court to clarify its own ambiguity on this matter.

3. ILO-169

3.1 General information about the convention

ILO-169 was adopted at the 76th session of the International Labour Organization's General Conference in Geneva on June 27, 1989. The convention stands as a proof that from that point on, indigenous people's ways of life were regarded as having intrinsic value, and that earlier standard's assimilationist orientation was now a (apparently) closed chapter.[18] Norway ratified the convention as the first state in the world on June 20, 1990. In sum, 24 states have now ratified it. The most recent was Germany on June 23, 2021.[19]

Similar to UNDRIP, the provisions of ILO-169 are understood as minimum standards.[20] The convention consists of 44 provisions and is divided into three main parts: Part I (Articles 1-12) sets out general guidelines ("general policy"). Part II (Articles 13-32) provides specific substantive rights including social security, health, education, and, notably, land. Part III (Articles 33-44) contains e.g. rules on the implementation of the convention.

ILO-169 is legally binding for Norway. The convention has been partially incorporated into several areas of Norwegian law, such as the Penal Code[21] and the Finnmark Act.[22] Within the areas where ILO-169 is incorporated into Norwegian law, it can be directly invoked (as legal basis) in cases for Norwegian courts. Where the convention is not incorporated into Norwegian law, it will only have significance as an interpretive aid, pursuant to the principle of presumption.[23]

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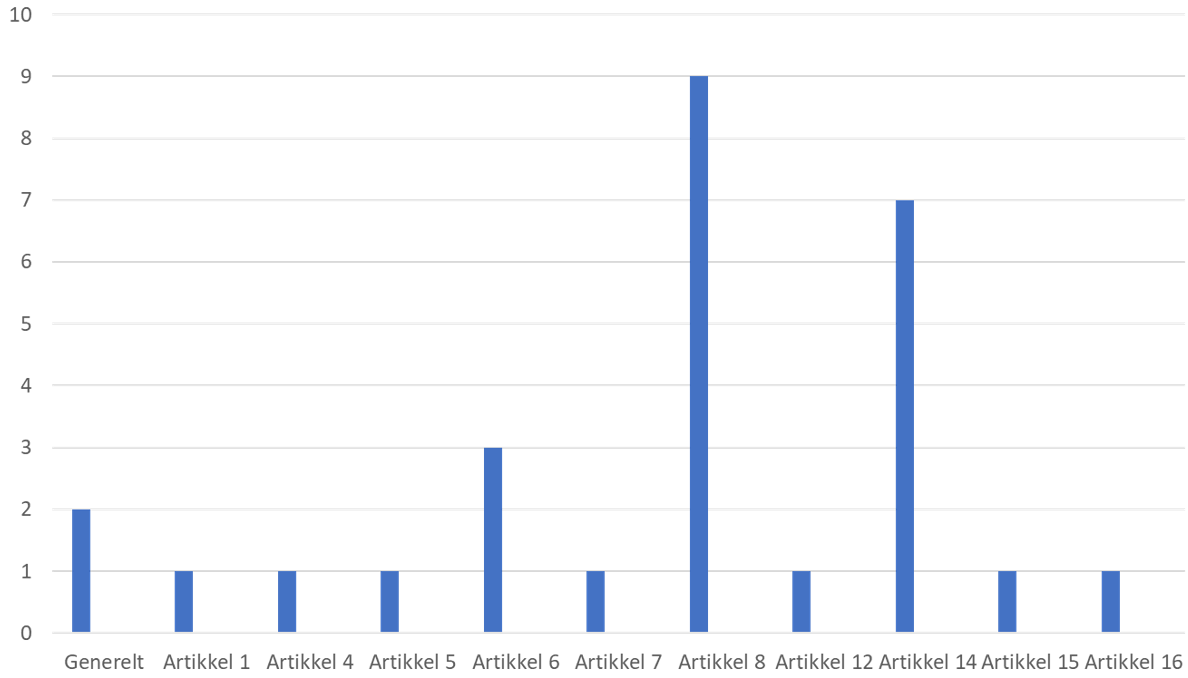
[18] See the Preamble of ILO-169 (para. 5).
[19] ILO, "Germany ratifies ILO Convention, 1989 (No. 169) as a strong expression of solidarity for the protection of indigenous and tribal peoples' rights", June 25, 2021, *ILO*, https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/WCMS_807508/lang--en/index.htm (read June 7, 2023).
[20] ILO-169 Article 35, jf. Constitution of the International Labour Organisation, Versailles, April 1, 1919 (Entry in to force: June 28, 1919) (ILO-Constitution) Article 19(8).
[21] Act May 20, 2005 nr. 28 Penal Code § 2.
[22] Act June 17, 2005 nr. 85 relating to legal relations and management of land and natural resources in Finnmark (Finnmark Act) § 3(1).
[23] For more information about the incorporation of ILO-169 in the Norwegian legal system, see Bendik Midtkandal, *Betydningen av ILO-169 i norsk rett – En studie av konvensjonens gjennomslagskraft*, Tromsø 2020.

3.2 The convention in the Supreme Court of Norway

3.2.1 Statistics

It has been over 30 years since ILO-169 came into force in Norway. Since then, the convention has been mentioned by the Supreme Court in its reasoning in 18 judgments.[24] Only Article 8 has been directly invoked for the Court, and this has happened in 5 criminal cases.[25] In the remaining 13 cases, the provisions of the convention have only been referred to or, at best, used as an interpretive tool to clarify the content of Norwegian domestic legal rules. Only in 2 of these 13 cases have the provisions of the convention been interpreted in detail: in HR-2016-2030-A (Stjernøya) and HR-2018-456-P (Nesseby), Article 14 (regarding indigenous land rights) is thoroughly interpreted by the Court.[26]

Figure: The provisions of ILO-169 mentioned in the reasoning in the 18 judgments by the Supreme Court of Norway



[24] RT-1992-1037 (p. 1039), RT-1996-1232 (Tysfjord) (pp. 1248 and 1250), RT-2001-769 (Selbu) (pp. 785–786 and 790–791), RT-2001-1116 (pp. 1118–1120), RT-2001-1229 (Svartskogen) (p. 1252), RT-2004-1092 (Stonglandshalvøya) (para. 74), RT-2006-957 (para. 19), RT-2008-1789 (para. 24–45 and 48–61), RT-2011-1101 (para. 9–14), RT-2011-1180 (para. 47), RT-2015-838 (para. 16), HR-2016-2030-A (Stjernøya) (para. 60, 74–85 and 115), HR-2018-456-P (Nesseby) (para. 86, 96–104, 125, 165–179, 194 and 197), HR-2018-872-A (Femund) (para. 43, 44 and 90), HR-2020-1956-A (para. 79), HR-2021-863-U (para. 9–10), HR-2021-1429-A (Saarivuomi) (para. 61, 131, 133, 192–193 and 230) and HR-2021-1472-U (para. 17–18).

[25] RT-2001-1116 (pp. 1118–1120), RT-2008-1789 (para. 24–45 and 48–61), RT-2011-1101 (para. 9–14), HR-2021-863-U (para. 9–10) and HR-2021-1472-U (para. 17–18).

[26] HR-2016-2030-A (Stjernøya) (para. 60, 74–85 and 115) and HR-2018-456-P (Nesseby) (para. 86, 96–104, 125, 165–179, 194 and 197). By «thoroughly interpreted» I mean that the Supreme Court uses other legal sources than only the wording (ordinary meaning) of ILO-169's provisions to interpret them.

As the figure shows, it is Articles 8 and 14 of ILO Convention No. 169 that are most often mentioned in the Supreme Court's reasoning. [27] In the following, I limit myself to examining the Court's legal approach only in relation to Article 8. For this examination, we will look at the judgment Rt. 2008 s. 1789, where a Sámi reindeer herder was convicted by the Court of Appeal for violating the animal welfare law[28] by slaughtering semi-domesticated reindeer for personal use using a heart-sticking method without prior stunning. The defendant argues before the Supreme Court that the slaughtering method is a Sámi custom and, therefore, protected by Article 8 of ILO-169, which is incorporated into Norwegian criminal law.[29] The interesting question for the Supreme Court is whether Article 8 of ILO-169 can lead to impunity even though the act *de facto* is a criminal offence after Norwegian criminal law. The appeal is dismissed by an unanimous Supreme Court, but the justices are divided (3-2) in their interpretation of Article 8.

3.2.2 Article 8

It is stated in Article 8(1-2) of ILO-169:[30]

> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
>
> 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle

In a Norwegian context, (1) determines that due regard should be given to Sámi customs and customary laws when applying Norwegian law. According to (2), the Sámi people are entitled to retain their customs and institutions if they do not conflict with fundamental national legal principles and internationally recognized human rights.

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[27] Article 8 is mentioned in the reasoning in 9 judgments by the Supreme Court: RT-2001-1116 (pp. 1118–1120), RT-2006-957 (para. 19), RT-2008-1789 (para. 24–45 and 48–61), RT-2011-1101 (para. 9–14), RT-2011-1180 (para. 47), HR-2016-2030-A (Stjernøya) (para. 85), HR-2018-456-P (Nesseby) (para. 125), HR-2021-863-U (para. 9–10) og HR-2021-1472-U (para. 17–18). Article 14 is mentioned 7 times: RT-1996-1232 (Tysfjord) (pp. 1248 and 1250), RT-2001-769 (Selbu) (pp. 790–791), RT-2001-1229 (Svartskogen) (p. 1252), RT-2004-1092 (Stonglandshalvøya) (para. 74), HR-2016-2030-A (Stjernøya) (para. 60, 74–85 and 115), HR-2018-456-P (Nesseby) (para. 165–179) and HR-2021-1429-A (Saarivuoma) (para. 61, 131 and 192–193).

[28] Act December 20, 1974 nr. 73 relating animal welfare (Animal Welfare Act) § 9, jf. § 31. The Act is repealed.

[29] Act May 22, 1902 nr. 10 The Penal Code of 1902 § 1(2). The act is repealed. The provision (§ 1 (2)) is similar to the current Penal Code of 2005 § 2.

[30] The last paragraph (3) of Article 8 is not relevant for this examination.

Article 8 of ILO-169 imposes requirements on Norwegian legal doctrine in two ways: Firstly, Sámi customs and customary laws should be recognized as relevant legal sources. Secondly, these Sámi legal sources should also be given some weight when they are in conflict with Norwegian law. Overall, Article 8 establishes protection for Sámi legal traditions and, by extension, Sámi culture. The purpose is to ensure that the Sámi can use their own law to resolve their conflicts.

As a treaty provision, ILO-169 Article 8 should be interpreted in accordance with the rules of international law, as outlined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[31] This is also stated by the Supreme Court in Rt. 2008 s. 1789.[32] One problem in this regard is that in that case, the Court relies on an inaccurate Norwegian translation instead of the authoritative English (or French, see ILO-169 article 44)) version of the convention text to interpret Article 8.[33] As Susann Funderud Skogvang has pointed out several times, there is a greater risk of misinterpreting a treaty when relying on a (Norwegian) translation.[34] Despite this criticism, the Norwegian translation has consistently been used by the Supreme Court both before and after the 2008-case.[35] By comparison, in the last years the English version has been used by the Court to interpret ILO-169 Article 14.[36]

Not only has the Supreme Court's use of a Norwegian translation of Article 8 been criticized, but its specific interpretation of the provision has also been subject to criticism. In the 2008-case, the majority of justices understands the distinction between the two paragraphs of Article 8 like this: (1) regulates the *internal* Sámi customs, while (2) regulates the *external* Sámi customs.[37] In essence, this distinction means that if the Sámi custom (in this case, the slaughtering method) is considered an internal Sámi matter, it will have a stronger standing in relation to Norwegian legal rules (in this case, the Animal Welfare Act § 9, cf. § 31) than if the custom is considered as an external matter. The question then is what determines whether the

[31] Vienna Convention on the Law of Treaties, Vienna, May 23, 1969 (Entry in to force: January 27, 1980).
[32] RT-2008-1789 (para. 28).
[33] RT-2008-1789 (para 25). See Susann Funderud Skogvang, «Hjertesukk om hjertestikk», *Tidsskrift for Strafferett*, 2009 pp. 373–389 (pp. 378–379) and Skogvang (2017) pp. 73–74, who also explains how this Norwegian translation is inaccurate.
[34] See Susann Funderud Skogvang, «Hjertesukk om hjertestikk», *Tidsskrift for Strafferett*, 2009 pp. 373–389 (pp. 378–379) and Skogvang (2017) pp. 73–74, who also explains how this Norwegian translation is inaccurate. Article 33 of the Vienna Convention implicates that the authoritative versions of the treaty text shall be used for the interpretation.
[35] RT-2001-1116 (p. 1118), RT-2011-1101 (para. 9) and HR-2021-863-U (para. 9). A Norwegian translation is also being used in HR-2021-1472-U (para. 17), but this seems to be an "updated" version that is more accurate, because the Norwegian word "skikk" has been replaced by the word "sedvane" in (2). Both words can be translated to "customs". However, the latter word has more legal connotations than the former one.
[36] HR-2016-2030-A (Stjernøya) (para. 78) and HR-2018-456-P (Nesseby) (para. 168).
[37] RT-2008-1789 (para. 38).

Sámi custom is to be *classified* as internal or external. The majority concludes that the slaughtering method is an external matter because it involves "the application of [Norwegian] legal rules that apply generally in Norway, and therefore, the question of impunity must be decided based on the balancing indicated by Article 8(1)".[38] In other words, the classification of the Sámi custom is not based on the Sámi custom in itself, but rather on the range of application of the Norwegian rules, that it conflicts with. Because the Norwegian rules "apply generally in Norway", the Sámi custom enjoys weaker protection than if it had been classified as internal.

The minority of justices believes, on the other hand, states that it is incorrect to determine whether the Sámi custom should be classified as either internal or external based on whether the Norwegian rule it conflicts with is general or specifically directed at the Sámi people. According to the minority, the majority's approach "in reality, could pave the way for the same integration approach that was by ILO Convention No. 169 – particularly the amendment to Article 8(2) – precisely aimed to be changed".[39] Skogvang goes even further and questions whether there even is a legal basis for distinguishing between internal and external customs. [40] In her opinion, there exists so few, if any, arenas where Sámi customs won't affect or meet the majority society.[41]

Here, I choose not to delve into how the Supreme Court has interpreted Article 8 in subsequent judgments. However, based on my reading of these judgments, it seems that the majority's interpretation of the provision in 2008-case continues to be relied upon. In my opinion, it can be said that the Court's legal approach to Article 8 has stagnated. Such a halt in development is problematic from a Sámi legal perspective because the current state potentially provides the Sami people with weaker protection than they may are entitled to under international law.

3.2.3 In general

When it comes to the Supreme Court's treatment of ILO-169 more generally, I would like to point out one thing: In both previous Court judgments and other public documents, it is often

[38] RT-2008-1789 (para. 40). My own translation.
[39] RT-2008-1789 (para. 57). In an article from 2017, the justice that represents the minority in the judgment, Arnfinn Bårdsen, expresses his continuing support for the minority's interpretation of Article 8, see Arnfinn Bårdsen, «Samerettslige spørsmål i Høyesteretts praksis», Domstolen, February 8, 2017, https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/samerett-i-hoyesterett---bardsen-080217.pdf (read June 2, 2023) (para 53).
[40] Skogvang (2009) p. 383.
[41] Skogvang (2009) p. 385.

expressed that the content of the convention is not particularly 'clear'.[42] What I wonder is whether the Court's statements in the Nesseby case indicate a change in this perception.

As mentioned earlier, the Supreme Court states in the Nesseby case that the UNDRIP "does not have direct relevance to the issues at hand", partly because "the scope of its provisions does not seem wider than the scope of the provisions in binding conventions, primarily the ILO Convention no. 169". In other words, the Court (falsely) consider that the declaration does not go further than what is already covered by ILO-169. Such a claim seems to presuppose that the Court finds the *content* of the convention (and the declaration) to be somewhat clear. Therefore, it might be argued that the Court has shifted from perceiving the convention to have an unclear content to having a clear (or at least clearer) content.[43] It makes sense that both the Court and other Norwegian legal practitioners believe that they have gained a clearer understanding of ILO-169's content over the last three decades.

4. ICCPR article 27

4.1 General information about the minority provision

On December 16, 1966, the ICCPR was adopted by the UN General Assembly. The convention has been ratified by 173 states, including Norway. [44] Article 27 protects minorities. Fundamental disagreements regarding to what extent minorities should have legal protection resulted in a provision with vague wording: [45]

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such 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.

While UNDRIP and ILO-169 are collective in nature, Article 27 of the ICCPR is primarily individual-oriented. The word "persons" implies that it is the individual members of the minority, rather than the minority as a whole, who are the rights holders under the provision. At

[42] E.g. RT-2001-1116 (p. 1119), RT-2008-1789 (para. 48), NOU 1993: 18 Lovgivning om Menneskerettigheter p. 143 and Innst.O nr.80 (2004–2005) Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (finnmarksloven) p. 33.

[43] It might be added that the Supreme Court, in my view, makes another problematic claim by stating that: "Due to, among others, the far more specific provisions in the ILO Convention no. 169, I cannot see that ICCPR article 1 or ICESC article 1 individually may serve as basis for the claims raised in this case", see HR-2018-456-P (Nesseby) (para. 96).

[44] OCHCR, «View the ratification status by country or by treaty», u.å., *OCHCR*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CCPR&Lang=en (read May 31, 2023).

[45] Manfred Nowack, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2. edition, Kehl 2005 p. 640.

the same time, the provision also has a collective dimension, as indicated by the phrase "in community with the other members of their group".

The protection of minority individuals' rights is formulated in the negative, as stated in "shall not be denied the right". The negative protection of rights imposes an obligation on states not to deny minority individuals the exercise of their culture, religion, and language. However, it cannot be directly inferred from the wording that the state has positive obligations towards minority individuals, such as facilitating their cultural practices or preventing other citizens from violating their rights. The negative formulation of Article 27 limits the possibilities of imposing positive obligations on states. Nevertheless, HRC, which is the convention's treaty body, has derived certain positive obligations from Article 27 through interpretation.[46]

The threshold for violating the rights of minority individuals is determined by the word "denied". Although the wording alone indicates a very high threshold for a breach of the convention, it is clear that other interferences besides complete denials can also lead to a violation. According to HRC, what matter is whether the interference has "a substantive negative impact" on the rights of minority individuals.[47] If the question is answered affirmatively, there is a violation.

ICCPR Article 27 has been incorporated into Norwegian law through the Human Rights Act, [48] § 2(3), and according to § 3, it takes precedence over any other Norwegian legislation that is in conflict except the Constitution. The solid integration of Article 27 into Norwegian law provides it with better prerequisites for having its content realized in the national courts compared to the UNDRIP and ILO-169.

4.2 The minority provision in the Supreme Court of Norway

4.2.1 Rt. 1982 s. 241 (Alta)

Article 27 of the ICCPR has been mentioned in by the Supreme Court in its reasoning in 15 decisions.[49] In 8 of these decisions, the provision has been directly invoked by the Court.[50] The

[46] General Comment No. 23 (1994): The rights of minorities (Art. 27) (GC-1994-23) (para. 6.1 and 7).
[47] Ángela Poma Poma v. Peru (CCPR-2006-1457) (para. 7.5).
[48] Act May 21, 1999 relating to the strengthening of the status of human rights in Norwegian law (The Human Rights Act).
[49] On January 13 2022, I did a case law-search by using Lovdata Pro. The result was 25 judgments, but 10 of the cases were either not about Sámi law (Rt-2014-976, HR-2019-788-U and HR-2021-475-A) or Article 27 is not mentioned in the Court's own reasoning (RT-1981-35, RT-1998-811, RT-2001-1229 (Svartskogen), RT-2003-1013, RT-2006-1382, HR-2017-1230-A (Hjerttind) and HR-2018-862-U).
[50] RT-1982-241 (Alta), RT-1992-1037, RT-2004-1092 (Stonglandshalvøya), HR-2017-2247 (Reinøya), HR-2017-2428-A (Sara), HR-2018-456-P (Nesseby), HR-2021-1429-A (Saarivuomi) and HR-2021-1975-S (Fosen). The 8

first time this occurs is in Rt. 1982 p. 241 (Alta). The case concerns the validity of an administrative decision to develop a hydroelectric power plant in the Alta-Kautokeino water-course. The Sámi appellants argue that Norway's international legal obligations, including ICCPR article 27, hinder its validity. The Court in plenary disagreed:

> Nor do I see that the alleged minority rights are able to question the decision. The crucial thing for me on this matter is the actual extent of the interference being made in the Sámi interests. A prerequisite for any international legal question to arise in a regulation case would, in any case, be that the regulation entails substantial and highly detrimental interference in such interests. Only then one could question whether the mentioned Article 27 had been too much disturbed, because the interference with the reindeer husbandry was so significant that it threatened the Sámi culture. However, the interference taking place here is far from this serious in character.[51]

In the Alta case, the Court does not find the interference to constitute a violation of Article 27. To determine the threshold for violation, the Court begins by stating that it is a "prerequisite" that the interference "entails substantial and highly detrimental interference in such interests". However, the actual threshold for violation seems to be even higher: Only when the interference is 'so significant that it threatened the Sami culture,' does the Court consider the provision to be violated. The threshold applied by the Court in the Alta case is evidently high; only in exceptional cases will there be grounds to argue that Article 27 has been violated.

The Supreme Court's statements in the Alta case can serve as a basis for comparison when we later examine how Article 27 has been treated by the court in two more recent cases: HR-2017-2247-A (Reinøya) and HR-2021-1975-S (Fosen). Like the Alta case, these cases concern interferences in traditional Sámi areas. In the three decades between the three cases, two significant events have taken place: First, as mentioned, Article 27 is now included in the Human Rights Act. Second, the extent of HRC-interpretation has increased significantly.

Three aspects from the Alta case are carried forward. First, the Supreme Court bases its interpretation solely on its own textual reading. There is no reference to HRC-interpretation (which is not surprising considering that the committee had only commented on one individual complaint case at that time).[52] Second, as mentioned, the Court applies a very high threshold

remaining judgments contribute little to our examination, due to the lack of in-depth discussion of Article 27 in these.

[51] RT-1982-241 (Alta) (pp. 299–300). My own translation.

[52] Lovelace v. Canada (CCPR-1977-24).

for violation. Third, little is said about which criteria that influence the assessment of whether the threshold has been reached or not.

4.2.2 HR-2017-2247-A (Reinøya)

In HR-2017-2247-A (Reinøya), a reindeer herding district claims that an administrative decision to implement a road project is invalid. It is argued, among other things, that the planned road construction violates ICCPR Article 27 due to the effect it will have for Sami reindeer husbandry. The Supreme Court concludes that the provision has been complied with.[53]

After quoting the English version of Article 27,[54] the Court proceeds to examine HRC-practice. By referring to a previous Supreme Court decision (RT-2008-1764 (para. 81)), it emphasizes that HRC-practice carry "significant weight" when Norwegian courts interpret Article 27 in Sámi law cases.[55] The Court then follows up with an interesting statement regarding *how to determine* the threshold for violation:

> The question in the case at hand is whether the measure is of such a scope and significance that it entails that the Sami have been denied rights under Article 27, **the way «denied» has been interpreted by the Committee on Human Rights**.[56] [emphasis added]

The phrase "the way «denied» has been interpreted by the Committee on Human Rights" suggests that the Supreme Court now considers it to be HRC's task to establish the threshold for violation. HRC-practice, therefore, appears to have decisive, rather than just significant, weight for the threshold assessment. In this way, the Court limits its own task to 'identifying' the threshold set by the committee and then assessing whether this threshold has been exceeded or not in the specific case.

The Reinøya case is the first time the Supreme Court uses HRC-practice to interpret Article 27 in a Sámi law case. Interestingly, HRC-practice is the only legal source used to determine the threshold for violation in the case. After having reviewed the committee's statements in several individual complaints and a general comment, the Court concludes "that it takes a lot [in Norwegian: "en god del"] for a measure to become so serious that it constitutes a violation of Article 27".[57] I am a not sure if the English phrase "takes a lot" is a precise translation of the

[53] Two dissenting justices conclude that the administrative decision is invalid, but not because of a violation of ICCPR Article 27. The minority expresses its agreement with the majority's "general interpretation of the provision", see HR-2017-2247-A (Reinøya) (para. 150). Translation provided by the Supreme Court of Norway.
[54] HR-2017-2247-A (Reinøya) (para. 118).
[55] HR-2017-2247-A (Reinøya) (para. 119).
[56] HR-2017-2247-A (Reinøya) (para. 122).
[57] HR-2017-2247-A (Reinøya) (para. 128).

Norwegian phrase “en god del”. In my opinion, it is possible to argue that the threshold established by the Court in the Reinøya case is lower than the one established in the Alta case.

It is also worth noting that in the Reinøya case, the Supreme Court highlights some of the criteria that influence the assessment of whether Article 27 has been violated. For example, it is stated that the overall effect of both previous and planned interferences must be considered.[58] The duty to consult the affected Sámi parties is also acknowledged by the Court without further discussion.[59]

In my view, the Reinøya case represents a paradigm shift. From now on, the Supreme Court sees it as the task of HRC to clarify and develop the substantive content of Article 27.

4.2.3 HR-2021-1975-S (Fosen)

The question for the Supreme Court, as a grand chamber (11 justices), in HR-2021-1975-S (Fosen) is whether the licence and expropriations decisions for wind power development on the Fosen peninsula are valid or not. The already established wind power plants are located within the area of Fosen reindeer grazing district, where two siidas practice reindeer husbandry – Sør-Fosen sijte (siida) and Nord-Fosen (siida). A “siida” is a group of reindeer herders working together on specific pasture areas.

The Fosen case raises several interesting procedural and administrative law questions. I will limit myself to examine how the Court addresses the contention that the wind power development violates the rights of the two siidas under Article 27 of the ICCPR.[60]

To address this contention, the Court begins by quoting the English version of Article 27.[61] Then, three important principles for the further interpretation are briefly presented: that the provision is incorporated into the Human Rights Act, that reindeer husbandry is a protected cultural practice, and that HRC-practice carries “significant weight”.[62]

As mentioned, it is the minority individuals who are the rights-holders under Article 27. A procedural question is whether the two siidas, which are collective entities, can invoke the individual rights of their members. The State, acting as intervener for the wind power-company,

[58] HR-2017-2247-A (Reinøya) (para. 126).
[59] HR-2017-2247-A (Reinøya) (para. 121).
[60] The siidas also claimed that the wind power development was incompatible with Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination. The contention is not being assessed, because of the violation of ICCPR Article 27, see HR-2021-1975-S (Fosen) (para. 154).
[61] HR-2021-1975-S (Fosen) (para. 98).
[62] HR-2021-1975-S (Fosen) (avs. 100–102).

argues that the siidas do not have competence to do this. This argument fails. Considering the collective dimension of Article 27, the Court concludes that the siidas have a limited capacity to invoke the individual rights of their members.[63]

After the initial clarifications have been made, the Court addresses the substantive question of whether there is a violation of Article 27. The Court starts by seeking to clarify where the threshold for violation lies. Similar to the Reinøya case, the main interpretation tool for identifying the threshold is HRC-practice. It is interesting that the Court uses both the Committee's general comments and its statements in individual complaint cases without distinguishing between them. In my view, this means that both forms of HRC-practice carry "significant weight".

In the Fosen case, the Court's threshold-assessment is further developed from its statement in the Reinøya case. While the Court in the Reinøya case states "that it takes a lot" for a violation of Article 27 to occur, the formulation in the Fosen case is that the interference will lead to a violation if it "has a substantive, negative impact on the possibility of cultural enjoyment".[64] This further development does not stem from statements made by HRC *after* the Reinøya case. In other words, it is the same HRC-practice that is being applied in the two cases. What for me seems to be the reason for the Court's further development, is that it wants to try to get closer to HRC's own description of the threshold; in the case Poma Poma v. Peru HRC states that the interference must have "a substantive negative impact on the author's enjoyment of her right to enjoy the cultural life…".[65] The Court makes a clarifying statement by saying that "the effect does not need to be as serious as in *Ángela Poma Poma v. Peru*, where thousands of livestock animals were dead as a result of the measure, and the author had been forced to leave her area".[66]

The *effects* of the intervention are considered by the Court as the central factor for determining whether Article 27 has been violated.[67] In the Fosen case, it is pointed out that the development of wind power has led to the loss of late winter grazing areas, and that these cannot be fully compensated. As a long-term effect, the Court states, "the reindeer numbers will most likely be dramatically reduced".[68]

[63] HR-2021-1975-S (Fosen) (para. 103–110).
[64] HR-2021-1975-S (Fosen) (para. 119).
[65] Poma Poma v. Peru (CCPR-2006-1457) (para. 7.5).
[66] HR-2021-1975-S (Fosen) (para. 119).
[67] HR-2021-1975-S (Fosen) (para. 120).
[68] HR-2021-1975-S (Fosen) (para. 136).

Continued profitability for the reindeer herders is an important factor in assessing the effects of the interference. The Court emphasizes that it is primarily the cultural practice that is protected, not the economic profit. However, considering that reindeer husbandry is both a cultural practice and a way of making a living, the economic aspect is relevant.[69] The Court states that:

> The relevance [of economy] must be assessed specifically in each individual case and must depend, among other things, on how the economy affects the cultural practice. In my view, the rights in Article 27 are in any case violated if a reduction of the pasture deprives the herders of the possibility to carry on a practice that may naturally be characterised as a trade.[70]

The wind power developer claims that factors other than the interference cause the significant negative effect on the reindeer herders' economy. The Court disagrees, and considers the government subsidies as part of the reindeer herders' income.[71] Therefore, how the interference effect the reindeer herders income from government subsidies should be taken into account. The Court finds it proven that the interference will lead to a reduction in government subsidies.[72] The fact that the reindeer industry already operates "with small margin" means that it takes less for an interference to constitute a violation.[73] In my view, such a context-sensitive approach, as here adopted by the Court, is essential to provide real protection for the reindeer herders.

The fact that the reindeer herders on Fosen belong to a South-Sámi culture that is "particularly vulnerable" is considered a "factor in the assessment" by the Court. Taking the statement "[t]raditional reindeer husbandry is what carries this culture and the South-Sami language" in account, it seems to me that the Court considers the protection of these reindeer herders to be especially important.[74] I have two critical comments relating to these statements: First, I believe it can be problematic to use 'minority as a whole' as an argument for the violation of the rights of the affected *individuals* of the minority. The problem lies in the possibility of using the same consideration as an argument *against* violation when the affected individuals belong to a minority group considered less vulnerable. Should it then take more for individual rights to be violated? I think not. It seems to me like the Court look at the vulnerability of the South-Sámi group as a whole as more of a 'supportive argument' without independent significance. Second, the Court seems particularly concerned with protecting reindeer husbandry because of its

[69] HR-2021-1975-S (Fosen) (para. 134).
[70] HR-2021-1975-S (Fosen) (para. 134).
[71] HR-2021-1975-S (Fosen) (para. 138)
[72] HR-2021-1975-S (Fosen) (para. 140).
[73] HR-2021-1975-S (Fosen) (para. 137).
[74] HR-2021-1975-S (Fosen) (para. 141).

importance for the South-Sámi culture. An important clarification here is that other traditional Sámi cultural activities are also protected by Article 27. It is not only the culture-specific reindeer husbandry that is a protected cultural activity.[75]

Consultation is another factor to consider when assessing whether Article 27 is violated. As the Fosen case demonstrates, consultations being carried out cannot in themselves be decisive in the assessment.[76] In my view, this statement shows that the procedural factors play a more subordinate role in the assessment than the substantive aspects do.

The Court states that Article 27 does not grant states a margin of appreciation and that proportionality assessments are not allowed in general.[77] However, the Court opens for the balancing of the minority provision against other rights "in the convention" and "other basic rights" in cases of conflict.[78] Although it is uncertain which "other basic rights" the Court refers to, it is quite clear that "the right to a good and healthy environment" is an example of this. Nevertheless, in the Fosen case, the Court does not consider it to be a conflict between environmental rights and minority protection because "'the green shift' could also have been taken into account by choosing other – and for the reindeer herders less intrusive – development alternatives".[79]

After having concluded "that the wind power development will have a substantive negative effect on the reindeer herders' possibility to enjoy their own culture on Fosen",[80] the Court Court examines if there are any satisfactory *remedy measures* or *duties to adapt* that may lead to avoiding a violation of Article 27. There is a difference between "remedy measures" and "duties to adapt": While remedy measures are actions that help the affected parties reduce their disadvantages from the interference, duty to adapt are obligations or requirements that can be imposed on the affected parties. On the one hand, the Court states that remedy measures are relevant for the assessment.[81] On the other hand, no decision is made as to which extent the duty to adapt is a relevant factor in the assessment of Article 27.[82]

[75] Activities that are «an essential element in the culture of an ethnic community» is protected, see Kitok v. Sweden (CCPR-1984-197) (para. 9.2) and Mahuika et.al v. New Zealand (CCPR-1993-547) (para. 9.3).
[76] HR-2021-1975-S (Fosen) (para. 121 and 142).
[77] HR-2021-1975-S (Fosen) (para. 129).
[78] HR-2021-1975-S (Fosen) (para. 130–131).
[79] HR-2021-1975-S (Fosen) (para. 143).
[80] HR-2021-1975-S (Fosen) (para. 144).
[81] HR-2021-1975-S (Fosen) (para. 147).
[82] HR-2021-1975-S (Fosen) (para. 148).

A ‘winter-feeding model’, which involved keeping half of the herd within a “relatively small fenced-in area” for 90 days, was considered by the Court of Appeal as a remedy measure. The Supreme Court is more skeptical. Concerned about the compatibility of this model with traditional nomadic reindeer husbandry, the Court does not consider it a remedy measure. [83] In my opinion, an action must be culturally adapted to be classified as a remedy measure in an interference-case. Without cultural adaptation, the measure will not help the affected parties' cultural practice. In that case, the measure should instead be viewed in light of the duty to adapt. When the Court is *uncertain* about the compatibility of the winter-feeding model with Sámi reindeer husbandry, I believe it is right not to consider the measure as a remedy. While the Court finds other remedy measures to be relevant – such as subsidies for slaughter facilities, electronic reindeer marking, and fences – it concludes that these do not sufficiently outweigh the negative effects of the interference.[84]

4.2.4 Conclusion

The development from the Alta case to the Fosen case shows that Article 27 of ICCPR has gone from being an unknown source of international law to achieving a high status in Norwegian law. Neither UNDRIP nor ILO-169 have a similar status.

The Supreme Court's comprehensive examination of the HRC-practice in the Fosen case should not be taken for granted. As mentioned, it is only six years ago (2023) since it was used for the first time in a Supreme Court judgment concerning Sámi rights. The diligent effort to find out how HRC has interpreted Article 27 demonstrates a benevolence which may not always be as prominent within a Sámi legal context. In this regard, it can be questioned whether the Court aims to engage in dialogue with HRC in the same way as with the European Court of Human Rights. Considering that Article 27 does not allow for a margin of appreciation, it may be more challenging to enter into such a dialogue with HRC.

The significance of the Fosen case for the treatment of minorities in other countries' courts should not be underestimated. It is particularly relevant for Swedish and Finnish courts. Previously, Finnish authorities, in their responses to individual complaints to HRC, have referred to the Supreme Court's understanding of Article 27 in the Alta case. [85] Going forward, reference should instead be made to the Fosen case.

[83] HR-2021-1975-S (Fosen) (para. 149).
[84] HR-2021-1975-S (Fosen) (para. 147 and 151).
[85] Länsman et.al. v. Finland (CCPR-1995-671) (para. 6.8) and Äärela and Näkkäläjärvi v. Finland (CCPR-1997-779) (para. 4.3).

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