Norwegian National Human Rights Institution

Human Rights Protection Against Interference in Traditional Sami Areas

Innhold

1. Introduction

The subject of this report is the legal protection of indigenous peoples and minorities against interference (in the form of for example development projects) in their traditional areas, as enshrined in international human rights law and Norwegian law. While existing legal protection is not always strong enough to prevent traditional Sami areas in Norway from being affected by development, even larger parts of these areas would have been lost had the legal protection not been in place.[*]

1.1 Issues and limitations

Worldwide, indigenous peoples are under pressure. Their traditional lands are often among the last untouched areas of the world. People living in such areas are threatened by exploitations of nature such as mining, dam construction, deforestation, the use of pesticides, agricultural expansion, water privatisation and other industrial activities.[1] Increased demand for raw materials, energy and the transition to "green energy", together with new technologies, have led to increased development of wind power and the need for increased extraction of minerals, which in many places threaten indigenous peoples' traditional livelihoods and economic bases.

In Norway, wind power in particular has had a major expansion in the last 20 years. Renewable energy is very important in counteracting harmful climate change. Increased utilisation of natural resources can also contribute to economic development and jobs in local communities. At the same time, developments in indigenous peoples' areas often result in indigenous peoples losing access to land and water areas that they have traditionally used for their own cultural practices and business activities.

FACTS ABOUT INDIGENOUS PEOPLES

- Approximately 370 million people, in approximately 70 countries, belong to indigenous peoples. Indigenous peoples make up roughly 5% of the world's population.
- There are more than 5,000 different indigenous communities in the world.
- According to the UN, indigenous peoples are exposed to more serious human rights violations today than 10 years ago.

Source: International Work Group for Indigenous Affairs (IWGIA).

A characteristic of indigenous peoples' cultures and ways of life is their close connection to nature and to the use of natural resources. The natural basis is therefore a particularly

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[1] UN Department of Economic and Social Affairs, https://www.un.org/development/desa/indigenouspeoples/ mandated-areas1/environment.html. Andrea Carmen, "Corporations and the Rights of Indigenous Peoples: Advancing the Struggle for Protection, Recognition, and Redress at the Third UN Forum on Business and Human Rights", Cultural Survival Quarterly Magazine, 2015, http://www.culturalsurvival.org/publications/ cultural-survival-quarterly/corporations-and-rights-indigenous-peoples-advancing

important precondition for indigenous peoples to be able to practice and further develop their traditional trades and cultures. It is a paradox that the green shift in many contexts has major consequences for indigenous peoples, as they do not contribute much to greenhouse gas emissions globally, but they will be hit particularly hard by climate change – both in the short and long term.[2]

Over time, questions concerning use and exploitation of nature and the impact on indigenous traditional lands have been central to the relationship between indigenous peoples and states. There are several international rules for the protection of indigenous peoples' rights, as well as a fairly comprehensive practice on the further implementation of this protection.[3]

Article 27 of the UN International Covenant on Civil and Political Rights (ICCPR Article 27) has through practice become the most important international provision on the protection of indigenous peoples against interference and on their rights to safeguard and further develop their culture. Other international instruments, such as ILO Convention 169 on Indigenous and Tribal Peoples in Independent States (ILO 169) and the UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), are also important instruments in this field. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) largely reflects current law in these areas.

ICCPR Article 27 was central to the Norwegian Supreme Court's consideration of the case concerning wind power plants on the Fosen peninsula in October 2021. This was a historic decision because it was the first time that affected Sami parties, in a case concerning a development project in their traditional areas, won in the Supreme Court through reference to human rights. This judgment is central in this report because it clarified several key issues regarding indigenous peoples' protection against interference in their traditional reindeer grazing areas.

One question that is particularly relevant in the aftermath of the *Fosen* judgment, is the question of which *consequences* and *remedies* such violations may lead to. The UN Human Rights Committee has stated, among other things, that the state is obliged to ensure the complainant "an effective remedy and reparation measures" that are in a balanced relationship with the damaged suffered.[4] The state also has an obligation to take measures to ensure that similar violations do not occur again.[5] What this entails concretely depends on the facts and circumstances of a given case, and states will have considerable leeway or a "margin of appreciation" to resolve this within their own national legal systems. This report

[2] UN Department of Economic and Social Affairs, Policy Brief #101: Challenges and Opportunities for Indigenous Peoples' Sustainability, https://www.un.org/development/desa/dpad/publication/un-desa-policy-brief-101- challenges-and-opportunities-for-indigenous-peoples-sustainability/. One issue that has been submitted to the UN Human Rights Committee concerns indigenous peoples and climate change. The complainants belong to the Torres Strait Islands in Australia and have stated that it is a violation of their rights to cultural practice that the islands they live on will soon be under water. See Ch. 7.2.4. Climate Change Litigation Databases, "Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change", Climate Change Litigation, 2019.

[3] See Chapters 3, 4 and 5 in this report. See also e.g. NHRI and Norway's OECD Contact Point Report *Natural Resource Development, Business and the Rights of Indigenous Peoples,* 2019.

[4] ICCPR Article 2, third paragraph (a).

[5] HRC, *Angela Poma Poma v Peru*, (Communication No. 1457/2006), para. 9. See also HRC, *Tiina Sanila-Aikio v Finland* (Communication No. 2668/2015), para. 8, *Klemetti Käkkäläjärvi et al. v Finland* (misspelled by the Human Rights Committee, real name is Näkkäläjärvi) (Communication No. 2950/2017), para. 11.

does not go into further detail on the issue of legal consequences of violations of provisions on indigenous peoples' rights in international law.

The report uses the terminology *minorities* and *indigenous peoples*. There are no precise legal definitions of the two terms. The term *minority* often means ethnic, religious or linguistic groups that are in the minority relative to the majority in a country's population.[6] *Indigenous peoples* is defined as peoples who often have a special connection to their traditional lands, often from before the state's borders were established, and who are not the dominant people in the state of which they are a part.[7]

In other words, the provisions of international law on minorities include indigenous peoples' conditions and their particular histories, which are also often reflected in cases concerning minority protection that have been raised before international treaty bodies. It is evident from Article 27's reference to "ethnic, religious or linguistic minorities" that the provision covers indigenous peoples. Since the adoption of the Sami Act in 1987 and the constitutional provision about the Sami from 1988 (and 2014), successive Norwegian governments and parliaments have had policies based on the fact that the Sami are a people and indigenous peoples.[8]

The purpose of this report is to contribute knowledge about the human rights protection against interference in Sami areas of use, with the main emphasis on ICCPR Article 27. The report shows that there has been a development towards a stronger emphasis on Sami conditions in cases of interference in the form of development projects. At the same time, pressure is generally increasing on Sami areas. The legal protection against interference, which follows from international law and Norwegian law, is not strong enough to prevent new areas from becoming subject to interference and developments. Without the existing protection, however, even larger parts of traditionally Sami lands would have been lost. Although many development projects have been allowed, a number of applications for such projects have also been rejected by the authorities due to the negative effects on indigenous peoples' cultural practices.

In cases concerning interference in Sami areas, the public administration and the courts are increasingly assessing how the protection of indigenous peoples' substantive and procedural rights under international law affects each

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[6] See United Nations, *Minority rights: International standards and guidance for implementation* (HR/PUB/10/3) (United Nations, 2010). In Europe, there is also a framework convention for national minorities. By national minorities, it is meant ethnic, religious or linguistic minorities who have been in the state for many years.
In Norway, it is the position of the authorities that such a connection must have lasted for at least 100 years, see Proposition to Parliament No. 80 (1997–98), Chapter 3.3.2.

[7] https://www.regjeringen.no/no/tema/urfolk-og-minoriteter/samepolitikk/midtspalte/hvem-er-urfolk/id451320/. In this connection, reference is often made to the definition used in ILO 169 Art. 1.1 letter b), which states that the convention applies to "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".

[8] See the Norwegian Human Rights Committee's report to Parliament in Document 16 (2011–2012), p. 214 onwards and the Supreme Court plenary judgment Rt. 2001 p. 769 (*Selbu*). On page 791, concerning ILO 169, it is stated: "There is no doubt that according to this definition the Sami have the status of an indigenous people in Norway, and that our obligations towards them under international law in pursuance of Article 14 of the Convention also apply in Sør-Trøndelag." See also Supreme Court plenary judgment HR-2018-456-P (*Nesseby*) para. 89, which states that "The Sami indigenous rights are protected both through provisions of the Constitution and various provisions of international law."

individual case. This legal protection is somewhat complex and is based on a number of different international sources. An important purpose of the report has therefore been to draw up a broad legal picture, which shows how the international provisions are interpreted in international bodies, in Norwegian courts and in the public administration.

In this report, the Norwegian National Human Rights Institution (NHRI) has highlighted some areas where we believe that steps can be taken to strengthen human rights compliance. This relates, among other things, to:

- Ensuring thorough, sufficiently early and independent impact assessments.
- Ensuring sufficient knowledge through research and mapping, on the gradual reduction of reindeer grazing areas and on the overall consequences of development projects, so that the cumulative effect of several different projects in reindeer herding areas is taken into account.
- Assessing the system of allowing the commencement of development projects before the validity of a permit has been subject to a final legal determination.
- Clarifying, through legislation or other regulations, the relevant elements contained in ICCPR Article 27, in order to contribute to good human rights assessments in public administration.
- We hope that this report can contribute to strengthening the implementation of this important human rights protection.

1.2 Overview of the chapters

Chapter 2 provides an overview of the international framework for the protection of indigenous peoples' rights to traditional livelihoods and business practices. How states' implementation of human rights conventions is monitored by international bodies and the impact of the practice of various monitoring bodies in Norwegian law is also discussed. ICCPR Article 27 is incorporated into the Human Rights Act and applies directly as Norwegian law with precedence over other laws. This act is significant for the protection against interference in Sami areas.

There is a close link between the Sami section of the Constitution, Article 108, and ICCPR Article 27. This provides a strong overall protection of Sami culture that sets the framework for the administration's and courts' application of law. Nevertheless, Article 27 has a relatively modest footprint in the sectoral laws that regulate major developments. National legislation concerning Sami matters is extensive, and it is beyond the scope of this report to thoroughly review this.

Chapter 3 discusses the international law protection of indigenous peoples and their culture and way of life. This includes traditional business practices related to nature, which forms the material basis for the culture. It discusses the human rights conventions that are particularly relevant for the protection of indigenous peoples against interferences with traditional business practices and culture, and practices by the international monitoring bodies.

Through the Human Rights Committee's interpretations of ICCPR Article 27, guidelines have emerged that more concretely define the protection against interference in traditional areas. The Committee has dealt with the question of when the *threshold* for violation of

Article 27 has been reached, and which elements are emphasised in this context. The Human Rights Committee has, among other things, interpreted requirements for the processes surrounding such interference (*effective participation* and the right to consultations). Furthermore, the Committee has assumed that even modest development projects can lead to a violation if viewed in the context of previous, *future and overall interferences over time*. The Committee has likewise assessed *remedial measures* that can prevent violations. These factors, together with the assessment of the negative effects of the interference on indigenous peoples' possibility for continued cultural practices, are central to the Committee's jurisprudence.

ILO 169 has important provisions on indigenous peoples' protection against interference. The most important provisions concern indigenous peoples' right to land and water as well as the right to consultations and effective participation in plans and decisions that concern them. ICERD moreover has provisions that are of importance to indigenous peoples' cultural protection.

Chapter 4 provides an overview of the practice from the Norwegian Supreme Court in cases where ICCPR Article 27, in particular, as interpreted by the Human Rights Committee, have been discussed. The *Fosen* judgment (2021) is the latest and most important judgment, but also the *Sara* judgment (2017) and the *Reinøy* judgment (2017) provide important guidelines. The *Nesseby* judgment (2018), the *Stongland's Peninsula* judgment (2004) and the *Alta* judgment (1982) are also mentioned. The judgments discuss the same elements of Article 27 that the Human Rights Committee has emphasised in its decisions, such as the importance of consultations, the overall effects of several interferences over time, remedial measures and the threshold for what should be considered violations of Article 27. An important question here is the extent to which a balancing of interests can be made between indigenous peoples' rights and the interests of society.

In the *Fosen* case, the ministry that granted the permission to build the power plant had carried out such a proportionality assessment, but the Supreme Court rejected this, significantly narrowing the possibility of such balancing of interests. The Supreme Court unanimously concluded that the developments at Storheia and Roan were a violation of Article 27.

Chapter 5 provides an overview of the use of ICCPR Article 27 in Norwegian administrative practice. Practice from the Ministry of Petroleum and Energy (MPE) and the Ministry of Trade, Industry and Fisheries (MTIF) shows that Article 27 is used in the administration's assessments in interference cases, and that the Human Rights Committee's guidelines are emphasised. The impact assessments are a key knowledge base in the assessments. Reindeer herders often disagree with the findings contained in impact assessments concerning the precise consequences of the development. The licensing processes are very long, and there is no "equality of arms" between the parties. The chapter reviews administrative practice from the last decade in which the Government has dealt with appeals against development decisions, mainly in wind power developments. The chapter discusses the administration's treatment of key topics such as the importance of consultations, the importance of the overall effects of several development projects over time, the importance of remedial measures and the negative effects of the interferences on cultural practices. It is noted here that the administration changed its practice regarding the balancing of interests between indigenous peoples' rights and the

interests of society, after the *Fosen* case in 2013.

Chapter 6 deals with business and human rights from an indigenous peoples' perspective. In Norway, almost all cases of interference in indigenous peoples' areas can be discussed in this perspective. The chapter describes various guidelines and principles that exist within various international forums, where the UN Guiding Principles on Business and Human Rights (UNGP) and the OECD Guidelines for Multinational Enterprises constitute the leading international standards for corporate human rights responsibility. It is the responsibility of states to have laws that protect the rights of indigenous peoples, but it is largely private and publicly owned companies that are actually responsible for the development and exploitation of natural resources. The Transparency Act, which enters into force in the summer of 2022, stipulates that larger enterprises must carry out due diligence and "identify and assess actual and potential adverse impacts on fundamental human rights". This obligation includes assessments of, among other things, ICCPR Article 27 and ILO 169.[9]

Chapter 7 comments on certain developments and ongoing and planned measures that will have an impact on indigenous peoples' rights to culture and business practices. Among other things, reference is made to the enactment of the right to consultation, the Wind Power Report to Parliament from 2020 and the work that takes place in the Mineral Acts Committee.

Ongoing cases concerning human rights protection against harmful *climate change* from an indigenous peoples' perspective are also discussed. Among other things, an Australian indigenous peoples' group has complained to the Human Rights Committee about Australia's alleged violation of ICCPR Article 27 due to the state's lack of climate action.

It is questioned whether such a brief and general provision as Article 27, even though it has been thoroughly interpreted by both the Human Rights Committee and the Supreme Court, ought to have been subject to a more detailed regulation that clarifies the various elements that should be assessed, in order to determine when the threshold is reached. A clarification of the content of Article 27, would contribute to more thorough human rights assessments of the administration as well as enhance due process and provide more predictability.

[9] Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act) of 18 June 2021.

2. International Conventions and Their Status in Norwegian Law

Through the Human Rights Act, the Equality and Anti-Discrimination Act and the Finnmark Act, several of the key human rights provisions concerning the protection of indigenous peoples' rights have been made directly applicable in Norwegian law.

2.1 Incorporation of human rights into Norwegian law

Human rights conventions, as with other conventions or treaties, are legally binding agreements amongst the states that choose to be parties to them. Human rights regulate primarily the relationship between each state and the individuals under its jurisdiction.

The authorities are obliged to implement, that is, respect and ensure, human rights. Article 92 of the Norwegian Constitution states that "The authorities of the State shall respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway."

In other words, public authorities at all levels, both state and municipal, are obliged by human rights.

Norwegian law and international law are basically two different and separate legal systems. In order for international rules to have direct effect in Norwegian national law, they must be incorporated separately. Through the Human Rights Act, the Equality and Anti-Discrimination Act and the Finnmark Act, several of the central human rights provisions have been incorporated (made directly applicable as Norwegian law). This does not mean that the incorporated rights in themselves are stronger than treaty rights that have not been incorporated, but that they can have a more direct impact on the Norwegian legal system. International law takes effect in Norwegian national law through three different approaches:

1. It is noted that there are no contradictions between the international rule and Norwegian law and that therefore no action is being taken (determination of legal harmony or passive transformation).
2. The international rule is given effect through some legislative changes (transformation).
3. The international rule is given direct effect in Norwegian law (incorporation).

The ICCPR is incorporated into the Human Rights Act.[10] It takes precedence over other Norwegian legislative provisions through Section 3 of the Act in the event of a conflict with them.[11] The same applies, inter alia, to the European Convention on Human Rights (ECHR).[12] The UN International Convention on

[10] Act Relating to the Strengthening of the Status of Human Rights in Norwegian law (the Human Rights Act) of 21 May 1999.
[11] Human Rights Act Section 3.
[12] Other conventions incorporated in this law are the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Convention on the Rights of the Child, and the UN Convention on the Elimination of All Forms of Discrimination against Women.

the Elimination of All Forms of Racial Discrimination (ICERD), which is also relevant for the protection of indigenous peoples and the culture of minorities, is incorporated into the Equality and Anti-Discrimination Act[13] – that is, it has the same status as other laws. ILO 169 is partially incorporated into Section 3 of the Finnmark Act.[14]

The relevant provisions of these conventions are covered in Chapter 3.

2.2 The Constitution Article 108

Article 108 of the Constitution states that "The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life."

The provision was adopted in 1988 as Article 110a of the Constitution. In the constitutional reform in 2014, it was moved to Article 108. The provision is based on a proposal from the Sami Rights Committee in the NOU (Official Norwegian Report) 1984:18, which in accordance with the Committee's mandate, contained a study of the basis and design of a constitutional provision. The report refers to, among other things, increasing demands for an explicit recognition of the status of the Sami people. Furthermore, the Sami Rights Committee's report states that "[...] even if the most significant effect will be of a political and moral nature, and not of a legal nature, the provision will also impose a certain legal obligation on the state authorities".[15]

Article 108 of the Constitution is based on ICCPR Article 27 and there is a close link between the provisions.[16] To ensure that the constitutional provision would provide sufficiently far-reaching cultural protection, the term "way of life" was included in addition to the concept of culture.[17] The provision establishes the state's legal obligations to the Sami people and has independent significance in the interpretation of laws and in the application of customary law rules. This is discussed in the Supreme Court's plenary judgment in a case concerning wilderness management in Nesseby,[18] where reference is made to the preparatory works for the constitutional amendments in 2014.[19] In these preparatory works, the significance of the provision (formerly Article 110a) is described as follows:

[13] Act Relating to Equality and a Prohibition against Discrimination (Equality and Anti-Discrimination Act) of 16 June 2017.
[14] Act Relating to Legal Relations and Management of Land and Natural Resources in Finnmark (Finnmark Act) of 17 June 2005. It states that the Act applies with "the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries" and that the Act shall "be applied in compliance with the provisions of international law concerning indigenous peoples and minorities". An equivalent provision is also found in the Tana Act (Act on fishing rights in the Tana watercourse of 20 June 2014) Section 3. The Reindeer Husbandry Act (Act Relating to Reindeer Husbandry of 15 June 2007) also stipulates that: "The Act shall be applied in accordance with the rules of international law on indigenous peoples and minorities". Although this provision does not have the same wording as the Finnmark Act Section 3, it is assumed that it has a similar content. See Susann Funderud Skogvang, *Samerett*, 3rd ed., (Oslo: Scandinavian University Press, 2017), p. 260, cf. p. 122. The Minerals Act Section 6 also has a similar wording and must be assumed to have a corresponding significance for the scope of the Minerals Act.
[15] NOU 1984:18, p. 432.
[16] On the relationship between ICCPR Article 27 and the Constitution Article 108, see NOU 2007:13 p. 190 onwards, as well as NOU 2008:5 p. 259 onwards.
[17] NOU 1984:18, p. 437.
[18] HR-2018-456-P (*Nesseby*), para. 91.
[19] Document 16 (2011–2012) Report to Parliament's Presidency of the Human Rights Committee on human rights in the Constitution, p. 215.

> Although Article 110a of the Constitution first and foremost is aimed at the Government and Parliament, the principle expressed in the provision may have an impact on the interpretation of laws and in the application of customary legal rules, for example as a guiding provision for the exercise of discretion by administrative authorities.[20]

In a case concerning liability for *Femund sitje* (a reindeer district), the Supreme Court stated that Article 108 of the Constitution has independent significance in the interpretation of laws, in the application of customary legal rules and as an independent legal basis where other sources of law do not provide an answer.[21] This was repeated in the *Fosen* judgment, where the Supreme Court ruled that Article 108 of the Constitution "is based on Article 27 ICCPR and may constitute an independent legal basis where other sources of law give no answer".[22] In the *Fosen* judgment, the Supreme Court also stated that Article 108 of the Constitution supports the understanding that reindeer herding groups (siidas) can have the legal capacity to sue and be sued in Norwegian courts.[23]

In legal theory, it has been pointed out that the courts have both a competence and an obligation to review whether the authorities comply with the obligations pursuant to Article 108 of the Constitution, but that this right of review may have limited significance in practice because the obligation is so generally formulated.[24]

The Supreme Court has ruled that the human rights provisions of the Constitution should generally be interpreted in light of its "models" under international law. The Supreme Court, however, has stated that future practice by the international enforcement monitoring bodies does not have:

> the same judicial precedent in a constitutional interpretation as in the interpretation of the parallel provisions of the convention: In our view, it is the Supreme Court — not the international enforcement agencies – which has the responsibility to interpret, clarify, and develop the Norwegian Constitution's human rights provisions.[25]

The Supreme Court has ruled that the protection pursuant to Article 108 does not go further than the protection pursuant to ICCPR Article 27.[26]

2.3 UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Human rights conventions such as the ICCPR, ICERD and ILO 169 form part of the international legal basis for the protection of indigenous peoples against interferences in their traditional business activities.[27] The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which is a newer instrument,

[20] Document 16 (2011–2012), p. 215.
[21] HR-2018-872-A (*Femund sijte*), para. 39. The case concerned a claim for compensation for damage caused by reindeer on cultivated land.
[22] HR-2021-1975, (*Fosen*), para. 99.
[23] HR-2021-1975, (*Fosen*), para. 110.
[24] Skogvang, *Samerett*, pp. 185 and 188 onwards.
[25] Rt. 2015 (*Maria*) p. 93, para. 57.
[26] HR-2017-2428-A (*Sara*), para. 53.
[27] Other instruments of international law also provide material protection for indigenous peoples' cultural practice, e.g. the Convention on Biological Diversity (CBD).

is based in part on these conventions as well as on practice and customary practices. UNDRIP is not in itself legally binding but is largely inspired by and reflects legally binding provisions, in particular ICCPR Article 27 as interpreted by the Human Rights Committee, as well as ILO 169.

A key starting point in the Declaration is that, pursuant to Article 2, indigenous peoples are equal to other peoples, and that under Article 3, they have a right to self-determination and that they can freely determine their political status and pursue their "economic, social and cultural development".[28]

The Declaration has several provisions concerning rights to land and natural resources. Two key provisions in this context are Article 26 and Article 32.

While Article 26 recognises indigenous peoples' right to land and natural resources and control over them, Article 32 has formulations of indigenous peoples' own priorities on the development and use of resources, in particular, situations concerning the development of indigenous peoples' areas. According to the provision, states shall consult with indigenous peoples concerned for the purpose of obtaining "their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

UN DECLARTION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP)

- The Declaration was adopted by the UN General Assembly on 13 September 2007.
- It was drawn up in a process where states and the UN worked closely with indigenous organisations and a number of indigenous experts from all continents Approximately 370 million people, in approximately 70 countries, belong to indigenous peoples. Indigenous peoples make up roughly 5% of the world's population.
- Involvement of such a broad group of stakeholders in the negotiations in addition to states has given the Declaration great legitimacy among indigenous peoples
- The Declaration is not legally binding but reflects legally binding provisions.

The UNDRIP also has provisions on effective participation in decision-making processes. According to article 8, states should ensure effective mechanisms to prevent and redress actions aimed at depriving indigenous peoples of their lands or resources, as well as effective schemes to prevent and redress any form of forced displacement of indigenous groups. The UNDRIP has several provisions that largely reflect current law regarding requirements for "free, prior and informed consent" for interference in indigenous peoples' areas.[29] These are discussed in more detail in Chapter 3.4.4.

[28] The exercise of this right of self-determination shall be seen in light of Article 4 on "internal and local affairs", and Article 5 on the right to "maintain and strengthen" their institutions. See more about the right to self-determination in Chapter 3.3.2.
[29] Free, Prior and Informed Consent (FPIC).

In the *Nesseby* judgment, the following was said about the significance of the declaration:

> The UN 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 has gained support from a large number of states. [...] 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.[30]

This statement thus emphasises that although the Declaration itself is not legally binding, it largely reflects binding international law. It is therefore an important instrument for the development and implementation of indigenous peoples' rights.[31]

2.4 International monitoring

Human rights conventions are monitored and interpreted by their own treaty bodies, which can be a committee, expert group or court. The national impact of the various treaty bodies varies, and depends, among other things, on the design of the convention, the mandate of the treaty body and how the conventions are incorporated into Norwegian law.

Judgments from the European Court of Human Rights (ECtHR) are directly binding on the state that is a party to the individual case. The judgments contain interpretations of the provisions of the convention, and the guidelines laid down in judgments from the ECtHR are generally of great importance to all member states of the Council of Europe.[32]

For the UN conventions on human rights, separate monitoring bodies (treaty bodies) have been established to monitor states' compliance with the conventions. The committees consist of independent experts who are nominated and elected by the states parties to the relevant convention. The monitoring takes place, among other things, through the examination of the states' periodic reports on the implementation of the conventions, which states must provide regularly at intervals of a few years. After the individual state has been examined by the committee, the committee prepares so-called Concluding observations which contain recommendations to the state.[33]

These committees also adopt general interpretative statements for various provisions of the individual convention, referred to as General Comments or General Recommendations. The comments express what the committees believe is the more detailed content of the individual provisions of the conventions. In an analysis of the statements of the treaty bodies, the General Comments are therefore characterised as a

[30] HR-2018-456-P (*Nesseby*), para. 97.

[31] This is emphasised i.a. by the fact that the international community is behind the Declaration. At the vote in the UN General Assembly on 13 September in 2007, 143 states voted in favour of the Declaration, four voted against and 11 abstained. The four who voted against have later accepted the Declaration.

[32] The individual judgment is only directly binding on the state party to the case, but nevertheless often lays down guidelines for other member states.

[33] In connection with the states' reports, both affected civil society organisations and national human rights institutions can submit their own so-called "shadow reports" with input to the committees.

form of treaty writing.[34] The closer the comments are anchored in the text of the convention, the more binding the states will perceive them.[35] The most important general comment in the indigenous peoples' area is General Comment 23 from the Human Rights Committee that deals with ICCPR Article 27.[36]

Most of the UN human rights conventions also have provisions where individuals who allege that they have been the victim of a violation of the convention by a State Party, can lodge a complaint to the relevant committee. Such individual complaint mechanisms are optional, and state parties to the individual convention can choose to accept them.[37] Statements (views) from UN committees (treaty bodies) in cases concerning whether there has been a violation of a convention are not binding under international law, but may have legal significance in national jurisdictions. In for example a Grand Chamber decision by the Supreme Court, it was stated "On the basis of what I have reviewed here of the preparatory work on the Human Rights Act, I find it clear that a convention interpretation made by the UN Human Rights Committee must have considerable weight as a source of law."[38] It is in particular where there is a interpretation of the wording of the convention that the statement may be given weight. The Supreme Court has stated that "The decisive factor will nevertheless be how clearly it must be considered to express the monitoring bodies' understanding of the parties' obligations under the conventions. In particular, one must consider whether the statement must be seen as an interpretative statement, or more as a recommendation on optimal practice within the scope of the convention."[39]

The Supreme Court has also stated that statements on the interpretation of the convention's wording in the form of General Comments can be given "considerable weight".[40] The UN Human Rights Committee's General Comment on ICCPR Article 27 is therefore important in interpreting this provision.

The Human Rights Committee has decided on a number of individual complaints related to ICCPR Article 27 in cases concerning interference in indigenous peoples' culture. This practice is central to the further determination of the content of the provision.

The ICERD also has a monitoring committee (the Committee on the Elimination of Racial Discrimination), which makes General Recommendations as well as statements in individual complaint cases.

The ILO has its own monitoring system, where states report to the ILO's expert committee for

[34] Thom Arne Hellerslia, "Uttalelser fra FN-komiteene–en strukturell analyse" ("Statements from the UN Committees – a Structural Analysis"), *Jussens Venner* 53, no. 02 (2018), p. 31.
[35] In a case concerning whether the state had an obligation to comply with a request for interim measure from the Committee against Torture, the Supreme Court stated that this "has no basis in the text of the convention", Rt. 2008 p. 513, para. 57.
[36] HRC General Comment No. 23, para. 27 (Rights of Minorities).
[37] Norway has accepted such individual complaint mechanisms for ICCPR, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture.
[38] Rt. 2008 p. 1764 (*Restauratør* decision), para. 81. The question concerned the legal significance of a statement in an individual communication before the Human Rights Committee (it was not a case against Norway), paras. 89 and 91.
[39] Rt. 2009 p. 1261, para. 44.
[40] HR-2016-2591-A, para. 57. The case concerned guardianship and the UN Convention on the Rights of Persons with Disabilities (CRPD). See also Rt. 2008 p. 1764 (*Restauratør* decision), para. 81.

monitoring the implementation of conventions and recommendations (CEACR).[41] The expert committee prepares reports for the ILO's annual labour conferences, which are the ILO's highest body. When the expert committee has concluded that a state has not fulfilled its obligations under the convention, it may be asked to explain itself to the labour conference.

The ILO's Constitution also establishes a system of appeals, in which a state can complain against another state, as well as a system in which employers' and workers' organisations can complain, the so-called "organisational complaints", which is the most used of these two systems.[42]

[41] ILO, "Supervision of Convention No. 169 and No. 107 (Indigenous and Tribal Peoples)", https://www.ilo.org/global/topics/indigenous-tribal/supervision/lang-en/index.htm.

[42] The ILO also has arrangements for co-operation and consultations with e.g. international civil society organisations, including the Sami organisation the Sami Council. ILO, "Complaints", https://www.ilo.org/global/standards/applying-and-promoting-international-labor-standards/complaints/lang-en/index.htm. ILO, "Non-State Actors and Civil Society", https://www.ilo.org/pardev/partnerships/civil-society/lang--en/index.htm. The Sami Council is on the "ILO Special List of NGOs", https://www.ilo.org/pardev/partnerships/civil-society/ngos/ilo-special-list-of-ngos/lang-en/index.htm.

3. Human Rights Protection against Interference in cultural practices – International Law

Article 27 of the UN Convention on Civil and Political Rights (ICCPR) is the most important provision on the protection of indigenous peoples' cultural practices. Other provisions in the ICCPR, as well as provisions in ILO 169 and ICERD, are also important for this protection.

3.1 Introduction

Several human rights conventions have provisions that are particularly relevant for the protection of indigenous peoples (and other minorities) from interference in their traditional business practices and culture. As mentioned, ICCPR Article 27 is the most important provision on the protection of indigenous peoples' cultural practices in a broader sense. This is particularly because the Human Rights Committee has, through its extensive practice, contributed to the fact that this has also become the most specific protection against interferences in indigenous peoples' areas.[43] This chapter will therefore largely deal with Article 27, but also other provisions of the ICCPR, as well as provisions of ILO 169 and the ICERD will be discussed.[44]

The interpretation of conventions is regulated by the Vienna Convention on the Law of Treaties.[45] The Convention has not been ratified by Norway, but expresses customary international law by which Norway is bound. Article 31 of the Vienna Convention refers to several interpretive factors used to establish the content of conventions. The central interpretive factor is the *wording* of the relevant treaty or convention. This is because states are sovereign and not as a point of departure subject to the will of other states. The principle of state sovereignty means that states must *make agreements* on what will be binding rules between them. States choose whether they want to be party to an individual convention or treaty, and it follows from the principle of sovereignty that they are only bound by the text of the agreement to which they have acceded. The text of a treaty shall be interpreted in

[43] The Human Rights Committee has decided on a total of approximately 50 individual complaints concerning ICCPR Article 27.
[44] UN Convention on Economic, Social and Cultural Rights (CESCR), UN Convention on the Rights of the Child (CRC) and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of Persons with Disabilities (CRPD) are also important for indigenous peoples' rights. The Convention on Biological Diversity (CBD), which is a global agreement on the conservation and sustainable use of biological diversity, is particularly relevant to the precautionary principle, the traditional use of nature and traditional knowledge in natural resource management. Other regional agreements under international law, such as the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages (the minority language charter), are also important for the rights of indigenous peoples in Europe. For further information on the framework convention and the minority language charter, see NHRI's report *Norges Nasjonale Minoriteter*, (*Norway's National Minorities*), 2019. https://www.nhri.no/2019/temarapport-2019-norges-nasjonale-minoriteter/.
[45] Vienna Convention on the Law of Treaties of 1969, entered into force 27 January 1980, 1155 UNTS 331.

accordance with the ordinary meaning of the terms of the treaty. Furthermore, Article 31 states that treaties shall be interpreted in their context, and in the light of its object and purpose. Human rights are an area of international law where courts and monitoring bodies have developed what is often referred to as a *dynamic* interpretation of convention provisions. Where the wording is general, the purpose of the provision shall be given increased weight. Many human rights provisions are general, and the development of societal conditions and legal perceptions develops over time. The content of many provisions will therefore also be developed over time.

The Human Rights Committee in particular has interpreted Article 27, in individual complaints cases, in General Comments and in Concluding observations. In the so-called *Diallo* case from 2010, the International Court of Justice (ICJ) ruled that in particular the views of the Human Rights Committee in individual complaints and General Comments must be given "great weight".[46] The Supreme Court has, as mentioned, also stated that the committees' views may have considerable weight as a source of law, but that such views must be given weight based on a "complex and concrete assessment".[47]

UN INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)

- The Covenant was adopted by the UN in 1966.
- Norway ratified the Covenant in 1972 and it entered into force in 1976.
- The purpose of the Covenant is that the member states shall ensure the civil and political rights of all individuals within its territories.
- ICCPR Article 27 is one of the most important rules of international law on the rights of indigenous peoples.
- The ICCPR is monitored by the UN Human Rights Committee.
- The ICCPR is incorporated in the Human Rights Act and shall, in the event of a conflict, take precedence over provisions in other legislation.

3.2 UN International Covenant on Civil and Political Rights (ICCPR)

The ICCPR's general implementation provision in Article 2 (1) states that the parties to the Covenant are obliged to "respect" and "ensure" the rights recognised in the Covenant.

The Covenant contains several provisions that are central to indigenous peoples and minorities, including Articles 1, 2, 25, 26 and 27. Article 1 (which has the same wording as Article 1 of the ICESCR) deals with, among other things, the right to self-determination of

[46] ICJ, *Guinea v Democratic Republic of Congo*, "Case concerning Ahmadou Sadio Diallo", 30 November 2010, para. 66. In an article, Hellerslia points out that "In the Diallo case, the ICJ stated that great weight had to be placed on statements in individual complaints cases and General Comments from the Human Rights Committee in understanding the Convention. It must be assumed that it was conscious that the ICJ did not mention 'concluding observations.", Thom Arne Hellerslia, "Uttalelser fra FN-komiteene–en strukturell analyse" ("Statements from the UN committees – a structural analysis"), *Jussens Venner* 53, no. 02 (2018), p. 10.

[47] HR-2016-2591-A para. 57.

peoples. Articles 2 and 26 deal with equality before the law and non-discrimination, and Article 25 deals with political participation. As mentioned, however, Article 27 is the most important provision on the protection of indigenous peoples' and minorities' right to practice their own culture.

Many of the rights of the Covenant give the authorities the right, under certain conditions, to interfere in the rights, so-called right of limitation or restriction. Such access to interference or restrictions is not part of ICCPR Article 27. However, pursuant to Article 4 of the ICCPR, several human rights, including Article 27, can be derogated from in cases of emergency that threaten the life of the nation.

3.3 Regarding ICCPR Article 27

3.3.1 Introduction

As noted, the key human rights provision in the area of human rights protection against interferences on Sami traditional areas is ICCPR Article 27. It is especially this provision that is discussed by the Supreme Court in the *Fosen* case, which was dealt with in Grand Chamber in October 2021, where the Supreme Court concluded that this particular provision had been violated through the permit to build wind power plants in a reindeer grazing district. The *Fosen* judgment clarified several important questions as to the application and scope of Article 27 in Norwegian law. This is discussed in more detail in Chapter 4 on Supreme Court case law.

The question of whether Article 27 has been violated must be decided on the basis of an overall assessment, where various factors are included in the consideration of whether the threshold for violation has been reached. Therefore, in the following review of Article 27, the question of where the threshold lies is addressed at the conclusion.

ICCPR Article 27 reads:

> 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.[48]

The provision thus provides protection for ethnic, religious or linguistic minorities. It protects national minorities, but also other linguistic, ethnic or religious minorities in each state. The provision includes indigenous peoples. ICCPR Article 27 protects the right to practice *culture*, profess *religion* and use of one's own *language*. This report is limited to the part of the provision that relates to the *practice of culture*, especially in the form of reindeer husbandry.

3.3.2 The relationship to ICCPR Article 1 - the right to self-determination

In its General Comment 23 (on ICCPR Article 27), the Human Rights Committee states that the rights under Article 27 do not prejudice the sovereignty and territorial integrity of the state parties. The provision concerning peoples' right to self-determination in Article 1 of the ICCPR is regarded as a purely collective right that cannot be invoked individually, nor may it be subject to

[48] The Norwegian translation of the authoritative English text, "I de stater hvor det finnes etniske, religiøse eller språklige minoriteter, skal de som tilhører slike minoriteter ikke nektes retten til, sammen med andre medlemmer av sin gruppe, å utøve sin egen kultur, bekjenne seg til og praktisere sin egen religion, eller bruke sitt eget språk."

individual complaints.[49] Nevertheless, in several decisions, the Human Rights Committee has pointed out that Article 1 of the ICCPR, on the right to self-determination for "peoples", may have significance on the interpretation of the individual rights in the Covenant, including Article 27. Indigenous peoples in particular have a way of life that is closely related to land, and there may therefore be a need to restrict states' right to intervene in such lands.[50]

The content of indigenous peoples' right to self-determination was a challenging question during the negotiations on the Declaration on the Rights of Indigenous Peoples. It is assumed that the term, as used in ICCPR Article 1, refers to both external and internal right of self-determination, but that the threshold for requiring external right of self-determination (status as a state) is extremely high.[51] The wording of UNDRIP Articles 3, 4 and 5 reflects that indigenous peoples' right to self-determination encompasses a right to *internal* self-determination within a state.

In several cases, the Human Rights Committee has pointed out that Article 1 of the ICCPR may be relevant to the interpretation of Article 27.[52] In the so-called *Diergaardt* case, the Committee stated, among other things, that although it does not deal with individual complaints alleging violations of Article 1, Article 1 may be relevant in connection with the interpretation of other rights protected in the Covenant, in particular Article 25 (on political participation), Article 26 (on discrimination) and Article 27 (on minority protection).[53]

The Sami Rights Committee (II) discussed, among other things, ICCPR Article 1 in light of the practice of the Human Rights Committee.[54] Regarding the decision in the so-called *Mahuika* case, it was stated:

> In its decision the Committee does not elaborate on the specific significance of Article 1 as a factor in the interpretation of Article 27. However, it may seem that Article 1 was part of the backdrop for the Committee going relatively far in interpreting Article 27 as a right for the indigenous peoples to be consulted in the determination of matters of direct relevance to their material cultural practice.[55]

The Sami Rights Committee believes that in light of the Human Rights Committee's views on the relationship between ICCPR Article 1 and

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[49] HRC, *Lubicon Lake Band v Canada* (Communication No. 167/1984), para. 32.1. See also HRC General Comment No. 12: The right to self-determination of peoples (Art. 1), 1984.

[50] HRC General Comment No. 23, para. 3.2: "The enjoyment of the rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party. At the same time, one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority."

[51] Article 1 on "self-determination" for "all peoples" in both ICCPR and ICESCR must be seen against the background of the decolonisation that had taken place after World War II, and which was still an inflamed political theme in the 50s and 60s. In any case, Article 1 on self-determination must be read in the light of the provisions of the UN Charter on the sovereignty and territorial integrity of states.

[52] HRC, *Diergaardt et al. v Namibia* (Communication No. 760/1997), HRC, *Apirana Mahuika et al. v New Zealand* (Communication No. 547/1993).

[53] "Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27", HRC, *Diergaardt et al. v Namibia*, (Communication No. 876/1999), para. 10.3. Also in the *Mahuika* case, the Committee stated that the provisions of art. 1 could be relevant in interpreting other provisions of the Covenant, in particular Article 27, HRC, *Mahuika et al. v New Zealand* (Communication No. 547/1993), para. 9.2.

[54] NOU 2007:13A, Chapter 5.

[55] NOU 2007:13 A, point 5.4.3.2.

several other provisions of the Covenant, the right to self-determination is a "fundamental condition for effective compliance with individual human rights". The Committee also says that for "development and strengthening of these rights, it must be assumed that the significance of self-determination as a factor of interpretation will particularly have an impact on purpose-oriented and dynamic interpretations and not in restrictive or strictly wording-based interpretations. This must also apply to the interpretation of ICCPR Article 27."[56]

In two individual complaint cases on Sami rights in Finland from 2018, the Human Rights Committee emphasised the right of indigenous peoples to self-determination.[57] The Committee's assessments in these two cases are largely identical. They concerned the validity of the Supreme Administrative Court's (SAC) decision to allow 93 people to stand in the electoral count of the Finnish Sami Parliament. The Finnish Sami Parliament had decided that these persons *did not* have the right to stand in the electorate. In both cases, the Committee concluded that SAC's decision was invalid, and found that there was a breach of Article 25 concerning the right to political participation, seen in connection with Article 27 and Article 1 on the right to self-determination.[58] In the decisions, the Committee expressed its view on the significance of ICCPR Article 27 in light of the right to self-determination. The Committee observed that Article 27, interpreted in the light of the Indigenous Declaration and ICCPR Article 1 on self-determination, gives indigenous peoples a fundamental right to "freely determine their political status and freely pursue their economic, social and cultural development".[59]

In the White Paper on the enactment of the right to consultation, the Ministry of Local Government and Regional Development stated that, in line with the Declaration on the Rights of Indigenous peoples, the Sami have a right to self-determination that entails something more than a right to be consulted, but that "at the same time the right to be consulted is a key element in the implementation of the right of self-determination in areas where both the Sami and others are affected by the measure in question".[60]

In other words, the right to self-determination provides important guidelines for the interpretation of other provisions. This includes the right to consultation, but is not limited to it.

3.3.3 Negative and positive rights

States have both positive and negative human rights obligations. The term "negative obligations" refers to states having to refrain from an act or omission in order to *avoid violating* a human right, while positive

[56] NOU 2007:13 A, point 5.4.3.2.
[57] HRC, *Tiina Sanila-Aikio v Finland* (Communication No. 2668/2015), *Klemetti Näkkäläjärvi et al. v Finland* No. 2950/2017.
[58] HRC, *Tiina Sanila-Aikio v Finland* (Communication No. 2668/2015), para. 6.11, *Klemetti Näkkäläjärvi et al. v Finland* (Communication No. 2950/2017), para. 9.11.
[59] HRC, *Sanila-Aikio v Finland* (Communication No. 2668/2015), para. 6.8 cf. and HRC, *Klemetti Näkkäläjärvi et al. v Finland* (Communication No. 2950/2017), para. 9.8. The Committee also referred to its General Comment 12 on Article 1.
[60] Prop. (Law Proposal to Parliament) 86 L (2020–2021), p. 47.

obligations mean that the state must actively take action to *ensure* a right.[61]

ICCPR Article 27 states that the minorities covered by the provision "shall not be denied" their rights according to the Article. Although Article 27 is thus negatively formulated, it speaks of "*the right*, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (our emphasis). The Human Rights Committee has assumed that this right must be protected, also through *active actions* on the part of the state, i.e. states must not only refrain from interfering in the right, but are also obliged to take positive measures to ensure it.[62]

Nevertheless, the state's negative obligation forms the core of Article 27, and it is the negative obligation that has mainly been considered in the Committee's practice. The scope and content of the state's positive obligations appear to have been clarified by the Human Rights Committee to a limited extent. The Committee states, however, that Article 27 requires states to safeguard the survival and continued development of the cultural, religious and linguistic identity of the minority concerned, and that the protection of these rights contributes to the enrichment of society as a whole.[63]

Positive measures to ensure indigenous peoples' right to cultural practice according to Article 27 may entail exceptions to the principle of equal treatment. Such positive measures, however, may in certain cases be lawful and necessary. The Human Rights Committee has stated that although the rights in ICCPR Article 27 are individual, the realisation of them depends on the minority group in question being able to maintain its culture, language or religion. In this regard, it must be assumed that any positive measures pursuant to Article 27 shall not violate the prohibitions on discrimination (Articles 2 and 26) of the Covenant. *Differentiental treatment* may be permitted, while *discrimination* is not. Permitted different treatment must be based on factual and objective criteria that appear legitimate in relation to the purpose of the Covenant.[64] Although Article 27 includes both positive safeguarding obligations and negative obligations for the state, it is mainly the latter that have been clarified by the Human Rights Committee.

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[61] There is not necessarily a sharp distinction between positive and negative rights in practice. Even where the state must refrain from interfering with rights (e.g. the ban on arbitrary deprivation of liberty), the state must take positive steps (provide for procedural guarantees of legal security) to ensure the right.

[62] The Committee emphasises this in its General Comment 23. It states here that although ICCPR Article 27 is formulated in a negative way (shall not be denied), the provision recognises positive rights that the parties to the Covenant are obliged to ensure, including through positive measures. HRC General Comment No. 23, para. 6.1, reads: "Although article 27 is expressed in negative terms, that article, nevertheless, does recognise the existence of a 'right' and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party."

[63] The Committee states i.a. that: "The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.", HRC General Comment No. 23, para. 9.

[64] "However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.", HRC General Comment No. 23, para. 6.2.

3.4 More about the assessment topics in ICCPR Article 27

3.4.1 The material basis for culture

The term *culture* is not precisely defined in ICCPR Article 27. A natural linguistic understanding of the wording of the provision implies that it is cultural practice related to minority protection that is particularly protected. According to the Human Rights Committee, the term culture must be understood in such a way that, in addition to other cultural expressions, it encompasses the material preconditions for culture, including traditional business activities.[65] This means that the provision may limit states' right to intervene in indigenous peoples' ability to operate traditional businesses.

Since the end of the 1980s and to this day, the Human Rights Committee has explicitly interpreted an obligation on states to protect the material basis of indigenous people's culture. The Committee points out that cultures can manifest themselves in various ways, including as special ways of life related to the use of land and other natural resources. This applies in particular to indigenous peoples.[66] The minority protection under ICCPR Article 27 includes traditional business activities and traditional activities such as fishing or hunting, and gives the right to live in areas where the relevant minority is protected. This must be seen in the context of indigenous peoples having a special relationship with land areas and associated natural resources in order to carry out their traditional activities.[67] The Committee has emphasised that states may be obliged to provide legislative measures to safeguard these rights.[68]

The Committee stated this in its handling of the complaint raised by *Ivan Kitok against Sweden*.[69] The main question in the case was whether the complainant, who had a reindeer herding Sami background, was entitled to continued membership in the Sami village after working outside the reindeer herding for more than three years. The Sami village opposed continued membership. Under strong doubt, the Committee concluded that this exclusion was not in conflict with ICCPR Article 27, since Kitok would nevertheless have the right to graze his reindeer and to hunt and fish in the area.[70] Concerning the connection between indigenous peoples and their traditional ways of life, the Committee stated, among other things, that although regulation of economic activities is usually something the state can decide on its own, this activity may be covered by Article 27 when it is an *essential part* of a minority group's culture.[71] In the decision, the Committee referred, among other things, to the so-called *Lubicon Lake Band* case.[72] In this case, the Committee had concluded that the authorities' permission to use traditional indigenous areas for various business activities, including drilling for oil and gas, could constitute a violation of Article 27, because these activities, as long as they were ongoing, together with previous

[65] HRC General Comment No. 23, para. 7.
[66] HRC General Comment No. 23.
[67] HRC General Comment No. 23, para. 3.2.
[68] HRC General Comment No. 23, para. 7.
[69] HRC, *Kitok v Sweden* (Communication No. 197/1985).
[70] HRC, *Kitok v Sweden*, paras. 9.6 and 9.8.
[71] HRC, *Kitok v Sweden*, para. 9.2.
[72] HRC, *Lubicon Lake Band v Canada* (Communication No. 167/1984).

interferences, would threaten the way of life and culture of the Lubicon Lake Band.[73]

In the first of the three *Länsman v Finland* cases, the state had granted a licence for a quarry in an area where reindeer husbandry was conducted. It was assumed that not only traditional operating methods are protected under Article 27. The Committee stated that the Sami use of modern work tools in reindeer husbandry did not result in weakened legal protections according to Article 27. Such methods are thus also covered by the material concept of culture.[74]

In the *Länsman II* case, the state forestry authorities had approved logging in a reindeer herding area. The main issue in this case was whether completed and planned forestry in the area was compatible with ICCPR Article 27.[75] The Human Rights Committee emphasised that although some of the complainants nearby the reindeer herding were also engaged in other (non-traditional Sami) activities to obtain income, it did not affect their right to the protection of their culture according to Article 27.[76]

In other words, the practice of the Committee shows that it is the material cultural practice that is protected, that this concept is interpreted broadly, and that this protection is not weakened by the replacement of traditional work tools and methods by more modern ones.

3.4.2 Individual or collective rights?

ICCPR Article 27 gives individual rights. This follows directly from the wording "*persons* belonging to" in ICCPR Article 27. This has also been emphasised by the Human Rights Committee, for the first time in 1981 in the case *Lovelace v Canada*.[77]

In General Comment 23, the Committee explains precisely how ICCPR Article 27 differs from Article 1 on the right to self-determination in that the right to self-determination applies to "peoples". It is explained in the Comment that Article 27 contains individual rights that are covered by the right to make individual complaints.[78]

The rights pursuant to ICCPR Article 27 are nevertheless of such a nature that they make little sense if they cannot be exercised jointly with other members of the minority group, as the wording of Article 27 also underscores. Linguistic and cultural rights, for example, can hardly have real content if one does not have someone to talk to in their language, or practice their culture together with. In legal theory, reference is often made to "The Collective Element in Article 27" which alludes to, among

[73] HRC, *Lubicon Lake Band v Canada*, para. 33. When the Committee nevertheless did not find that there was a violation of ICCPR Article 27, this was because the state had implemented extensive remedial measures.
[74] HRC, *Ilmari Länsman et al. v Finland* (Communication No. 511/1992), para. 9.8.
[75] HRC, *Jouni E. Länsman et al. v Finland* (Communication No. 671/1995).
[76] Also in this case, the Committee concluded that there was no violation, i.a. on the basis that the authorities had conducted consultations with affected Sami and because the interference did not lead to lack of economic sustainability for reindeer husbandry.
[77] HRC, *Sandra Lovelace v Canada*, (Communication No. 24/1977), para. 14.
[78] The Committee states i.a. "Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part II of the Covenant and is cognizable under the Optional Protocol", HRC, General Comment No. 23, para. 3.1.

other things, the wording "in community with the other members of their group".[79]

The collective element was also highlighted by the Human Rights Committee in the *Lubicon Lake Band v Canada* case.[80] The complaint was raised by the chief of a tribe on behalf of the group. This was accepted by the Committee.[81] Even though the provision in the wording gives individual rights, in the Committee's view, there is nothing preventing that groups of individuals can be behind complaints concerning violations. This has since been the Committee's practice, in a number of cases that have been raised on behalf of a group.[82]

The Sami Rights Committee (II) also emphasised that ICCPR Article 27, according to the Committee's interpretation and practice, protects both individual and collective rights: "The individual's right to cultural practice will necessarily depend on the group's possibility for cultural practice. If the culture is not maintained, the individual rights to cultural practice cannot reasonably be exercised."[83]

In the *Fosen* judgment, it was clarified that ICCPR Article 27 grants individual rights, but that the right can also be invoked by groups of individuals.[84]

3.4.3 Effective participation in decision-making processes (consultations)

Although the wording of ICCPR Article 27 does not explicitly mention consultations, the Human Rights Committee has, through its practice, interpreted a right in Article 27 for minorities to effectively participate in decisions concerning their economic, social and cultural rights, and that positive measures to ensure such participation may be necessary.[85] The safeguarding of this right of consultation is included in the overall assessment of whether the authorities have overstepped the threshold according to Article 27. This has been the basis for several individual complaints, including the aforementioned *Länsman* cases.[86] The fact that the authorities consulted with the complainants during the proceedings was probably contributing to the fact that the Committee in these cases found that Article 27 had not been violated.[87] In the case *Angela Poma Poma v Peru*, the Committee concluded that Article 27 had been violated, and assumed that the question of violation depends, among other things, on whether the members of the affected minority community had had the opportunity to participate in the decision-making processes in the case in an effective manner.[88]

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[79] Manfred Nowak, *U.N. Covenant on Civil and Political Rights - CCPR-Commentary*, 2nd ed. (Kehl: N.P. Engel Publishers, 2005), p. 655.

[80] HRC, *Lubicon Lake Band v Canada* (Communication No. 167/1984).

[81] In its decision on this complaint, the Committee stated, inter alia on the individual complaints scheme, which is authorised in the First Additional Protocol to the Covenant, HRC, *Lubicon Lake Band v Canada*, (Communication No. 167/1984), para. 32.1.

[82] The Committee's practice in the Sami cases *Länsman I*, *II* and *III*, *Sanila-Aikio and Näkkeläjärvi v Finland* are examples of this.

[83] NOU 2007:13 A, point 5.5.3.4.

[84] See Chapter 4.2.2.

[85] HRC General Comment No. 23, para. 7.

[86] HRC, *Ilmari Länsman et al. v Finland* (Communication No. 511/1992), para. 9.6.

[87] HRC, *Ilmari Länsman et al. v Finland*, para. 9.6.

[88] The Committee stated: "In the present case, the Committee observes that neither the author nor the community to which she belongs was consulted at any time by the State party concerning the construction of the wells", HRC, *Poma Poma v Peru* (Communication No. 1457/2006), para. 7.7.

Effective participation was also central to the case *Apirana Mahuika et al. v New Zealand*.[89] The complainants, who were a group of Maori, alleged that fishery regulations introduced by the state violated their rights under ICCPR Article 27 by limiting their right to participate in commercial fishing. The authorities' general measures in the 1980s to limit commercial fishing due to strong pressure on fish resources, including through a quota system, had also resulted in many Maori losing the right to engage in such fishing. To remedy this, in 1988, an agreement was negotiated between the Government and representatives of a majority of Maori. A separate law was also passed. A group of Maori claimed, however, that the agreement and the law violated their right to fish in saltwater. The Human Rights Committee assumed that the original quota system was a possible violation of Article 27 because in practice, the Maori had no part in this, which in turn meant that they were deprived of their right to fish. Under the agreement that was signed, however, the Maori gained access to a large share of the quota. In this case, the Committee concluded that the state, by consulting prior to the implementation of the original bill, and by emphasising the sustainability of Maori fishing, had complied with ICCPR Article 27's requirement for effective participation.[90] In this case, the Committee emphasised that the right to consultation must also be understood on the basis of the right to self-determination in ICCPR Article 1.[91]

The Human Rights Committee's interpretation of effective participation in decision-making processes as an important element of ICCPR Article 27 is possibly inspired by provisions on consultations in ILO 169. Article 6 of ILO 169 states that states should "consult the peoples concerned, [...] whenever consideration is being given to legislative or administrative measures which may affect them directly". Consultations shall be undertaken in good faith, and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.[92]

One question that has been raised in Norway through cases concerning wind power plants, is the extent to which the developer can enter into individual (and secret) agreements with individual reindeer owners on development projects.[93] It is uncertain whether such individual agreements will prevent violation of ICCPR Article 27, if the negative consequences of the interference are serious enough. Such individual agreements may also be problematic in terms of the Sami right to be consulted in matters relating to the collective natural basis for Sami culture.

Although the Human Rights Committee has emphasised the extent to which the minority

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[89] HRC, *Apirana Mahuika et al. v New Zealand* (Communication No. 547/1993).

[90] HRC, *Apirana Mahuika et al. v New Zealand*, para. 9.8.

[91] HRC, *Apirana Mahuika et al. v New Zealand*, para. 9.2: "Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27."

[92] A similar wording is used in Article 32, 2nd paragraph, on prior consent for the development and utilisation of natural resources.

[93] See nrk.no, about the case of Davvi wind farm: "Vindkraftutbygger tilbyr hver enkelt reineier millionbeløp for beiteområder – igjen" ("Wind power developer offers each individual reindeer owner millions for grazing areas – again"), Lene Marja Myrskog, June Grønnvoll Bjørnback and Thor Werner Thrane. Retrieved 15 November 2021 from https://www.nrk.no/sapmi/grenselandet-as-tilbyr-millioner-til-hver-enkelt-driftsenhetseier-i-distrikt-13-1.15727952 See on the same case, "Fálle 9 miljovnna ruvnno njuolga kontui, Ávvir", Roy Arthur Olsen. Retrieved 15 November 2021 from https://www.avvir.no/fallet-miljovnnaid-boazodolliide-vai-besset-cegget-bieggamilluid/#plus.

has been consulted in interference cases as an important factor, there are some individual complaints under ICCPR Article 27 where the Committee has not mentioned effective participation.[94] This may indicate that there is no general and absolute requirement for effective participation or consultations in all types of matters that may concern Article 27. The cases in question, however, are from 1981 and 1988 respectively, i.e. from before consultations were established in ILO 169 and in the UN Declaration on the Rights of Indigenous Peoples. It is clear that consultations are a factor that can be included in, and have an impact on, the overall assessment of whether cultural protection has been violated.[95]

3.4.4 Free, prior and informed consent (FPIC)

As stated above, the question of the right to participate in decision-making processes (consultations) is an important factor in the Human Rights Committee's assessments of whether interference or other measures may constitute a violation of ICCPR Article 27. A central question in connection with this is whether a general requirement can be made for *prior consent* in cases of interference or other measures affecting indigenous peoples.[96]

The Human Rights Committee assumes that indigenous peoples' participation in decision-making must be effective. In the *Poma Poma* case, the Committee stated that in this case, where the indigenous people's livelihoods *were in danger of being destroyed*, the group's "free, prior and informed consent" from the affected indigenous peoples was required. In this case, neither the complainant nor the group to which she belonged had been consulted by the state regarding the interference that threatened their livelihoods.

ILO 169 Article 16 and UNDRIP Article 10 specify when free, prior and informed consent is required. ILO 169 Article 16 stipulates that indigenous peoples shall not be forcibly removed from their areas. The provision further states that if "relocation" (resettlement) of such persons is nevertheless deemed strictly necessary, this can only happen with the group's free, prior and informed consent. If such consent cannot be obtained, "relocation" can only take place if the indigenous peoples are given "effective representation" in the process.[97] A further requirement is that the people shall have the right to move back to their lands, or where this is not possible, be granted lands of at least the same quality and legal status as the area that has been lost, or if they

[94] HR-2017-2428-A (*Sara*), para. 74: "In the *Lovelace* case and the *Kitok* case, the issue of consultations was not touched upon, which indicates that one cannot claim that there is an unconditional requirement that the minority's participation must have influenced the decision."

[95] Cf. HR-2021-1975-S (*Fosen*), para. 121. With effect from 1 July 2021, the right to consultation is further regulated in the Sami Act, Chapter 4.

[96] Cf. Prop. (Law Proposal to Parliament) 86 L (2020-2021), p. 62.

[97] ILO 169, Article 16: "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."

prefer, receive compensation in the form of money.[98]

Article 10 of the UNDRIP confirms that indigenous peoples shall not be forcibly relocated from their lands or territories. Any resettlement shall take place with the free, prior and informed consent of the affected indigenous peoples, in accordance with a compensation agreement, and if possible, the group shall be allowed to return. This provision in the UNDRIP therefore requires free, prior and informed consent for measures that lead to "relocation", and if the indigenous peoples refuse to move, then it must be respected. The provision thus goes somewhat further than its "model" ILO 169.[99]

None of these provisions expresses a general requirement for free, prior and informed consent in all interference cases. When the Human Rights Committee in the *Poma Poma* case ruled that a free, prior and informed consent was required,[100] the Committee emphasised that the interference was so serious that the complainants' livelihood was destroyed, which was tantamount to forced relocation. The Committee stated about the interference that "it has ruined her way of life and the economy of the community, *forcing its members to abandon their land* and their traditional economic activity" (our emphasis).[101]

The question as to whether also other measures besides those that will lead to forced relocation, are covered by a *requirement* for prior consent, has been the subject of debate in international fora, academics and civil society organisations for many years. The debate has been about whether the rules on FPIC constitute a general requirement that consent must be obtained before decisions that affect indigenous peoples can be made. While, among other things, the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has suggested that this may be the case,[102] the ILO has, inter alia, rejected that such a claim can be derived from the wording of ILO 169 or UNDRIP.[103] ILO has, among other things, referred to the rules of international law on treaty interpretation, and determined that a general requirement for prior consent in all matters affecting indigenous peoples cannot be derived from the provisions of ILO 169, and thus not from UNDRIP.[104]

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[98] It can be noted, however, that the MPE in the *Fosen* case stated: "The Ministry should nevertheless note that replacement land may be relevant, but then as a remedial measure and *not a requirement under international law*", (our emphasis), MPE, "Vindkraft og kraftledninger på Fosen – klagesak" ("Wind power and power lines at Fosen - complaint case"), 2013, pp. 89–90, https://webfileservice.nve.no/API/PublishedFiles/Download/200700502/761649.

[99] But see the Supreme Court decision in *Nesseby*, where it is stated about UNDRIP that "It is not legally binding, and the individual provisions in the declaration do not seem to go beyond what follows from binding conventions, primarily ILO Convention no. 169.", HR-2018-456-P (*Nesseby*), para. 97.

[100] The Committee's views were adopted on 27 March 2009, while the Indigenous Declaration was adopted on 13 September 2007. The Declaration's use of the term free, prior and informed consent was therefore known to the Committee.

[101] HRC, *Poma Poma v Peru* (Communication No. 1457/2006), para. 7.5.

[102] HRC, Study of the Expert Mechanism on the Rights of Indigenous Peoples: *Free, prior and informed consent: a human rights-based approach,* A/HRC/39/62, 2018. See also on the CERD's handling of the case *Vapsten Sameby v Sweden*, (CERD/C/102/D/54/2013), discussed in Chapter 3.5.1.

[103] Comments submitted by the ILO to the Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples Eleventh Session, 9–13 July 2018 Item 4: Study on free, prior and informed consent, p. 4: "Such a reading does not appear to be borne out by the wording and drafting history of Articles 19 and 32, a view that is shared by academic writers and experts, including experts cited by the draft study." See also ILO Manual on the Convention: ILO Convention on Indigenous and Tribal Peoples 189 (169) A Manual, p. 22.

[104] ILO Convention on Indigenous and Tribal Peoples 189 (169) A Manual, pp. 5–6.

The Supreme Court has ruled, citing the *Poma Poma* case, that the requirement to obtain free, prior and informed consent applies in cases where the livelihood is completely destroyed, but that otherwise no unconditional requirement can be made that the participation of the minority must have had an impact on the decision.[105]

In other words, according to ILO 169 and the UNDRIP, the requirement to obtain free, prior and informed consent applies in cases where interference will lead to forced relocation or the equivalent. The Human Rights Committee has interpreted ICCPR Article 27 as containing a requirement for informed prior consent for interferences that threaten or will destroy the indigenous peoples' continued livelihoods in their traditional lands. The implications of ILO 169 Article 16 and UNDRIP Article 10 are that in other types of interference cases, free, prior and informed consent will be a goal, but not an absolute requirement.

3.4.5 Overall effect or cumulative effects

A common challenge related to ICCPR Article 27 is how to assess several interference measures over time. This is important because it is often not singular measures that alone will threaten indigenous peoples' cultural practices, but many such measures over time may collectively amount to a violation. The Human Rights Committee has therefore ruled that the combined effects, i.e. the cumulative effect of several interferences, each of which is not large enough to constitute a violation, may lead to Article 27 being violated. In the *Lubicon Lake Band* case, which is the first case concerning interference in traditional indigenous areas, the Committee pointed out that there was no major interference in that specific case. The Committee emphasised, however, that the combined effects of historical injustices and recent developments combined posed a threat to the Lubicon Lake Band's way of life and culture, and would therefore be a violation of Article 27.[106]

The question of cumulative effects of interferences was also discussed in the three *Länsman* cases against Finland. In the first of these cases, the Committee pointed out that the scope of the interference that had already taken place did not violate ICCPR Article 27. The Committee determined, however, that it could lead to violation if the interferences in the area were allowed on a large scale and significantly expanded. In the two subsequent *Länsman* cases, the Committee stated that even if the logging that was approved did not violate Article 27, new interferences could change this, even if the various activities *in isolation* would not in themselves constitute a violation of Article 27. In the assessment of whether a measure is in conflict with Article 27, the Committee could therefore not only consider interferences in an area traditionally used by the indigenous peoples concerned at a given time, but had to assess the effects of past, present and future forestry on the minority's ability to continue practicing their culture.[107]

This is central because the right to cultural practice is often threatened precisely by different types of natural interferences of varying magnitude, over time, which together

[105] HR-2017-2428-A (*Sara*), para. 74.

[106] Due to the state's remedial measures, however, the Committee did not find any violation in this case, HRC, *Lubicon Lake Band v Canada* (Communication No. 167/1984), para. 33.

[107] 107 HRC, *Jouni Länsman et al. v Finland* (Communication No. 1023/2001), para. 10.2. See also HRC, *Lubicon Lake Band v Canada* (Communication No. 167/1984), para. 33 and *Länsman et al. v Finland II*, para. 10.7.

can become so extensive that it exceeds the threshold for what is permitted under ICCPR Article 27. The condition for assessing cumulative effects of interferences tightens the requirements for decision-makers who must not only consider the interference in question, but also see it in the context of previous and planned interferences. This also places demands on the factual basis to be considered, because an assessment of cumulative effects of interferences requires a sufficient overview of both historical and future planned interferences.

3.4.6 Remedial measures

Even if interferences or other measures in principle would have constituted a violation, *remedial measures* may nevertheless prevent violation of ICCPR Article 27. Remedial measures may, for example, constitute special guidelines for how the interference is to be implemented, compensation for lost income, allocation of other lands to the protected cultural practice or other measures.

In the *Lubicon Lake Band* case, it was assumed that the planned measures could be implemented if the culture of the minority group were taken into account and necessary adjustments were made. The Human Rights Committee noted that the state wanted to rectify the situation in a way that satisfied the requirements of the ICCPR Article 2 (3) a on "effective remedy". In this case, Canada allocated an area of 250 square kilometres and paid compensation equivalent to 45 million Canadian dollars to the group.

In the *Länsman I* case, one important reason why the Human Rights Committee believed reindeer husbandry had not been "adversely affected" was that the authorities had set conditions for the activities of the quarry. The Committee pointed out that the authorities had sought to limit the permit for extraction so that it caused minimal damage to reindeer husbandry and the environment. It had been agreed that the extraction would take place during the periods when the area was not used for grazing, which was a remedial measure.[108] This contributed to the conclusion that, according to the Committee, the operation did not constitute a breach of ICCPR Article 27.

Conversely, the Human Rights Committee pointed out in the *Poma Poma* case that no measures had been taken to minimise the effect of the measure or to repair the damage that had occurred.[109]

Although remedial measures are central to the Committee's practice, it is nevertheless worth noting that there is a limit as to how far a remedial measure can reach. For example, the Supreme Court in the *Fosen* judgment stated that despite the fact that the Court of Appeal required the developer to provide comprehensive remedial measures in the form of e.g. winter feeding of the reindeer in a fenced area, this was still not sufficient to prevent ICCPR Article 27 from being violated, see Chapter 4.

3.4.7 The threshold for violation of ICCPR Article 27 and proportionality assessments

3.4.7.1 Requirements for significant negative impact

The wording that minorities should not be "denied the right to [...]" in ICCPR Article 27 provides only limited guidance on what it takes for someone to be denied the right to practice

[108] HRC, *Ilmari Länsman et al. v Finland* (Communication No. 511/1992), para. 9.7.
[109] HRC, *Poma Poma v Peru* (Communication No. 1457/2006), para. 7.7.

their culture.[110] In its General Comment 23 (on ICCPR Article 27), the Human Rights Committee specified that indigenous peoples' rights should be protected against "denial or violation" – i.e. the protection includes both total *denials* of cultural practice, but also other *violations*.[111]

Practice from the Human Rights Committee shows that the threshold for ascertaining violations of ICCPR Article 27 is relatively high. This is illustrated for example by the three *Länsman* cases. In the first *Länsman v Finland* case, the state had granted a licence to develop a quarry in an area where reindeer husbandry was practiced. The Committee concluded that interferences in the form of extraction and transport of stone through a grazing area were not so extensive that there was a violation of ICCPR Article 27.[112] The Committee noted that measures that have a limited impact on the way of life of a minority do not necessarily constitute a violation of Article 27.[113] Certain interferences that affect the possibility to practice the culture, or that complicate the practice, can be accepted. The Committee emphasised that the affected Sami had been consulted in the process and that reindeer herding in the area did not appear to have been "adversely affected" by such activities that had taken place.[114] The Committee, however, assumed that a *significant increase* in activities related to the quarry could lead to violation of Article 27. In order to comply with the requirements of Article 27, such interferences, according to the Committee, must not have led to a lack of financial sustainability for Sami reindeer husbandry or other traditional industries.[115] In this case, remedial measures were the reason why no violation was found.[116]

In the *Länsman II* case, the Committee stated that the state forestry authorities had approved logging to an extent that, admittedly, led to additional work and additional costs for the traditional activity (reindeer husbandry), but which did not threaten the existence of reindeer husbandry. The fact that reindeer husbandry was not very profitable was not due to the state's economic activities in the area in question, but to external economic factors.[117] If the interference, or the additional work and expenses it inflicted on the complainants, had threatened the survival of reindeer husbandry, however, it would have been different.

An important clarification was that when the Committee here referred to "the survival of reindeer husbandry", it referred not to Sami reindeer husbandry in Finland as a whole, but to the specific reindeer herding in the area where the effects of the interference occurred.

In 2001, *Jouni E. Länsman et al.* brought a new case against Finland (the *Länsman III* case),

[110] The Sami Rights Committee (II) stated i.a. the following about how extensive an interference must be in order for it to cause a violation of the right to cultivate one's culture: "A denial in Article 27's meaning will consequently include not only total denials, but also violations of the right to cultural practice. In addition to the measures that will actually constitute a total denial of the right to cultural practice, measures that significantly restrict the complainant's or complainants' opportunities for cultural practice, but without involving a total denial, will probably also be in conflict with the provision. Such an interpretation is also in accordance with the purpose of the provision, in that cultural protection becomes more effective when the expression 'denied' in Article 27 is given a wider scope than just the total refusals.", NOU 2007:13 A, p. 203.

[111] HRC, General Comment No. 23, para. 6.1.

[112] HRC, *Ilmari Länsman et al. v Finland* (Communication No. 511/1992), para. 9.6.

[113] HRC, *Ilmari Länsman et al. v Finland*, para. 9.4.

[114] HRC, *Ilmari Länsman et al. v Finland* (Communication No. 511/1992), para. 9.6.

[115] HRC, *Ilmari Länsman et al. v Finland*, para. 9.8.

[116] HRC, *Ilmari Länsman et al. v Finland*, para. 9.7.

[117] HRC, *Jouni Länsman et al. v Finland* (Communication No. 671/1995), para. 10.6.

alleging, among other things, that continued and expanded timber operations threatened the existence of reindeer herding in the area in question.[118] The complainant argued that the decision of the Finnish Ministry of Agriculture and Forestry to reduce the number of permitted reindeer in Muotkatunturi reindeer grazing district by 15 per cent, showed that forest operations caused greater damage to reindeer husbandry than the Committee had assumed in the *Länsman II* case. The Committee, however, also in this case came to the conclusion that ICCPR Article 27 had not been violated. Although it could not be ruled out that the timber operation adversely affected the reindeer husbandry activity in the area, the effects of the operation were not serious enough to constitute a violation of Article 27.[119]

Nor in the so-called *Howard case against Canada* did the Committee find that regulating traditional use of outlying areas was a violation of ICCPR Article 27.[120] Here, a tribal member did not prevail in claiming that the state's regulation of licenses, as well as restrictions on access to fishing and hunting, were a violation of Article 27. The Committee pointed out that states can regulate areas that are part of a minority's culture, as long as the regulation does not constitute a denial of practicing the culture.[121]

In the case *Angela Poma Poma v Peru*, the Committee concluded that there was a violation of ICCPR Article 27.[122] The case concerned interference in the form of development projects in the grazing resources of a woman who was engaged in llama farming, an industry that constituted an essential part of her culture. The complainant and her group lost their grazing resources after the authorities, in the 1990s, allowed the drilling of a number of water wells. The well drilling led to the drying up of 10,000 hectares of grazing land and this completely destroyed the livelihoods of the complainant and her group, and forced them to give up living in their areas and conduct their traditional business activities.[123] No impact assessment been carried out on the well construction by any independent professional bodies to assess the impact on the traditional way of life of this group, and no measures were taken to minimise the damage caused by well construction.[124]

In this case, the Committee recognised the right of states to decide on measures to promote their economic development, but emphasised that this should not undermine rights protected under ICCPR Article 27. The Committee pointed out that measures which constituted a denial of a community's practicing its own culture, were incompatible with Article 27. This was in contrast to measures which have only a limited negative effect on the conduct of business for members of such communities.[125] The Committee assumed that the question was as to whether the consequences of well drilling were of such a nature that they had "a

[118] HRC, *Jouni Länsman et al. v Finland* (Communication No. 1023/2001).
[119] HRC, *Jouni Länsman et al. v Finland*, (Communication No.1023 / 2001), para. 10.3.
[120] HRC, *Howard v Canada* (Communication No. 879/1999).
[121] HRC, *Howard v Canada*, para. 12.7. That Howard still had the opportunity to fish appears to be an important factor, see paras. 12.8–12.11.
[122] HRC, *Poma Poma v Peru* (Communication No. 1457/2006).
[123] HRC, *Poma Poma v Peru*, para. 7.5.
[124] HRC, *Poma Poma v Peru*, para. 7.7.
[125] HRC, *Poma Poma v Peru*, para. 7.4.

substantive negative impact" on Poma Poma's right to exercise her culture.[126]

In contrast to the *Länsman* cases, the interference in this case was so extensive that complainants were completely deprived of the opportunity to continue to benefit financially from their traditional business. The Committee found that the state's actions had significantly compromised the traditional way of life of the complainant and her group, and that her right to practice her own culture with members of her group under ICCPR Article 27 had been violated.[127] In the Committee's rationale, emphasis was placed on the extent of the interference (the complainant's livelihood was completely torn away) and the fact that the indigenous peoples concerned had not been consulted. The lack of independent impact assessments was also emphasised.

The threshold for violation of ICCPR Article 27 was thus reached in the *Poma Poma* case, both because the affected minority had not been given the opportunity to effectively participate in the decision-making process, because the impact and consequences of the interference had not been assessed, because no remedial measures had been implemented and because the interference was so extensive that it hindered cultural practice and forced the minority to leave their traditional lands. In other words, the procedure had a significant negative impact on the complainant and her group.

3.4.7.2 Proportionality assessment

Although ICCPR Article 27 does not provide absolute protection against all forms of interference into indigenous peoples' culture, the provision is written in an "absolute" form in the sense that it does not contain the legal basis for restricting or limiting the right under certain conditions. Such legal bases for restrictions or limitations can be found in human rights provisions on freedom of religion and belief, freedom of expression, freedom of assembly, the right to privacy, etc.[128] These rights can be restricted on the condition that the restrictions are prescribed by law, serve a legal purpose, and are necessary, i.e., they must be proportional. States may be obliged to have legislation that, for example, prohibits certain statements despite having freedom of expression, often justified in the consideration of the rights of others.

ICCPR Article 27 does not provide for such restrictions. If Article 27 is in danger of being violated due to an interference in the cultural practice of minorities, it does not follow from Article 27 that one may balance the interests of the minority against the interests of society.[129] ICCPR Article 27 can, according to its wording, only be derogated from in cases of public emergency that threaten the life of the nation,

[126] HRC, *Poma Poma v Peru*, para. 7.5, cf. 8, where the Committee concluded that the case "discloses a violation of Article 27 and Article 2, paragraph 3 (a), read in conjunction with article 27".

[127] The Committee stated: "[...] The Committee also observes that the author has been unable to continue bene ting from her traditional economic activity owing to the drying out of the land and loss of her livestock. The Committee therefore considers that the State's action has substantially compromised the way of life and culture of the author, as a member of her community. The Committee concludes that the activities carried out by the State party violate the right of the author to enjoy her own culture together with the other members of her group, in accordance with Article 27 of the Covenant.", HRC, *Poma Poma v Peru*, para. 7.7.

[128] ICCPR Articles 18, 19, 21 and 22.

[129] See e.g. *Länsman I*, HRC, *Ilmari Länsman et al. v Finland* (Communication No. 511/1992), para. 9.4: "A state may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by a reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27."

cf. Article 4.[130] In the first *Länsman* case, the Human Rights Committee stated that "A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27."[131]

In the *Poma Poma* case, the Committee stated that interferences in indigenous peoples' rights had to "respect the principle of proportionality as not to endanger the very survival of the community and its members".[132] While the Committee confirms that interferences that completely destroy cultural practice are considered disproportionate, it is difficult to draw any broader conclusions regarding proportionality assessments from this sentence. As referred to in Chapter 5.3.6 of this report, the authorities (Ministry of Petroleum and Energy) in the *Fosen* case appeared to assume that this sentence allowed for balancing between the interests of indigenous peoples and the interests of society as a whole. In the *Fosen* judgment, however, the Supreme Court ruled that ICCPR Article 27 does not in principle allow for a balance of interests or proportionality assessment, other than in cases where fundamental rights are opposed to each other, see Chapter 4.2.6.

3.4.8 Summary of ICCPR Article 27

ICCPR Article 27 sets out a threshold. This chapter has discussed each of the assessment factors before discussing the threshold. Whether the threshold has been overstepped, will depend on an overall assessment of the factors discussed in this chapter: whether the *participation* of the affected minority in the decision on interference has been effective, whether the *cumulative effects* of the interference together with previous interferences constitute a violation of Article 27, or whether *remedial measures* have been implemented that may result in the threshold not being reached after all. These factors are included in the assessment of the *negative effects of the interference* and thus of whether Article 27 has been violated. If these factors indicate that the threshold for significant negative impact has been reached, the state's scope to allow other interests to take precedence over the rights of indigenous peoples is very limited.

3.5 UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

As the ICCPR, the ICERD contains a prohibition against discrimination on the basis of ethnicity, but the definition of such discrimination is more detailed and comprehensive than it is in the ICCPR. Racial discrimination is defined as various forms of discrimination on the basis of race, ethnic origin or the like, which has the purpose or effect of making it difficult to enjoy human rights in the same way as others.[133] The wording shows that racial discrimination can consist of both acts and omissions that constitute different treatment, if this has occurred due to a person's "race, skin colour,

[130] Article 4 allows states to derogate from (deviate from) some human rights in war or crisis situations, under certain conditions.

[131] HR-2021-1975-S (*Fosen*), para. 125, cf. para. 124.

[132] HRC, *Poma Poma v Peru*, para. 7.6.

[133] The Convention's Article 1 defines racial discrimination as follows: "[] any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

descent, or national or ethnic origin".[134] When the definition refers to "purpose or effect", this means that it is sufficient that the act has had differential treatment due to ethnic origin etc. as an effect, it need not have been the intention.

In order for differential treatment to be permitted, it must be proportionate. In the *Femund sijte* judgment, the Supreme Court ruled that both the constitutional provisions and the international conventions imply that "[...] in the question of whether there is discrimination, special consideration must be given to the protection of Sami culture. In concrete terms, this means that in the assessment of objectivity and proportionality that must be made, it must be important that the case concerns Sami reindeer husbandry."[135]

The ICERD allows for positive special measures of certain groups when the purpose is equal treatment with the majority population.[136] Article 1 (4) states that special measures taken to ensure adequate advancement for ethnic groups and/or individuals who need special protection shall not be regarded as racial discrimination in the meaning of the Convention. The premise is that the positive measures are terminated when the purpose of equality has been achieved. Article 2 (2) obliges states to take special measures to protect these groups when circumstances make it necessary.

UN INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (ICERD)

- The ICERD was the UN's first human rights convention. The Covenant was adopted by the UN in 1966.
- The convention was adopted by the UN in 1965 and ratified by Norway in 1970.
- The convention is monitored by the UN Committee on the Elimination of Racial Discrimination.
- Non-discrimination is a fundamental human rights principle.
- The ICERD allows for positive discrimination of certain groups when the purpose is real equal treatment with the majority population.
- The convention is incorporated in the Equality and Anti-Discrimination Act.

The Committee on the Elimination of Racial Discrimination, which monitors the convention, has stated that the implementation of human rights of minorities and indigenous peoples, among others, is not in itself positive special measures, but positive special measures can be implemented to help realise these rights.[137] According to the Committee, positive special measures must be based on needs. In addition, they must be legitimate, necessary,

[134] ICERD Article 1. The UN International Convention on the Elimination of All Forms of Racial Discrimination is incorporated into the Equality and Anti-Discrimination Act, see Section 5.
[135] HR-2018-872-A (*Femund sitje*), para. 44. The judgment, however, does not contain further assessments of provisions of international law.
[136] ICERD Article 1 (4).
[137] CERD General Recommendation No. 32, (CERD/C/GC/32), 2009. The meaning and scope of special measures in the International Convention on the Elimination of All Forms of Racial Discrimination, paras. 14 and 15. The Committee stated in para. 8 as a central point of departure for understanding the concept of discrimination is that: "To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same".

proportionate and temporary.[138] The measures should also be implemented through consultations and active participation from those affected.

Article 5 of the convention lists a number of areas where it prohibits discrimination on ethnic grounds and requires equality before the law. Article 5 (d)(v) mentions "the right to own property, alone as well as in association with others" as one of these areas. This provision has been invoked in cases concerning indigenous peoples' land rights.[139]

Article 6 states that the courts and other authorities shall provide all effective protection and effective remedies against all racial discriminatory acts that violate the human rights of the person concerned.[140]

3.5.1 The Racial Discrimination Committee on FPIC

The prohibition against discrimination in Article 5 (d)(v) was assessed by the Committee on the Elimination of Racial Discrimination in a complaint from members of *Vapsten Sameby v Sweden*.[141] The complaint was that the state had granted a licence to establish a mine in Rönnbäcken in 2020, in an area used for reindeer herding.[142] The members of the Swedish reindeer grazing district (Sami village) argued in the complaint, among other things, that they had not been involved in a process of free, prior and informed consent (FPIC)[143] in the event of the state's violation of safeguarding property rights.[144]

The Committee on the Elimination of Racial Discrimination stated that the state had not taken the Sami land rights into account, which should have been done.[145] In the view of the Committee, the Swedish authorities had violated ICERD Article 5 (d)(v) on the right to own property without discrimination on the grounds of ethnicity.

Part of the rationale for the Committee on the Elimination of Racial Discrimination was that the authorities should have carried out a consultation process that was both suitable for, and that actually led to a free, prior and

[138] CERD General Recommendation No. 32, para. 16. The Committee also stated in para. 17 that measures should be designed on the basis of statistics on the groups' living conditions. See more about Sami statistics in "En menneskerettslig tilnærming til samisk statistikk i Norge" ("A human rights approach to Sami statistics in Norway" (Norwegian National Institution for Human Rights, Oslo, 2020).

[139] This basis was invoked by the reindeer owners in the *Fosen* case, but the Supreme Court found that this allegation was not relevant to the question of the validity of the license, HR-2021-1975 (*Fosen*), para. 154. The *Fosen* case has otherwise been appealed to CERD with a claim for violation of Article 5 (d) (v), but not decided as of December 2021.

[140] ICERD Article 6: "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."

[141] The appeal was filed in 2013 in *Vapsten Sameby v Sweden*, (CERD/C/102/D/54/2013) and was decided on 18 November 2020. Opinion adopted by the Committee under Article 14 of the Convention, concerning communication No. 54/2013, CERD/C/102/D/54/2013.

[142] See the judgment of the Supreme Administrative Court, 29 October 2014, Case no. 7425–7427-13, see https://www.domstol.se/globalassets/ler/domstol/hogstaforvaltningsdomstolen/avgoranden-2008-2018/2014/mal-nr-7425-7427-13.pdf.

[143] See more about FPIC in Chapter 3.4.4.

[144] The state pointed out that the right to reindeer husbandry under Swedish law is a right of use, and not a right of ownership, and that the concept of free, prior and informed consent as expressed in UNDRIP does not give a collective right to veto (does not entail a collective right to veto). The state also pointed out that UNDRIP is not legally binding.

[145] *Vapsten Sameby v Sweden* (CERD/C/102/D/54/2013), paras. 6.5–6.10.

informed consent.[146] Shortcomings in the impact assessment and in assessing the cumulative effects of previous interferences were also elements of the assessment.[147] The Committee also concluded that Sweden had violated ICERD Article 6 since the Swedish judicial system had not been able to examine the rights of the affected Sami based on their fundamental right to traditional territory.[148]

In this case, the Committee on the Elimination of Racial Discrimination interpreted both consultation rights and a requirement for free, prior and informed consent into the right to own property without discrimination pursuant to Article 5 (d) (v). In this case, usage rights were equated with property rights. The fact that the usage rights of the Sameby (Sami village) were hindered as a result of the establishment of the mine, was regarded as discrimination on ethnic grounds because ethnicity and usage rights in this case were so closely related.

It is unclear what basis the Committee used when it came to the conclusion that the ICERD, including Article 5 (d)(v), contains a requirement for consultations and for a free, prior and informed consent as a condition for granting the mining operation permission at the expense of the Sami usage rights. According to the Vienna Convention on the Law of Treaties, the wording of treaties must be interpreted in accordance with the natural understanding of the terms used.[149] Human rights are, however, often subject to what is referred to as dynamic interpretation. This is done to adapt the human rights to changing societal conditions. Interpretations that go beyond the natural understanding of the wording still have to be kept *within the purpose* of the provision. Interpreting usage rights in the concept of property rights will be a typical example of such dynamic interpretation, as ECtHR has also done.[150] Interpreting a positive obligation for the state to actually secure the prior agreement of the affected indigenous peoples, arguably add new purposes into Article 5(d)(v). This provision contains only a negative obligation to refrain from discriminating on ethnic grounds. The Committee on the Elimination of Racial Discrimination, however, considers that FPIC is a "norm stemming from the prohibition of racial discrimination".[151]

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[146] *Vapsten Sameby v Sweden*, para. 6.20.

[147] *Vapsten Sameby v Sweden*, paras. 6.11 and 6.18.

[148] *Vapsten Sameby v Sweden*, para. 6.29 and para. 7. Sweden does not have as of December 2021 a system for consultations in line with ILO 169, and in the Swedish court review, ICCPR Article 27 was not further assessed. The Swedish Minerals Act also does not contain provisions on consultations, but the authorities recommend voluntary consultations in connection with so-called processing licenses. This differs a great deal from similar processes in Norway. For further information about the processes of mining establishment in Sweden, please contact SGU, the Swedish Geological Survey, which is the authority for questions concerning rocks, soil and groundwater in Sweden. See the Swedish Geological Survey, "Vägledning för prövning av gruvverksamhet"
("Guidance for testing mining activities") (SGU report, 2016).

[149] Vienna Convention on the Law of Treaties Article 31 states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[150] The right to *property* is protected in the ECHR's Additional Protocol 1. The ECtHR assumes that the right to property also includes *rights of use*. The court has dealt with a number of cases concerning other forms of connection to property than the classic property right itself, e.g. cases concerning various forms of tenancy rights or land lease, see e.g. *James et al. v Great Britain* (8793/79), 1986 and *Lindheim et al. v Norway* (13221/08 and 2139/10).

[151] As reasoning for this conclusion, CERD refers to the EMRIP (Expert Mechanism on the Rights of Indigenous Peoples) study from 2018, para. 10, which in turn refers back to CERD's own General Recommendation No. 23 (1997). This is a recommendation to states to ensure the informed consent of indigenous peoples in matters concerning their rights, and not an interpretation of provisions of the Convention itself. See *Vapsten Sameby v Sweden* (CERD/C/102/D/54/2013), para. 6.16.

The Committee on the Elimination of Racial Discrimination moreover seems to maintain that there is a *general* legal requirement for a free, prior and informed consent from the indigenous peoples, in order for interference to take place. The Committee states that FPIC must be safeguarded when indigenous peoples' "rights may be affected by projects carried out in their traditional territories [...]", in other words in any interference case affecting indigenous peoples' rights. As mentioned previously, the Human Rights Committee in the *Poma Poma* case has understood FPIC less broadly, stating that the condition of free, prior and informed consent in ICCPR Article 27 was linked to the indigenous peoples being in practice *forcibly relocated*.[152] The complainants in the *Vapsten* case claimed that they were in danger of having to shut down the reindeer husbandry and leave the area if mining were allowed.[153] It is nevertheless unclear whether the Committee on the Elimination of Racial Discrimination linked the requirement for free, prior and informed consent to the terms of ILO 169 and the UNDRIP, whereby FPIC is a requirement where the interference may result in forced relocation.[154] In the decision on *Vapsten* on the other hand, the condition of free, prior and informed consent appears to be referred to as a general requirement for interference cases.[155]

3.6 ILO Convention 169 concerning indigenous and tribal peoples in independent states (ILO 169)

3.6.1 Introduction

ILO 169 is the only international convention that specifically concerns the rights of indigenous peoples. The convention has provisions that affect many aspects of indigenous peoples' lives. Several of the provisions are central to the Sami protection against interferences in their culture and traditional business practices. This applies in particular to the provisions on the right to consultation and provisions on land rights. As concerns monitoring of ILO conventions, reference is made to 2.4.

ILO CONVENTION 169 ON INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT STATES (ILO 169)

- The convention was adopted in 1989. .
- Norway was the first country to ratify the convention (1990).
- For Norway, the convention applies to the Sami.
- 24 states in the world have ratified the convention.
- Sweden and Finland have not ratified the convention.

3.6.2 Consultations and indigenous peoples' own priorities

The right to consultation is a fundamental right of indigenous peoples'. This right implies that states have an obligation to consult indigenous peoples whenever consideration is being given to legislative or administrative measures that

[152] HRC, *Poma Poma v Peru*, para. 7.5.
[153] *Vapsten Sameby v Sweden*, para. 6.11.
[154] ILO 169 Article 16 and UNDRIP Article 10, see Chapter 3.4.4.
[155] *Vapsten Sameby v Sweden*, see e.g. para. 6.7, which i.a. refers to "[...] their right to offer free, prior and informed consent whenever their rights may be affected by projects carried out in their traditional territories [...]".

may have a direct impact on them.[156] Article 6 of ILO 169 contains provisions on the state's obligation to consult indigenous peoples in such matters, and that they shall establish appropriate means to ensure that this is implemented. The obligation to consult is regarded as a key part of states' obligations to indigenous peoples, and in 2021, it was laid down in national legislation as a separate chapter of the Sami Act.[157]

As previously mentioned, the issue of whether the indigenous peoples concerned have been consulted and have been allowed to participate actively in the decision-making process is also an important part of the assessments made by the UN Human Rights Committee when assessing interference cases according to ICCPR Article 27. [158]

ILO 169 contains several provisions that more explicitly impose an obligation on states to consult. Article 6 imposes an obligation on states to consult, and Article 7 gives indigenous peoples the right to participate in decision-making processes and to adopt their own priorities in matters that directly concern them. Article 15 contains rules on the right of indigenous peoples to participate in the use and management of natural resources and to be consulted in connection with plans to exploit natural resources in their traditional areas. The Sami Rights Committee (II) assumed that ILO 169 Articles 6, 7 and 15 "require states to consult with their indigenous peoples and ensure that they, through real consultations and in other ways, are ensured active participation in decision-making processes in matters that may have a direct impact on the peoples concerned".[159]

The provisions of the convention presuppose that the consultations must be organised in such a way that they are suitable for reaching an agreement.[160] Indigenous peoples must have an actual opportunity to influence the process, and the parties must consult with a view to reaching an agreement, in good faith. It is, however, not an absolute requirement that the indigenous peoples' prior consent must be obtained before a project is implemented, see Article 16. This provision stipulates that indigenous people shall not be forcibly relocated from their areas and that if the "relocation" of such peoples is nevertheless deemed strictly necessary, this may only take place with the group's free, prior and informed consent, or if such consent cannot be obtained, only if the indigenous peoples are given "effective representation" in the process.[161]

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[156] In its report to the ILO Labour Conference in 2011, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) states that consultations and participation constitute "the cornerstone" of ILO 169. International Labour Office, "Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)" (Geneva: International Labour Office, 2011), p. 786.

[157] See the Sami Act Chapter 4. Prop. (Law Proposal to Parliament) 86 L (2020–2021).

[158] In the *Mahuika* case, the Committee emphasised that i.a. ICCPR Article 27 had to be interpreted in light of ICCPR Article 1 on self-determination, HRC, *Apirana Mahuika et al. v New Zealand* (Communication No. 547/1993), para. 9.2.

[159] NOU 2007:13, para. 5.6.3.2.

[160] ILO 169 Article 6 (2). See also ILO Manual on the convention, ILO Convention on Indigenous and Tribal Peoples 189 (169) A Manual, p. 22, and Handbook for Tripartite Constituents. Understanding the Indigenous and Tribal Peoples Convention, 2013. These publications are not direct sources of law, but show how ILO itself interprets the provisions of the convention.

[161] See Chapter 3.4.4. where also a memorandum from ILO is referred to, see ILO, "Comments submitted by the ILO", 2018, https://www. ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/genericdocument/wcms_634380.pdf.

ILO 169 ARTICLE 6

1. In applying the provisions of this Convention, governments shall:

    a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

    b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

    c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases, provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 6 applies in all cases where measures that may have a direct impact on indigenous peoples are examined or implemented, not only measures that affect land rights.[162] The obligation to consult applies at all administrative levels in the relevant case, and must be seen in light of the rights of indigenous peoples pursuant to Article 7 and Article 15.

Central to Article 7 is that indigenous peoples have the right to adopt their own priorities when it concerns the development of their traditional lands, and they shall participate in the design, implementation and evaluation of plans that may have direct consequences for them.

Article 7 (3) requires governments to ensure that, whenever appropriate, studies are carried out in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. This must be seen as a requirement for the content of impact assessments. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. Central to both the impact assessments and the measures to protect and preserve the environment is that they should be carried out in cooperation with the indigenous peoples.

3.6.3 Land rights

ILO 169 Article 15 (1) provides special protection for indigenous peoples' right to

[162] The obligation to consult according to the wording in Article 6 applies "in applying the provisions of this Convention". In Prop. (Law Proposal to Parliament) 86 L (2020-2021) p. 41, it is "assumed that the obligation to consult also arises when the state considers measures that are not related to the specific application of the provisions of the Convention, but which nevertheless directly affect the indigenous peoples concerned." This appears to be in line with ICCPR Article 27, seen in the light of the right to self-determination.

natural resources in their lands.[163] The provision states that "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources." ILO's manual on interpretation of ILO 169 states that the Convention recognises both individual and collective aspects of the concept of "land areas". This includes land that a community or peoples use together, and land that is owned and used individually.

According to the Sami Rights Committee (II), Article 15 establishes a general restriction on the public sector's right to regulate the use of land and resources in the indigenous peoples' traditional areas of use. The Committee states that the first sentence of Article 15 (1) appears "to provide material protection against measures that may interfere with the rights of indigenous peoples."[164] Article 15 (2) provides special provisions on counselling and compensation in mineral cases. The provisions of Article 15 shall also be read in conjunction with the obligation of consultation and the right to priorities and participation in planning, impact assessments and implementation pursuant to Articles 6 and 7.

ILO's Expert Committee for Monitoring the Implementation of Conventions and Recommendations (CEACR) has, in the same manner as the Sami Rights Committee (II), assumed that Article 15 (1) provides *substantive* rights, and thus goes further than simply regulating the more procedural consultation and participation rights.[165] This approach nevertheless does not clarify the *scope* of indigenous peoples' right to natural resources, nor the threshold for legal interference. This is also the conclusion of the Sami Rights Committee (II),[166] which states that "ICCPR Article 27, as interpreted by the UN Committee on Human Rights", still seems "to be the central instrument of international law when it concerns the protection against interference with indigenous peoples' ability to exercise their land rights". The reason for this is probably partly because ICCPR Article 27 can provide strong protection if the threshold has been exceeded, and partly in the way the complaint mechanisms are organised and who has the right to complain. For example, ILO 169 does not have an individual complaints mechanism, as opposed to the ICCPR. This means that although ILO 169, according to its wording, provides more explicit rights to natural resources than ICCPR Article 27, the more extensive practice according to Article 27 has resulted in protection in interference cases which provides at least as strong protection as the ILO Convention.

3.6.4 ILO 169 in Norwegian legislation

ILO 169 is incorporated into the Finnmark Act, which has provisions on administration of land and natural resources as well as on survey and recognition of existing land rights in Finnmark.

[163] Part of the core of the land rights chapter in ILO 169 is Article 14, which provides that the land rights of indigenous peoples shall be identified and recognised. The main purpose of this chapter, however, is to discuss the protection against interference that follows from ILO 169.

[164] NOU 2007:13 A, chapters 5.6 and 5.9.

[165] In requests to Norway from CEACR of 2014, the Committee has i.a. asked the Government to continue to keep it informed on measures to secure Sami rights to natural resources in their lands. The Committee also requested an assessment of the effects of changes in reindeer husbandry management. Furthermore, the Committee requested information on measures to ensure Sami fishing rights, as well as Sami participation in fishing management, ILO, "Direct Request (CEACR) - adopted 2014, published 104th ILC session (2015)", 2015.

[166] NOU 2007 A:13, p. 239.

Section 3 of this Act states that "the Act shall apply with the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries".[167] This means that the provisions of the ILO Convention take precedence in Finnmark (where the Act applies).

When the question of incorporation of this convention was discussed in Parliament, the majority of the members of the Pariament's Justice Committee stated that the ILO Convention was unsuitable for incorporation due to ambiguity regarding the interpretation of the convention. The majority pointed out that the convention in any case would be an important source of law, due to the so-called "presumption principle". The majority nevertheless proposed "a limited incorporation of the convention by adopting a rule in Section 3, saying that the Act shall apply 'with the limitations' that follow from the ILO Convention. At the same time, this will highlight the law's international legal background in a good way".

The Justice Committee further stated that the formulation "with the limitations" means that the ILO Convention will take precedence over the Finnmark Act if it turns out that provisions of the Act contradict provisions in ILO 169. The committee said:

> If, however, it is concluded on the basis of the ILO Convention that the law lacks provisions of certain content, this will be a task for the legislature. In other words, the Courts shall not use the ILO Convention to expand the scope of the Finnmark Act. It will be easier to predict the consequences of such a limited incorporation than if one were to give the ILO Convention general precedence over all Norwegian legislation.[168]

The state's obligations under ILO 169 constitute an important background for legislating the obligation to consult, in the Sami Act in 2021.[169] The international law's requirement for holding consultations in the event of interferences in indigenous peoples areas has largely been followed up by the authorities – albeit to varying degrees.[170] Both the Finnmark Act and the Minerals Act incorporate ILO 169, so that the provisions on consultation (Articles 6 and 7) apply to the extent that these laws apply.[171]

To have the right to consultation explicitly enshrined in the legislation has for years been requested by Sami communities. In 2007, the Sami Rights Committee (II) recommended that

[167] ILO 169 is also partially incorporated in the Tana Act Section 3.
[168] Inst. O. no. 80 (2004–2005) (Finnmark Act), p. 33.
[169] Prop. (Law Proposal to Parliament) 86 L (2020–2021).
[170] Procedures for consultations between state authorities and the Sami Parliament were based on an agreement between the Government and the Sami Parliament from 2005 and determined by Royal Decree on 1 July 2005. The procedures only applied to authorities directly under the Government, not municipalities and county municipalities, and only directly to consultations with the Sami Parliament.
[171] Sections 13 and 17 of the Minerals Act. Partial incorporation of ILO 169 is mentioned in the Finnmark Act and the Tana Act together with rules on so-called "sector monism". Section 3 of both Acts states that: "The Act shall apply with the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries". Provisions that clarify the presumption principle, and which may have a wider scope than this principle, are found in the Reindeer Husbandry Act Section 3 and the Minerals Act Section 6, which states in both Acts that "The Act shall be applied in accordance with the rules of international law relating to indigenous peoples and minorities". Section 8 of the Nature Diversity Act essentially corresponds to CBD Article 8 on traditional knowledge. Section 9 of the Nature Diversity Act refers to the precautionary principle in environmental law.

the Government propose a new general law on consultations with regard to measures or interference that may have an effect on the natural basis in traditional Sami areas.[172] As noted, the right to consultations was enshrined in the Sami Act in 2021.[173]

The new statutory provisions in the Sami Act entail that the obligation to consult will cover all cases that may have a direct impact on Sami matters, including language and education, in addition to interference cases. The main rule is that legislation, regulations and other decisions or measures that may affect Sami interests directly must be subject to consultations.[174] The obligation to consult applies primarily to state, municipal and county authorities, but may also apply to state enterprises and private legal entities when exercising authority on behalf of the state.[175]

Several provisions of the Minerals Act are also intended to implement Norway's obligations pursuant to ILO 169 and ICCPR Article 27. Section 2 of the Minerals Act, shall, among other things, safeguard "the foundation of Sami culture, commercial activity and social life", and pursuant to Section 6 of the Minerals Act, the Act shall be applied in "accordance with the rules of international law relating to indigenous peoples and minorities".[176] Section 17 of the Minerals Act also contains special provisions on applications relating to exploration in Finnmark, but not corresponding special provisions for other traditional Sami areas outside Finnmark.[177]

ILO 169 has been invoked and given weight in several cases before the Supreme Court, but not in cases solely about interference. This report therefore does not address case law concerning ILO 169. In case law on interference cases, it is instead ICCPR Article 27 that has been of decisive importance, see Chapter 4. ILO 169, conversely, has had a significant footprint in the legislation that is central to interference cases.

[172] NOU 2007:13 B, cf. p. 54 onwards, p. 824 onwards, Chapter 18 p. 917 onwards and Chapter 24.5, p. 1234 onwards.
[173] Prop. (Law Proposal to Parliament) 86 L (2020-2021), p. 6.
[174] With the exception of matters concerning the state budget and matters of a general nature which must be assumed to affect the whole society in the same way. The right to be consulted applies to the Sami Parliament and other representatives of those affected Sami interests.
[175] Prop. (Law Proposal to Parliament) 86 L (2020-2021), respectively Chapters 6, 7 and 8.
[176] The Energy Act, which regulates wind power, does not have similar provisions.
[177] How the Government processes within the framework of the Minerals Act can safeguard the international law obligations for the whole country is per 1 December 2021 under consideration by the Minerals Act Committee, see Chapter 7.2.3.

4. Human Rights Protection against Interference – The Supreme Court

Supreme Court judgments where ICCPR Article 27 is a factor, largely follow the practice of the Human Rights Committee. The *Fosen* judgment, from October 2021, constitutes the most thorough interpretation and application of Article 27 in Norwegian law to date. The judgment is based on previous Supreme Court decisions, but also provides a number of further clarifications on ICCPR Article 27.[178]

4.1 Introduction

Human rights have gained increased importance in Norwegian legal practice since the Human Rights Act entered into force in 1999. This is also reflected in cases concerning Sami affairs where one can see an increased emphasis and application of human rights.

This chapter gives an account of relevant cases from the Supreme Court that provide guidelines for how indigenous peoples' rights are dealt with in interference cases.[179] It is mainly the *Fosen* judgment from 2021 and the *Reinøya* judgment from 2017 that provide guidance on the interpretation of ICCPR Article 27 in cases relating to interference in Sami areas.[180] The *Sara* judgment also provides important legal clarifications on Article 27 that will be of significance for interference cases, although the judgment is not about interferences in nature.[181] The *Nesseby* judgment from 2018, the *Stonglandshalvøya* judgment from 2004, and the *Alta* judgment from 1982 provide briefer overall assessments of ICCPR Article 27 and give limited guidance on interpretations of the provision's significance in interference cases.[182]

4.2 Assessments of ICCPR Article 27 in the Supreme Court's jurisprudence

Supreme Court judgments where ICCPR Article 27 is a factor, largely follow the assessment themes that have been developed through the

[178] The judgement can be found in English translation here: https://www.domstol.no/en/supremecourt/rulings/2021/supreme-court-civil-cases/hr-2021-1975-s/

[179] Several judgments of more limited transfer value in relation to interference cases are therefore not discussed in more detail, e.g. Rt. 2006 p. 1382 (*Utsi*) on transfer of operating unit, Rt. 2008 p. 1789 (*Hjertestikk*) on customary law, HR-2016-2030-A (*Stjernøya*) on property rights, HR-2018-872-A (*Femund sitje*) on grazing damage.

[180] HR-2021-1975-S (*Fosen*) and HR-2017-2247-A (*Reinøya*). The ICCPR Article 27 assessments are most comprehensive in the *Fosen* judgment.

[181] HR-2017-2428-A (*Sara*). The case has been appealed to the Human Rights Committee, who as of February 2022 has not published a decision in the case.

[182] See respectively Rt. 1982 p. 241 (*Alta*), HR-2004-1128-A, Rt. 2004 p. 1092 (*Stonglandshalvøya*) and HR-2018-456-P (*Nesseby*). The *Alta* judgment must be read i.a. in view of the fact that at that time, there was very little practice by the Human Rights Committee on the interpretation of ICCPR Article 27, and the Committee had not yet made any general comment on ICCPR Article 27.

practice of the Human Rights Committee. In all recent Supreme Court judgments dealing with Article 27, the Supreme Court has noted that a "convention interpretation undertaken by the UN Committee on Human Rights, must have significant weight as a source of law".[183]

The *Fosen* judgment, from October 2021, constitutes the Courts'most thorough treatment of ICCPR Article 27 to date. The judgment is based on the Supreme Court's previous rulings in the *Reinøya* judgment and in the *Sara* judgment, but also provides a number of further clarifications on Article 27. The *Fosen* judgment concerned the validity of the Ministry of Petroleum and Energy's decision from 2013 on expropriation and granting a licence to the Storheia and Roan wind power plants on the Fosen Peninsula.[184] The central question was whether the licence was valid, (by the Court formulated as to whether the appraisal should be inadmissible) as a result of the development being contrary to the protection of the reindeer husbandry activities according to ICCPR Article 27.[185]

In the *Fosen* judgment, the Supreme Court takes as its point of departure that ICCPR Article 27 must be viewed in the context of Article 108 of the Constitution, and that this constitutional provision "may be an independent legal basis where other sources of law do not provide an answer".[186] Another important point of departure in the judgment is that the ICCPR applies directly as Norwegian law pursuant to the Human Rights Act, and shall, in case of a conflict of norms, take precedence over any other legislative provisions.[187] The Supreme Court therefore ruled that ICCPR constitutes a limitation on administrative discretion, which means that the licensing decision was invalid if ICCPR Article 27 were violated.[188]

An important procedural question in the *Fosen* judgment was whether the Supreme Court, in its examination of the administrative discretion, could only decide whether the administration's forecasts had been sound at the time of the decision, as Fosen Vind had argued.[189] This could have resulted in strong restrictions on the Court's right to make an independent fact assessment. The Supreme Court concluded that such a limitation on the assessment of facts could not "apply in a case such as this, where there are questions as to whether ICCPR Article 27 prevents the appraisal" and that the courts could not limit their review to "the adequacy of administrative forecasts".[190]

4.2.1 The material basis for culture

The *Alta* judgment of 1982 reflects the early discussion of the concept of *culture* in ICCPR Article 27. The plaintiffs stated that the concept of culture in Article 27 included nature as "the material basis of culture", and that this was a "necessary prerequisite for the group to maintain a way of life in which culture constitutes an integral part".[191] The state, on the other hand, stated that "a protection of the material preconditions of culture clearly lies

[183] HR-2017-2428-A (*Sara*), para. 57, cf. HR-2017-2247-A (*Reinøya*), para. 119, and HR-2021-1975-S (*Fosen*), para. 102.
[184] This is referred to in the judgment as the licensing decision.
[185] HR-2021-1975-S (*Fosen*), para. 2, 11. For the Ministry's decisions, see Chapter 5.
[186] See Chapter 2.2. See also HR-2021-1975-S (*Fosen*), para. 99.
[187] Human Rights Act Section 2 no. 3, cf. Section 3.
[188] HR-2021-1975-S (*Fosen*), para. 100.
[189] HR-2021-1975-S (*Fosen*), para. 66.
[190] HR-2021-1975-S (*Fosen*), para. 71.
[191] Rt. 1982 p. 241 (*Alta*), p. 292.

outside the wording".[192] In this case, no direct position was taken as to whether Article 27 protects the material preconditions of culture, i.e. the traditional business practice of the indigenous peoples.[193]

The Sami Rights Committee (I) stated in 1984 that ICCPR Article 27 includes the material basis for culture.[194] The UN Human Rights Committee has also explicitly stated this in a number of statements.[195] The Supreme Court has, in accordance with statements from the Human Rights Committee, ruled that the Sami are protected under Article 27 and that the concept of culture in ICCPR Article 27 may include lifestyles and traditional activities such as reindeer husbandry, trapping and fishing. In the *Reinøya* judgment, it was stated that "It is undoubted, and undisputed, that the reindeer husbandry of the Sami is protected according to the provision."[196] The *Sara* judgment states that "the Sami are a minority in the sense of the provision, and that reindeer husbandry is a form of protected cultural practice".[197] It was also emphasised here that the concept of culture in ICCPR Article 27, as specified by the Human Rights Committee in General Comment 23, "also comprises ways of living and traditional activities such as fishing and hunting."[198] In the *Fosen* judgment, the Supreme Court summed up: "It is clear that the Sami people are a minority within the meaning of Article 27, and that reindeer husbandry is a form of protected cultural practice."[199]

This point of departure has also been recognised by both the Government and Parliament in legislative preparatory work.

4.2.2 Individual or collective rights - who can claim violation of ICCPR Article 27?

The question of who may be covered by the protection under ICCPR Article 27, largely relates to whether the provision protects individuals or groups. This again is linked to the cultural lifestyles of the minorities the provision protects.

The issue of individual or collective protection was thoroughly addressed in the *Fosen* judgment because the state, through the Attorney General as a third-party intervention to Fosen Vind, argued that ICCPR Article 27 applies only to individuals and therefore could not be invoked by Siidas.[200] Among other things, the state believed that the Siidas could not complain to the UN Human Rights Committee. The state argued, on this basis that the case should be rejected by the Supreme Court.

In the verdict, the Supreme Court initially noted that ICCPR Article 27 *protects* individuals, but

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[192] Rt. 1982 p. 241 (*Alta*), p. 297.

[193] Rt. 1982 p. 241 (*Alta*), p. 299 onwards. The Supreme Court's discussion of ICCPR Article 27 must be seen in the light of the right to self-determination in ICCPR Article 1, where the question was whether Norwegian exercise of sovereignty was restricted due to this provision. The effects of the development of the Alta-Kautokeino watercourse - which meant that an area of approximately 2.8 km2 was dammed up and lost as grazing land - were not so extensive that ICCPR Article 27 was violated.

[194] NOU 1984:18, On the legal position of the Sami, p. 24.

[195] See Chapter 3.4.1.

[196] HR-2017-2247-A (*Reinøya*), para. 120.

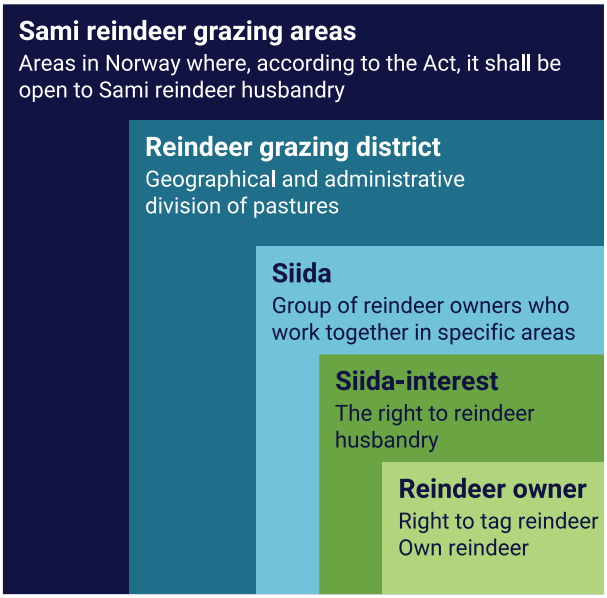
[197] HR-2017-2428-A (*Sara*), para. 55.

[198] HR-2017-2428-A (*Sara*), para. 60, where it is stated that "It is clear that the Sami are a minority in the sense of the provision, and that reindeer husbandry is a form of protected cultural practice", cf. HR-2017-2247-A (*Reinøya*), para. 120.

[199] HR-2021-1975, (*Fosen*) para. 101.

[200] In the case, South Fosen Siida and North Fosen Siida were parties, HR-2021-1975-S (*Fosen*), paras. 57 and 103.

"has a certain collective character". Furthermore, it is stated that because reindeer husbandry is conducted jointly, in Siida, in areas where the collective grazing rights of reindeer herders lie with the Siida, it will be difficult to draw a sharp distinction between the individuals and the group.[201]



The Supreme Court then considered the question of whether groups can *invoke* this protection. The Supreme Court held that although the Human Rights Committee deals with individual complaints, the Committee does not always clearly distinguish between the protection of individuals in a minority group and the group as such.[202] Furthermore, the Supreme Court noted that it is not "doubtful that a Siida may have limited party capacity". Reference was made to Section 44 second paragraph of the Reindeer Husbandry Act, which stipulates that the Siida can safeguard their own special interests, among other things, in litigation.[203]

The Supreme Court concluded:

> In a case dealing with such rights, a Siida must then have the capacity to act as a party and invoke individual reindeer herders' rights under Article 27 on their behalf. Article 108 of the Constitution, which requires the public authorities to create conditions enabling the Sami people to preserve and develop its culture, supports this interpretation.[204]

The state's main point had been that the Siida did not have rights under the convention and that the case before the Supreme Court therefore should be rejected.[205] One might ask why the state argued that the Siida did not have party rights before the Human Rights Committee, when ICCPR Article 27 is part of Norwegian law. It was thus not decisive whether the procedural prerequisites for complaining to the Committee were met. In light of the Attorney General's intervention on the part of the developer, the state's understanding of its role in the case of Fosen wind power plant has been questioned.[206] As a party to the ICCPR and pursuant to its

[201] HR-2021-1975-S (*Fosen*), para. 106.
[202] HR-2021-1975-S (*Fosen*), paras. 105 and 106.
[203] HR-2021-1975-S (*Fosen*), paras. 108 and 109.
[204] HR-2021-1975-S (*Fosen*), para. 110. The basis for the conclusion was i.a. the wording of ICCPR Article 27,the practice of the Human Rights Committee, the Reindeer Husbandry Act's organisation of reindeer husbandry and the Supreme Court's statements in the judgments Rt. 2000 p. 1578 (*Seiland*), HR-2017-2428-A (*Sara*), HR-2019-2395-A (Reindeer numbers reduction II). Article 108 of the Constitution also supported such an understanding. It can be added here that the Ministry of Petroleum and Energy has an extensive government practice with ICCPR Article 27 assessments in relation to Siida and reindeer grazing districts, see Chapter 5.3.1.
[205] HR-2021-1975-S (*Fosen*), para. 57.
[206] This has later been criticised, i.a. by Professor Emeritus Inge Lorange Backer, who in an interview pointed out that the state also has an interest in protecting minorities. Retrieved 29 October 2021 from nrk.no: Ingrid Lindgaard Stranden, "The state only helped one side in the lawsuit, now criticism is flowing in the *Fosen* case", NRK, 2021, https://www.nrk.no/trondelag/staten-hjalp-bare-den-ene-parten-i-fosen-rettssaken_-na-strommer-kritikken-pa-1.15705617.

obligations under the Human Rights Act and the Constitution, the state has an obligation to ensure that both public and private actors act in a manner which does not violate Article 27.

Also in the *Sara* judgment, the Supreme Court pointed out that ICCPR Article 27, according to the wording, protects the individual, but that the protection nevertheless has a certain collective character – it must be possible for the culture to be practiced jointly with other members of the group.[207] But in this case, which concerned reduction in reindeer numbers which mainly concerned internal matters in the group, the validity of the measure in relation to Article 27 should be assessed specifically on the basis of its impact on the individual.[208] In the *Nesseby* judgment, the Supreme Court pointed out that "Section 5 of the Finnmark Act first paragraph states that the Sami have collectively and individually acquired rights to land in Finnmark".

In summary, it is no longer doubtful that ICCPR Article 27 involves the *protection* of both individuals and groups of individuals. Both individuals and groups can also *invoke* the rights. The Supreme Court confirmed that both individuals and collective groupings, such as Siida, will have party capacity and legal interest, including under the Reindeer Husbandry Act.

4.2.3 Effective participation in decision-making processes

The Supreme Court has, in several cases, emphasised the importance of consultations.[209] In the *Reinøya* judgment, it was assumed that it matters if, and to what extent, "the minority has been allowed to speak out and been included in the process".[210]

This was also central to the *Sara* judgment, in which the Supreme Court stated that there was a requirement for effective participation in the decision-making process, but found, on the basis of the Human Rights Committee's practice, that in a case of internal burden sharing within an indigenous group, there was no unconditional requirement that such participation actually influenced the decision. It was sufficient that the minority had been consulted with a view of finding a unified solution.[211]

The significance of consultations during the process was also discussed in the *Fosen* judgment. Based on the above-mentioned judgments, as well as the Human Rights Committee's views, including in the *Poma Poma* case, the Supreme Court ruled that it is not only "decisive if and to what extent the minority has been consulted", but that this is one of several factors "that are included in the assessment of whether the cultural protection has been violated".[212]

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[207] HR-2017-2428-A (*Sara*), para. 55.
[208] HR-2017-2428-A (*Sara*), para. 76.
[209] See Kirsti Strøm Bull, "En kommentar til Høyesteretts forståelse av SP artikkel 27 og konsultasjonsplikten" ("A commentary to the Supreme Court's understanding of ICCPR Article 27 and the obligation to consult"), *Lov og Rett* 57, no. 08 (2018), pp. 504–9.
[210] HR-2017-2247-A (*Reinøya*), para. 121, cf. HR-2017-2428-A (*Sara*), paras. 72 and 89, see also HR-2021-1975-S (*Fosen*), paras. 120-123.
[211] HR-2017-2428-A (*Sara*), para. 75. The Supreme Court referred here to HRC General Comment No. 23, para. 7, as well as to the Committee's decision in the *Mahuika* case and to NOU 2007:13 A, p. 207.
[212] HR-2021-1975-S (*Fosen*), para. 121. The Supreme Court referred here to both the Human Rights Committee's and the Supreme Court's practices, as well as NOU 2008:5, p. 272.

Following this, the Supreme Court emphasised that consultations cannot reduce the material protection provided by the provision:

> If the consequences of the interference are sufficiently serious, consultation does not prevent violation. On the other hand, it is not an absolute requirement under the Convention that the minority's participation has contributed to the decision, although that, too, may be essential in the overall assessment.[213]

In its interpretation of what lies in the obligation of consultation, the Court of Appeal had in its ruling on the *Sara* case, in the opinion of the Supreme Court, gone too far when, on the basis of the *Poma Poma* case, it indicated an obligation for the authorities to obtain informed prior consent. In this regard, the Supreme Court stated:

> The *Poma Poma* case concerned interference by the authorities that completely ripped off the basis of existence of the appellant and the other members of the minority community to which she belonged. In such a case, it is clear that violation has taken place if no prior consent had been obtained from the minority. But this is not analogous to the case at hand.[214]

In the *Sara* judgment, the Supreme Court further referred to the *Mahuika* case, in which the Human Rights Committee had stated that the relevant members of the minority must have had "the opportunity to participate". The Supreme Court further stated that in the *Lovelace* case and the *Kitok* case, the issue of consultations was not addressed, which in their view implied "at least, that it cannot be an unconditional requirement that the participation of the minority has influenced the decision".[215] The Supreme Court therefore seems to be taking the line of the Human Rights Committee in the *Poma Poma* case, which states that the indigenous peoples have the right to participate in decision-making processes in interference cases, and that their free and informed prior consent should have been obtained in a case where the livelihood was destroyed.

4.2.4 Overall effect or cumulative effects

In the *Reinøya* judgment, a central theme was whether the overall effects, or cumulative effects, were of such a magnitude that the complainants were denied the right to practice their culture.[216] The Supreme Court ruled that the effect must be looked at over time, and referred, among other things, to the Human Rights Committee's views that one must consider "the effects of past, present and planned future logging".[217] In this case, however, no " information has been provided on any future measures that might constitute a violation of the Sami rights under Article 27".[218]

The statements in the *Reinøya* judgment on cumulative effects were repeated in the Supreme Court ruling in the *Fosen* judgment, where it was concluded that the interference

[213] HR-2021-1975-S (*Fosen*), para. 121.
[214] HR-2017-2428-A (*Sara*), para. 74.
[215] HR-2017-2428-A (*Sara*), para. 74. It should be noted that both of these decisions of the Human Rights Committee came before ILO 169 and UNDRIP were adopted, and that less attention was paid to consultations.
[216] HR-2017-2247-A (*Reinøya*), para. 125.
[217] HR-2017-2247-A (*Reinøya*), para. 126. Regarding the cumulative effect, the Supreme Court referred in particular to the Human Rights Committee's assessments of the cases *Jouni E. Länsman et al. v Finland* of 22 November 1996 (ICCPR-1995-671), para. 10.3 and *Jouni E. Länsman et al. v Finland* from 15 April 2005 (ICCPR-2001-1023) para. 10.2, see Chapter 3.4.5.
[218] HR-2017-2247-A (*Reinøya*), para. 133.

must be "seen in context of other measures, both previous and planned. It is the different activities taken together that may constitute a violation."[219] The Supreme Court did not discuss this issue specifically in the *Fosen* judgment. Neither did the Supreme Court clarify how far back in time one must assess the cumulative effects.

4.2.5 Remedial measures

Remedial measures concern limiting the negative effects of interferences. The obligation to mitigate negative effects of interferences can be said to follow directly from the obligations of states pursuant to ICCPR Article 27 to ensure the right of minorities to cultural practice. In the *Sara* judgment, the Supreme Court stated that states "[...] have an obligation to implement positive measures when deemed necessary to protect the minority."[220]

In the *Reinøya* judgment, the Supreme Court emphasised that remedial measures had been taken. This was part of the assessment which lead to the conclusion that Article 27 had not been violated. Among other things, it was decided in the appraisal conditions that there should be routines for having discussions between the Sami and the developer, and that the construction activity should be stopped when reindeer were landed from a boat, and that the construction activity should be stopped during the calving period.[221]

In the *Fosen* judgment, the question of remedial measures was central. The Court of Appeal had, although hesitantly, come to the conclusion that there was no violation of ICCPR Article 27. This was mainly due to the remedial measures that the Court of Appeal decided, including a very costly scheme of winter grazing in fenced-in areas. The Supreme Court agreed that remedial measures by the authorities or the expropriator (developer) that reduce the disadvantages of an interference, could, depending on the circumstances "keep the interference below the threshold for violation."[222] Economic subsidies for a slaughter facility and electronic reindeer marking and barrier fences were examples of measures that were relevant to the Supreme Court's "violation assessment".[223] Nevertheless, remedial measures in the form of winter feeding of reindeer in enclosures, were not sufficient according to the Supreme Court.[224] It was in any event uncertain whether extensive winter feeding in enclosures was in line with the reindeer owners' right to exercise their culture according to Article 27.[225] According to the Supreme Court, remedial measures could not be seen as part of the expropriator's (reindeer husbandry) adaptation obligation: "Measures of this nature must alternatively be presented by the public administration as a condition for expropriation, or provisions on this may be included in the conditions for appraisal proceedings."[226]

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[219] HR-2021-1975-S (*Fosen*), para. 119.

[220] HR-2017-2428-A (*Sara*), para. 58 cf. 59 which states that such "measures for protection of the minority must respect the Covenant's provisions on protection against discrimination. As long as the measures aim to improve the minority's possibilities of enjoying its culture, etc., they may be deemed legitimate, as long as they are based on reasonable and objective criteria."

[221] HR-2017-2247-A (*Reinøya*), para. 130.

[222] HR-2021-1975-S (*Fosen*), para. 147.

[223] HR-2021-1975-S (*Fosen*), para. 147.

[224] HR-2021-1975-S (*Fosen*), para. 151.

[225] HR-2021-1975-S (*Fosen*), para. 149.

[226] HR-2021-1975-S (*Fosen*), para. 152.

In contrast to the Court of Appeal, the Supreme Court in the *Fosen* judgment thus ruled that the proposed remedial measures were not sufficient to prevent a violation of ICCPR Article 27.

4.2.6 The threshold for violation of ICCPR Article 27 and proportionality assessments

4.2.6.1 Substantive negative impact

In addition to the above specific assessment topics, an overall assessment must be made of the interference's negative impact on cultural practice. As mentioned above, remedial measures could mean that an interference that as a point of departure constitutes a violation, nevertheless may fall below the threshold. Whether the threshold is reached will thus be a kind of "net assessment".

The question of the meaning of the term "denied" in ICCPR Article 27, and how the actual threshold for violation of Article 27 is assessed, is discussed in particular in the *Fosen* judgment, but also in the *Reinøya* judgment and the Sara *judgment*.

In the *Reinøya* judgment, the Supreme Court reviewed four decisions of the Human Rights Committee, the three *Länsman* cases and the *Poma Poma* case.[227] The Supreme Court noted that the Human Rights Committee in the *Poma Poma* case formulated the decisive question as follows: "The question is whether the consequences [...] are such as to have a *substantive negative impact* on the author's enjoyment of her right to enjoy the cultural life of the community to which she belongs." (our emphasis).[228] The first voting justice concluded after this review that "Overall, the case law of the Human Rights Committee shows that it takes a great deal for a measure to become so serious that it constitutes a violation of Article 27."[229]

Both in the *Reinøya* judgment and in the *Sara* judgment, the Supreme Court referred to the Human Rights Committee General Comment 23, which specifies that indigenous peoples' rights should be protected from both "denial" and "violation" – i.e. that a total denial of cultural practice is not required, but at the same time that there is a fairly high threshold for breaching the provision.[230]

Fosen Vind argued before the Supreme Court that the threshold for violation is very high and that "the interference must be so intrusive that it equals a total denial".[231] The Supreme Court did not agree with this, citing the assessments in the *Sara* judgment and the *Reinøya* judgment.[232] The Court said that the consequences of an interference do not have to be as serious as in the *Poma Poma* case, "where thousands of livestock animals were dead as a result of the measure, and the author had been forced to leave her area".[233] Based on the Human Rights Committee's statements, the Supreme Court concluded, regarding the threshold, that "the question must be whether

[227] HR-2017-2247-A (*Reinøya*), paras. 124–127.
[228] HR-2017-2247-A (*Reinøya*), para. 127.
[229] HR-2017-2247-A (*Reinøya*), para. 128.
[230] HR-2017-2428-A (*Sara*), para. 55. HR-2021-1975-S (*Fosen*), paras. 111, 113. The Supreme Court also referred to statements from the Human Rights Committee in the three *Länsman* cases, and that the Sami Rights Committee stated that "denial" in the sense of ICCPR Article 27 will not only include "total denials" but also "violations", cf. NOU 2007:13 A, p. 203. Cf. HR-2017-2247-A (*Reinøya*), para. 124-127. See also HR-2017-2428-A (*Sara*), para. 55.
[231] HR-2021-1975-S (*Fosen*), para. 52.
[232] HR-2021-1975-S (*Fosen*), paras. 111–114.
[233] HR-2021-1975-S (*Fosen*), para. 119.

the measure has 'a substantive negative impact' on the author's enjoyment of her culture" and that "there will be a violation of the rights in Article 27 of ICCPR if the interference has a substantive negative impact on the possibility of cultural enjoyment".[234] It appears that the threshold in the *Fosen* judgment has been placed at approximately the same level as in the *Reinøya* judgment. Both here and in the *Fosen* judgment, the Supreme Court refers to the term "substantive negative impact".

In the specific assessment of the threshold in Article 27, the main question in the *Fosen* judgment was "whether Storheia and Roan windfarms have a substantive negative impact on the Sami people's possibility to enjoy their own culture".[235] The Supreme Court ruled that the development had completely changed the nature of important winter grazing areas over 60 square kilometres, which in the long term would likely lead to a significant reduction in reindeer numbers and pose a serious threat to the business activities and thus to cultural practice.[236] The particular vulnerability of the South Sami culture, and the importance of the reindeer husbandry industry to this culture and the South Sami language, also appear to be an important factor in the assessment.[237]

4.2.6.2 Proportionality assessment

Because the Ministry of Petroleum and Energy (MPE) had assumed, in its 2013 licence decision, that pursuant to ICCPR Article 27 a balance could be struck between the interests of society and the interests of reindeer husbandry,[238] this very question was also central in the *Fosen* judgment.

Unlike the MPE, the Supreme Court concluded that Article 27 does not as a point of departure allow for proportionality assessments: "the wording of Article 27 does not allow the States to strike a balance between the rights of indigenous peoples and other legitimate purposes".[239] The Supreme Court noted that this follows from the wording of Article 27 which, contrary to many other human rights provisions, does not allow for limitation in the right with a view to secure other interests. They also pointed out that Article 27, in accordance with ICCPR Article 4 on derogation, can only be derogated from in emergency situations. The court also referred to the Human Rights Committee's statement in the first *Länsman* case:

> A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27.[240]

The Supreme Court stated, however, that if *fundamental* rights – such as the right to the environment – conflict with indigenous peoples' rights, a balance may still have to be struck.[241]

The right to the environment is protected, among other things, by Article 112 of the

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[234] HR-2021-1975-S (*Fosen*), para. 118, 119. Following these statements in the *Fosen* judgment, any ambiguities about the meaning of the term "denied" after the *Nesseby* judgment, HR-2018-456-P (*Nesseby*), para. 164, is considered clarified.
[235] HR-2021-1975-S (*Fosen*), para. 135.
[236] HR-2021-1975-S (*Fosen*), paras. 136 and 137.
[237] HR-2021-1975-S (*Fosen*), para. 141.
[238] Ministry of Petroleum and Energy decision of 26 August 2013 - The *Fosen* cases, pp. 88 and 108. See also Chapter 5.3.6.
[239] HR-2021-1975-S (*Fosen*), para. 124.
[240] 239 HR-2021-1975-S (*Fosen*), para. 125, cf. para. 124.
[241] HR-2021-1975-S (*Fosen*), paras. 131 and 143.

Constitution, and is also protected by several human rights, such as the right to life and the right to property.[242] According to the Supreme Court, however, the wind power development at Fosen did not represent a collision between two fundamental rights. The right to the environment and the consideration for a "green shift" could have been safeguarded in other ways, partly because before the development started there had been other, and for reindeer herders less intrusive, development alternatives.[243]

In the *Fosen* judgment, the Supreme Court concluded that the licensing decision and the expropriation decision, as far as Storheia and Roan are concerned, contradicted the rights of the reindeer herders pursuant to ICCPR Article 27 and that the decision was therefore invalid.[244]

As discussed below (in Chapter 5), the *Fosen* case was decided by the MPE before the Ministry seemed to change their view on the question of whether Article 27 provides for proportionality assessments. It is not unlikely that this assessment on the part of the Ministry in the *Fosen* case has contributed to the state losing the case in the Supreme Court. This emphasises the importance of making thorough human rights assessments in the public administration.

[242] See NHRI's report *Climate and Human Rights*, https://www.nhri.no/*Climate and Human Rights*

[243] HR-2021-1975-S (*Fosen*), para. 143.

[244] HR-2021-1975-S (*Fosen*), para. 11, cf. 151 and 153.

5. Human Rights Protection against Interference – Administrative Practice

Human rights have become increasingly important in Norwegian administrative practice in recent decades. This is also reflected in cases of interference in Sami areas of use. The rights pursuant to ICCPR Article 27 are relevant in many types of interferences in Sami areas.

5.1 Introduction

This chapter sheds light on how the administration assesses the relevant criteria in ICCPR Article 27 in cases concerning licences for developments in Sami areas of use. Some of these administrative decisions have come before the courts or may come before the courts in the future.

As a source of law, these administrative decisions are of minor importance, but they demonstrate how the ministries have carried out Article 27 assessments. The Sami Rights Committee (II) proposed a joint overall regulation of special procedural rules to ensure that the requirements for assessments of indigenous peoples' rights could be implemented in the same manner in different sectors of the administration. The Ministry of Local Government and Regional Development did not agree with this, and as of today, each ministry is responsible for assessing how the consideration of Sami interests should be weighted in their respective sector.[245] The fact that there are no guidelines for the administration's interpretation of international legal obligations may have contributed to the MPE making a balancing of interests between the needs of society and the rights of indigenous peoples in the interpretation of Article 27, which the Supreme Court later disagreed with. This demonstrates, in our view, a need to clarify the assessment criteria and their practical and procedural aspects.

5.2 Administrative practice on wind power and mining

5.2.1 Introduction

Human rights have also become increasingly important in administrative practice since the Human Rights Act came into force in 1999, which is also reflected in cases concerning Sami issues.[246] The rights under ICCPR Article 27 will typically be relevant in interferences in the form of plans and measures in Sami areas. This may apply to new roads, railways, military training fields, cabin areas, hydropower dams, wind power and mines, or other interferences that may affect Sami reindeer husbandry.

The assessments of ICCPR Article 27 in relation to interference will be relevant for several types of interferences and for several authorities, including municipal authorities. This applies to

[245] Prop. (Law Proposal to Parliament) 86 L (2020-2021), pp. 103–104.

[246] As discussed in more detail in Chapter 2.1, ICCPR Article 27 is incorporated into Norwegian law through the Human Rights Act and thus takes precedence in the event of any legal conflicts. Public authorities are obliged by human rights, cf. Article 92 of the Constitution. This applies to the exercise of public authority at all levels, and without regard to the distribution of power and competence between different state powers and administrative levels.

licences not only pursuant to the Planning and Building Act, but also pursuant to, for example, the Energy Act, the Minerals Act and other special areas of legislation. It will be too extensive to review administrative practices in all areas that may be of significance for Sami issues. This report focuses mainly on wind power development, as well as the establishment of mining industry. The report emphasises relevant examples of government practice from the Ministry of Petroleum and Energy (MPE) and the Ministry of Trade, Industry and Fisheries (MTIF).[247]

Wind power is a relatively new type of industry in Norway, established mainly during the 2000s. The Sami traditional reindeer herding areas are in the counties of Troms and Finnmark, Nordland, large parts of Trøndelag and parts of Innlandet. Figures from the Norwegian Water Resources and Energy Directorate (NVE) for these counties show that they have received 129 applications for a licence, of which 37 are for plans in Troms and Finnmark, 28 in Nordland and 64 in Trøndelag.[248] This gives an indication of the amount of cases that reindeer husbandry and other Sami interests have faced. *Mining*, on the other hand, is one of Norway's oldest industries. Since the 2000s, there have been a modest number of new cases concerning mining licences for processing by MTIF.[249]

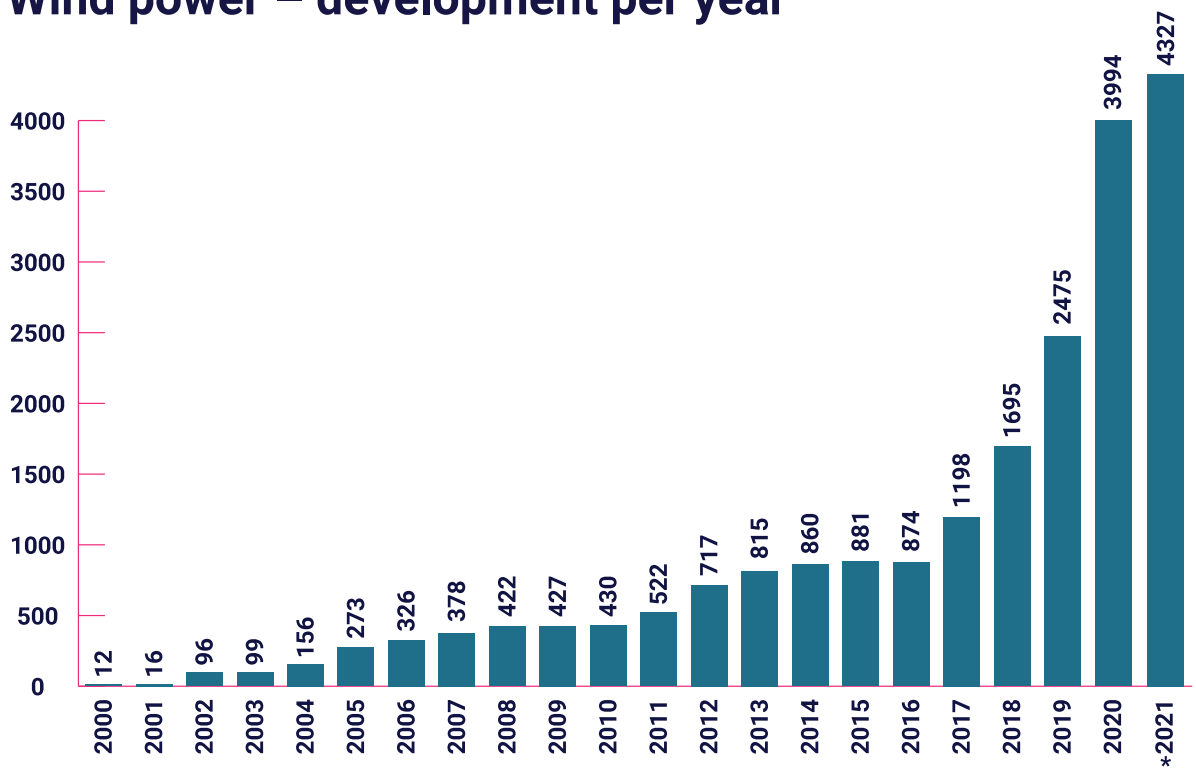
All of the decisions discussed in this chapter contain assessments of, among other things, environmental considerations and other considerations. In the following, however, the focus is only on the assessment factors that appear to be important under indigenous peoples' human rights protection, especially according to ICCPR Article 27 and ILO 169.

5.2.2 Facts in the cases

Decisions concerning licences for wind power pursuant to the Energy Act are made by the Norwegian Energy Directorate (NVE) and can be appealed to the MPE. The report focuses on the MPE's practice in appeal decisions on licence applications from the last ten years. These involved decisions from Sami reindeer herding areas: Fosen, Hammerfest, Fálesrášša, Kalvvatnan, Øyfjellet and Mosjøen, Kopperaa and Stokkfjell.[250] All these cases concerned the establishment of wind power plants in reindeer herding areas. The MPE's decision in the *Fosen* case was appealed to the courts, and was decided in the Supreme Court in 2021. This case is therefore also dealt with in Chapter 4 on Supreme Court case law.

[247] These are appeal bodies for decisions in licensing cases by the Norwegian Water Resources and Energy Directorate (NVE) and the Directorate for Mineral Management with the Commissioner of Mines at Svalbard (DMF), respectively.
[248] NVE, "Konsesjonssaker – NVE" ("Licensing cases – NVE") https://www.nve.no/konsession/konsesjonssaker/?ref=mainmenu.
[249] And for the Directorate for Mineral Management with the Commissioner of Mines at Svalbard (DMF).
[250] The Ministry's decisions in the *Kvitfjell* case and the *Raudfjell* case on Kvaløya in Tromsø municipality, respectively, are not included since they are based on agreements with reindeer husbandry, and ICCPR Article 27 has thus not been used in those cases. In connection with the applications for Hammerfest and Fálesrášša, NVE 11/1-2013 also rejected an application from Aurora Vindkraft for the Kvalsund wind farm, following a balance of interests between the societal benefits and the overall effects on reindeer husbandry and biodiversity.

Wind power – development per year



Installed effect in MW, aggregated per year. *The figures for 2021 are preliminary.
Source: NVE - https://www.nve.no/energi/energisystem/vindkraft/vindkraftdata/

Mining activities are regulated by the Minerals Act. According to its purpose, this Act shall "[...] promote and ensure socially responsible administration and use of mineral resources in accordance with the principle of sustainable development". Within this framework, administration and use of mineral resources shall take into account, inter alia, value creation and business development, as well as the natural basis for Sami culture, business and society.[251] In light of the fact that few plans for mining has been made, this report only considers the Ministry of Trade, Industry and Fisheries' (MTIF)'s decision in the appeal concerning a licence for the Nussir mine.[252] The table on the next page shows, in addition to the name of the case, who was applying for a licence, the date of notifications/applications and decisions, what NVE[253] (or MTIF) concluded, respectively, the indication of relevant complainants, and what the MPE[254] (or MTIF) concluded after the appeal round.

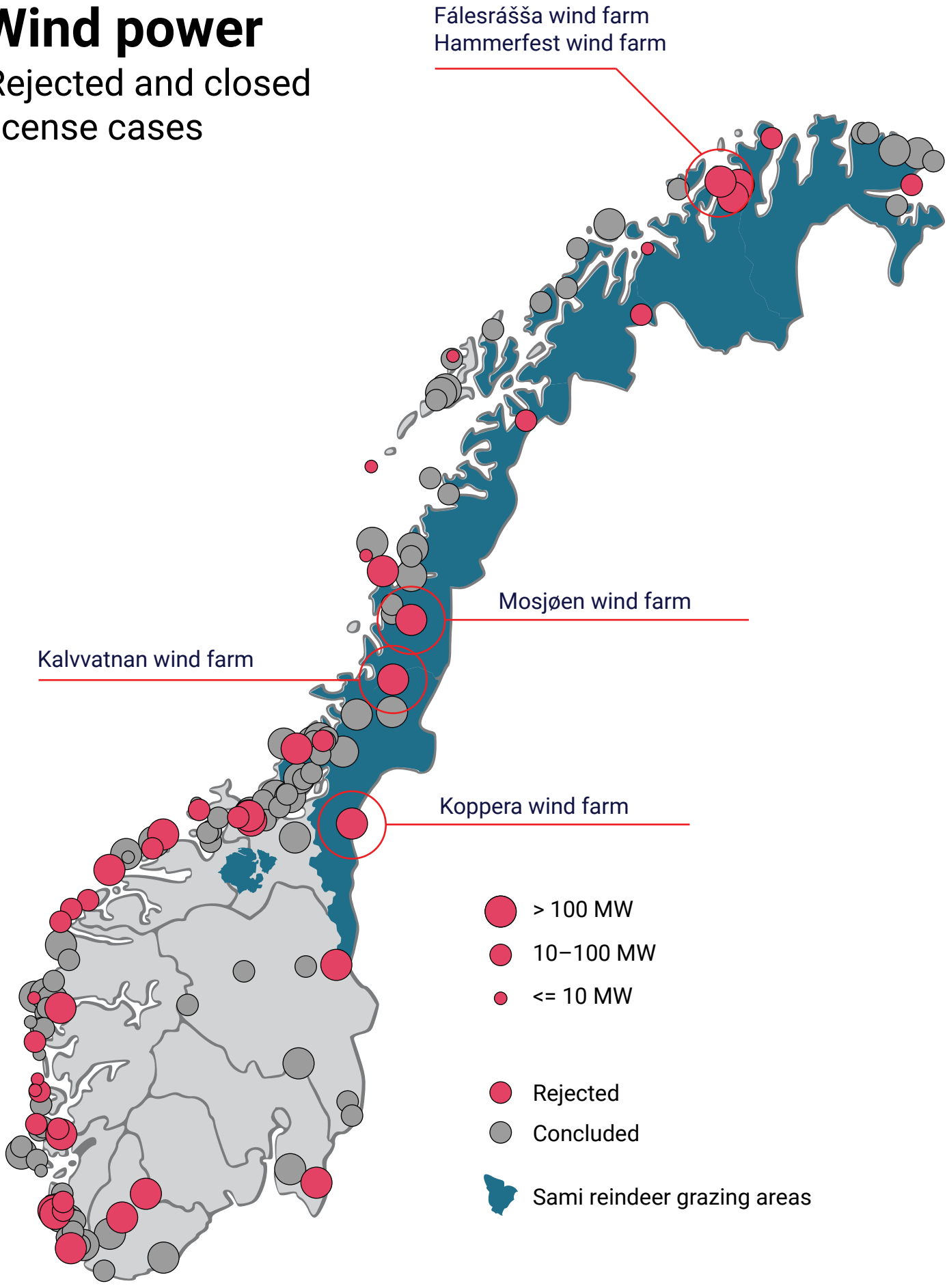
[251] The Minerals Act paras. 1 and 2. Cf. Chapter 3.6.4 on provisions in the Minerals Act that contribute to the implementation of ICCPR Article 27 and ILO 169. The Energy Act, which regulates wind power, does not have corresponding provisions.
[252] A license application from ELKEM for a license for the Nasafjell mine (open pit) is being considered by the Ministry. The case will affect reindeer grazing districts, but as of 1 December 2021 is still being processed.
[253] Norwegian Water Resources and Energy Directorate.
[254] Ministry of Petroleum and Energy.

Case	Applicant	NVE decision	Complaints	MPE decision
Fosen	Fosen Vind 30/6-2006	License granted 7/6-2010	Reindeer grazing districts, Sami Parliament	Granting of application with additional conditions 26/8-2013[255] (Case decided by the Supreme Court 11/10-2021)
Hammerfest	SAE Vind 22/8- 2005	License denied 11/1-2013	SAE Vind	Rejection of the application 2/3-2015[256]
Fálesrášša	Aurora Vindkraft 15/11-2011	License granted 11/1-2013	Among others, reindeer husbandry organisations and the Sami Parliament	Rejection of the application 2/3-2015[257]
Kalvvatnan	Fred Olsen Renewables October 2011	License granted 31/3-2014	Among others, reindeer husbandry organisations and the Sami Parliament, the county governor in Nordland	Rejection of the application 11/11-2016[258]
Øyfjellet	Eolus Vind 5/7- 2011 and 6/1-2014	License granted 13/11-2014	Among others, reindeer husbandry organisations and the Sami Parliament, the county governor in Nordland	Granting of application 16/11-2016[259] (Requirement of additional terms)
Mosjøen	Fred Olsen Renewables September 2011	License denied 13/11-2014	Fred Olsen and Vefsn Municipality	Rejection of the application 16/11-2016[260] (Øyfjellet and Mosjøen seen together)
Kopperaa	E.ON. Wind Norway April 2012 and 8/11-2013	License denied 13/4-2015	E.ON.Wind and Meraker Brug	Rejection of the application 19/9-2017[261]
Stokkfjellet	Trønder Energi Kraft November 2011	License granted 8/5-2019	Reindeer husbandry organisations and the county governor of South Trøndelag	Granting of application 19/9-2017 (Requirement of additional terms)[262]

[255] MPE, "Vindkraft og kraftledninger på Fosen – klagesak" ("Wind power and power lines at Fosen - complaint case"), 2013, https://webfileservice.nve.no/API/ PublishedFiles/Download/200700502/761649.
[256] MPE, "Hammerfest vindkraftverk – klage på avslag" ("Hammerfest wind turbine - complaint of denial"), 2015, https://webfileservice.nve.no/API/PublishedFiles/Download/201107331/1383393.
[257] MPE, "Aurora Vindkraft AS – klagebehandling av konsesjon til etablering av Fálesrášša vindkraftverk i Kvalsund kommune" ("Aurora Vindkraft AS - complaint handling of a license for the establishment of Fálesrášša wind power plant in Kvalsund municipality"), 2015, https://webfileservice.nve.no/API/PublishedFiles/Download/201002742/1383392.
[258] MPE, "Fred. Olsen Renewables AS – Kalvvatnan vindkraftverk i Bindal og Namsskogan kommuner – klagesak" ("Fred. Olsen Renewables AS - Kalvvatnan wind farm in Bindal and Namsskogan municipalities – complaint"), 2016, https://webfileservice.nve.no/API/PublishedFiles/Download/200801262/1905272.
[259] MPE, "Eolus Vind Norge AS Fred. Olsen Renewables AS – Øyfjellet og Mosjøen vindkraftverker – klagesak" ("Eolus Vind Norge AS Fred. Olsen Renewables AS - Øyfjellet and Mosjøen wind turbines - complaint case"), 2016, https://webfileservice.nve.no/API/PublishedFiles/Download/201104174/1910185.
[260] MPE, "Eolus Vind Norge AS. Fred. Olsen Renewables AS – Øyfjellet og Mosjøen vindkraftverker – klagesak" ("Eolus Vind Norge AS Fred. Olsen Renewables AS - Øyfjellet and Mosjøen wind turbines - complaint case"), 2016, https://webfileservice.nve.no/API/PublishedFiles/Download/201104174/1910185.
[261] MPE, "E.ON Wind Norway – Kopperaa vindkraftverk i Meråker – klagesak ("E.ON Wind Norway - Kopperaa wind power plant in Meråker - complaint case"), 2017, https://webfileservice.nve.no/API/PublishedFiles/Download /201203135/2173543.
[262] MPE, "Trønder Energi Kraft AS – Stokkfjellet vindkraftverk – klage og innsigelse" ("Trønder Energi Kraft AS - Stokkfjellet wind farm - complaint and objection"), 2017, https://webfileservice.nve.no/API/PublishedFiles/Download/201106956/2173480.

Wind power

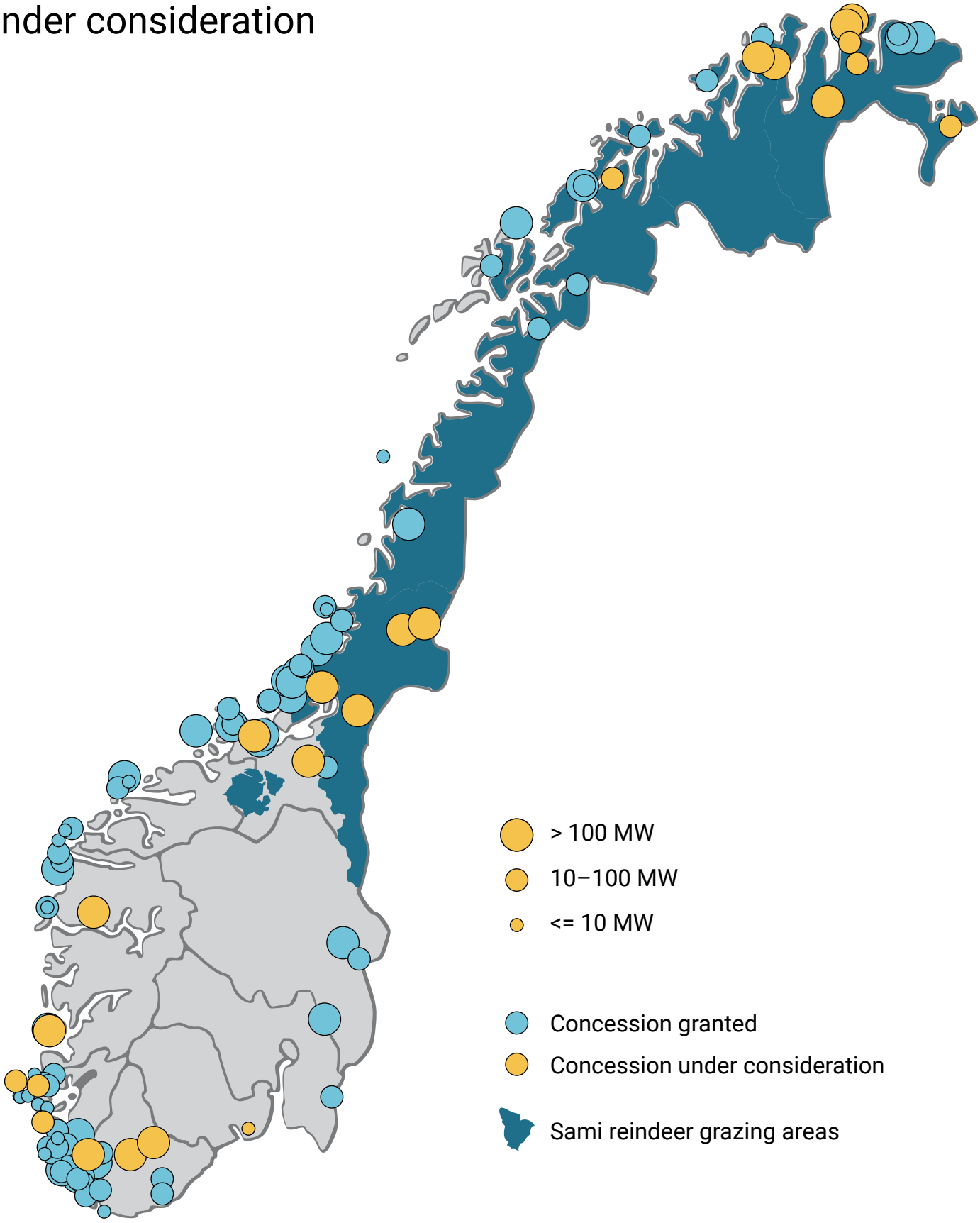
Rejected and closed license cases



Source: NVE – https://temakart.nve.no/tema/vindkraftverk

Wind power

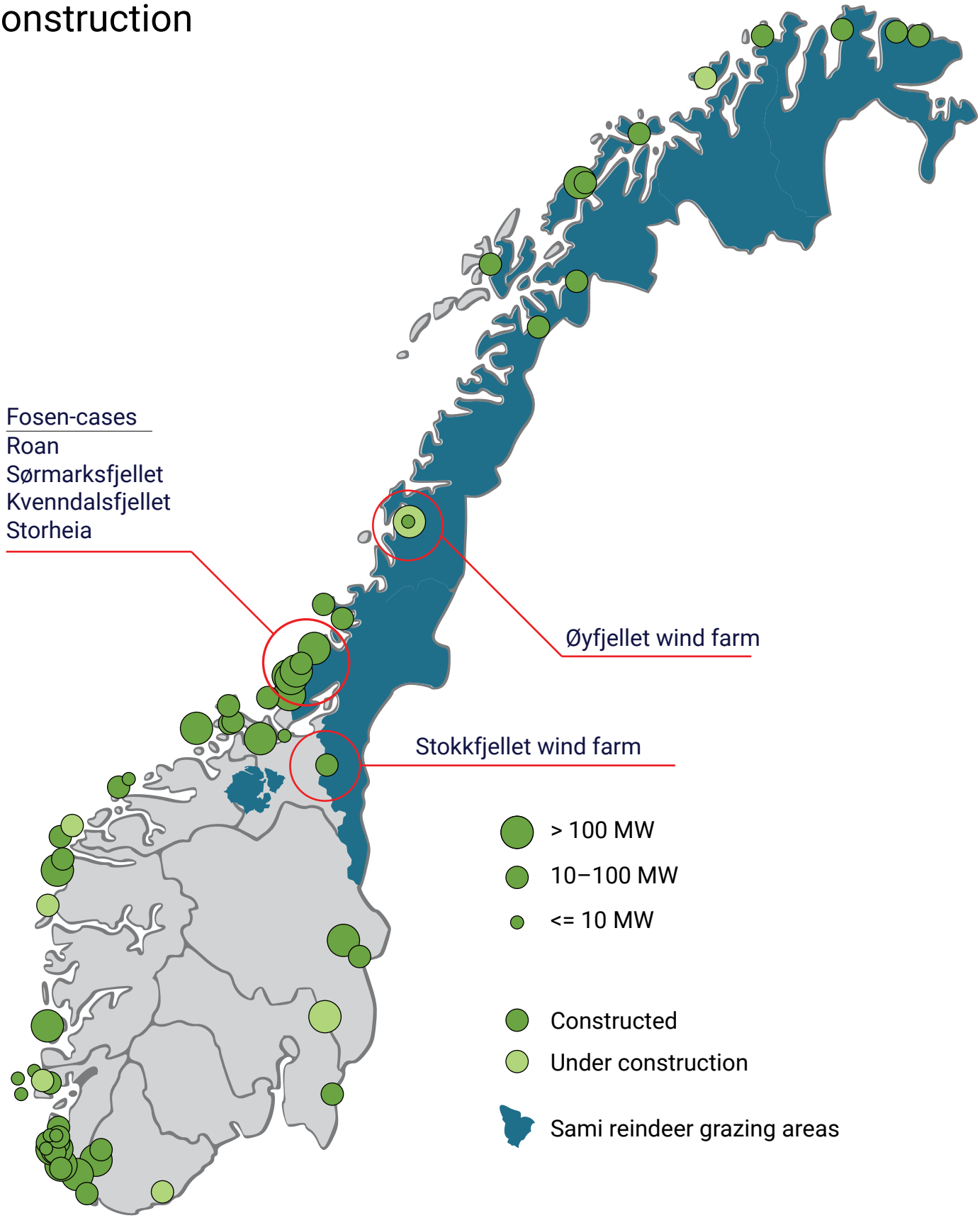
Concession granted and under consideration



Source: NVE – https://temakart.nve.no/tema/vindkraftverk

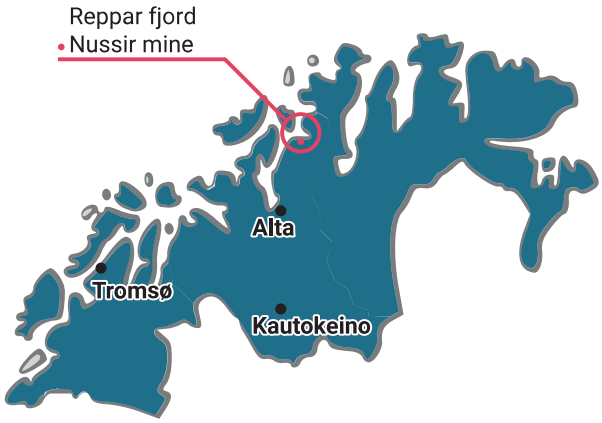
Wind power

Developed and under construction



Source: NVE – https://temakart.nve.no/tema/vindkraftverk

Case	Applicant	MTIF[263]	Complaints	MTIF (The King in Council)
NUSSIR	Nussir ASA 6/5-2016	Granted 14/2-2019	Among others, several reindeer grazing districts, Sami Parliament	Granted 29/11-2019[264]



Source: SNL

5.3 Central elements in administrative practice

The facts in these cases are quite extensive and complicated, and a number of bodies have appealed against various aspects of the decisions. The assessment topics that the Human Rights Committee and the Supreme Court have used as a basis in their discussions on the scope and significance of ICCPR Article 27 are repeated in the administrative decisions discussed in this chapter. The discussions of administrative practice are systematised around the assessment topics in Article 27 that were discussed in chapters 3 and 4.

First, however, we discuss the importance of *impact assessments* for the administration's decisions.

5.3.1 Impact assessments

In order to determine whether an interference in nature could conflict with the protection given in ICCPR Article 27, it is necessary to obtain a thorough knowledge base on the effects of the interference in question. The impact assessments constitute the most central knowledge base for the authorities' assessments of the planned interferences' future significance for reindeer husbandry.[265]

Impact assessments are carried out by consulting companies, and are ordered and paid for by the developer.[266] In the *Poma Poma* case, the Human Rights Committee stressed that no impact assessment had been carried out in the case which was "undertaken by a competent *independent* body" (our emphasis). This could be an argument for reconsidering

[263] Ministry of Trade, Industry and Fisheries.

[264] Link to the decision in the form of Royal Decree no. (Royal Decree), 29 November 2019 "Klage over Nærings- og fiskeridepartementets vedtak 14. februar 2019 om tildeling av driftskonsesjon til Nussir ASA for utvinning av Repparfjord kobberforekomst" ("Complaint about the Ministry of Trade, Industry and Fisheries' decision of 14 February 2019 on the award of an operating license to Nussir ASA for extraction of Reppar Fjord copper deposit"), can be found at https://www.regjeringen.no/contentassets/ 7403db77a0d84af2b9876e868f3f8c02/kongelig-resolusjon.pdf.

[265] Provisions on impact assessments have been discussed in the literature, see e.g. Øyvind Ravna, "Same- og reindriftsrett" ("Sami and reindeer husbandry law"), Gyldendal 2019 p. 432 onwards, and Nikolai K. Winge, "Konsekvensutredning i reindriftsområder" ("Impact assessment in reindeer husbandry areas"), *Tidsskrift for eiendomsrett* 12, no. 02 (2016).

[266] The Impact Assessment Regulations, Section. 4.

the current system where impact assessments are being carried out by the developer.[267]

The decisions discussed in this report do not state the extent to which the impact assessments have been carried out in cooperation with those affected by the interference, as prescribed by ILO 169.[268]

Impact assessments must be based, among other things, on available research. In 2013 (the *Fosen* case), there was little research on the impact of the turbines on the reindeer, and it was assumed that sound and movement from the turbines would not to any great extent affect the reindeer's behaviour in nearby areas. It was also assumed that the wind turbines would have "little impact" and would enable "rapid adaptation" for the reindeer. The research basis for these conclusions in the *Fosen* case was weak. The precautionary principle pursuant to Section 9 of the Nature Diversity Act was not applied.[269]

In the *Hammerfest* case, however, the Ministry, in line with the Nature Diversity Act, assumed that when "[...] in the case of uncertainty concerning the extent of damages and inconveniences, the Ministry finds that in the absence of concrete knowledge, a certain precautionary approach must be taken".[270]

New research was also assessed in the *Kalvvatnan* case from 2016, and in line with this and with the precautionary principle, the MPE used indications of reduced grazing and reduced conditions for reindeer grazing at a distance of 3-4 kilometres from the turbines, even after several years of operation. The disturbances were considered to have been even greater during the construction period.[271] NVE had concluded that reindeer herding's use of the planned area would not cease, but that the use of the area could be reduced in the short term.[272] The Ministry pointed out that the actual effects from the establishment of wind power in a reindeer grazing area were uncertain and that there were no unambiguous research results.[273] It is worth noting that the Ministry in this case stated that "the principles of Section 7 of the Nature Diversity Act cf. Sections 8-12[274]

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[267] HRC, *Poma Poma v Peru*, para. 7.7.

[268] ILO 169 Article 7 no. 3 states that such studies shall be carried out "in co-operation with the peoples concerned".

[269] MPE, "Vindkraft og kraftledninger på Fosen – klagesak" ("Wind power and power lines at Fosen - complaint case"), 2013, 761649 (nve.no). The Ministry does not either appear to have further assessed the Sami's traditional knowledge of the reindeer's behaviour, cf. the Natural Diversity Act Section. 8.

[270] Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Hammerfest*, p. 3.

[271] Ministry of Petroleum and Energy (MPE) decision of 11 November 2016 - *Kalvvatnan*, p. 7.

[272] Ministry of Petroleum and Energy (MPE) decision of 11 November 2016 - *Kalvvatnan*.

[273] Previous studies at the Kjøllefjord wind farm had indicated that the reindeer were to a small extent affected by wind farms in the operational phase. This previous knowledge base was used as a basis by NVE and the MPE in the *Fosen* decision, where the Ministry assumed that wind turbines and power lines do not in principle prevent an area from being used for grazing even after the development, see the *Fosen* decision p. 99.

[274] It is noted that the Nature Diversity Act Section 8, second paragraph on the emphasis on traditional knowledge, implements the Convention on Biological Diversity (CBD) Article 8 (j) on traditional knowledge. The Nature Diversity Act contains i.a. provisions on the knowledge base, the precautionary principle, ecosystem approach and overall impact, that the costs of environmental degradation shall be borne by the developer as well as environmentally sound techniques and operating methods.

are used as guidelines for decisions pursuant to the Energy Act".[275]

One objection that may be raised against the system for impact assessments is that the developer's duty to investigate alternative solutions in accordance with the impact assessment regulations is limited to what the Act describes as "relevant and realistic" alternatives.[276] It has been pointed out that it is "by and large the developers themselves who determine which alternatives meet these criteria".[277] This means that the developer will be able to rule out alternatives at an early stage as unrealistic if the alternative is not considered cost-effective. In the *Fosen* case, one might ask whether alternative solutions that would have had a lesser impact on reindeer husbandry were assessed to a sufficient degree.

As mentioned earlier in this chapter, it appears that the Human Rights Committee believes that impact assessments should be carried out by independent bodies. It is outside the scope of this report to discuss the content of such a requirement for independence. It is important that the independence is genuine, so that the motivation of the consulting companies to disseminate information that could make the implementation of the plan difficult, cannot be questioned.

5.3.2 Individual or collective rights

According to its wording, ICCPR Article 27 protects individuals, but according to the practice of the Human Rights Committee, also groups of individuals.[278] The ministries have in cases referred to in this report assessed Article 27 in relation to reindeer grazing districts, and where applicable, also siidas. The question has thus not come to the fore in administrative practice, but in the *Hammerfest* case, the Ministry specified that although alternative locations of the wind power plants could benefit reindeer husbandry as a whole, Article 27 also protects each reindeer herder individually.[279] It can, however, be difficult to individualise the harm to individuals in reindeer husbandry, since reindeer husbandry is to a great extent treated as a collective activity.[280] This question was thoroughly addressed by the Supreme Court in the *Fosen* judgment.[281]

5.3.3 Effective participation in decision-making processes

In all of the cases concerning wind power, affected districts and the Sami Parliament have been consulted, often through several rounds of

[275] Ministry of Petroleum and Energy (MPE) decision of 11 November 2016 - *Kalvvatnan*, p. 2. Furthermore, it appears from the Ministry's decision that the Minerals Act Section 2 on the management and use of mineral resources shall take into account the natural basis for Sami culture, business and society. The Ministry referred to Section 6 of the Minerals Act, which states that the Act shall be applied in accordance with the rules of international law on indigenous peoples and minorities and refers in this connection to the fact that the preparatory work refers specifically to ICCPR Article 27 and ILO 169, the Ministry of Petroleum and Energy decision of 11 November 2016 - *Kalvvatnan*, p. 15.

[276] The Impact Assessment Regulations Section 14 1st paragraph (c).

[277] Nikolai K. Winge, "Konsekvensutredning i reindriftsområder" ("Impact assessment in reindeer husbandry areas"), *Tidsskrift for eiendomsrett* 12, no. 02 (2016): pp. 118.

[278] See more about this in Chapter 3.4.2.

[279] Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Hammerfest*, p. 4.

[280] In the *Fosen* judgment, it was established that the protection under ICCPR Article 27 has a collective character in addition to providing individual protection. HR 2021-1975, para. 106.

[281] See Chapter 4.2.2.

consultation.[282] Due to a lack of available documentation, however, it is difficult to know when the involvement in decision-making processes have begun, how often consultation meetings have been held, and to what extent there has been a process with a view to reaching agreement in line with the requirements of ILO 169.

In 2005, a separate agreement was entered into between the Ministry of Local Government and Regional Development and the Sami Parliament on procedures for consultations between state authorities and the Sami Parliament. Here it is stated that minutes shall be written down from all consultation meetings between the state authorities and the Sami Parliament.[283]

The Norwegian NHRI's own limited study of the scope, topics and outcomes of consultations between the Sami Parliament and state authorities in the period 2005–2017, shows that several measures have been taken to ensure the effective implementation of the state's consultation obligations, but that there are different consultation practices in different ministries.[284] It also shows that consultations are rarely sufficient to achieve an agreement between the Sami Parliament and state authorities, and that it is particularly in land-use interference and land management matters that agreement is not reached.

In its appeal against the decision on *Nussir*, the Sami Parliament, emphasised, among other things, that the consultations between the Ministry and affected reindeer grazing districts were not genuine consultations, but only input meetings, because the reindeer grazing districts were not presented with assessments to which they could respond.[285] The Sami Parliament and the reindeer grazing district pointed out that there were violations of the rules on consultation obligations pursuant to ILO Conventions 169 Articles 6 and 7 in the consideration of this matter.[286]

In the *Fosen* case, the reindeer owners did not claim that the obligation of consultation had been violated, even though they claimed that their rights to cultural practice had been violated.[287]

The new chapter of the Sami Act on consultations which was adopted in 2021 clarifies to a greater extent both the content of consultations and how they are to take place.[288] It was, among other things, legislated in Section

[282] In the decision on the *Fosen* cases, the Ministry emphasised that two consultation meetings had been held between NVE and the reindeer grazing district represented by the Northern Group and between NVE and the Sami Parliament, and that a thorough assessment of reindeer husbandry had been made. The decision also stated that consultations had been held between NVE and the reindeer grazing district represented by the Southern Group in 2009, and between the Ministry and the Southern Group in May 2013, as well as between the Ministry and the Sami Parliament in August 2013, Ministry of Petroleum and Energy decision of 26 August 2013 - *Fosen* cases, p. 112.

[283] Agreement on procedures for consultations between state authorities and the Sami Parliament, 11 May 2005, para. 7.

[284] The survey is discussed in more detail in NHRI's annual report for 2018, as well as in NHRI's letter to the Ministry for Local Government and Regional Development of 26.06.2019 on "State authorities' and the Sami Parliament's experiences with indigenous law consultations". In the Sami Parliament's annual report for 2020, there is an overview of selected consultations with the authorities in 2020. Of the cases that were closed, the vast majority ended with agreement or partial agreement. In two cases concerning the environment and area, however, no agreement was reached, the Sami Parliament's annual report 2020.

[285] Royal Decree 29 November 2019 - *Nussir*, p. 4.

[286] Royal Decree 29 November 2019 - *Nussir*, p. 20.

[287] In this connection, it is worth noting that the Court of Appeal in the *Fosen* case ruled that one cannot "consult away from the material protection that the provision provides". LF-2018-150314 - LF-2018-150323 - LF-2018-150327, p. 16. The Supreme Court repeated this in the *Fosen* judgment. See Chapter 4.2.3.

[288] The Sami Act, Section 4-7.

4-7 of the Sami Act that minutes shall be kept from the consultations.

5.3.4 Overall effect or cumulative effects

Assessments of the cumulative effects have been made in all administrative cases, and have contributed to the rejection or reduction of the development plans in several of the cases. The cumulative effects of previous and planned interferences appear decisive for rejection of the developments in Hammerfest, Fálesrášša and Kalvvatnan.

In the *Hammerfest* case, the Ministry noted that there was agreement between the reindeer herders and the professional assessor that the reindeer grazing district was already affected by interferences in the region.[289] NVE had stated in its decision that "[...] the sum of established and planned other interferences in the area is so large that it is uncertain whether reindeer herding can be maintained in the district if the wind power plant is also established". In the *Fálesrášša* case, in the Ministry's view, there was "a risk that the sum of the wind power plant and the pipeline system could prevent reindeer herding in the district from being maintained to the extent it has today".[290] Also in the *Kalvvatnan* case, where NVE's permit was overturned, the Ministry said that the cumulative effects of the interference "in conjunction with previous measures and other adopted measures" appeared to be an important factor.[291] In assessing *Øyfjellet*, however, the Ministry concluded after an assessment of the cumulative effects, that "[...] the basis for cost-effective reindeer herding will also be present after the establishment of Øyfjellet wind power plant."[292] The establishment was therefore not considered to be in conflict with Article 27.[293]

In the *Fosen* case, the Ministry stated that the "relevant assessment theme must be whether the measure applied for in combination with previous measures and other adopted measures will result in the reindeer herder being denied his right to cultural practice".[294] The Ministry did not agree, however, that all types of interference after the year 1900 had to be quantified and form the basis for the assessment of the cumulative effects of several interferences over time.[295]

In the *Nussir* case, the Sami Parliament had argued that the cumulative effects of previous and planned interferences in the area were inadequately studied. The Ministry said that it must look at "the impact over time and the effect of past, current and future measures",[296] but concluded after a concrete assessment "that the project will not prevent or significantly

[289] Among other things, a decision in 2011 on spatial planning had referred to the cumulative effects of the interferences for reindeer husbandry, but at the same time emphasised that Hammerfest municipality had no other available areas for business development. Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Hammerfest*, p. 4.

[290] Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Fálesrášša*, p. 6.

[291] Ministry of Petroleum and Energy (MPE) decision of 11 November 2016 - *Kalvvatnan*, p. 3, cf. the MPE's decisions in the cases *Hammerfest* and *Fálesrášša*.

[292] See report from Protect Sápmi on cumulative effects and Øyfjellet, Protect Sápmi, "Inngrepskartlegging og reindriftsfaglig utredning" ("Interference mapping and reindeer husbandry study"), 2019. https://protectsapmi.com/assets/Dokuments/Ojfjellet-Vindpark/Utredning- end-June-2019.pdf.

[293] Ministry of Petroleum and Energy (MPE) decision of 16 November 2016 - Øyfjellet and Mosjøen, p. 8.

[294] Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases, p. 89.

[295] This was claimed by one of the reindeer grazing districts, the Southern Group.

[296] Royal Decree 29 November 2019 - *Nussir*, p. 16.

narrow the possibilities for reindeer herding and thus Sami cultural practice in the area".[297]

It seems that cumulative effects are often a key factor in interference cases where licence applications have been rejected by the administration. The concrete assessment is whether the cultural practice is "denied" by the relevant measure, either alone or in the context of previous measures. A key question, however, is how far back one must consider cumulative effects. On this question, there do not appear to be any clear-cut sources.

5.3.5 Remedial measures

Remedial measures can be used to reduce the negative effects of interferences. In cases where the interference could have constituted a violation of ICCPR Article 27, remedial measures may result in this threshold nonetheless *not* being overstepped. In administrative practice, it appears that both *measures* to reduce the negative effects of the interference (such as shutdowns in periods, etc.), as well as *rejection of other licence applications* in the same area, have been considered remedial measures.

In the *Fosen* case, the MPE considered remedial measures decisive in the assessment that the areas could still be used for winter grazing "even if the value of the areas is reduced".[298] The Ministry assumed that reindeer husbandry would be reimbursed for its losses such as expenses connected to increased workload, either through agreement with the developer or in the appraisal case.[299] The Ministry also emphasised that several licence applications had been rejected to protect reindeer husbandry.[300] The Ministry noted that a number of wind power projects had been applied for within the reindeer grazing district's area, but that the NVE had rejected or requested the developer to withdraw all other wind power projects.[301] The scope of the planned area had been reduced from 314 square kilometres to 80 square kilometres.[302] This appears to have been considered a remedial measure, even though the capacity and size of the turbines were subsequently increased.[303]

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[297] Royal Decree 29 November 2019 - *Nussir*, p. 2 onwards. See also the Government's press release: Ministry of Trade, Industry and Fisheries, "Gir Nussir ASA driftskonsesjon" ("Gives Nussir ASA operating license"), (Ministry of Trade, Industry and Fisheries, 2019), https:// www.regjeringen.no/no/dokumentarkiv/regjeringen-solberg/aktuelt-regjeringen-solberg/nfd/pressemeldinger/2019/nussir/id2629241/.

[298] Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases, p. 107.

[299] For example, the Ministry believed that barriers were appropriate, but this question was referred to more detailed plans, where the developer should finance this if necessary. With the remedial measures, the Ministry considered that the measures were not "of such a scope that the reindeer herders are denied the right to cultural practice, cf. ICCPR Article 27." Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases, p. 108 onwards.

[300] The various alternatives for NVE's priorities were not dealt with by the MPE in the complaints in the *Fosen* cases, but they appear from the impact assessment. Based on the impact assessment compared with NVE's decision, it is not obvious that NVE chose the alternatives for wind power plants that would have caused the reindeer husbandry the least damage, ASK Rådgivning AS and SWECO Norge AS, "Fagrapport reindrift. Konsekvenser av vindkraft- og kraftledningsprosjekter på Fosen" ("Technical report on reindeer herding. Consequences of wind power and power line projects at Fosen"), 2008, chapter 8.

[301] In the Ministry's overall assessment and decision, it was assumed that Haraheia was a very important area for reindeer husbandry, and that a change in the location of the turbines and a reduction in the power plant's power was considered a suitable remedial measure, Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases, pp. 108 and 118.

[302] Other remedial measures included assistance with 75 per cent financing for clearing of migratory routes and electronic marking of 200 reindeer for easier monitoring, smaller barrier fences in critical areas and two power generators for two of the Southern Group's shepherd huts. The developers also had to compensate for other negative effects for the Southern Group, the Ministry of Petroleum and Energy's decision of 26 August 2013 - the *Fosen* cases, p. 121, cf. p. 129.

[303] Ministry of Petroleum and Energy (MPE) decision of 15 February 2016 - appeal against decision on effect changes.

In the case of *Mosjøen and Øyfjellet*, it also seems that not granting permits to both applicants, but only to one of them (Øyfjellet), was seen as a remedial measure. It was also, in granting the licence to Øyfjellet, emphasized that the developer must implement remedial measures to help ensure that reindeers' movement to and from the winter grazing areas was secured.[304] The Ministry therefore confirmed NVE's decision concerning a licence, but with changes to the licence conditions. The developer had to ensure that an agreement was entered into with the reindeer grazing district for remedial measures in both the construction and operational phases. Access to winter pastures should, among other things, be ensured by remedial measures related to the the reindeers' trails through the planning area. Here, it may be noted that criticism has since been raised because these terms were not fully implemented.[305]

In the *Stokkfjell* case, it was emphasised that negative consequences of the interference could be compensated through remedial measures.[306] The Ministry reinforced NVE's wording, creating stronger obligations for the developer and including provision for the involvement of the reindeer husbandry.[307] The complainants had stated that using larger turbines than originally planned was relevant, as it would cause greater damage and inconvenience. The Ministry noted that technological developments means larger and more efficient turbine types, and considered that the increase in turbine size was offset by the fact that the number of turbines in this case would be halved.[308]

In the *Nussir* case, remedial measures constituting downtime and reduced operation during critical periods for the reindeer, were set as conditions for the permit. The actual content of the condition for reduced operation, however, was not stipulated, but was to be defined and approved afterwards, in the more detailed operating plans. The fact that the Ministry set up a number of remedial measures to benefit reindeer husbandry as a condition for a licence appears to be an important factor in the Ministry's overall assessment and weighting of Sami culture pursuant to both the Minerals Act

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[304] Ministry of Petroleum and Energy (MPE) decision of 16 November 2016 - *Øyfjellet and Mosjøen*, p. 11.

[305] The developer applied for a dispensation from the additional condition that NVE had stipulated for deferred implementation of construction activities during the reindeer herding. In April 2020, the MPE granted Øyfjellet Vind a temporary exemption (deferred implementation) from this requirement, so that they did not have to stop the construction work in the days during the reindeer's movement past the construction area anyway. The reindeer grazing district complained to the Ministry about this, but did not succeed. See NVE decision 19 December 2019: "Øyfjellet Wind AS – Godkjenning av detaljplan, miljø-, transport- og anleggsplan og andre konsesjonsvilkår for Øyfjellet vindkraftverk, Vefsn kommune" ("Øyfjellet Wind AS - Approval of detailed plan, environmental, transport and construction plan and other license conditions for Øyfjellet wind farm, Vefsn municipality"), 2019, p. 2 onwards, https://webfileservice.nve.no/API/PublishedFiles/Download/201707386/2937071. See also NVE's letter to the MPE on 19 May 2020: "Øyfjellet vindkraftverk- Oversendelse av seks klager på tre vedtak av 18.12.2019 og en klage på vedtak av 08.04.2020, samt begjæring om omgjøring og utsatt iverksettelse" ("Øyfjellet wind power plant - Transmission of six appeals against three decisions of 18.12.2019 and one appeal against decisions of 08.04.2020, as well as a request for conversion and deferred implementation"), 2020, p. 2 onwards, and John Christian Nygaard, "Vil ikke kreve byggestans i Øyfjellet: – Vi mener at det ikke er grunnlag for å stanse driften nå" ("Will not demand construction stoppage in Øyfjellet: - We believe that there is no basis for stopping operations now"), *Helgelendingen*, 2020, https://www.helg.no/5-24-548136.

[306] Ministry of Petroleum and Energy (MPE) decision of 19 September 2017 - *Stokkfjellet*, p. 21.

[307] Ministry of Petroleum and Energy (MPE) decision of 19 September 2017 - *Stokkfjellet*, p. 25.

[308] Ministry of Petroleum and Energy (MPE) decision of 19 September 2017 - *Stokkfjellet*, p. 8.

Section 17 and ICCPR Article 27.[309] The Ministry concluded that the interference, with the remedial measures as conditions, would not constitute an increase in the overall burden in a way that prevented further reindeer husbandry activity or significantly narrowed the possibilities for this, and therefore was not in violation of Article 27.[310]

Once remedial measures have been decided, it will be an obligation for the administration to ensure that these are implemented. Failure to do so could lead to questions about violation of Article 27.

One might question whether rejecting a certain number of applications in an area can be regarded as remedial measures. The Human Rights Committee has not considered remedial measures in this way.[311] Such a practice will make it easy for the developers to plan for this event by submitting more applications than they actually expect to proceed with.

5.3.6 Threshold for violation of ICCPR Article 27 and proportionality assessments

5.3.6.1 Requirements for substantive negative impact

In assessing whether the threshold for violation of ICCPR Article 27 has been reached, the negative impact of the interference on cultural practice will be important. In the *Fosen* case, the Ministry pointed out that for an interference to constitute a violation, "the interferences must be so comprehensive that the possibility of benefitting from reindeer hearding is lost". The Ministry assumed that "special restrictions on the possibility to conduct reindeer husbandry may also be regarded as a violation of Article 27, even though the measure does not imply a total denial".[312] In the subsequent cases, the MPE made it even clearer that not only complete *denials*, but also interferences which constitute *violations* that considerably narrow the Sami's opportunity to practice cultural activities, would be a breach of Article 27.[313] The question in these cases was whether the reindeer herder still had the opportunity to

[309] Special conditions for downtime for the Ulverygg deposit in the period 1 May to 15 June and reduced operation from 15 April to 1 October is stated to be important in order to be in line with the protection in the Reindeer Husbandry Act Section 22 against the closure of the reindeer's migratory routes, Royal Decree 29 November 2019 - *Nussir*, pp. 17–19 and pp. 22–23. For a list of remedial measures, see: https://www.regjeringen.no/globalassets/departementene/nfd/dokumenter/liste-over-avbotende-tiltak.pdf.

[310] It was also stated by some of the complainants that development would be contrary to several articles in ILO 169, in particular Article 15, as well as ECHR Additional Protocol 1, Article 1 (on property rights), ICERD Article 5 (d) (i) and (v) and the UN Declaration on the Rights of Indigenous Peoples. The Ministry did not find that these allegations were sufficiently substantiated and added that they also did not provide legal guidance that had not been duly assessed either in this decision or in other relevant national legislation, Royal Decree 29 November 2019 - *Nussir*, pp. 22–23.

[311] See Chapter 3.4.6.

[312] With reference to the *Länsman I* case, the Ministry of Petroleum and Energy's decision of 26 August 2013 - the *Fosen* cases, p. 88.

[313] Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Hammerfest*, p. 3, Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Fálesrášša*, p. 6, Ministry of Petroleum and Energy (MPE) decision of 16 November 2016 - *Kalvvatnan*, p. 3, Ministry of Petroleum and Energy (MPE) decision of 16 November 2016 - *Øyfjellet and Mosjøen*, p. 3, Ministry of Petroleum and Energy (MPE) decision of 19 September 2017 - *Stokkfjellet*, p. 12.

conduct reindeer husbandry in a "manner that is economically sustainable". [314]

In the *Nussir* case, the Ministry emphasised, among other things, that the extraction of the Nussir deposit would not "deprive the affected reindeer herders of the opportunity to make a financial profit".[315] The Ministry stated here that the "planned mining operations do not occupy land to such an extent that this *denies* the practice of reindeer husbandry in the area in violation of ICCPR Article 27" (our emphasis). The Ministry concluded that the development would not "prevent or limit the right to cultural practice to such an extent that there are violations of ICCPR Article 27".[316]

Whether the threshold for violation of Article 27 will be considered to be overstepped depends on an overall assessment of the negative effects of the interference on cultural practice, seen together with factors such as effective participation, cumulative effects and remedial measures. It is a type of "net consideration" that is used as a basis. It seems that the MPE's understanding of the concept "substantive negative impact" is quite similar to the understanding that the Supreme Court assumes in the *Reinøya* judgment and in the *Fosen* judgment. Both the MPE and the Supreme Court assume that there does not have to be a total denial of cultural practice, but that violations are sufficient.

5.3.6.2 Proportionality assessment

The question of whether ICCPR Article 27 provides for a proportionality assessment – where the interests of indigenous peoples are weighed against the interests of society or the interests of others – was finally clarified by the Supreme Court in the *Fosen* judgment.[317] In the administrative decision on the licence to Fosen Vind, the MPE had assumed that the benefits of renewable energy production had to weigh heavily against the disadvantages of reindeer husbandry. For an assessment of whether the threshold had been reached, according to the Ministry, it would "be relevant to assess the proportionality of the interference".[318] In assessing the overall effects on reindeer husbandry at Fosen, the conclusion was that

> the Ministry believes that a development offers great advantages in the form of new renewable energy, and that this must weigh heavily in the balancing against the disadvantages for reindeer husbandry. On this background, the Ministry believes that the threshold in ICCPR Article 27 is not exceeded.[319]

In this context, the Ministry referred to a legal opinion which had been obtained in connection with the case, where it was pointed out that it would "be relevant to assess the proportionality of the interferences so that the interference is made as insignificant as possible, and that there is proportionality between the need for the measure and the scope of the

[314] Cf. Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Hammerfest*, p. 13, Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Fálesrášša*, p. 16, Ministry of Petroleum and Energy (MPE) decision of 16 November 2016 - *Kalvvatnan*, p. 23, Ministry of Petroleum and Energy (MPE) decision of 16 November 2016 - *Øyfjellet and Mosjøen*, p. 21, Ministry of Petroleum and Energy (MPE) decision of 19 September 2017 - *Stokkfjellet*, p. 23.
[315] Royal Decree 29 November 2019 - *Nussir*, p. 16.
[316] Royal Decree 29 November 2019 - *Nussir*, p. 17.
[317] HR-2021-1975-S (*Fosen*), paras. 123–131 and 143, see Chapter 4.2.6.
[318] Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases, p. 88.
[319] Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases p. 108, cf. p. 114 onwards.

interference".[320] The view appeared to be based on a statement in the *Poma Poma* case, in which the Human Rights Committee had stated that measures had to be proportionate so that they did not threaten the survival of the minority. The Committee, however, did not strike a balance of interests here between the need for the measure and the disadvantages for indigenous peoples.[321]

On the basis of this, among other things, the Ministry believed that the threshold in Article 27 had not been exceeded,[322] and concluded that "it will also be relevant to assess [...] whether the benefits of the interference are proportional to the disadvantages inflicted on reindeer herding".[323]

The Supreme Court did not share this understanding of ICCPR Article 27.[324]

In subsequent decisions by the administration, such a proportionality assessment or balancing of interests between the interests of indigenous peoples and the interests of society has not been made when assessing whether the threshold for violation of Article 27 has been reached. The Ministry's decision in the *Hammerfest* case specifies, for example:

> Although a principle of proportionality applies under international law, socio-economic considerations of advantages and disadvantages alone cannot be used as a basis for the assessment of whether a licence can be granted, when international law sets a limit to what interferences may be permissible.[325]

Also in the decision on *Fálesrášša*, the Ministry emphasised that the protection of minorities in ICCPR Article 27 does not operate with a principle of proportionality that simply puts the interests of the minority against the interests of society. The Ministry states that "disadvantages and damages to Sami interests shall be assessed in the light of international law's minority protection, which limits the scope for socio-economic cost-benefit calculations".[326] The same was assumed in the case of *Kalvvatnan*. Here, the Ministry stated that the "ordinary societal balancing" could not be applied as a basis and that "international law can thus result in no licence being granted for an interference that otherwise would have a positive value in a socio-economic sense".[327]

The review of the MPE's practice in these interference cases thus shows that the Ministry seemed to move away from a general proportionality assessment in its assessments of the threshold question after its consideration of the *Fosen* case in 2013.

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[320] Ministry of Petroleum and Energy decision of 26 August 2013 p. 88, cf. p. 81, cf. Geir Ulfstein, 16.6.2013, *Samiske folkerettslige rettigheter ved naturinngrep – Utredning for Olje- og energidepartementet i forbindelse med utbygging av kraftledninger og vindkraftverk* (*Sami rights according to international law in the event of interference on nature - Study for the Ministry of Petroleum and Energy in connection with development of power lines and wind turbines*), p. 5.

[321] HRC, *Poma Poma v Peru*, (Communication No. 1457/2006), para. 7.6.

[322] Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases, p. 108.

[323] Ministry of Petroleum and Energy decision of 26 August 2013 - the *Fosen* cases, p. 88.

[324] See Chapter 4.2.6. See also HR-2021-1975-S (*Fosen*), paras. 123–131 and 143.

[325] Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Hammerfest*, p. 4.

[326] Ministry of Petroleum and Energy (MPE) decision of 2 March 2015 - *Fálesrášša*, p. 5.

[327] Ministry of Petroleum and Energy (MPE) decision of 11 November 2016 - *Kalvvatnan* p. 13.

5.4 Summary

This review shows how ICCPR Article 27 has been applied in the administration's decisions on interferences in Sami areas. In most of the cases reviewed here, consultations with Sami reindeer grazing districts and with the Sami Parliament had been carried out, but the consultation processes are often poorly documented. Cumulative effects of several interferences in the same area were used in some of the cases as the reason for rejection of licence applications. Remedial measures have taken the form of both rejection of applications for licences and decisions on special measures to reduce adverse effects.

The threshold for violations of Article 27 is high, and the harmful effects must be clearly negative for cultural practice. In the *Fosen* case in 2013, the Ministry emphasised a balancing of interests between the utility value for society and the rights of indigenous peoples. This practice changed after the *Fosen* case, and it seems that no such balancing of interests was made in cases after 2013.

The Ministry's decision in the *Fosen* case has had serious human and economic consequences for the reindeer owners and could prove to have major economic consequences for the developer and/or the state. This shows that there is a need to highlight to a greater extent the assessment topics in ICCPR Article 27, as set out by the Human Rights Committee and the Supreme Court, in order to minimise this risk and ensure that thorough assessments are made by the administration in cases concerning indigenous peoples' rights.

6. Business and Human Rights – An Indigenous Peoples' Perspective

Many of the cases concerning corporate human rights responsibilities in Norway concern indigenous peoples' rights. Companies do not have human rights obligations, but companies are usually responsible for the development and utilisation of natural resources. There are several guidelines and principles (particularly within the UN and the OECD frameworks) that seek to "build bridges" over the gap that exists between the legal obligations of states and the responsibilities of companies.

6.1 Introduction

Indigenous peoples' rights are largely about rights to use of land and associated natural resources, and it is precisely this issue that complaints under ICCPR Article 27 and ILO 169 often concern. The human rights conventions are legally binding on states parties and require them to have legislation that protects the rights of indigenous peoples. But it is largely private companies that are actually behind the development and utilisation of natural resources. Companies are not subject to obligations under international law, and are not bound directly by these conventions. At the same time, over the past couple of decades, increasing attention has been paid to companies' responsibilities for human rights in connection with their businesses.

Both the UN and the OECD have tried to "build bridges" over the gap that exists between the legal obligations of states and the responsibilities of companies. There are a number of different guidelines and principles within many different international fora.

This chapter discusses first and foremost the UN Guiding Principles on Business and Human Rights (UNGP),[328] which constitute the leading international standards for corporate human rights responsibility, as well as the OECD Guidelines for International Companies, where Chapter IV reflects the UNGPs.[329]

In addition, there are more industry-specific standards and principles, for example in the oil and gas field, mining, etc.[330]

The National Action Plan from 2015 for follow-up of the UN Guiding Principles, states that the Government expects Norwegian companies to know and comply with these guidelines and principles, including in making due diligence considerations in the field of human rights.[331] Particularly demanding requirements are placed on companies with state ownership.

[328] United Nations Guiding Principles on Business and Human Rights (UNGP).
[329] OECD Guidelines for Multinational Corporations.
[330] See i.a. UN Global Compact. More than 16,000 companies in a number of different areas participate.
[331] Ministry of Foreign Affairs, "Næringsliv og menneskerettigheter – Nasjonal handlingsplan for oppfølging av FNs veiledende prinsipper" ("Business and Human Rights - National action plan for follow-up of the UN Guiding Principles"), 2015, p. 8 onwards.

These companies are expected to be at the forefront in their work with corporate social responsibility, and to strive to safeguard human rights and reduce their climate and environmental footprint. In the Government's ownership report from 2019, it is expected that the companies will be "identifying and managing important risk areas for those affected by the company's operations, ensuring broad support for this work, incorporating it into the company's goals, strategy and guidelines, and following internationally recognised guidelines, principles and conventions".[332]

6.2 UN Guiding Principles on Business and Human Rights (UNGP)

After extensive work and dialogue between states and businesses, the UNGPs were adopted by consensus by the UN Human Rights Council in 2011.[333] The UNGPs are divided into three so-called pillars, and is based on the fact that it is the *states'* obligation to *protect* (Pillar 1), and the *companies'* responsibility to *respect* human rights (Pillar 2), and that it is the responsibility of both states and companies to ensure that there are effective complaint mechanisms (*remedy* – Pillar 3).[334]

Pillar 1 reflects the states' obligation under international law to protect individuals from human rights violations by third parties, including companies. It is stated that states should set a clear expectation that companies respect human rights in all their activities. Furthermore, it discusses what the state should do to implement this. In particular, the state's role as a legislator and supervisor is central here. To protect human rights, the state should have laws that ensure that companies respect human rights, and they should provide guidance to companies on how to respect human rights. The states' responsibilities are specified in Principle 4, which refers to the particular responsibility of states not only as subjects with human rights obligations, but as owners of enterprises. Here, states should assume responsibility for ensuring human rights follow-up of the companies they own or control.

Pillar 2 on the business community's own responsibility to respect rights provides a number of important recommendations with guidance for companies on what they should do to not cause or get involved in human rights violations. Worth mentioning here are:

- Principle 11, which states that business enterprises should respect human rights, and "[...] that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved". This means that companies are expected to take measures to *prevent* human rights violations, and that they should *remedy* and possibly *repair* the adverse impacts of human rights violations.

- Principle 12, which lists *which* human rights must be respected: The companies have a minimum responsibility to respect the rights in the UN Universal Declaration of Human Rights as well as the ICCPR and ICESCR, which together constitute the "International Bill of Human Rights". Moreover, Principle 12 encompasses the ILO Declaration on Fundamental Principles and Rights at Work,

[332] Meld. St. (Report to Parliament) 8 (2019-2020), "Statens direkte eierskap i selskaper – Bærekraftig verdiskapning" ("The state's direct ownership in companies - Sustainable value creation"), p. 7, cf. pp. 10, 39 and 53 onwards.
[333] For the English language original version, see United Nations, "Guiding Principles on Business and Human Rights", 2011, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[334] Pillar 1) The states' duty to protect human rights, Principles 1-10. Pillar 2) Corporate responsibility to respect human rights, Principles 11-24. Pillar 3) Access to remedy, Principles 25-31.

which includes the ILO's eight core conventions on freedom of association and the right to collective bargaining, the prohibition of child labour, the prohibition of discrimination and prohibition of forced labour.

The international instruments covered by Principle 12 contain more than 30 specific human rights (including labour rights), of which ICCPR Article 27 is included.[335] A separate reporting tool for the UNGPs provides an overview of these human rights, together with a brief explanation of what they entail, and examples of how companies' activities can affect the exercise of each individual right.[336]

In addition to the rights covered by Principle 12, the UNGPs framework specifies that human rights other than these may also be relevant to companies, such as the special rights of indigenous peoples, women, the disabled, and children.[337]

What it means to respect these human rights is explained in more detail in Principle 13. Companies should avoid causing or contributing to a negative impact on human rights through their activities, and try to prevent or reduce negative impacts on human rights through their activities or business contacts.

What the companies should do and how they should do it is stated in more detail in Principles 15–20. Companies should ensure due diligence that include internal guidelines and a statement that they respect human rights. Due diligence processes "[...] to identify, prevent, mitigate and explain how companies endeavour to respect human rights" as well as procedures to deal with any negative impacts are also central. In accordance with Principle 17, companies should:

> [...] identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.[338]

Pillar 3 concerns the states' overall duty to ensure effective complaint mechanisms and follow-up of human rights violations. In addition, companies should facilitate complaints in connection with their activities.

The UNGPs are important to the rights of indigenous peoples. Firstly, the list set out in Principle 12 includes a number of rights on, for example, self-determination and political participation, as well as rights that protect indigenous peoples from for example discrimination or forced labour, in addition to ICCPR Article 27. Also, the right to life and the right to privacy are rights that protect indigenous peoples from environmental damage or climate damage. Secondly, Principle 12 includes "a minimum" and more specific rights in other relevant instruments must also be respected by the companies. In cases

[335] These rights are collected and presented in a matrix in Shift and Mazars, "UN guiding principles reporting framework", 2015, pp. 102–108, https://www.ungpreporting.org/wp-content/uploads/2015/02/UNGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf
[336] Shift and Mazars, p. 101 onwards.
[337] United Nations, "Guiding Principles on Business and Human Rights", 2011, commentary on Principle 12. https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[338] UNGP Principle 17.

concerning indigenous peoples' right to, for example, natural resources or land and their right to consultations, the rules in ILO 169 should also be respected by the companies, especially where the states do not take this responsibility.[339]

As mentioned, states are required to have greater responsibility for businesses they own or control. The Government expects state-owned companies to be at the forefront in their work with responsible activities, respect human rights, follow the UNGPs and the OECD guidelines and conduct due diligence.[340] The state has large holdings in Fosen Vind, and it can be questioned whether the due diligence on indigenous peoples' rights were thorough enough in the *Fosen* case.[341]

6.3 OECD Guidelines for Multinational Enterprises and the OECD National Contact Point

The OECD Guidelines for Multinational Enterprises deal with areas such as corruption, competition, taxation, the environment and consumer protection. In 2011, the OECD Guidelines were expanded with a separate human rights chapter, which refers to the UNGP. The content of the business community's human rights responsibilities under the UNGPs and the OECD Guidelines thus coincides.

A key point of departure is that companies should respect human rights and avoid violating human rights or contributing to negative impacts in the field of human rights. Prevention and limitation of negative consequences through due diligence, stakeholder dialogue and cooperation are central. Sustainable development, respect for human rights and remedial measures to avoid causing or contributing to negative impacts as a result of one's own activities are key principles.[342]

The guidelines point out that respect for human rights today is the global standard for expected behaviour for companies, with a clear expectation from the states that the companies also contribute to respecting human rights. In this connection, the rights of particularly vulnerable groups such as indigenous peoples, ethnic, linguistic and religious minorities, women, and children are cited as examples of groups that require special attention from the companies.[343]

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[339] See more about UNGP and indigenous peoples in e.g. "A/HRC, Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries", 2012, https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-CRP1_en.pdf or IWGIA and European Network On Indigenous Peoples, "Interpreting the UN guiding principles for indigenous peoples Report 16", 2014, https://www.iwgia.org/images/publications/0684_IGIA_report_16_FINAL_eb.pdf.

[340] Meld. St. (Report to Parliament) 8 (2019–2020), "Statens direkte eierskap i selskaper – Bærekraftig verdiskaping" ("The state's direct ownership in companies - Sustainable value creation"), p. 83 onwards. Cf. "Næringsliv og menneskerettigheter – Handlingsplan for oppfølging av FNs veiledende prinsipper"
("Business and human rights - Action plan for follow-up of the UN guiding principles"), Ministry of Foreign Affairs 2015.

[341] The Transparency Act was not in force when the Ministry decided the *Fosen* case, but Norway had already in 2011 advocated that the UN Human Rights Council should adopt the UNGP. The Government's Action Plan for Business and Human Rights from 2015, on the state's responsibility for Sami rights, mentions the Minerals Act (mining), but not the Energy Act (wind power), p. 19.

[342] OECD Guidelines for Multinational Enterprises, Chapter 2, General Guidelines, Sections A 1, 2, 10 and 14, see also Chapter 4 of the Guidelines on Human Rights. There are 50 states, including the Nordic countries, that have acceded to the guidelines. https://les.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/ les/2013/11/OECD_retningslinjer_web.pdf.

[343] OECD Guidelines for Multinational Enterprises, paras. 36–40.

In their internal guidelines, companies should incorporate an obligation to respect human rights, and take necessary measures to stop or prevent activities that cause or may cause negative consequences in the field of human rights. It is assumed that a company's "activities" include both acts and omissions.[344]

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

- Comprehensive guidelines for responsible business activities that 50 governments have committed to promote.
- A main goal of the guidelines is for the business community to contribute to sustainable development.
- UNGP is included in the guidelines chapter on human rights.
- Norway's OECD Contact Point handles complaints about Norwegian businesses related to the guidelines.
- Has been partially implemented through the Transparency Act.

In accordance with both the UNGP and the OECD guidelines, companies should carry out due diligence in the field of human rights. This is of great importance in relation to developments in Sami areas. According to OECD's comments on the guidelines, this means "[...] assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed".[345] An introduction and guidance can be found in the OECD Due Diligence Guidance for Responsible Business Conduct, prepared by the Norwegian OECD Contact Point in 2019.[346]

The extractive industry often conflicts with indigenous peoples' rights, around the world. In continuation of its guidelines, and with regard to the special characteristics of the extractive industry (large investments, site-bound production, longevity and extensive social, economic and environmental impacts) the OECD has prepared a guide for meaningful stakeholder dialogue in the extractive industry. The aim of the guide is to provide practical guidance on handling challenges related to stakeholder dialogue.[347]

The implementation of the OECD Guidelines for Multinational Enterprises is supported by national OECD Contact Points in the countries

[344] OECD Guidelines for Multinational Enterprises, paras. 2 and 42.
[345] OECD Guidelines for Multinational Enterprises, paras. 4 and 5 and comments on human rights paras. 44 and 45.
[346] OECD, "OECDs veileder for aktsomhetsvurderinger for ansvarlig næringsliv" ("OECD Due Diligence Guidance for Responsible Business Conduct") (OECD Publishing, 2019), https://les.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/les/2019/09/201904_OECD_DDveileder_nett l. Pdf For the more comprehensive main document, see OECD, "OECD Due Diligence Guidance for Responsible Business Conduct" (OECD Publishing, 2018), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance- for-Responsible-Business-Conduct.pdf.
[347] OECD, "OECDs veileder for meningsfylt interessentdialog i utvinningsindustrien" ("OECD's guide for meaningful stakeholder dialogue in the extractive industries") (OECD Publishing, 2017), pp. 3 and 15, https://les.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/les/2019/06/OECD Guides_ Meaningful-Stakeholder Dialogue_ENGLISH_web.pdf. The supervisor's appendix contains i.a. further recommendations for dialogue with indigenous peoples and women. The guide is also available in Northern Sami: OECD, "OECD várrugasvuođa bagadallan rogganindustriija ulbmillaš beroštеaddjisearvideami várás" (OECD Publishing, 2017), https://les.nettsteder.regjeringen.no/wpuploads01/less./blogs./blogs./blogs.OECD Guide/Meaningful-Stakeholder Dialogue_SAMISK_web.pdf.

that adhere to the guidelines. Norway's OECD Contact Point is a professional, impartial advisory body that shall promote and supervise the guidelines, cooperate internationally and deal with complaints related to the guidelines.[348]

Under the OECD system, there is a separate complaints system. The national Contact Points deal with complaints against companies' alleged non-compliance with the guidelines. These are not legally binding complaint systems, and the aim of the complaint proceedings is to reach an agreed solution in the cases. Where the parties do not reach agreement through negotiations assisted by the OECD Contact Point, the Contact Point provides recommendations on how the enterprises can act in line with expectations in the OECD guidelines. In its handling of complaints, the OECD Contact Point can be a forum for helping to resolve issues arising in connection with the implementation of the guidelines, including issues concerning human rights matters. If the parties agree, the OECD Contact Point may also facilitate and contribute to consensus-oriented solutions such as settlement or mediation to help the parties resolve the matter.[349]

The Norwegian Contact Point has dealt with complaints against enterprises about, among other things, indigenous peoples' rights, the right to organise and engage in collective bargaining and other human rights. In a separate compendium, the Contact Point has referred to ten "ground-breaking complaints" against various companies.[350]

One example of the OECD Contact Point's handling of complaints in indigenous peoples' issues is the case *Jinjievaerie Sameby v Statkraft* on the establishment of a wind farm in a Sami reindeer grazing area in Sweden. The Swedish and Norwegian OECD Contact Points considered the case in 2013. The dialogue (mediation) did not lead to an agreement between the parties, but a final declaration was issued by the Contact Points in 2014. The Contact Points found no basis for concluding that Statkraft had failed to comply with OECD guidelines, although it pointed to "room for improvement" on some points.[351]

6.4 Enactment of enterprises' human rights responsibility - the Transparency Act

Corporate human rights responsibility is a new area of law under rapid international development. In June 2021, Parliament adopted a new law on the transparency and work of enterprises with basic human rights and decent

[348] For more information about Norway's OECD Contact Point for responsible business, see their website: https://www.responsiblebusiness.no/.

[349] OECD Guidelines for Multinational Enterprises, p. 72 onwards.

[350] OECD, "20 år med nasjonale kontaktpunkt – Ti banebrytende klagesaker om etterlevelse av OECDs retningslinjer for ansvarlig næringsliv ("20 Years of National Contact Points - Ten ground-breaking complaints about compliance with the OECD Guidelines for Responsible Business") (National Contact Point OECD Guidelines for Multinational Enterprises, 2020).

[351] Experiences from i.a. this process was discussed at a seminar organised by the OECD Contact Point and NHRI in June 2019 in Karasjok. The theme was key issues for the Sami faced with wind power and mining development. Participants from the Sami Parliament, the Sami civil society, Jinjievaerie Sameby, Fiettar reindeer grazing district, Kvalsund municipality and the business community, as well as other participants, exchanged views and discussed important issues related to human rights, reindeer husbandry and industrial establishment in reindeer husbandry areas. Both the international law background and the OECD's guide for stakeholder dialogue, e.g. on indigenous peoples' interests, as well as indigenous law challenges and how such conflicts are dealt with in practice, were discussed and summarised in a report from the seminar, the Norway's National Institution for Human Rights and the OECD's Contact Point for responsible business, *Natural Resource Development, Business and the Rights of Indigenous Peoples* (Karasjok, 2019).

working conditions, the so-called Transparency Act.[352]

In the Act, larger enterprises are required to carry out due diligence. This obligation covers some of the areas in the OECD Guidelines, the enterprises shall, according to Section 4(b) "identify and assess actual and potential adverse impacts on *fundamental human rights* and *decent working conditions*" (our emphasis).[353] The reference to basic human rights includes, among other things, ICCPR Article 27 and ILO 169.[354]

The obligations under the Act apply to one's own business and to responsibilities directly related to the business through supply chains or business partners both inside and outside Norway.[355] It may also include hindering or preventing negative impacts outside the business itself – for example, negative impact on indigenous peoples or local population.[356]

The obligation to carry out due diligence is limited to larger enterprises.[357] This includes both private companies and state-owned enterprises.[358] This obligation will therefore include larger enterprises wishing to interfere in Sami areas of use.[359] The Government, however, expects that all companies, including those that fall outside the scope of the Transparency Act, know and follow UNGP and OECD guidelines and carry out due diligence.[360]

The obligation to carry out due diligence entails, among other things, that the relevant companies, when planning a development in Sami areas of use, must make such assessments that are in line with the assessment themes in ICCPR Article 27, and not to implement projects that will have a substantive negative impact on the Sami traditional practices. The due diligence will therefore have to include, among other things, evaluations of how impact assessments can be carried out in a responsible manner, assessments of cumulative effects over time, remedial measures and how consultations can be carried out in accordance with the rules in the Sami Act. The due diligence obligation includes the companies' acts or omissions that may lead to violations of the right to life, property and privacy, as well as the right to cultural practice according to ICCPR Article 27, through climate damage.

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[352] Act relating to enterprises' transparency and work on fundamental human rights and decent work conditions (Transparency Act) of 18 June 2021. The Act enters into force on 1 July 2022.

[353] The Transparency Act Section 4 (b).

[354] Prop. (Law Proposal to Parliament) 150 L pp. 15 onwards, 17, 37, 106.

[355] Prop. (Law Proposal to Parliament) 150 L p. 118, cf. p. 107 onwards.

[356] Prop. (Law Proposal to Parliament) 150 L p. 69.

[357] The Transparency Act Section 3. By larger enterprises, it is meant enterprises that are covered by the Accounting Act Section 1-5, or which on the date of financial statements exceed the threshold for two of the following three conditions, sales revenue of NOK 70 million, balance sheet total of NOK 35 million or average number of employees in the financial year: 50 full-time equivalent. It is still expected, however, that other enterprises also know and comply with UNGP and OECD guidelines, including the due diligence that follow from these.

[358] Prop. (Law Proposal to Parliament) 150 L p. 47.

[359] The implementation of the UNGP and OECD guidelines for multinational enterprises in the finance sector will also be strengthened through two relatively new EU regulations, Regulation (EU) 2019/2088 on the publication of sustainability information in the financial sector and Regulation (EU) 2020/852 on the classification system for various sustainable activities. Compliance with human rights responsibility is a sustainability factor in both EU regulations, which the Financial Supervisory Authority of Norway (Finanstilsynet) proposes to implement in a new law on information on sustainability.

[360] Prop. (Law Proposal to Parliament) 150 L p. 31. The Transparency Act does not replace the international principles.

7. The Way Forward

ICCPR Article 27 applies as Norwegian law and it has precedence in conflict with other laws, but the assessment topics in this provision should have a clearer footprint in national law. For both the Sami and the developers, a more detailed regulation would provide a greater degree of due process and predictability in this important area of law.

7.1 Introduction

This report deals with how the international law rules on indigenous peoples' protection against interferences in nature have been interpreted and applied by the UN Human Rights Committee, and by Norwegian courts and administrative bodies. Regulating interferences in nature and indigenous peoples' rights to cultural practice, is however, a dynamic field. Several developments are worth noting. Recently, the right to consultation has been included in the Sami Act.[361] The Minerals Act Committee's ongoing work and the Wind Power Report to Parliament from 2020 also provide important guidelines for how indigenous peoples' rights should be taken into account. The new Transparency Act (discussed in Chapter 6) will also be significant.[362] Last, but not least, the *Fosen* judgment, by the Supreme Court in the autumn of 2021, provides important legal clarifications on indigenous peoples' rights in Norway.[363]

At the same time, new knowledge is constantly being generated, both concerning the actual consequences of interferences and the need for protection of indigenous peoples' cultural and business practices, as well as about the need for intervention. The climate crisis will also increasingly affect the rights of indigenous peoples.

7.2 Developments

7.2.1 Enactment of rights to consultations

An important recent development has been the statutory addition to the Sami Act on the right to consultation. All the cases mentioned in the chapter on administrative practice (Chapter 5) were dealt with before this right was enacted. In interference relating to ICCPR Article 27 and/or ILO 169, consultations are important, not only for the quality and legitimacy of the decisions, but also as part of the legality assessments pursuant to Article 27. There has been a development towards more focus on assessments of Sami conditions in these processes, including on consultations, cumulative effects and remedial measures. It is often difficult, however, based on the administrative decisions discussed in this report, to assess whether the consultations have started early enough, and whether they have provided the opportunity for effective participation and how far one has gone to reach agreement. As mentioned in Chapter 5.3.3, the Norwegian NHRI's own limited examination of the scope, topics and outcome of consultations between the Sami Parliament and state

[361] Sami Act, Chapter 4 on consultations, adopted on 11 July 2021.
[362] See Chapter 6.4.
[363] See Chapter 4.

authorities in the period 2005–2017 shows that consultations are seldom sufficient to achieve agreement between the Sami Parliament and state authorities, and that particularly in land-use interference and land management matters, agreement is not reached.[364]

7.2.2 The Report to Parliament on land-based wind power

In its Wind Power Report from 2020, the Government proposed a number of updates to the licensing processes in wind power cases.[365] These include:

- A shorter and stricter time period for the licensing process.
- Possibility to reject the plans early in the process.
- Clearer terms in the framework for the licence.
- Better connection between assessment, license and detailed plans.
- Strengthened supervision of the licensee's responsibility for ensuring compliance with the licence conditions during construction and in the operational phase.[366]

In the Report to Parliament, significant changes are proposed to the roles of the various actors, as well as changes in the licensing process and supervision. This includes, among other things, better and earlier involvement of reindeer husbandry, increased participation in impact assessments, updated requirements for the impact assessments, greater emphasis on cumulative effects, clearer conditions for remedial measures, coordination of objections and consultation.[367]

Conditions for prioritisation in the licensing process are emphasised in the report:

> Licencing applications containing documentation of participation from reindeer husbandry in the studies and an agreement on remedial and compensatory measures will be given priority in the licensing process over applications that do not have good documentation of these conditions.[368]

The Wind Power Report also warns that the developers' choice of who will carry out the impact assessment should be discussed in more detail with those involved in reindeer husbandry in advance, in order to ensure confidence in the processes.[369] In light of the impact assessment's often key importance in ICCPR Article 27 assessments, questions may be raised as to whether this is sufficient to

[364] The survey is discussed in more detail in NHRI's annual report for 2018, as well as in NHRI's letter to the Ministry of Local Government and Regional Development (KDD) of 26 June 2019 on state authorities and the Sami Parliament's experiences with indigenous law consultations. In the Sami Parliament's annual report for 2020, there is an overview of selected consultations with the authorities in 2020. Of the cases that were closed, the vast majority ended with agreement or partial agreement. In two cases concerning the environment and area, however, no agreement was reached, the Sami Parliament's annual report 2020.
[365] Meld. St. (Report to Parliament) 28 (2019–2020) Vindkraft på land - Endringer i konsesjonsbehandlingen (Wind power on land - Changes in the licensing process).
[366] Meld. St. (Report to Parliament) 28 (2019–2020) Vindkraft på land (Wind power on land), p. 31 onwards, 38 and 42 onwards.
[367] Meld. St. (Report to Parliament) 28 (2019–2020) Vindkraft på land (Wind power on land), p. 40 onwards.
[368] Meld. St. (Report to Parliament) 28 (2019–2020) Vindkraft på land - Endringer i konsesjonsbehandlingen (Wind power on land - Changes in the licensing process), p. 40.
[369] Report. St. 28 (2019–2020) Vindkraft på land - Endringer i konsesjonsbehandlingen (Wind power on land - Changes in the licensing process), p. 40.

ensure that impact assessments are carried out by independent professional bodies, as implied in the Human Rights Committee's view on impact assessments, see Chapter 5.3.1. It may also be questioned whether the overall amendments of the procedural measures will be sufficient to meet the requirements for impact assessments pursuant to ILO 169.[370]

A question for the future is whether the procedural measures announced in the Wind Power Report will also apply to other parts of the energy sector and other sectors of society where similar licensing processes may be relevant.[371] It is currently unclear at what normative level several of the measures will be followed up, whether it will be through guidelines, regulatory changes or legislative changes.

The announced measures in the Wind Power Report do not include the question of how the authorities should proceed in their assessments of the threshold pursuant to ICCPR Article 27. Also, there is no mention of possible changes in the practice of pre-accession to developments (permission to start construction before the validity of the licence is final).

7.2.3 The Minerals Act

The Minerals Act Committee, which was appointed in 2020, will present its proposal for amendments to the Minerals Act by 1 July 2022.

It follows from the mandate that the Committee shall especially consider Sami interests, including reindeer husbandry, and base its work on Norwegian obligations under international law. Among other things, the Committee's purpose is to "ensure that regulatory processes within the framework of the Minerals Act meet international legal obligations, clarify how the obligations are to be complied with and streamline them".[372]

The mandate also states that "The Committee shall assess how the Act can better facilitate necessary clarifications with rights holders, including reindeer husbandry". The Committee shall also propose a solution that gives the Sami a share of the utility value related to mineral activities in the traditional Sami area.

The Commission has also been tasked with "proposing how Norway's obligations to the Sami under international law can be operationalised in the Minerals Act through specific procedural rules".[373] This part of the assignment may contribute to clarifications with regard to requirements for impact assessments, consultations and other procedural frameworks regarding interference cases in the mineral field.

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[370] See Chapter 3.6.2.

[371] For example, hydropower developments, roads, railways, power lines, military firing and training ranges and larger mineral activities.

[372] See the Minerals Act Committee's mandate Section 3.5, see the Ministry of Trade, Industry and Fisheries, "Mandat for lovutvalg som skal utarbeide forslag til revidert lov om erverv og utvinning av mineralressurser (mineralloven)" ("Mandate for a law committee to prepare a proposal for a revised act relating to the acquisition and extraction of mineral resources [the Minerals Act]"). The Committee shall submit its recommendation in the form of a Norwegian public report by 1 July 2022.

[373] Ministry of Trade, Industry and Fisheries, "Mandat for lovutvalg som skal utarbeide forslag til revidert lov om erverv og utvinning av mineralressurser (mineralloven)" ("Mandate for a law committee to prepare a proposal for a revised act relating to the acquisition and extraction of mineral resources [the Minerals Act]"), p. 4. The Committee has been given a postponed deadline of 1 July 2022, see https://www.regjeringen.no/no/dokumentarkiv/regjeringen-solberg/aktuelt-regjeringen-solberg/nfd/nyheter/nyheter-2020/vil-ha-lonnsom-og-barekraftig-mineralvirksomhet/id2715431/.

7.2.4 Climate, environment, and indigenous peoples' human rights

Indigenous peoples will often, because their cultural practice is linked to the nature in which they live, be hard hit by climate change. The loss of natural areas and ecosystems also affects indigenous peoples to a great extent. Biodiversity is being lost at an alarming rate.[374] The reason is primarily the decommissioning of natural areas through land use and other interferences.[375] As concerns reindeer husbandry, increased temperatures will lead to overgrowth and elevation of tree boundaries, as well as uncertain winters, with an increased likelihood of more frequent freezing and thawing with subsequent "locking" of pastures. Competing land use and other interferences reduce the flexibility and ability of reindeer herders to adapt to the changing conditions.[376] Not only interventions intended to counter climate change, but also interventions that cause greenhouse gas emissions and environmental damage must be seen in the context of indigenous peoples' human rights protection.

The discussion concerning the relationship between climate and human rights in general is now undergoing rapid development, including in the form of proceedings before national and international courts and monitoring bodies.[377]

Issues concerning climate change and indigenous peoples' human rights are also on the agenda. A case concerning this has been communicated to the Human Rights Committee by an indigenous peoples group in Australia.[378] A group of *Torres Strait Islanders* claim that their right to cultural practice under ICCPR Article 27 (as well as ICCPR 6 on the right to life and ICCPR 17 on the right to privacy) has been violated because the Australian Government does not have adequate plans and measures to reduce greenhouse gases, while at the same time not taking adequate measures to prevent damage due to rising water levels. The case was submitted in 2019 and is still under consideration by the Human Rights Committee.

Also in other international monitoring bodies, issues concerning climate and human rights are on the agenda, but without being directly

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[374] CBD Global Biodiversity Outlook 5, https://www.cbd.int/gbo/gbo5/publication/gbo-5-en.pdf.

[375] Simon Jakobsson, Bård Pedersen (ed.), NINA p. 10 Naturindeks for Norge 2020, Tilstand og utvikling for biologisk mangfold (Nature index for Norway 2020, Condition and development for biological diversity), p. 10, NINA 2020, https://www.miljodirektoratet.no/globalassets/publikasjoner/m1800/naturindeksfornorge2020_m1800.pdf.

[376] Jan Åge Riseth, Hans Tømmervik, Klimautfordringer og arealforvaltning for reindrifta i Norge (Climate challenges and land management for reindeer husbandry in Norway), NORUT-Northern Research Institute, Report 6/2017, p. 9. In the Solberg Government's Report to Parliament on reindeer husbandry, Meld. St. (Report to Parliament) 32 (2016–2017) p. 50, states that "Endringer i klimaet har de siste årene økt risikoen for ulykker. Innsjøer og elver som tidligere har vært trygge å passere, er ikke lenger like trygge. Tilsvarende er områder blitt mer skredutsatt" ("Climate change has in recent years increased the risk of accidents. Lakes and rivers that were previously safe to cross are no longer as safe. Similarly, areas have become more prone to landslides").

[377] The ECtHR communicated its first climate case in November 2020, *Duarte Agostinho and Others v Portugal and 32 other states* (39371/20), 2020. The second case, *Verein Klimaseniorinnen Schweiz and Others v Switzerland*, was communicated in April 2021.

[378] *Billy et al. v Australia*, Communication No. 3624/2019 (pending). For a summary of the case, see Climate Change Litigation Databases, "Petition of Torres Strait Islanders to the United Nations Human Rights Committee Alleging Violations Stemming from Australia's Inaction on Climate Change". http://climatecasechart.com/climate-change-litigation/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/

linked to indigenous peoples.[379] The ECtHR has (per April 2022) three cases concerning climate and human rights under consideration,[380] but has not yet decided whether the right to protection against harmful climate change is covered by the Convention. Among the issues considered by ECtHR are whether Article 2 (the right to life) and 8 (the right to privacy) contain an obligation for states to prevent the risk of dangerous climate change. The outcome of these cases in ECtHR may have an impact on indigenous peoples' right to protection against harmful climate change.

7.3 Increased knowledge

New knowledge is constantly being generated about actual conditions that are of importance for the rights of indigenous peoples in interference cases.[381] In 2020, Statistics Norway (SSB) published an analysis on the consequences of development for reindeer husbandry.[382] The analysis showed how large areas are affected by development and what consequences this will have for reindeer's use of these areas.

It shows that knowledge about interferences in Sami traditional areas is a good example of knowledge that, when updated on a regular basis, can contribute to overall land management and an overall safeguard of the natural basis for Sami culture.

In the work on the development of the Regional Plan for Reindeer Husbandry in Troms, a comprehensive regional intervention analysis for reindeer husbandry has been prepared.[383] This provides important knowledge about the overall regional impact on reindeer husbandry, which appears to be a good tool in future planning for utilisation of natural resources.[384]

In 2017, the Norwegian Institute for Nature Research published a report on wind power and reindeer.[385] This report points to the need for more research on the overall effects of wind power plants and other pressures in relation to reindeer, including remedial measures, and more integration of experience-based knowledge in the research. This type of research may be key to future impact analyses and may contribute to laying important premises for decisions.

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[379] These questions, including practice from the ECtHR, are discussed in more detail in NHRI's report *Climate and Human Rights*, see p. 85 onwards.

[380] *Duarte Agostinho et al. v Portugal* and 32 other states (39371/20), *Verein Klimaseniorinnen Schweiz et al. v Switzerland* (53600/20), and *Greenpeace Nordic and Others v. Norway* (34068/21).

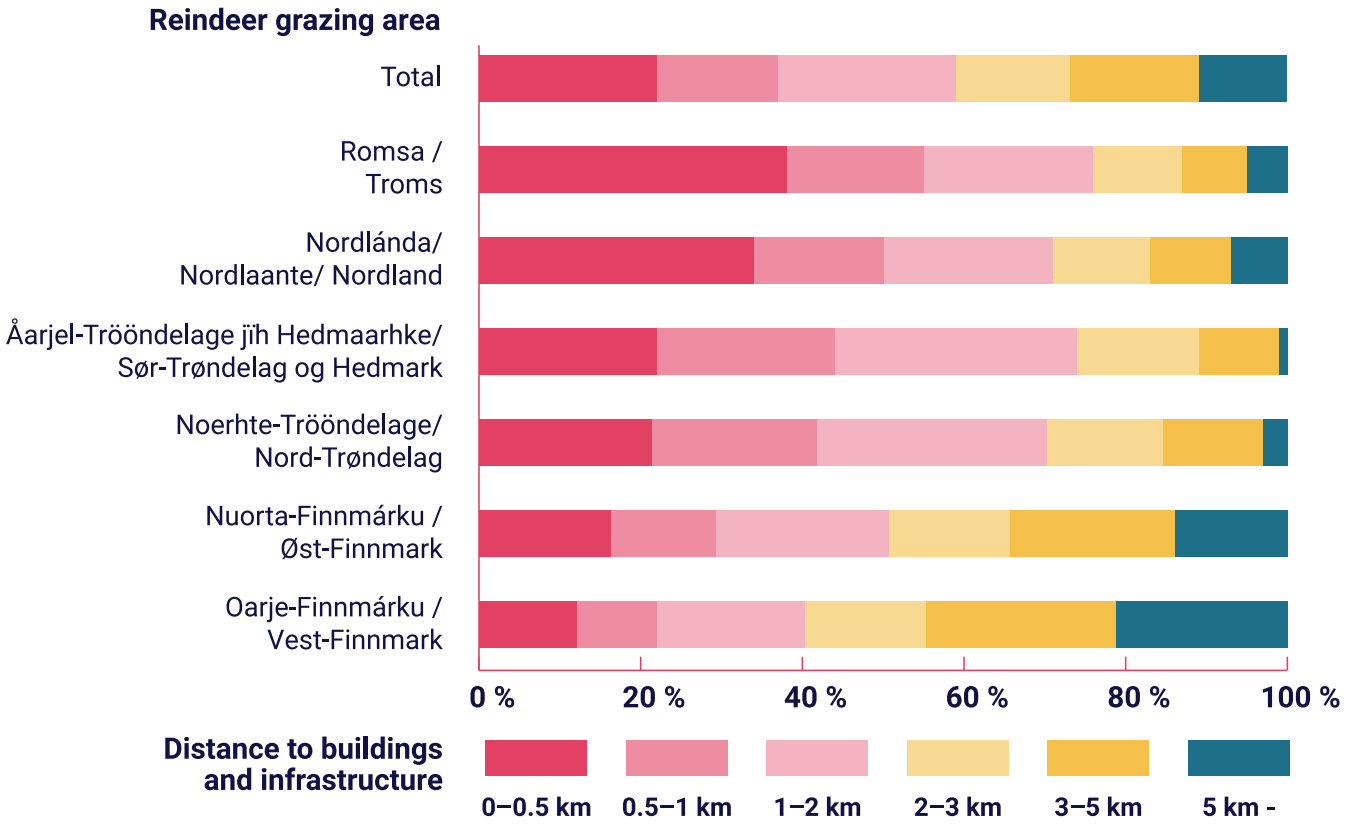
[381] NHRI has pointed out that systematised data is important for the implementation of indigenous peoples' human rights in a number of areas in society. See NHRI's report *A human rights approach to Sami statistics in Norway*.

[382] Erik Engelien, Iulie Aslaksen, and Jørn Kristian Undelstvedt, "Utbygging får konsekvenser for reinbeiteområder" ("Development has consequences for reindeer grazing areas"), 16 (SSB, 2020), https://www.ssb.no/natur-og-miljo/artikler-og-publikasjoner/utbygging-father-consequences-for-reindeer grazing areas.

[383] Information and the plan for this work can be read here: https://www.tffk.no/tjenester/plan-og-horinger/ pagaende-planarbeid/regional-plan-for-reindrift/.

[384] Jan Åge Riseth and Bernt Johansen, "Inngrepskartlegging for reindrifta i Troms fylke. På oppdrag fra Troms Fylkeskommune" ("Intervention survey for reindeer husbandry in Troms County. On behalf of Troms County Municipality") (Norut, 2019), https://www.tffk.no/_f/p1/ib5af7653-5341-4032-bc07-078f719dc5e5/ inngrepsanalyse.pdf.

[385] Olav Strand et al., "Vindkraft og reinsdyr – En kunnskapssyntese" ("Wind power and reindeer - A knowledge synthesis") (Trondheim: Nina, 2017).



Proportion of grazing area by distance to buildings and infrastructure (2018). Source: Statistics Norway and the Norwegian Directorate of Agriculture.

New research from Sweden shows that reindeer and reindeer husbandry are negatively affected by wind power developments. The cumulative negative effects of wind power in addition to other interventions for reindeer husbandry are considerable. On top of this come other influencing factors such as predator populations and climate change. This entail complex connections between these various influencing factors, which should be considered by the authorities in the planning of wind power.[386]

Another interesting development is the emergence of reindeer husbandry studies in interference cases, carried out by persons with academic and Sami reindeer husbandry expertise in cooperation with the affected reindeer herders. These studies, which to a large extent are based on traditional knowledge

[386] Anna Skarin, Per Sandström, Bernardo Brandão Niebuhr, Moudud Alam and Sven Adler, "Renar, renskötsel och vindkraft" ("Reindeer, reindeer husbandry and wind power"), (Naturvårdsverket 2021) pp. 7 onwards, 111 onwards. The research was carried out by the Swedish University of Agricultural Sciences and Dalarna University, in the research program Vindval which is a collaboration between the Swedish Energy Agency and the Swedish Environmental Protection Agency, in collaboration with representatives from Mittådalen, Tåssåsen and Malå Sami villages. The number of wind turbines in the reindeer husbandry area in northern Sweden has increased from 43 in 2003, to 1557 in 2021. https://www.naturvardsverket.se/globalassets/media/publikationer-pdf/7000/978-91-620-7011-3.pdf.

about reindeer, reindeer husbandry, snow, weather, grazing conditions and previous interferences, often come to different conclusions concerning the negative effects than the regular impact assessments.[387]

There is a great need for more knowledge and research on the impact of developments on reindeer husbandry and Sami conditions, particularly on cumulative effects and what may be appropriate remedial measures. The research from Sweden, as mentioned above, is an example where the traditional knowledge of reindeer herders is included in the research. As shown in Chapter 5 on administrative practice, the knowledge base is of central and often decisive importance in interference cases.

There is also no knowledge of the cumulative effects of interferences in relation to how quickly the areas within the overall Sami reindeer herding area are being reduced, and what impact this will have on Sami culture. There is a "bit by bit" reduction, without there being an overall view that says what this actually means for Sami culture in general. This is serious, and must be seen in relation to the Constitution's overarching obligation to facilitate the development of Sami culture. It is also serious that this type of knowledge is lacking for the entire Sami reindeer herding area in Norway, Sweden and Finland. There is not enough knowledge of how the increased rate of interferences will affect Sami cultural practice as a whole.

7.4 Need for further regulation?

An overarching legislative development seems to be a strengthening of the consideration of Sami culture and a strengthening of the procedural rules for Sami participation in decision-making processes. The enactment of the right to consultation, and provisions on assessments of, among other things, cumulative effects and remedial measures in the Impact Assessment Regulations, as well as measures to improve involvement in the licensing processes, are examples of this.[388] Another example is the Minerals Act, which contains procedural rights for the Sami Parliament and reindeer husbandry, and where the study by the Minerals Act Committee is likely to strengthen these. The same applies to the Nature Diversity Act.[389] In this context, it should be considered that the Energy Act, which regulates wind power developments, has not been part of this development, despite the fact that wind power accounts for the largest share of interferences in Sami areas of use in recent times.

Strengthening procedural rights is an important contribution to the implementation of ICCPR Article 27 and ILO 169, but this does not provide guidance on how the authorities should proceed in the actual assessment of the material content of Article 27. In its White Paper on the enactment of the obligation to consult,

[387] Tim Valio, Anders Johansen Eira and Svein Ole Granefjell, "Inngrepskartlegging og reindriftsfaglig utredning i forhold til Øyfjellet vindkraftverk ("Intervention surveying and reindeer husbandry assessment in relation to the Øyfjellet wind farm"), (Foundation Protect Sápmi 2019), p. 83 onwards. http://protectsapmi.com/assets/Documents/Ojfjellet-Vindpark /Utredning-endelig-juni-2019.pdf. Anders Johansen Eira, Svein Ole Granefjell, Isak Henrik Eira and Elli-Ristin Tuorda, "Analyse av virkningen for reindriften ved planlagt gruvedrift i Nussir og Ulveryggen i Kvalsund kommune" ("Analysis of the impact on reindeer husbandry at planned mining in Nussir and Ulveryggen in Kvalsund municipality"), (Foundation Protect Sápmi, 2020), p. 107 onwards. https://sametinget.no/_f/p1/i34eef697-e763-4735-8ab6-8390038be43b/analyze-av-virkningen-for-reindriften-ved-planlagt-gruvedrift-i-nussir-og-ulveryggen-i-kvalsund-kommune.pdf.

[388] Meld. St. (Report to Parliament) 28 (2019–2020) Wind power on land - Changes in the licensing process, p. 39.

[389] Nature Diversity Act, lov-2009-06-19-100.

the Ministry signalled that in the follow-up of the Sami Rights Committee's report, there are no plans to introduce common procedural rules for Sami cases for the administration.[390] It will be up to each ministry to individually consider the processing of ICCPR Article 27 cases in their sector. At the same time, the White Paper states that the proposal for overall regulation of the material threshold in Article 27 will be considered in the further follow-up of the Sami Rights Committee's proposal.[391]

There may be good reasons for considering this. The threshold for violation of ICCPR Article 27 in interference cases is not only high, it is also unclear. It may therefore be asked whether it is now time for the assessment topics in Article 27 to get a clearer footprint nationally, either in law or other regulations, even if the provision itself applies directly as Norwegian law. For legal practitioners, a more detailed instruction on assessment topics and weighting between them would have provided better guidance. For both rights holders and developers, a more detailed regulation would provide a greater degree of predictability. This threshold is of great importance for persons and groups covered by the protection of the provision, as well as for licence-seeking enterprises. There is much at stake both for the affected Sami and for the developers in a licensing process. The case concerning wind power at Fosen shows with all possible emphasis that there is a need to clarify which factors must be included in an overall assessment of whether a measure is approaching the limit for violation of ICCPR Article 27, and how these factors should be weighted.

The *Fosen* case also shows that issues concerning impact assessments should be considered in more detail, including the question of the independence of the investigator, which the Human Rights Committee has emphasised.[392] It is important that the public sector contributes at all times in ensuring the necessary factual basis for assessing the cumulative effect of various measures, so that the ongoing assessments are based on solid, objective factual bases.

The question of whether the practice of allowing the actual development in accordance with the licence to proceed *before* the question of the validity of the licence has legally been decided, will also be a topic that should be considered further after the *Fosen* judgment.

One challenge in interference cases is that there is often a considerable lack of "equality of arms" in the balance of strength between the parties. There will typically be reindeer grazing districts on the one hand, and large companies or the state on the other, that stand against each other in interference cases, in processes that can often become lengthy and costly. It is important to consider how this can be compensated through legal aid and the distribution of legal costs.

The practices of the Ministry of Petroleum and Energy (MPE) and the Ministry of Trade, Industry and Fisheries (MTIF) show that the requirements in ICCPR Article 27, according to the Human Rights Committees' interpretations, are being considered in licensing processes, but the *Fosen* judgment shows that the weighting of the factors in Article 27 came out askew. The MPE's licensing decision in the case shows that the state here emphasised a

[390] Prop. (Law Proposal to Parliament) 86 L (2020–2021), p. 103.
[391] Prop. (Law Proposal to Parliament) 86 L (2020–2021), p. 104.
[392] HRC, *Poma Poma*, para. 7.7.

balancing of interests, which the Ministry itself abandoned in its later decisions, and for which there proved to be no support in the Supreme Court.

Although the threshold for ICCPR Article 27 will ultimately have to be considered specifically in each individual case, further clarification and possible regulation may contribute to increasing legal protection and predictability in this important area of law.

Source list

Conventions/Covenants

European Convention on Human Rights (ECHR), 4 November 1950.

UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 7 March 1965.

UN International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966.

UN International Covenant on Civil and Political Rights (ICCPR), 16 December 1966.

Vienna Convention on the Law of Treaties, 22 May 1969.

UN Convention on the Rights of the Child, 20 November 1989.

ILO Indigenous and Tribal Peoples Convention, 27 June 1989.

Convention on Biological Diversity (CBD), 5 June 1992.

European Charter for Regional or Minority Languages, 25 June 1992.

European Framework Convention for the Protection of National Minorities, 10 November 1994.

Other International Instruments

UN Universal Declaration of Human Rights, 1948.

UN Declaration on the Rights of Indigenous Peoples (UNDRIP), 13 September 2007.

UN Guiding Principles on Business and Human Rights (UNGP), 16 June 2011.

OECD Guidelines for Multinational Enterprises, 2011 Edition.

Laws and Regulations

Constitution of the Kingdom of Norway, 17 May 1814.

Energy Act, 29 June 1990.

Human Rights Act, 21 May 1999.

Finnmark Act, 17 June 2005.

Reindeer Husbandry Act, 15 June 2007.

Planning and Building Act, 27 June 2008.

Minerals Act, 19 June 2009.

Nature Diversity Act, 19 June 2009.

Tana Act, 20 June 2014.

Equality and Anti-Discrimination Act, 16 June 2017.

Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), 18 June 2021.

The Impact Assessment Regulations, 21 June 2017.

Preparatory Works for Laws and Public Reports

NOU 1984:18 Om samenes rettsstilling (On the legal position of the Sami) (Sami Rights Committee I).

St.prp. nr. 80 (1997–98) Om samtykke til ratifikasjon av Europarådets rammekonvensjon (On consent to ratification of the Council of Europe Framework Convention), 1 February 1995.

NOU 2007:13 Den nye Sameretten – Utredning fra Samerettsutvalget (The New Sami Right - Report from the Sami Rights Committee) (Sami Rights Committee II).

NOU 2008:5 Retten til fiske i havet utenfor Finnmark (The right to fish in the sea off Finnmark).

Prop. (Law Proposal to Parliament) 86 L (2020–2021) Endringer i sameloven mv. (konsultasjoner) (Changes in the Sami Act, etc. [consultations]).

Prop. (Law Proposal to Parliament) 150 L (2020–2021) Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (Act on Business Transparency and Work on Basic Human Rights and Decent Working Conditions) (Transparency Act).

Innst. O nr. 80 (2004–2005) Innstilling fra justiskomiteen om lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke (Recommendation from the Justice Committee on the Act on Legal Relations and Management of Land and Natural Resources in Finnmark County) (Finnmark Act), to Ot.prp. no. 53 (2002–2003).

Parliament

Document 16 (2011–2012) Rapport til Stortingets presidentskap fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (Report to Parliament's Presidency from the Human Rights Committee on Human Rights in the Constitution (submitted 19 December 2011).

Sami Parliament

Sami Parliament Annual Report 2020.

UN Human Rights Committee

HRC General Comment No. 12: Article 1, Right to Self-determination (1984).

HRC General Comment No. 23: Article 27, Rights of Minorities (1994).

HRC, *Sandra Lovelace v Canada* (Communication No. 24/1977).

HRC, *Lubicon Lake Band v Canada* (Communication No. 167/1984).

HRC, *Kitok v Sweden* (Communication No. 197/1985).

HRC, *Ilmari Länsman et al. v Finland* (Communication No. 511/1992).

HRC, *Apirana Mahuika et al. v New Zealand* (Communication No. 547/1993).

HRC, *Jouni Länsman et al. v Finland* (Communication No. 671/1995).

HRC, *Diergaardt et al. v Namibia* (Communication No. 760/1997).

HRC, *Howard v Canada* (Communication No. 879/1999).

HRC, *Jouni Länsman et al. v Finland* (Communication No. 1023/2001).

HRC, *Poma Poma v Peru* (Communication No. 1457/2006).

HRC, *Tiina Sanila-Aikio v Finland* (Communication 2668/2015).

HRC, *Näkkäläjärvi et al. v Finland* (Communication No. 2950/2017).

HRC, *Billy et al. v Australia* (Communication No. 3624/2019), (pending).

UN Committee on the Elimination of Racial Discrimination

CERD General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination.

CERD, *Vapsten sameby v Sweden* (CERD/C/102/D/54/2013).

UN Documents

Minority rights: International standards and guidance for implementation (HR/ PUB/10/3), 2010.

UN Department of Economic and Social Affairs Policy Brief #101: Challenges and Opportunities for Indigenous Peoples' Sustainability.

UN Human Rights Council, Free, prior and informed consent; a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) (A/HRC/39/62), 2018.

UN Human Rights Council, Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries (EMRIP), (A/HRC/EMRIP/2012/CRP.1), 2012.

International Court of Justice (ICJ)

Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), 30 November 2010.

ILO

ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual, 2003.

Handbook for ILO Tripartite Constituents Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169), 2013.

Comments submitted by the ILO Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples Eleventh Session, 9–13 July 2018 Item 4: Study on free, prior and informed consent, 2018.

European Court of Human Rights (ECtHR)

James et al. v United Kingdom (8793/79), 1986.

Duarte Agostinho and Others v Portugal and 32 Other States (39371/20), 2020.

Lindheim et al. v Norway (13221/08 and 2139/10), 2012.

Verein Klimaseniorinnen Schweiz and Others v Switzerland, submitted September 2021.

Supreme Court Judgments

Rt. 1982 p. 241 (*Alta*).

Rt. 2000 p. 1578 (*Seiland*).

Rt. 2001 p. 769 (*Selbu*).

Rt. 2001 p. 1116 (*Båndtvang*).

Rt. 2001 p. 1229 (*Svartskog*).

Rt. 2004 p. 1092 (*Stonglandshalvøya*).

Rt. 2006 p. 1382 (*Utsi*).

Rt. 2008 p. 513.

Rt. 2008 p. 1764 (*Restauratør*).

Rt. 2008 p. 1789 (*Hjertestikk*).

Rt. 2009 p. 1261.

Rt. 2015 p. 93 (*Maria*).

HR-2016-2030-A (*Stjernøya*).

HR-2016-2591-A.

HR-2017-2247-A (*Reinøya*).

HR-2017-2428-A (*Sara*).

HR-2018-456-P (*Nesseby*).

HR-2018-872-A (*Femund sijte*).

HR-2019-2395-A (*Sara judgment II*).

HR-2021-1975-S (*Fosen*).

Court of Appeal

LF-2018-150314 – LF-2018-150323 – LF-2018-150327 (*Fosen*).

Supreme Administrative Court, Sweden

Supreme Administrative Court judgment, 29 October 2014, Case no. 7425–7427-13.

Decisions and documents from ministries

Ministry of Trade, Industry and Fisheries
Kgl. res. 29. november 2019. Avslag på klage over Nærings- og fiskeridepartementets vedtak 14. februar 2019 om tildeling av driftskonsesjon til Nussir ASA for utvinning av Repparfjord kobberforekomst. (Royal Decree 29 November 2019. Rejection of an appeal against the Ministry of Trade, Industry and Fisheries' decision of 14 February 2019 on the award of an operating license to Nussir ASA for the extraction of Repparfjord copper deposits.)

Meld. St. 8 (Report to Parliament) (2019 – 2020) Statens direkte eierskap i selskaper – Bærekraftig verdiskapning (The state's direct ownership in companies - Sustainable value creation).

Mandate for law committee that will prepare proposals for a revised law on the acquisition and extraction of mineral resources (the Minerals Act)

Ministry of Petroleum and Energy
Ministry of Petroleum and Energy decision of 26 August 2013 – the *Fosen* cases.

Ministry of Petroleum and Energy decision of 2 March 2015 – *Hammerfest*.

Ministry of Petroleum and Energy decision of 2 March 2015 – *Fálesrášša*.

Ministry of Petroleum and Energy decision of 11 November 2016 – *Kalvvatnan*.

Ministry of Petroleum and Energy decision of 16 November 2016 – *Øyfjellet og Mosjøen*.

Ministry of Petroleum and Energy decision of 19 September 2017 – *Kopperaa*.

Ministry of Petroleum and Energy decision of 19 September 2017 – Stokkfjellet.

Ministry of Petroleum and Energy decision of 15 February 2016 – appeal against decisions on effect changes (*Fosen*).

Meld. St. (Report to Parliament) 28 (2019–2020) Vindkraft på land – Endringer i konsesjonsbehandlingen (Wind power on land – Changes in the license processing).

Ministry of Foreign Affairs
Næringsliv og menneskerettigheter – Nasjonal handlingsplan for oppfølging av FNs veiledende prinsipper (Business and human rights - National action plan for follow-up of the UN's guiding principles), Ministry of Foreign Affairs, 2015.

OECD

OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, 2017.

OECD várrugasvuođa bagadallan rogganindustriija ulbmillaš berošteaddjisearvideami várás, OECD Publishing, 2017.

OECD Due Diligence Guidance for Responsible Business Conduct, OECD Publishing, 2019.

20 years of National Contact Points. Ten ground-breaking complaints about compliance with the OECD Guidelines for Responsible Business, 2020.

Norwegian Water Resources and Energy Directorate (NVE)

Norwegian Water Resources and Energy Directorate decision 18 December 2019, Øyfjellet Wind AS – Godkjenning av detaljplan, miljø-, transport- og anleggsplan og andre konsesjonsvilkår for Øyfjellet vindkraftverk (Approval of detailed plan, environmental, transport and construction plan and other license conditions for Øyfjellet wind farm), Vefsn municipality, 2019.

Norwegian Water Resources and Energy Directorate, 19 May 2020, Øyfjellet vindkraftverk – Oversendelse av seks klager på tre vedtak av 18.12.2019 og en klage på vedtak av 08.04.2020, samt begjæring om omgjøring og utsatt iverksettelse (Øyfjellet wind farm - Submission of six appeals against three decisions of 18.12.2019 and one appeal against decisions of 08.04.2020, as well as a request for conversion and postponed implementation), 2020.

Literature

ASK Rådgivning AS, and SWECO Norge AS. *Fagrapport reindrift. Konsekvenser av vindkraft- og kraftledningsprosjekter på Fosen* (*Technical report reindeer husbandry. Consequences of wind, power and power line projects at Fosen*) (2008).

Bull, Kirsti Strøm, "En kommentar til Høyesteretts forståelse av ICCPR artikkel 27 og konsultasjonsplikten" ("A commentary on the Supreme Court's understanding of ICCPR Article 27 and the obligation to consult") *Lov og Rett*, vol. 57, no. 8, 2018, pp. 504–509.

Carmen, Andrea. "Corporations and the Rights of Indigenous Peoples: Advancing the Struggle for Protection, Recognition, and Redress at the Third UN Forum on Business and Human

Rights" Cultural Survival Quarterly Magazine, 2015.

Eira, Anders Johansen, Svein Ole Granefjell, Isak Henrik Eira, Elli-Ristin Tuorda, *Analyse av virkningen for reindriften ved planlagt gruvedrift i Nussir og Ulveryggen i Kvalsund kommune* (*Analysis of the impact on reindeer husbandry during planned mining operations in Nussir and Ulveryggen in Kvalsund municipality*) (Foundation Protect Sápmi, 2020).

Engelien, Erik, Iulie Aslaksen, and Jørn Kristian Undelstvedt. *Utbygging får konsekvenser for reinbeiteområder* (*Development has consequences for reindeer grazing areas*) (SSB 2020/16).

Hellerslia, Thom Arne. "Uttalelser Fra FN-Komiteene–En Strukturell Analyse" ("Views by the UN Committees - A Structural Analysis). *Jussens Venner* 53, no. 02 (2018).

IWGIA and European Network on Indigenous Peoples. *Interpreting the UN guiding principles for indigenous peoples, Report 16* (IWGIA 2014).

Menneskerettighetene i Norge (Human Rights in Norway), Document 6 (2018–2019).

Norwegian National Human Rights Institution and OECD's Contact Point for Responsible Business. *Natural Resource Development, Business and the Rights of Indigenous Peoples.* (Karasjok, 2019).

Norwegian National Human Rights Institution. *A Human Rights-Based Approach to Sami Statistics in Norway*). (Oslo, 2020).

Norwegian National Human Rights Institution. *Climate and Human Rights*. (Oslo, 2020).

Norwegian National Human Rights Institution. *Norges nasjonale minoriteter* (*Norway's National Minorities*). (Oslo 2019).

Nowak, Manfred. *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd revised edition, N.P. Engel Publisher, 2005.

Ravna, Øyvind, *Same- og reindriftsrett* (*Sami and reindeer husbandry law*). 1st edition, Gyldendal 2019.

Riseth, Jan Åge and Hans Tømmervik. *Klimautfordringer og arealforvaltning for reindrifta i Norge* (*Climate challenges and land management for reindeer husbandry in Norway*). (NORUT – Northern Research Institute, Report 6/2017).

Riseth, Jan Åge, and Bernt Johansen. *Inngrepskartlegging for reindrifta i Troms fylke. På oppdrag fra Troms Fylkeskommune* (*Interference survey for reindeer husbandry in Troms county. On behalf of Troms County Municipality*). (NORUT – Northern Research Institute, Report 23/2018).

Shift and Mazars. *UN guiding principles reporting framework* (UNGPREPORTING 2015).

Skarin, Anna, Per Sandström, Bernardo Brandão Niebuhr, Moudud Alam, Sven Adler, *Renar, renskötsel och vindkraft* (*Reindeer, reindeer husbandry and wind power*) (Naturvårdsverket 2021).

Skogvang, Susann Funderud. *Samerett* (*Sami Law*) (3rd edition, Scandinavian University Press 2017).

Strand, Olav, Jonathan E. Colman, Sindre Eftestøl, Per Sandström, Anna Skarin, and Jørn Thomassen, *Vindkraft og reinsdyr – En kunnskapssyntese* (*Wind power and reindeer - A knowledge synthesis*) (Trondheim, Nina, 2017).

Geological Survey of Sweden, *Vägledning för prövning av gruvverksamhet* (*Guidance for testing mining operations*) (SGU Report, 2016).

Ulfstein, Geir, *Samiske folkerettslige rettigheter ved naturinngrep – Utredning for Olje- og energidepartementet i forbindelse med utbygging av kraftledninger og vindkraftverk* (*Sami international law rights in the event of interference on nature - Study for the Ministry of Petroleum and Energy in connection with the development of power lines and wind turbines*), (16.6.2013).

Valio, Tim, Anders Johansen Eira, Svein Ole Granefjell, *Inngrepskartlegging og reindriftsfaglig utredning i forhold til Øyfjellet vindkraftverk* (*Interference survey and reindeer husbandry professional assessment in relation to the Øyfjellet wind farm*) (Foundation Protect Sápmi 2019).

Winge, Nikolai K. "Konsekvensutredning i reindriftsområder" ("Impact assessment in reindeer husbandry areas"). *Tidsskrift for eiendomsrett* 12, no. 02 (2016): 101–24.

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