To: Committee of Experts on the Application of Conventions and Recommendations
International Labour Organization

Comments from the Government of Norway regarding additional submission by the Sami Parliament to Norway's report under ILO Convention No. 169

Summary

- **The Supreme Court of Norway in HR-2024-982-S (the Karasjok judgment) based its findings on the facts of the case and on existing domestic property law, and further interpretation of ILO Convention No. 169 was not necessary in the case.**
- **As ordered by the Supreme Court, the case is now to be considered further by The Uncultivated Land Tribunal based on the procedural requirements of the Finnmark Act, which is in line with ILO Convention No. 169**
- **The compatibility of the Finnmark Act with ILO Convention No. 169 must be understood having regard to the Act as a whole, as it was adopted with the unanimous approval of the Sami Parliament and as applied by the Supreme Court of Norway on several prior occasions.**
- **The Norwegian Government maintains that the Finnmark Act is in conformity with ILO Convention No. 169.**

1 Introduction

The Government of the Kingdom of Norway (the Government) presents its compliments to the Committee of Experts on the Application of Conventions and Recommendations (the Committee) and refers to the transmission 30 August 2024 of additional information submitted to the Committee by the Sami Parliament (the *Sámediggi*) regarding Norway's periodic report concerning the implementation of ILO Convention No. 169 on Indigenous and Tribal Peoples (the Convention) for the period ending 31 May 2023.

In their submission the Sami Parliament invites the Committee to investigate some aspects – regarding Article 14 of the Convention in particular – of the Supreme Court of Norway's Grand Chamber judgment 31 May 2024 (HR-2024-982-S) (the Karasjok judgment), in which the Supreme Court by a majority held that the residents of the municipality of Karasjok do not collectively own the lands within the municipality, currently held by the Finnmark estate. The Sami Parliament has appended a commissioned report by professor emeritus Geir Ulfstein, University of Oslo, covering two issues related to in the judgment, notably:

i) who are the subjects of land rights pursuant to Article 14 (1) of the Convention, and the extent of consideration of indigenous peoples' views and practices in this regard, and

ii) the status of ILO Convention 169 in Norwegian law, including whether "the practice of consistent interpretation" ('presumsjonsprinsippet') satisfies the Convention.

The Government refers at the outset to Norway's most recent periodic report, which was submitted for the Committee's consideration in September 2023. In response to the Committee's comments on Norway's report for the period ending 31 May 2013 – where the Committee had requested information on progress made regarding the survey and recognition of existing rights of indigenous peoples in Finnmark County, including information on the work of the Finnmark Commission and the Uncultivated Land Tribunal for Finnmark – the Government states as follows at p. 14:

> "The Finnmark Commission's work has been ongoing since Norway's previous report. The Commission has now completed the mapping of rights in field 1 Stjernøya/Seiland, field 2 Nesseby, field 3 Sørøya, field 4 Karasjok, field 5 Varangerhalvøya east and field 6 Varangerhalvøya west … Following the Finnmark Commission's report on rights in field 4 Karasjok, questions about ownership of land in Karasjok were brought before the Uncultivated Land Tribunal for Finnmark. The [Tribunal] passed judgment in the case on 21 April 2023. Like the majority of the Finnmark Commission, the majority of the [Tribunal] (dissent 3-2) concluded that most of the land in Karasjok Municipality is collectively owned by the people of Karasjok. The verdict has been appealed to the Supreme Court of Norway."

The Supreme Court proceedings mentioned here ended with the Karasjok judgment 31 May 2024.

While ILO reporting procedures are based on cyclic rather than continuous reporting, the Government welcomes the opportunity to furnish the Committee with more information on the Supreme Court's Grand Chamber judgment and its context and to address the two issues raised by the Sami Parliament.

2 Background: the 2005 Finnmark Act and its institutions

The Government refers the Committee to Norway's report for the period ending 31 May 2003, which was submitted to the Committee in September 2003, and evaluated by the committee later that year. The periodic report provides useful background for understanding the legal standard at issue and in operation in the Karasjok judgment. Reference is made to the report's "part I-II", with its subsection 1 entitled "Proposed Finnmark Act" setting out the legal framework and its background, and its penultimate section entitled "part I-II and IV" enumerating judgments of the Supreme Court of Norway on Sami property rights, delivered a few years prior.[1]

An unofficial translation of the then proposed Act was appended to Norway's 2003 report. At the time, however, the preparations of the Act were not complete, and for the Committee's consideration, please find enclosed an unofficial English translation of the 2005 Finnmark Act provided by the Ministry of Justice and Public Security.[2]

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[1] See Rt-2001-769 (Selbu) and Rt-2001-1229 (Svartskog).

[2] This translation includes amendments made to the Finnmark Act by Act of 20 December 2019 No. 108 (in force 1 January 2020) and all earlier amendment Acts. It does not include minor amendments made by three subsequent

Annex 1: English translation of the 2005 Finnmark Act

Unlike other land areas in Norway, not all issues regarding title of land in the county of Finnmark – which has a notable Sami population – has yet been resolved. This is reflected in Section 1 of the Act, setting out its purpose as "to facilitate the management of land and natural resources in Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of Finnmark and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life".

The Act was the result of a comprehensive legislative process spanning more than a decade, where Sami rights and interests were paramount and given considerable representation. The Committee made several observations on the process and the Government's law proposal late in 2003, and those concerns were considered during the legislative process in the Norwegian Parliament. The latter process included comprehensive consultation between the Parliamentary Standing Committee Justice and the Sami Parliament in Norway, in accordance with Articles 6 and 7 of the Convention.

The consultations ended with agreement. The Sami Parliament on 13 May 2005 unanimously gave formal consent to the Act as it was to be adopted by the Norwegian Parliament (the Storting) on 24 May 2005. The Sami Parliament's decision of prior consent is enclosed here in unofficial English translation. As a political matter, the Storting would not have adopted the Act had the Sami Parliament not given its prior consent to the draft Act.

Annex 2: The Sami Parliament's decision of prior consent to the 2005 Finnmark Act, 13 May 2005 (office translation)

The Act establishes an independent agency (the Finnmark Estate) to own and administer state owned land and natural resources in Finnmark county on behalf of all its residents, including the Sami (Chapter 2 of the Act). The agency's board comprises six members, three of which are elected by the Sami Parliament (Section 7). In practice, the Norwegian State by the 2005 Act relinquished its ownership role in Finnmark and passed its ownership rights to the Finnmark Estate. Chapter 5 of the Act further establishes two designated mechanisms for the survey and recognition of existing rights on the land nominally in the Finnmark Estate's possession:

- The Finnmark Commission was set up to "investigate rights of use and ownership to the land to be taken over by" the Finnmark Estate (Section 29) and to publish its findings inter alia on "who, in the view of the Commission, are owners of the land" (Section 33). The five-member Commission includes jurists, Finnmark residents and Sami representatives. The Finnmark Commission's reports are based on comprehensive material assembled and analysed with regard to principles of adversarial proceedings. The Commission, whose work started in 2008, is expected to finish its task by 2033. All costs are borne by the State.

- The Act institutes a special court – entitled The Uncultivated Land Tribunal for Finnmark – to consider, as a court of first instance, disputes concerning rights that arise pursuant to the findings in the Finnmark Commission's reports (Section 36). In function since 2014, the five-

amendment acts, of which only one has entered into force, which are not relevant to the issues raised by the Sami Parliament's additional submission.

member court proper comprises jurists and lay members and has Sami representation. The Supreme Court of Norway consider appeals against the Land Tribunal's decisions directly (Section 42). The State covers the costs of private parties relating to disputes before the Land Tribunal (Section 43). The Government adds that all Supreme Court cases considering appeals of decisions by the Land Tribunal thus far have concluded that private parties are exempted from liability to bear the costs of the winning party. This is also the case in the 2024 Karasjok judgment.

3 The subject of land rights and the relevance of Article 14(1) of the Convention

The Government now turns to the Sami Parliament's concerns about the Supreme Court's Karasjok judgment.

The Government is of the view that the Sami Parliament's submission portrays an incomplete picture of the Supreme Court's approach and wishes to submit the following observations.

3.1 The scope of the Supreme Court judgment

It is correct that the Supreme Court judgment in the Karasjok case does not address whether village communities, siidas or others in Karasjok have acquired property rights to smaller areas of the municipality. The Supreme Court did not address this because it was beyond the remit of the case. The issue under consideration was whether *all* inhabitants in the municipality of Karasjok, or the Sami population of the municipality, *collectively* had acquired a right of ownership to *all* land held by the Finnmark Estate within the municipal borders.

The Supreme Court concluded that the residents had not acquired ownership rights prior to the area's inclusion in the Kingdom of Norway in 1751, and that they had not acquired collective ownership rights based on immemorial usage. The Supreme Court majority adresses these questions of fact in close to 100 paragraphs of the judgment (paras. 115-202), and based on an eight-day hearing with a very considerable evidentiary material and attorneys representing all sides. In the view of the Supreme Court, no collective ownership over the entire area could be established, as the historical usage of the land was based on individual villages and reindeer herding siidas, each using their own areas within the municipality. Thus, local customs – including Sami custom – did not justify collective ownership of the entire disputed area.

That this was the sole matter before the Supreme Court is attested by the English summary prepared by the Supreme Court, which was appended to the Sami Parliament's submission to the Committee. Indeed, in para. 205 of the judgment the Supreme Court majority – as per Justice Falch – found reason to emphasise (office translation):

> "… that I have not decided as to whether individuals, village communities, siidas or others in Karasjok have in fact acquired ownership rights to "their" areas by immemorial usage. Such claims are not part of the Supreme Court's case. I mention also that the people of Karasjok in any event have considerable rights of usage to the land independently of the Finnmark Act."

The limited scope of the Supreme Court's judgment is also evident in the two main operative clauses at the very end of the decision. Item 1 states that judgment was given in favour of the Finnmark Estate to the effect that "unsold land in the municipality of Karasjok is not the collective property of the

inhabitants of the municipality" (office translation). Item 2 holds that The Uncultivated Land Tribunal's decision is vacated. This turn of phrase means that the Land Tribunal is under an obligation to reconsider the case having regard to the findings of the Supreme Court. In other words, the Supreme Court has not given a final ruling on the allocation of ownership rights on the lands in Karasjok municipality. It has found that the Land Tribunal majority's view that all residents of Karasjok municipality had collectively acquired ownership right to the land in question, was premised on an analysis of the facts of the case that the Supreme Court did not agree to, and referred the remaining questions back to the Land Tribunal for further proceedings. Decisions on how these further proceedings are to continue are currently under the jurisdiction of The Uncultivated Land Tribunal. It is, however, clearly premature to infer that the ownership over the uncultivated lands in Karasjok municipality has been decided by the courts.

3.2 The status of ILO Convention No. 169 under Norwegian law

The Sami Parliament's submission does not correctly describe the Convention's status in Norwegian law.

Section 3 of the Finnmark Act is entitled "Relationship to international law". It sets out that the Act:

> "… shall apply with the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Act shall be applied in compliance with the provisions of international law concerning indigenous peoples and minorities …"

The Standing Committee majority, which prepared the Act, at the outset considered that the Convention was not suited for incorporation. However, it placed much emphasis on the views of the Sami Parliament, which had proposed incorporation and therefore recommended a limited incorporation of the Convention: the term "with the limitations that follow" in Section 3 meant that the Convention would take precedence over the Finnmark Act if provisions of the Act were to contravene the Convention. The Convention may, however, not provide the basis of new rules not accounted for in the Act. It is is for the Storting to consider such questions.

In the Karasjok judgment the Supreme Court states as follows in para. 87 (office translation):

> "According to the first sentence of Section 3, the Finnmark Act applies "with the limitations" that follow from the Convention. The Supreme Court in the Nesseby judgment paras. 101 and 102 refers to this as "partial incorporation". This means that the Convention when in conflict with the Finnmark Act takes precedence, while on the other hand the Convention cannot "expand" the Act. It follows from the second sentence in section 3 that the Act shall be applied in compliance with the provisions of international law concerning indigenous peoples and minorities. This means that the Convention "will still be crucial in the application of the Act," see the Nesseby judgment para. 103."

While the Supreme Court has not yet finalised an English translation of the Karasjok judgment, it has published an English translation of the Nesseby judgment that the Supreme Court refers to in the quote above. The Nesseby judgment also concerned an appeal against a decision by The Uncultivated Land Tribunal for Finnmark and is enclosed herewith.

> Annex 3: English translation of the 2018 Nesseby judgment

In para. 87 of the Karasjok judgment, the Supreme Court refers to para. 103 of the Nesseby judgment, where the Supreme Court held that the interpretative importance of the Convention "also follows from

the general presumption principle, which entails that Norwegian law, as far as possible, must be interpreted in accordance with international law". The Supreme Court thus acknowledges the importance of the presumption principle in the Karasjok judgment.

Para. 87 of the Karasjok judgment further reflects the importance of the Convention as part of Norwegian law in referring to para. 102 of the Nesseby judgment, where the Supreme Court had stated as follows:

> "102. Thus, it is a matter of a partial incorporation. In its judgment HR-2016-2030-A para 76 (Stjernøya) the Supreme Court explains it as follows:
>
> > «The statement that the ILO Convention is not to be used «to expand the Finnmark Act» stresses that the incorporation was meant to be limited to the Finnmark Act's own provisions. Although the Act regulates the procedures for clarifying rights, it does not regulate the substantive rules based on which the rights are to be clarified. Moreover, the fact that rights cannot be derived «directly from the ILO Convention» is expressly stated in the majority's comments to section 5 of the Act on page 36 in the Recommendation."

The Supreme Court's English translation of the 2016 Stjernøya judgment is enclosed herewith.

Appendix 4: English translation of the 2016 Stjernøya judgment

3.3 The Supreme Court's interpretation of Article 14 of ILO Convention No. 169

Professor Ulfstein's concerns regarding what he sees as the Supreme Court's insufficient consideration of Article 14 of the Convention seem unfounded. In the view of the Government there are cogent reasons why the Supreme Court did not approach Article 14(1) in detail having direct regard to the rules of treaty interpretation as provided for in Articles 31 *et seq*. of the Vienna Convention on the Law of Treaties. The Supreme Court *did not see the need* of elaborating on how Article 14(1) of the Convention *may* be understood, as the scope of the case at hand did not warrant this examination. This is explained in the following.

It should at the outset be recalled that Article 14(1) of the Convention does not determine national property law but requires recognition and protection of already existing rights. It is for domestic law to determine, as a more practical matter, what suffices for the establishment of a right of ownership and who are owners of the land in question, having due regard to the methods customarily practiced by the (indigenous) peoples concerned. The Standing Committee preparing the Finnmark Act "observed that the Sami Parliament in the consultations have wanted a clearer reference to Article 14 of the Convention in section 5 of the Act and that the Act makes clear that the Sami people have ownership rights and rights of possession pursuant to domestic and international law". Against this background the Standing Committee majority recommended (office translation):

> "… a clarification in the [Finnmark] Act to the effect that it recognises that rights exist in Finnmark that have not yet been identified and resolved. A direct reference to international law as a basis for such rights is nonetheless problematic. ILO Convention No. 169 provides for the recognition of acquired rights. In the view of the majority one cannot derive rights directly from the Convention."

The Standing Committee further recommended a provision in the Finnmark act, to which the Sami Parliament consented, clarifying that "the survey of land must be carried out on the basis of existing domestic law" (section 29) and noted "a certain development in Supreme Court case law the last decades" that provided a basis for the acknowledgement of Sami property rights. The case law in question was submitted to the Committee in Norway's report in 2003 and mentioned above. It holds that Sami may have established rights on the basis of immemorial usage. The assessment of immemorial usage must be undertaken with reference to general Norwegian property law but with paramount regard to Sami views and perceptions, thus having regard to ILO Convention No. 169. Section 5 of the Finnmark Act reflects this case law of the Supreme Court as it provides as follows:

> "Section 5. *Relationship to established rights*
>
> Through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark.
>
> This Act does not interfere with collective and individual rights acquired by Sami and other people through prescription or immemorial usage. …
>
> In order to establish the scope and content of the rights held by the Sami and other people on the basis of prescription or immemorial usage or on some other basis, a commission shall be established to investigate rights to land and water in Finnmark and a special court to settle disputes concerning such rights, cf. chapter 5."

In chapter 5 of the Finnmark Act, the first sentence of Section 29 concerning the establishment of the Finnmark Commission reads as follows:

> "A commission (the Finnmark Commission) shall be established, which, on the basis of current national law, shall investigate rights of use and ownership to the land to be taken over by Finnmarkseiendommen pursuant to section 49."

The Supreme Court in paras. 59-61 of the Stjernøya judgment referenced further details on the background of what was to become section 5 of the Finnmark Act:

> "59. In Proposition to the Odelsting no. 53 (2002–2003), the proposal for the Finnmark Act was presented. The draft contained provisions on Finnmarkseiendommen in chapter 2 and on its management of renewable resources in chapter 3. Despite an express provision in section 5 subsections 1 and 2 stating that the Act did not entail any interference with private or collective rights acquired through prescription or immemorial usage, the draft did not contain any rules that could contribute to clarifying the scope of such rights.
>
> 60. The bill generated much debate, as many found that the proposed ownership and management model was not sufficient to comply with, among others, the ILO Convention Article 14. Upon the request of the Parliamentary Standing Committee of Justice, the Ministry procured an independent review of the bill, see Recommendation to the Odelsting no. 80 (2004–2005) page 14. In the autumn of 2003, the professors Geir Ulfstein and Hans Petter Graver, both at the Faculty of Law in Oslo, presented the report «International law review of the proposed new Finnmark Act». Their conclusion was that the government's bill was not sufficient to comply with the provisions in the ILO Convention's Article 14 no. 1 on indigenous peoples' land rights. This

> could, however, be rectified by implementation of procedures for identifying the Sami rights on the FeFo land in Finnmark in line with Article 14 no. 2. The Ministry of Justice also agreed, in a letter of 6 April 2004 to the Standing Committee of Justice, that it might be appropriate to assess supplementary measures to realise «the goals of the Convention to identify the acquired individual and collective rights» to land.
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> 61. The outcome of this process was the adding of chapter 5 on «Survey and recognition of existing rights» to the Finnmark Act with the establishment of the Finnmark Commission and the Uncultivated Land Tribunal. The Finnmark Commission's task is to «investigate rights of usage and ownership to the land to be taken over by Finnmarkseiendommen pursuant to section 49», see section 29, while the task of the Uncultivated Land Tribunal is to «consider disputes concerning rights that arise after the Finnmark Commission has investigated a field», see section 36. The fact that section 36 refers to disputes over rights to land and water, is reflected in section 5 to which a subsection 3 was added regarding this survey procedure …"

This provides a useful backdrop for the Supreme Court's approach in the Karasjok judgment, including its para. 88 (office translation; italics in original):

> "In the present case the question is not the impact of ILO Convention 169 on the application of the Finnmark Act, but what its role is regarding general *property law*. In such matters the courts "cannot derive rights directly from the ILO Convention," see [Innst.O. nr. 80 (2004-2005)] page 36 and the Stjernøya judgment para. 76. The Convention will nonetheless matter by way of the so-called *presumption principle*, as also stated in [Innst.O. nr. 80 (2004-2005)] pp. 18-19. According to this principle Norwegian law – in the present case national property law – "as far as possible must be interpreted in accordance with international law", see Nesseby judgment para. 103."

Following its conclusion based on the facts of the case, the Supreme Court in the Karasjok judgment added as follows in paras. 203, 204 and 206 (office translation; italics in original):

> "203. ILO Convention 169 does not lead to a different result. When the conditions for the acquisition of property rights through immemorial usage pursuant to domestic property law have not been met, my opinion is that Article 14 (1) does not require a recognition of a collective property right for *all* residents in Karasjok – or *all* Sami residents in the municipality – for *the whole area* in the municipality of Karasjok."
>
> 204. As I mentioned in my general review of the Convention above, the *subject* whose rights of ownership Article 14(1) first sentence requires to be recognised, must be determined based on who has *exercised* the rights of immemorial usage. Local Sami custom and legal perceptions are thus respected. When having concluded that neither usage, local Sami customs nor legal perceptions constitute collective ownership rights for the entire population in the disputed area, I cannot see that the provision requires recognition of such ownership rights.
>
> …
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> 206. I add that if Article 14(1) first sentence were to be interpreted as requiring that the entire or the Sami part of the population be granted ownership of the entire area, I would have difficulty reconciling the property law assessments with the requirements of the Convention. I would like

> to remind that rights cannot be directly derived from the Convention. However, given my interpretation and application of Article 14(1), I do not need to further consider the scope of the presumption principle."

The Government notes that professor Ulfstein's translation of a fragment of para. 206 of the judgment ("if the Convention establishes further rights than what follows from Norwegian property law, it would be difficult to reconcile with Norwegian law") differs from the interpretation given here. In the Government's view professor Ulfstein's interpretation insufficiently conveys the meaning of the Supreme Court's approach when considered in context.

In other words, as made clear in paras. 203 and 204 of the Karasjok judgment, the Supreme Court had every reason to continue to infer that Norwegian domestic law on property rights, as clarified in the Finnmark Act, the circumstances around its adoption, and subsequent case law, is in accordance with article 14 of the Convention. Hence the task of the Supreme Court was to apply Norwegian domestic law on property rights on the fact on the present case.

4 Conclusion

In conclusion, it remains the view of the Norwegian Government that the Finnmark Act, as adopted, with the consent of the Sami Parliament, and as interpreted and applied by the Supreme Court of Norway, is in accordance with the requirements of ILO Convention No. 169 on Indigenous and Tribal Peoples.

The Norwegian Government acknowledges the role of the Sami Parliament in the Committee's consideration of Norway's implementation of the Convention and is grateful for the opportunity this has provided to clarify certain matters concerning the Supreme Court of Norway's Grand Chamber judgment of 31 May 2024 in the Karasjok case. However, in the view of the Government the concerns raised by the Sami Parliament in their additional submission to the Committee are premature, as the matter has been returned to The Uncultivated Land Tribunal for Finnmark for further proceedings. Furthermore, these concerns are based on a reading of the Supreme Court judgment to which the Government does not agree.

The Government will inform the Committee on further developments in the case in any relevant future reporting cycle, as part of Norway's reporting obligations under the Convention.