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Deploying the Engagement Policy: The Significance of Legal Dualism in Norway's Support for Human Rights Treaties from the late 1970s¹

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Abstract: Leadership in human rights was added to the 'engagement policy' in Norway's foreign policy from the late 1970s, and the country emerged as a supporter of initiatives to draft new human rights treaties. This paper compares Norwegian participation in the drafting of three key human rights treaties in the 1980s in order to examine the significance of its dualist legal system in contributions to these efforts. Based on parliamentary negotiations, archival materials of the ministries involved, and private papers, the article argues that Norway's dualist legal system, as practiced at the time, enabled the government to ratify human rights treaties quickly and also informed the state's disposition towards different human rights projects long before any ratification took place. In other words, it facilitated impulses to pursue ideologically and politically desirable projects under the rubric of international legal norms.

¹ The authors wish to thank anonymous reviewers and the participants at the conferences and workshops named in the introduction to this special issue for valuable feedback. We also thank Anders G. Hamre for research assistance in the early phase of preparing this article. Norwegian language sources that appear as quotes and concepts in the text and footnotes in English have been translated by the authors. Titles of books and sources in the footnotes appear in the original languages.

In April 1977, the Norwegian government issued a strategy on international human rights. This was a response both to ‘frequent requests from many quarters with demands for increased efforts to promote human rights’ and to the fact that two major human rights treaties had recently come into force.² The document reflected the emergence of human rights as a central component of what historian Rolf Tamnes has termed Norway’s ‘engagement policy’, which had come to the fore in its foreign relations from the latter half of the 1960s. This policy entailed support for development aid, human rights and – later – peace mediation; and Tamnes observed that it was aimed at influencing others, with no intention of incurring significant change domestically.³ In contrast to providing aid and criticizing breaches of human rights norms, human rights law had significant relevance at home. That was the point: treaties obligated states to secure the rights of humans within their borders and ambit.⁴

Norwegian efforts to support human rights treaties therefore call for closer study. Did politicians and bureaucrats see no domestic relevance? If not, why not? In this article we ask whether Norway’s support for human rights treaties from the late 1970s must be understood as enabled at least in part by the dualist doctrine for the relationship between domestic and international law as practiced in Norway at the time. We compare Norwegian contributions to the creation of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1989 UN Convention on the Rights of the Child (CRC), and the 1989 International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (C169) and their ratification. Our aim is not to criticize any lack of attention by Norwegian politicians and bureaucrats to the domestic relevance of human rights; rather, it is to further our understanding of a structural feature that helped raise Norway’s profile on international human rights issues.

The analysis is based on parliamentary records and unpublished documents from the Ministry of Foreign Affairs, the Ministry of Justice and other relevant bodies, which collectively provide detailed insights into how the involved parties judged the domestic

² Report to the *Storting* from the Government (also known in English as ‘white paper’, hereinafter Meld St.) 93 (1976-1977), 3. For the Parliament’s consideration, see the recommendation report to the *Storting* from the responsible parliamentary committee (hereinafter Innst. S.) 333 (1976-77) and the official report of the proceedings of the *Storting* (hereinafter S. tid.) 6 June 1977, 4298-4381.

³ Rolf Tamnes, *Oljealder* (Universitetsforlaget 1997), 346-347. See also Olav Riste, *Norway’s Foreign Relations – A History* (Universitetsforlaget 2004), 255-256.

⁴ On signature and ratification status see UN Office of the High Commissioner for Human Rights: <<http://indicators.ohchr.org>>, and Council of Europe <www.coe.int/en/web/conventions/home>, accessed 8 February 2018.

relevance of the treaties from the first international-level initiatives to create a new treaty, throughout the negotiations, and to subsequent ratification. Key actors have been interviewed to supplement written records with personal recollection, but the written material is more reliable for establishing the sequence and relative weight given to particular concerns in internal government deliberation at the different stages of the process.⁵ Methodologically, this material allows for tracing over time the developments on international and domestic levels and the reasoning of involved actors. Studying treaties from the same period has the advantage of positing fairly certain conclusions regarding the way domestic relevance was assessed. We ask: How thoroughly did diplomats, bureaucrats, politicians and other stakeholders evaluate the domestic relevance of the treaties in the late 1970s and 1980s? How significant were such assessments for Norwegian positions during the negotiations and the ratification processes?

In all three cases studied, the Norwegian government applied so-called passive transformation to implement human rights treaties, which was limited to declaring the existence of legal harmony between treaty obligations and domestic laws. Our contention is that at the time when it had become politically desirable to take a consistently supportive role in efforts to create new human rights treaties, Norway's use of passive transformation, as well as the non-invasive legal theory and practices of courts in weighing international rules when interpreting domestic law, enabled its government not only to ratify human rights treaties quickly but also informed the state's disposition towards different human rights projects long before any ratification took place. In other words, the way Norway's dualist system operated at the time facilitated impulses to pursue ideologically and politically desirable projects in the shape of international legal norms.

The article opens with a brief engagement with prior works before we give an overview over the historical development of the interface between international and Norwegian municipal law, and the country's ratification practices in the field of human rights. The subsequent sections detail the three negotiations that created new human rights treaties and their subsequent ratification, especially the treaty on children's rights and the broad range of issues it involved. The concluding section discusses the significance of Norway's dualist

⁵ Interviews have been part of research projects that has also provided the materials for the current study, and also: Hanne Hagtvedt Vik and Anne Julie Semb, 'Who Owns the Land? Norway, the Sami and the ILO Indigenous and Tribal Peoples Convention' 20 (2013) *International Journal on Minority and Group Rights*, 517-550; Skage Alexander Østberg, 'The Question of Torture: Scandinavian States and the Human Rights Issue of Torture, 1967-1984' (master's thesis, University of Oslo 2017).

system for its engagement policy in the field of international human rights through the 1980s and beyond.

The significance of legal dualism

In political science and law, the process of state ratification of treaties have been subjected to much research. A leading scholar on the topic, Beth Simmons has argued that when states support and ratify such treaties, their calculation of potential domestic consequences reflects particularities in legal systems and legal and political cultures, including previous experiences with the application of treaties at home.⁶ Nordic states are often portrayed as supporters of human rights frameworks, but scholars have found them to be surprisingly reluctant in giving international law effect at home. One important factor behind this pattern has been identified to be their tradition of legal realism in which parliamentary supremacy in domestic law-making has been a core democratic value.⁷ Reflecting this, a dualist doctrine has secured the parliaments a central role in giving force to treaty-commitments.

In dualist systems international and domestic law are in principle two separate legal systems. An act of implementation is required to make treaty commitments part of domestic law, normally through acts by parliament: International law becomes domestic law through acts of transformation (whereby domestic laws or regulations are adopted or changed in light of new treaty commitments) or incorporation (whereby the treaty itself is given the status of domestic law). In contrast, in monist systems, treaties as a general rule automatically become domestic law upon ratification. The significance of the distinction between the systems should not be overestimated – in practice the direct impact of international law in the domestic sphere is better understood as a scale, determined by a set of factors particular to that state.⁸

⁶ Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009).

⁷ Johan Strang discusses this tradition in a historical perspective in this current special issue. For works by political scientists and legal scholars, see Ran Hirschl, 'The Nordic Counternarrative: Democracy, Human Development, and Judicial Review' [2011] 9:2, 449-469; Marlene Wind, 'Do Scandinavians Care about International Law: A Study of Scandinavian Judges' Citation Practice to International Law and Courts' 85 (2016) *Nordic Journal of International Law*, 281-302; Johan Karlsson Schaffer, 'The Reluctant Activists: The Nordic States and International Human Rights' [November 15, 2017] available at Copenhagen: Social Science Research Network (SSRN): <https://ssrn.com/abstract=3071635>. For an exposition of Nordic legal cultures and the respect of courts for their national Parliaments, see Jaakko Husa, 'Nordic Constitutionalism and European Human Rights – Mixing Oil and Water' (2011) 55 *Scandinavian Studies in Law*, 102-124.

⁸ For a contemporary review of various systems of implementing international law in national law, see Francis G. Jacobs and Shelley Roberts (eds), *The Effect of Treaties in Domestic Law* (Sweet and Maxwell 1987). On the position of human rights treaties in Nordic legal systems, assessed in the early 1990s, see the special issue 'Menneskerettigheter i nordisk rett' of (1993) 11 *Mennesker og rettigheter*.

Of special relevance here is the fact that the political and legal cultures in Denmark and Sweden have been particularly hostile to judicial review by courts, whereas Norwegian courts has some tradition for it, and Marlene Wind has found the latter to have had a somewhat stronger internationalist bent, as reflected in citation practices to international law and courts.⁹

The formal division between international and domestic law has been argued to have had international ramifications. In the case of Denmark, Jonas Christoffersen and Mikael Rask Madsen have found legal dualism to have served as ‘the pre-requisite for the politics of virtue’.¹⁰ In other words, not expecting immediate domestic effects, it’s government pursued a high international profile in support of human rights promotion.

Johan Karlsson Schaffer has recently argued that previous studies could not account for differences among the Nordic states, nor for changes over time. In his view, a supplementary approach should be to understand that Nordic political elites have carefully assessed the domestic effects of participation in international human rights frameworks and that this explains their “oscillation between activism and ambivalence”.¹¹ His study, however, is not based on unpublished archival materials from the involved government agencies. He is therefore not able to investigate how and to which degree a careful assessment of domestic effects happened during international-level processes creating new treaties and the subsequent national-level political processes leading up to their ratification. This is where historical methods may add much to our understandings.

Human rights treaties and domestic law

Human rights rules were among the radical new inventions in international law-making after 1945. In the immediate post-war years, they were embedded in the Genocide Convention (1948), the Refugee Convention (1950) and the Convention on the Political Rights of Women (1952), in addition to the non-binding Universal Declaration of Human Rights (1948). The ILO also adopted treaties that encompassed human rights norms. At the regional level, the

⁹ Wind, ‘Scandinavian Judges’ Citation Practice’; On judicial review, see also Andreas Føllesdal and Marlene Wind [2009] ‘Introduction: Nordic Reluctance Towards Judicial Review under Siege’, *Nordisk tidsskrift for menneskerettigheter* 27:3, 131-141; and Marlene Wind, ‘Who is Afraid of European Constitutionalism? The Nordic Distress with Judicial Review and Constitutional Democracy’ (2014) 13 Copenhagen: Social Science Research Network (SSRN). iCourts Workingpaper.

¹⁰ Jonas Christoffersen and Mikael Rask Madsen, ‘The End of Virtue? Denmark and the Internationalisation of Human Rights’ (2011) 80 *Nordic Journal of International Law*, 257-277, with quote from 269.

¹¹ Schaffer, ‘The Reluctant Activists’, 1.

Council of Europe adopted the European Convention on Human Rights in 1950. Norway ratified all these treaties – albeit in this last case with a reservation about the provision on religious freedom. The political leadership was disinclined to subject itself to supervision: Norway accepted the optional provisions on the individual complaints procedure only in 1955, and the jurisdiction of the European Court of Human Rights in 1964.¹²

In the mid-1960s, the UN General Assembly adopted, in quick succession, The International Convention on the Elimination of All Forms of Racial Discrimination (1965), The International Covenant on Civil and Political Rights (1966) and The International Covenant on Economic, Social and Cultural Rights (1966). The committee systems introduced as an enforcement mechanism necessitated planning by all state parties for the follow-up and implementation of these conventions domestically. By 1972 all three UN human rights conventions were ratified. At the time, human rights were slowly becoming a matter of increased interest, thanks in part to the Scandinavian complaint to the Council of Europe against junta-ruled Greece in 1967.¹³

Typically, ratification by Norway started with the decision by Cabinet to sign a given treaty, thereby signaling intent to live up to the norms in question. The Foreign Ministry coordinated the subsequent domestic ratification effort and prepared the Cabinet proposal to Parliament. Once a positive vote on ratification was achieved, a declaration would be lodged with the international organization. From this point, Norway was bound by the convention. The act of ratification did not in itself render a treaty domestic law. Norwegian legal theory held that the government was obligated to propose necessary changes to domestic laws prior to - or in conjunction with - placing a treaty before the *Storting*: it could also propose reservations to certain provisions. Once ratified, interpretative rules presupposed that municipal laws were in accordance with ratified international treaties; and as long as no direct conflict existed between the literal reading of Norwegian laws and the treaty, the former was

¹² Proposition to the *Storting* (also known as bill or draft resolution, hereinafter Prop. S.) 83 (1951); Terje Wold, 'Den europeiske menneskerettighetskonvensjon og Norge' in *Legal Essays: A Tribute to Frede Castberg on his 70th Birthday* (Universitetsforlaget 1963), 353–374; Anniken Hareide, 'Norge og Den europeiske menneskerettighetsdomstolen: Veien fra motstand til tilslutning, 1948-1964' (master's thesis, University of Oslo 2016).

¹³ Skage Alexander Østberg and Hanne Hagtvedt Vik, 'Global Anti-Torture Politics 1967-1977 and the Scandinavian States', unpublished manuscript.

to be interpreted in a way that accorded with the latter. In case of conflict, domestic law would prevail in Norwegian courts.¹⁴

In November 1969, the Norwegian Ministry of Justice appointed a committee to reconsider the system for domestic implementation of international law. The catalyst was that many global and regional international organizations were trying to standardize member states' domestic laws - maritime, aeronautical, and private - and there was a need to reduce time and effort spent implementing treaties while at the same time securing a result that was at once easy for the public to understand and an accurate representation of the international rules.¹⁵ Other Nordic countries were grappling with similar issues. A Danish committee worked from 1965 on the issue of the announcement and implementation of treaties. In Finland in 1967, one expert was charged with clarifying transformation in Finnish law. In Sweden, a committee was tasked with considering the incorporation of international agreements in domestic law. These efforts were part of a broad international process aimed at improving and securing the effectiveness of international law, reflected in how the 1969 Vienna Convention on Treaties codified rules on the conclusion of international treaties.¹⁶

In 1972, the Norwegian committee by a majority discarded the idea of replacing Norway's dualist system with a monist one, but it made recommendations on how to adjust current practices. The Cabinet and the *Storting* later concurred.¹⁷ The committee emphasized that while the monist and dualist systems were different in principle, in practice this was not clear-cut. Due to the many interfaces between international and domestic rules, including interpretative rules, the impact of international rules on domestic law was a matter of degree and varied across the two kinds of states. When the committee rejected the idea of changing to a monist system in Norway, it was in part because the similar effect of direct application of international rules could be achieved within a dualist system, while at the same time retaining

¹⁴ Frede Castberg, *Norges Statsforfatning* vol 2 1st edn, (Universitetsforlaget 1947), 158-161; 172-5; and 3rd edn (Universitetsforlaget 1964), 125-126. On the historical evolution of this principle in a Norwegian context, in works that challenges prevailing legal theory in their own time, see Carsten Smith and Lucy Smith, *Norsk rett og folkeretten* 2nd ed (Universitetsforlaget 1982), esp. 14-31 and Jan Helgesen, *Teorier om folkerettens stilling i norsk rett* (Aschehoug 1982), esp. 11-59.

¹⁵ Official Norwegian reports [hereinafter NOU] 1972:16, 9 and 36-37. These reports are written by an individual expert or a group of experts and stakeholders and are appointed and mandated by a ministry.

¹⁶ NOU 1972:16, 10.

¹⁷ NOU 1972:16. See also Meld.S. 77 (1974-75) and Innst. S. 167 (1975-76).

the division of power among legislators, government and courts. Significantly in the context of our argument, the committee noted that ‘a treaty that would be directly operative in domestic law would require significantly more work by Norwegian representatives at the international level [...] to find formulations that conform to Norwegian legal language and to get accepted form and systems etc. that we are familiar with.’¹⁸

The committee outlined the three methods to secure domestic implementation of international rules within the dualist system. For the first two methods, the material rules of the treaty were compared with existing domestic laws. The simplest solution was the confirmation of legal harmony (also called *passive transformation*), wherein it was assumed that domestic law already was in conformity with a given treaty, making further transformation unnecessary. This was by far the least intrusive. The second method was *transformation by rewriting* in light of new treaty commitments and involved adopting a new or changing an existing law or regulation. Finally, there was *incorporation* whereby a legal act gave the treaty itself the status of Norwegian law (identical in principle to what happened automatically in a monist system).¹⁹ The committee concluded that passive transformation should be considered an alternative only if Norwegian law was deemed already to fulfil the provisions of a treaty. The advantages to this were avoiding dual regulation and an unnecessary workload. Significantly in the context of human rights treaties, however, the committee warned that passive transformation could lead to a practice that was *too* easy-going; and the assumption that Norwegian law was compliant with treaty demands could be erroneous. The committee concluded that none of the established methods was preferable to

¹⁸ NOU 1972:16, 61. See also 15-16, 62-64. In the United States the structural feature of the self-executive character of treaties magnified contextual ones and in particular domestic racial discrimination, impeding its support for the draft human rights covenant(s) in the period 1947-1953, see Hanne Hagtvedt Vik ‘How Constitutional Concerns Framed the US Contribution to the International Human Rights Regime from Its Inception, 1947-53’ (2012) 34 *International History Review*, 887-909. See also L. Henkin, ‘The Constitution, Treaties and International Human Rights’, (1968) 116 *University of Pennsylvania Law Review*, 1012-32; Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press 2005), esp. pp. 1-27, 147-198, 241-277; and generally also John H. Jackson, ‘United States of America’ in Jacobs and Roberts, *The Effect of Treaties*, 141-170; and John F. Murphey, *The United States and the Rule of Law in International Affairs* (Cambridge University Press 2004). A state with a monist system, the Netherlands was nevertheless able to sustain what Hilde Reining has called ‘a generous attitude to international law’. It was only from the late 1970s that decisions by the European Court of Human Rights and Dutch courts were beginning to undermine the presumption of the Dutch government which assumed that domestic laws were in compliance with the new international norms and that consequences of ratification therefore were negligible, see Hilde Reiding (2007) ‘The Netherlands and the Development of International Human Rights Instruments’, PhD dissertation submitted to the University of Utrecht, 22 *School of Human Rights Research Series*, 31. See also Henry G. Schermers, ‘Netherlands’ in Jacobs and Roberts, *The Effect of Treaties*, 109-122.

¹⁹ NOU 1972:16, esp. 7, 14-16, 34-37.

the exclusion of the others and instead that all three methods be retained and used as appropriate. They further concluded that in order to achieve an effective and more faithful implementation of international law, direct incorporation should be used to a greater extent than before.²⁰

The committee pointed to human rights treaties as an example of treaty obligations that gave ‘general commitments as regards the content of national legislation’ and therefore rarely led to a word-for-word reiteration of the treaty in domestic law but were, rather, implemented by ensuring both that old domestic laws were reviewed and changed to conform to the treaty provisions, and that future laws conformed to the treaty.²¹ While the committee noted that ‘it can hardly be said that Norway did not loyally implement its [human rights] treaty obligations’, the European Human Rights Convention was, in its view, a case for the problem of failing to identify discrepancies between international rules and Norwegian laws at the time of ratification.²² In light of the 1977 human rights strategy - where the government underscored how Norway was one of only a few states to accept the inter-state complaint system as well as the right to complain to UN human rights bodies, that this was also part of the European regional human rights framework, and emphasized the importance of keeping its own house in order and secure and expand human rights within Norwegian law and society - one might have expected to see some use of the incorporation method for new human rights treaties, or at least a serious effort in exploring the need to change domestic laws and practices.²³ Instead, the government continued to rely on passive transformation when acceding to new human rights treaties.

The 1980s saw three parallel developments: Norway’s high-profile support for new human rights treaties, greater involvement by international supervision bodies, and signs of an increased domestic relevance of these norms. The Norwegian dualist system was challenged by law professor and chair of the government-appointed Sami Rights Commission, Carsten Smith, later chief justice (1991-2002). He argued that treaties should trump domestic law where the latter deviated from the former.²⁴ Law professor Lucy Smith noted in 1988 that

²⁰ NOU 1972:16, 83-84, 97.

²¹ NOU 1972:16, 9 and 36-7.

²² NOU 1972:16, 61, 84.

²³ Meld. S. 93 (1976-1977) 4, 9, 12, 24.

²⁴ NOU 1984:18, 15, 338.

‘several jurists now are strongly against dualist principles’ and argued that this principle was weak, particularly if the international rule in question was a fundamental human rights norm.²⁵ At that time this was not a mainstream view among legal scholars and lawyers. International human rights norms had yet to attain prominence in Norwegian legal education and court litigation; this came in the 1990s and especially the 2000s. But there was a shift toward greater significance of such norms at home. Increased significance of human rights norms happened gradually through evolving legal practice: An expert committee noted that by 1993 human rights norms had been invoked in more than sixty cases before the Supreme Court, and that legal scholars increasingly assumed that the Court would let such treaties take precedence over Norwegian domestic law in cases of conflict. The committee itself both reflected and was part of this development, as it was established to explore how human rights treaties could be implemented, including the potential incorporation of existing treaties. In 1989 the Parliament decided in principle that human rights conventions should be incorporated into Norwegian law.²⁶ Concurrently, in the political arena, human rights claims were becoming more frequent and hard-hitting.

Before and parallel to this development, during the years between 1979 and 1992 Norway consistently ratified new treaties quickly, using only up to eighteen months from time of adoption to the treaty had been ratified. By then, the engagement policy was well entrenched in its foreign relations platform. The question arises: How did various stakeholders judge the potential domestic relevance of new human rights treaties?

UN Convention against Torture

The Norwegian Foreign Ministry’s engagement with the human-rights issue of torture began with the interstate complaint by Denmark, Norway and Sweden against the junta in Greece between 1967 and 1970 – in which accusations of torture became a crucial component. In 1973, Amnesty International’s lobbying for a convention targeting torture coincided with the September military coup in Chile and the murder of the president, Salvador Allende. Sweden initiated UN resolution 3059 (XXVIII), which condemned torture and resolved to return to the issue at a later session. In 1975, Sweden together with the Netherlands introduced the

²⁵ Norwegian National Archive, Oslo, S-6380 Papers of the Ministry of Consumer and Administration (henceforth FAD), Da102, 063.33, 1988-1999, Lucy Smith, ‘Barnekonvensjonen og norsk lov’ in final program and report of seminar of 23 March 1988.

²⁶ NOU 1993:18, see esp. 11, 51-68 and 70-75.

Declaration against Torture at the UN. Two years later, Sweden initiated the drafting process on a convention against torture.²⁷ Denmark and Norway gave their support to the endeavor from the very beginning, and all Nordic states joined in lobbying efforts to secure the adoption of the UN Convention against Torture (CAT) in 1984.²⁸

Early on, Norwegian representatives knew there were discrepancies between its domestic law and the draft treaty; the same held true in Sweden. In 1975, around the time the Swedish Ministry of Foreign Affairs was drafting a declaration defining acts of torture as punishable offences under domestic law, Norway and Sweden responded to a questionnaire from the UN soliciting information from all member states on domestic laws and regulations targeting torture. The Norwegian State Report prepared by the Ministry of Justice cited Section 96 from the Constitution of 1814 – 161 years earlier – in which the Constitution ‘prohibits torture being employed for the purposes of obtaining a confession’.²⁹ This section stated that no one could be found guilty or punished other than by law, and that ‘*Pinligt Forhør*’ (painful interrogation) must never occur.³⁰ The paragraph prohibited the use of torture during interrogations, not as punishment:

The Constitution contains no provisions aimed at protecting persons subjected to imprisonment, or others who are being prosecuted, against torture or degrading treatment not directed towards eliciting a confession... But there is inherent protection in the fact that such treatment would need to be based on the authority of a statute enacted by Parliament, and it is obvious that no such authority is to be found in the Norwegian statute book.³¹

²⁷ Østberg and Vik, ‘Global Anti-Torture Politics’. ECHR article 3 already prohibited the use of torture and inhumane or degrading treatment or punishment.

²⁸ Ibid. See also Østberg, ‘The Question of Torture’.

²⁹ Archives of the Norwegian Ministry of Foreign Affairs, Oslo [hereinafter ANMFA], 26.8/9, 7, Letter Norwegian Ministry of Justice [hereinafter NMJ] to Norwegian Ministry of Foreign Affairs [hereinafter NMFA], 18 July 1975.

³⁰ Section 96 of the Norwegian Constitution of 17 May 1814, see Stortinget: <<https://stortinget.no/no/Stortinget-og-demokratiet/Lover-og-instrukser/Grunnloven-fra-1814/>> accessed 20 December 2017. It was changed in 2014: see Lovdata: <<https://lovdata.no/dokument/NL/lov/1814-05-17>> accessed 20 December 2017.

³¹ ANMFA, 26.8/9, 7, Letter Ministry of Justice to NMFA, 18 July 1975.

The State Report nevertheless assured readers that were torture ever employed, it would be punishable by provisions relating to ‘bodily injury and defamation’, regardless of the fact that the word ‘torture’ itself never appeared in the Norwegian penal code.³²

The provision dealing with criminalization of torture was adopted as Article 7 of the Declaration against Torture. When the Swedish foreign ministry submitted its first draft of the convention to the UN in 1978, the article was included in near-identical form but was strengthened with a second provision that called for ‘severe penalties’ against torture in domestic law.³³ With some alterations, the proposed provision made it through the negotiations and was included as Article 4 when CAT was adopted by the General Assembly on 10 December 1984. Once the treaty was completed, ratification by all Scandinavian states was highly likely; to do otherwise would be to overturn more than a decade of foreign policy.

When the issue of Norwegian ratification was put to the *Storting* in 1986, the Proposition, prepared by the Ministry of Foreign Affairs, noted that Norway had given its support to the Convention since work began in the late 1970s. In its review of the various articles, the Foreign Ministry admitted that regarding the criminalization of torture and Article 4, the penal code contained no provisions specifically addressing such violations.³⁴ Following the same line of reasoning as the State Report of 1975, it argued that provisions targeting assault or bodily harm would be used to penalize torture – the same provisions deployed against those accused of torture following World War II.³⁵

A critical analysis of this logic would highlight that prosecutors after the war could hardly have done otherwise, since it was by then too late to change the law. The point of Article 4 in CAT, however, was to make torture illegal *before* the fact. Moreover, human rights law had evolved significantly since World War II. No such objections were raised. Instead, the proposition could conclude: ‘The question of Norwegian ratification of the

³² ANMFA, 26.8/9, 7, UN General Assembly Report, UN Doc A/10158, ‘Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment’, 23 July 1975.

³³ See Article 7 of Sweden’s ‘Draft International Convention against Torture etc.’, telex Danelius to Delegation in Geneva, 18 January 1978, material from dossiers ‘HP 48Y Allmän’ and ‘48R FN’. The draft convention had been reviewed by the Swedish Ministry of Justice before it was submitted to the UN: see telex Danelius to Delegation in Geneva, 30 December 1977. Documents related to the Swedish involvement has been made available by the Swedish Ministry of Foreign Affairs in response to our research request designation UD2015/424/RS, Archives of the Swedish Ministry of Foreign Affairs, Stockholm [henceforth ASMFA]

³⁴ Prop. S. 69 (1985-86), 2.

³⁵ They were referring to the infamous Rinnan Gang. John Lyng, Foreign Minister during the Case against Greece, had also been chief prosecutor in the trials against members of the Rinnan Gang.

Convention has also been put to the Ministry of Justice, which had nothing to add. It is especially noted that Norwegian approval of the Convention does not require laws to be altered.³⁶

UN Convention on the Rights of the Child

The process to enumerate children's rights started in 1978 when Poland introduced a draft convention to the UN. The convention applied to multiple aspects of public and private life and therefore had much greater significance domestically than the treaty against torture. Norwegian participation was assigned to the Ministry on Consumption and Administration (FAD), and the leading bureaucrat in the early years was Karin Stoltenberg, who had a key role in developing a governmental family policy that would encourage gender equality.³⁷ Many Western states were reluctant to embrace the initiative, especially because it might slow down work on the torture convention. Recently decolonized states showed little enthusiasm. In January 1984, an international NGO noted that at the 'present rate of progress, the Convention will not be completed for around twenty years.'³⁸ Nevertheless, the process gained momentum from 1985, and a string of ratifications followed in quick succession once the UN Convention on the Rights of the Child (CRC) - with fifty-four articles - was adopted on 20 November 1989.³⁹

FAD had immediately welcomed the Polish initiative, while noting that the proposed material norms were 'not very specific and therefore relatively uncommitting' but that a convention, and the process that would lead to it, might have a certain political influence. Even 'rich countries like Norway do not fulfil the goals described'.⁴⁰ Norway took a supporting role in the UN working group established in 1979 to prepare the convention.⁴¹

³⁶ Prop. S. 69 (1985–86), 4.

³⁷ FAD, Da 112, 063.8, 1978-1979, Minute of meeting in FAD, 23 August 1978.

³⁸ FAD, Da101, 063.33, 1981-1984, Council of Europe, Memorandum by the International Union for Child Welfare, 10 January 1984.

³⁹ On the negotiations see Lindkvist in this issue and also Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indiana University Press 2008), 282-286; Gry Synnøve Bøhagen Simensen, 'Hvorfor binde seg til internasjonale menneskerettighetsavtaler? En casestudie av norsk ratifikasjon av FNs barnekonvensjon' (master's thesis in political science, University of Oslo 2013).

⁴⁰ FAD, Da 112, 063.8, 1978-1979, Letter FAD to NMFA, 23 October 1978.

⁴¹ The working group was open to all members of the UN Commission on Human Rights. Other member states, UN agencies and NGOs with consultative status could take part as observers. See UN doc E/CN.4/L.1575, 17

Stoltenberg reported in early 1982 that progress was slow; few states had attended the yearly meetings, and those that had taken part showed little enthusiasm. There had been ‘hardly any substantial disagreements or tendencies to [political and geographic] blocks in the debates’, but the US delegation was ‘obviously under instruction to slow the negotiations’ due to the parallel work on the torture convention which was being sabotaged by the USSR and Latin American states.⁴²

Norway’s representatives, who presumably had consulted the political leadership of their ministry, focussed on what they deemed as pressing issues for the most vulnerable children, be it the rights of children of political prisoners, deported or exiled (Latin America was at the forefront of the mind in 1979) or support for the proposal by the Food and Agricultural Organization (FAO) that children have the right to sufficient nutrition. Equally important, the bureaucrats took the opportunity to promote a modern Scandinavian view on children: They took a critical stance against proposals that recognized the authority of parents to define the child’s best interests and highlighted children as independent human beings with their own rights. (France suggested at one point that the child ‘who is unable to express his own wishes’ should be represented by ‘his father and his mother’; on the archived UN document, a Norwegian official had written ‘NO! and again!’⁴³) Additionally, the Scandinavians suggested using gender-neutral wording; incorporating modern family policies such as economic assistance to families; protecting childhood itself through the right to play and participate in social activities and recreation; and emphasizing the state’s responsibility for administrative instruments and protocols safeguarding children’s rights.⁴⁴ An unrelated but parallel domestic process resulted in the establishment of the Ombudsman for Children in 1981, mandated by law to oversee that legislation protected the interests of the child, to inform public and private entities about children’s rights and to suggest improvements policy

February 1981, in FAD, Da101, 063.33, 1980-1982. On early Norwegian support, see for example UN doc A/34/424, 30 August 1979, FAD, Da 112, 063.8, 1978-1979.

⁴² FAD, Da101, 063.33, 1980–1982, Memo by Karin Stoltenberg of 2 February 1982. See also Memo by FAD, 24 February 1981, and on the east-west dimension and the parallel drafting of the torture convention see Memo from Norwegian Delegation at the Council of Europe, 24 March 1983, both in FAD, Da101, 063.33, 1981-1984; see also Østberg, ‘The Question of Torture’, 93-98.

⁴³ FAD, Da101, 063.33, 1980-1982, UN doc E/CN.4/1324/Add.1., 1 February 1979, p. 5.

⁴⁴ FAD, Da101, series 063.33, folder 1980-1982, Memo by FAD, 22 February 1979; and UN Doc E/CN.4/1324, 27 December 1978. See also FAD, Da 112, 063.8, 1978-1979, Minute of meeting in FAD, 23 August 1978. The priorities were fairly consistent throughout the process: see for example, ANMFA, 26.8/37, 6, FAD’s Report on the work on a convention on the rights of the child, 4 March 1988, p. 1.

in this field.⁴⁵ Despite this development, there is scant evidence that the Ministry believed the international efforts would become important at home.

Once the UN process kicked off in earnest, the Ministry in Oslo consulted regularly with the national chapters of Save the Children and UNICEF as well as the Ombudsman for Children, Amnesty International, and the Red Cross.⁴⁶ It also consulted with relevant government ministries and legal scholars, which routinely included considerations of potential discrepancies between the draft documents and Norwegian domestic law.⁴⁷ This review was a literal one, where direct discrepancies between the wording of successive drafts and domestic laws were scrutinized in order to identify possible challenges during the ratification process. Mirroring the relationship between domestic and international law in Norway, the review did not include considerations of a possible dynamic interpretation of domestic law by courts with support in the future treaty. Several potential conflicts between domestic law and international-level drafts were identified. Most importantly, the article on freedom of thought, conscience and religion, championed by the US, was problematic for all the Nordic states due to their system of state religion and, accordingly, religious education in public schools.⁴⁸

An illustrative balancing act emerged in 1985 when Sweden pushed hard for raising the age threshold of children in armed conflicts to 18.⁴⁹ The Ministry of Defense pointed out that Norwegian males during war were obliged to join the armed forces at the age of 17, and in peacetime for those recruited to military schools, and this dissuaded vocal Norwegian support in 1987.⁵⁰ The following year, the Ministry of Defense reiterated that Norwegian laws

⁴⁵ FAD, Da102, 063.33, 1986, Norwegian Periodic Report to the UN on ICESCR Articles 10-12, 3 March 1987.

⁴⁶ For example FAD, Da101, 063.33, 1981-1984, Letter NMFA to several recipients, 30 October 1981; FAD, Da101, 063.33, 1981-1984, Report from meeting at the NMFA 21 January 1983; FAD, Da45, 018, Invitation to meeting of 7 January 1986; and FAD, Da102, 063.33, 1984-1986, Minute of the meeting of 13 January 1986; FAD, Da102, 063.33, 1989, Letter FAD to Redd Barna, Invitation to consultation/seminar on the 31 October 1989.

⁴⁷ The legal scholars were Jan Helgesen, Lucy Smith, and Asbjørn Eide. See FAD, Da45, 018, 1983-1989, Invitation to meeting, 5 January 1984; FAD, Da102, 063.33, 1984-1986, Invitation to meeting, 4 April 1986.

⁴⁸ Other issues were the right to national citizenship and the unconditional right to appeal, see ANMFA, 26.8/37, 4, Meeting in NMFA, 21 January 1983; ANMFA, 26.8/37, 5, Draft report from UN working group meeting, 10 February 1984; FAD, Da101, 063.33, 1981-1984, FAD's Report from the UN working group on the Rights of the Child, 26 June 1984; FAD, Da102, 063.33, 1986, Letter Ministry of Justice to FAD, 11 September 1986; and Letter Ministry of Church and Education to FAD, 22 August 1986 in *ibid*.

⁴⁹ See article by Lindkvist in this issue.

⁵⁰ FAD, Da102, 063.33, 1986, Letter FAD to Ministry of Defense, 2 December 1986. See also ANMFA, 26.8/37, 6, Memorandums by NMFA's 1st Legal Office of and 28 August and 7 December 1987, and Telex NMFA to Norwegian UN delegation of 9 November 1987; all in *ibid*.

would have to be changed should the Swedish proposal be adopted.⁵¹ At the UN, Norway supported the proposal in general terms while emphasizing that an absolute age limit should not be allowed to derail the process, and that a compromise was needed, as the US vehemently opposed the proposal, which conflicted with its compulsory service laws. Sweden was under pressure from NGOs at home and reacted ‘very coolly’.⁵² FAD and the Ministry of Foreign Affairs wanted to support the Swedish position, disagreeing with the Ministry of Defense’s view that national legislation would have to be changed.⁵³ Thus, while this prevented unreserved, vocal support, Norwegian representatives nevertheless went a long way to convey the ministries’ basic position, also expressing regret on behalf of the Nordic countries that it had been impossible to achieve a better result in the final convention.⁵⁴

The common cause of the Norwegian UNICEF and Save the Children was children in developing countries, but these organizations identified adoption, children in prisons and resourcing for Child Protection Services as areas of domestic relevance.⁵⁵ When the two agencies suggested that the Minister address a conference attended by 180 representatives of Norwegian organizations, tentatively called ‘How will the Norwegian government follow up the convention, nationally and internationally’, FAD changed the title to ‘Children on the Agenda!’ The speech made only very general reference to how the convention would affect children’s rights in Norway, noting that even though it was a model state on this issue in the world, the convention would inspire new initiatives to improve the situation and rights of

⁵¹ ANMFA, 26.8/37, 7, Letter FAD to Ministry of Defense, 21 November 1988; Letter Ministry of Defense to FAD, 24 November 1989; Delegation in Geneva to NMFA, 5 December 1988; all in *ibid*. See also Memorandum by 1st legal office of NMFA, 26 January 1989, FAD, Da102, 063.33, 1988-1989.

⁵² ANMFA, 26.8/37, 7, Letter FAD to Ministry of Defense, 21 November 1988; Letter Ministry of Defense to FAD, 24 November 1989; Delegation in Geneva to NMFA, 5 December 1988; all in *ibid*. On public pressure in Sweden, in particular from Swedish Save the Children, see UN delegation in New York to NMFA, 6 December 1989; Memorandum by NMFA in preparation of Meeting of Nordic Foreign Ministers, 14-15 August 1989; both in *ibid*.

⁵³ ANMFA, 26.8/37, 7, Memorandum by NMFA’s 2nd Political office, 16 January 1989. See also Memorandum on the article on children in armed conflicts by NMFA’s 1st Legal office, 26 January 1989 and Telefax UN delegation in New York to NMFA, 31 August 1989; both in *ibid*.

⁵⁴ ANMFA, 26.8/37, folder 8, Nordic statement to the Third Committee of the UN GA by Ambassador Thorvald Stoltenberg, 9 November 1989. The twenty-page Norwegian report mentioned many occasions where Norway had intervened to promote what it saw as preferable principles, but it did not mention any particular efforts by Norwegian representatives to safeguard national legislation. The right to nationality was changed by other states and no longer was seen as problematic for Norway, see FAD, Da102, 063.33, 1988-1989, FAD’s report on the work on a convention on the rights of the child, 3 January 1989. The UN doc is E/CN.4/1989/48, 2 March 1989, in FAD, Da102, 063.33, 1989.

⁵⁵ FAD, Da102, 063.33, 1989, Letter from UNICEF, 20 May 1989.

children.⁵⁶ Another eloquent example: In November 1988, the Norwegian ambassador Tom Vraalsen spoke to the UN General Assembly's Third Committee on behalf of the Nordic countries. He noted that 'children in many parts of the world ... are fatally affected by hunger, armed conflict and social injustice.' He did not address how the convention could improve the situation of children in the Nordic countries themselves.⁵⁷

While public interest and early pressure to ratify CRC can be documented domestically, the Norwegian government spearheaded a ratification initiative of its own. Norway signed the Convention at the earliest opportunity, and the minister of the Christian Peoples Party, Solveig Sollie underscored the importance of swift ratification.⁵⁸ The recently restructured Ministry on Family and Consumption encouraged stakeholders to report potential conflicts between CRC and Norwegian law as soon as possible. It reminded recipients, however, that it had previously been predicted 'that Norwegian ratification would present no real problems and that reservations would not be necessary'.⁵⁹ Any problems identified would be dealt with either through a reservation, or changes in domestic laws or, as pointed out by the Ministry of Foreign Affairs, an interpretative declaration at the time of ratification.⁶⁰

Several provisions were flagged. Of particular concern was the provision in Article 37 obligating states to keep youths in prison separate from adults. Norway had had negative experiences with detention facilities for children, and the system had been abolished in 1974. In the late 1980s there were 'at any given time about 30 children/youngsters under 18 years old in Norwegian prisons'.⁶¹ The Ministry of Justice emphasized that minors should serve out sentences near their homes, which often necessitated the use of adult facilities. A second

⁵⁶ FAD, Da102, 063.33, 1988-1999, pp. 53-55, Anne-Lise Bakken, 'Barna på dagsorden!' in Final program and report of seminar of 23 March 1988. On the number of participants, see Report by UNICEF-Committee, attached to letter of 6 February 1989, in ANMFA, 26.8/37, 9. On a similar seminar by the Ombudsman for Children, 18-19 August 1989, in ANMFA 26.8/37, 7.

⁵⁷ FAD, Da102, 063.33, 1988-1989, Nordic statement to the Third Committee of the UN GA by Ambassador Tom Vraalsen, 14 November 1988. For a similar statement, see Nordic statement to the Third Committee of the UNGA by Ambassador Thorvald Stoltenberg, 9 November 1989, in ANMFA 26.8/37, 8.

⁵⁸ ANMFA, 26.8/37, 9, Telex Norwegian Delegation in New York to UD, 26 January 1990, and letter Ministry on Family and Consumption to relevant ministries and others, 3 April 1990.

⁵⁹ ANMFA 26.8/37, 9, Letter titled 'Høring – FN'S Konvensjon om barnets rettigheter', 15 January 1990.

⁶⁰ Ibid; Letter NMFA to Ministry on Family and Consumption, 30 January 1990; both in ANMFA, 26.8/37, 9. On the preceding assessment, see FAD's Report on the work on a Convention on the Rights of the Child, 3 January 1989, p. 16, in FAD, Da102, 063.33, 1989.

⁶¹ FAD, Da 102, 063.33, 1989, Ministry of Justice, Status report after the Year of the Child, 23 October 1989, p. 3.

provision was Article 40. The legal system in Norway enshrined limits on appeals to the Supreme Court – to wit, the Court could not review questions of guilt, only length and character of the punishment.⁶² Save the Children took a more expansive view on the obligations: While seeing no serious problems with swift ratification, it stressed that Norway would need to step up its efforts both nationally and internationally, including in development aid strategies. For impact at home, the advocacy group variously cited the situation of children who were asylum seekers, the resourcing of Child Protection Services and the problem of sexual abuse of children.⁶³ The Ministry of Family and Consumption, having reviewed the reports from relevant ministries and other interested parties, nevertheless concluded that ‘Norwegian ratification of the convention will not have budgetary consequences.’⁶⁴ The government assumed legal harmony in all but two instances (Article 37 on separate criminal facilities, and Article 40 on procedures in criminal cases) and proposed ratification with reservations to these two provisions.⁶⁵

At the *Storting* the parliamentarians reasoned that if one state applied reservations, others might too, leading to a weakening of the convention. They accepted the reservation on Article 40 because it mirrored a similar one made to the 1966 UN Covenant on Civil and Political Rights; but they learned that the Swedish *Riksdag* had ratified CRC and rejected a proposed reservation to Article 37.⁶⁶ The Ministry of Foreign Affairs initially defended the government’s position in a letter to the Foreign Relations and Constitution Committee but gave in three weeks later. Preparatory notes reveal an intention to submit a declaration to the UN that explained Norwegian practices with regard to children within the prison system.⁶⁷ With reference to the Swedish decision and the view that imprisonment of children under 18 be avoided wherever possible, the responsible parliamentary committee decided that no

⁶² ANMFA 26.8/37, 10, Letter ‘FN’S Konvensjon om barnets rettigheter - horing’, 30 January 1990. Reservations to articles 7 and 9 were also considered, see St.prp. nr. 104 (1989-90), 4-6.

⁶³ ANMFA, 26.8/37, 9, Letter Save the Children to MFC, 12 March 1990.

⁶⁴ Prop. S. 104 (1989-90), 4.

⁶⁵ Prop. S. 104 (1989-90).

⁶⁶ ANMFA 26.8/37, 10, Letter Foreign Relations and Constitution Committee of the *Storting* to Minister of Foreign Affairs Kjell Magne Bondevik, 1 October 1990.

⁶⁷ ANMFA 26.8/37, 10, Letter Under Secretary of State Knut Vollebæk to the Foreign Relations and Constitution Committee, 2 October 1990; Telefax Delegation in Geneva to NMFA, 22 October 1990; and Memorandum ‘Momenter til Utenriksministerens innlegg’ of 22 October 1990; all in *ibid*.

reservation was needed. The government's clearest acknowledgement of the convention's domestic relevance lies in its remark that the convention 'should be the principal foundation for the development of Norwegian laws and practices in all areas covered by the convention'.⁶⁸ However, the representative of the Socialist Left Party was the lone voice to call for a closer review of Norwegian laws and practices to comply with the convention upon ratification; he also forecast increased spending on such issues.⁶⁹ The *Storting* voted unanimously in favour of ratification. No focus was put on submitting a declaration regarding Article 37, so none was issued.⁷⁰

The ratification process shows that the bureaucrats and almost all the involved politicians interpreted potential discrepancies between domestic law and the treaty narrowly, considering only explicit, literal conflicts in the wording of the treaty and domestic laws. UNICEF, Save the Children and the Socialist Left Party saw a wider and more immediate relevance of the convention at home. The legal scholar Anders Brattholm found it 'strange' that the Ministry of Foreign Affairs had not studied whether Child Protection Services were conforming to the convention in light of 'multiple, and occasionally very serious, instances of neglect'.⁷¹

ILO Indigenous and Tribal Peoples Convention

In the early 1980s, the ILO launched initiatives in the field of indigenous rights, responding to harsh criticism by the nascent international indigenous peoples' movement of the assimilationist approach embodied in the existing Indigenous and Tribal Populations Convention (C107) of 1957. The first step was the appointment of a committee of experts to consider the proposal to revise the convention, including a Norwegian expert who had worked on Sami issues at the Ministry of Justice. Revisions were negotiated at the International Labour Conferences of 1988 and 1989 and resulted in the new Indigenous and Tribal Peoples Convention (C169). This represented a significant development in international law, as it

⁶⁸ Innst. S. 7 (1990-91), 10 October 1990, 3. See also S. tid. 8 November 1990, 482-497.

⁶⁹ Innst. S. (1990-91), 4.

⁷⁰ ANMFA, 26.8/37, 10, Memorandum NMFA's First Legal Office to NMFA's Legal Department, 13 November 1990.

⁷¹ ANMFA, 26.8/37, 10, Letter Anders Brattholm to NMFA, with his memo titled 'FN's konvensjon om barns rettigheter og konsekvensene for Norge', 11 October 1990. See also letter President of the Parliament to the Government, transmitting proposals from the Socialist Left Party on the Child Protection Services in light of the CRC, 8 November 1990, in *ibid*.

designated such groups as ‘peoples’ and recognized their individual and collective political, economic and cultural rights, including the right to self-determination. In 1990 Norway became the first country to ratify the convention – the only state with an indigenous population of its own to do so among the several participating European and North American countries, and Australia and New Zealand. Denmark followed in 1996; the others still have not.

In addition to the general desire to support human rights, Norwegian support for the efforts to revise C107 must be understood as a result of two developments.⁷² First, for more than a decade the very difficult situations of indigenous populations - in Latin American countries in particular, but elsewhere as well - had been debated in the UN and on various media platforms, including by vocal indigenous groups and advocacy NGOs.⁷³ Second, the national controversy over the building of a hydroelectric dam in what was considered Sami heartland had propelled Sami rights to the center of national political discourse in the late 1970s and early 1980s.⁷⁴ It led the Norwegian government to launch a formal political process aimed at reviewing and making proposals for changes in Sami rights under the auspices of its Ministry of Justice.

It was clear from the beginning that the ILO deliberations were relevant to the ongoing national political processes. During the negotiations in Geneva it was unproblematic for Norway to support formulations in the draft ILO treaty regarding political rights, including the right of indigenous peoples to self-determination. The government had instructed the Sami Law Commission to prioritize cultural and political rights. In 1984 it proposed the election of a Sami political body; five years later the Sami Parliament was established in accordance with the Sami Act of 1987. The bureaucrats took this to mean that Norway would be in compliance with the future convention.⁷⁵ In the arena of economics, however, there were clear discrepancies between national law and the drafts being developed in Geneva.

⁷² For a detailed analysis, see Vik and Semb, ‘Who Owns the Land?’.

⁷³ Hanne Hagtvedt Vik, ‘Indigenous Internationalism’ in Glenda Sluga and Patricia Clavin (eds), *Internationalisms: A Twentieth Century History* (Cambridge University Press 2017). See also Jonathan Crossen, ‘Another Wave of Anti-Colonialism: The Origins of Indigenous Internationalism’ (2017) 52 *Canadian Journal of History*, 533 – 559.

⁷⁴ Henry Minde, ‘The Challenge of Indigenism: The Struggle for Sami Land Rights and Self-Government in Norway, 1960-1990’, in S. Jentoft, H. Minde and R. Nilsen (eds), *Indigenous Peoples: Resource Management and Global Rights* (Eburon 2003), 75-104.

⁷⁵ Vik and Semb, ‘Who Owns the Land’, 531.

The main problem was the large areas of state-owned lands in Norway and the system of legally protected rights to various forms of use, a system that was unknown in most other national contexts. C107 equated the right of indigenous populations to control over natural resources with collective or individual ownership to lands traditionally occupied by these groups, and this issue had been identified in 1980 as a stumbling block to Norwegian ratification of this convention.⁷⁶ During negotiations over what became C169, the Norwegian government, among others, tried to amend the land rights provisions as proposed by the ILO Secretariat, with the Ministry of Foreign Affairs stressing that Norway would not be able to ‘ratify a convention that obliged her to recognize ownership rights’.⁷⁷ These efforts were seen by the ILO secretariat and indigenous representatives as potentially undermining a strong protection of indigenous land rights in the convention, and they did not win through.⁷⁸ The final version of the ILO convention did not explicitly place rights of ownership on a par with rights of use, as Norwegian negotiators had wanted. Still, Norway voted in favour of the convention, preceded by a joint Nordic interpretative statement emphasizing that under the convention, strongly protected rights of use constituted adequate protection of indigenous land rights.⁷⁹

During the ratification preparations, potential discrepancies between the wording of the treaty and Norwegian domestic laws were noted in internal governmental correspondence.⁸⁰ The Ministry of the Environment voiced concern over the lack of clarity as to what ‘traditional use’ would entail and recommended against ratification before domestic laws had been reviewed and changed. It later softened its position and merely expressed concern.⁸¹ The Ministry of Finance made similar remarks.⁸² And Sami activists were

⁷⁶ NOU 1980:53, 40.

⁷⁷ ANMFA, 76 14/20B, 3, Instructions to the Norwegian governmental delegation to the ILO conference, 30 May 1988. See also Lee Swepston private papers, Geneva, (on file with author), International Labour Conference, 75th session, Geneva, June 1988, Amendment submitted by the government member of Canada, seconded by government members of the United States, Sweden, Norway, Australia, New Zealand, Denmark and Finland (C.C.107/D.135.).

⁷⁸ International Labour Conference, 76th Session 1989, Report IV (2A) *Partial revision of the Indigenous and Tribal Populations Convention*, 1957 (No.107), 36.

⁷⁹ ANMFA, 76.14/20B, 3, Telefax, Norwegian Delegation in Geneva to MFA, 27 June 1989.

⁸⁰ Vik and Semb, ‘Who Owns the Land’, 540-546.

⁸¹ Archives of the Ministry of Local Government, Oslo, (hereinafter MLG), C169, Letter Ministry of the Environment to Ministry of Local Government, 7 March 1990; and Letter Ministry of Local Government to Ministry of the Environment, 12 March 1990; both in *ibid*; Vik and Semb, ‘Who Owns the Land’, 544-547.

convinced that Norwegian laws were not in accordance with the ILO treaty provisions on economic rights.⁸³ Some in the Sami Parliament argued that major changes in Norwegian laws had to be in place prior to ratification, but it nevertheless decided to welcome ratification, opining that this would ‘require a timely clarification and likely legislative changes on certain points later’.⁸⁴ In its recommendation to the *Storting* the Ministry of Local Government called for ratification without simultaneously proposing changes in Norwegian domestic laws, concluding (after a review in which much weight was given to the reasoning of the Ministry of Justice) that such changes were not necessary. Swift ratification was symbolically important to both the government and the Parliament. The recommendation for swift ratification from the Cabinet to the Parliament cited the ‘strong wishes of a quick Norwegian accession to the treaty by the Sami Parliament and Sami organizations, and also Norway’s active efforts internationally for the rights of indigenous populations’.⁸⁵ The Parliament concurred.⁸⁶ Thus, politicians and bureaucrats alike sought to ratify the convention as demonstrations of good faith to the Sami, expecting that ongoing national political processes would result in changes that would resolve any discrepancies. This, and support for suffering indigenous populations of other countries, trumped concerns that, at the time of ratification, domestic laws were not fully in line with the treaty.

Conclusions

In none of the three cases discussed above did treaty negotiation or ratification draw noticeable attention to possible changes at home among Norwegian bureaucrats and politicians who found the new norms at once desirable internationally and unproblematic domestically. Notably, they did not actively and intentionally mobilize the doctrine of legal dualism as a “domestic bulwark against international law”, as indicated by Johan Karlsson Schaffer.⁸⁷ Those in charge of negotiating and preparing ratifications ironed out potential

⁸² MLG, C169, Ministry of Finance to the Ministry of Local Government, 23 April 1990; Vik and Semb, ‘Who Owns the Land’, 546.

⁸³ Norske Reindriftsamers Landsforbund, 1 February 1990; Nordic Sami Council, 16 February 1990; both in MLG, C169; Vik and Semb, ‘Who Owns the Land’, 542-543.

⁸⁴ MLG, C169, Sami Parliament, 2 February 1990; Vik and Semb, ‘Who Owns the Land’, 543.

⁸⁵ Prop. S. 102 (1989-1990). Quote from 15.

⁸⁶ Innst. S. 197 (1989-1990); S. tid. 3962-3965 (7 June 1990).

⁸⁷ Schaffer, ‘The Reluctant Activists’, 2. Also 6-7.

effects at home, or expected these to solve themselves by ongoing domestic political processes. Thus, as Rolf Tamnes has found for the engagement policy in general, human rights treaties were seen as tools to effect change elsewhere, despite their purpose of regulating the domestic affairs of all its state parties.

A convention on the rights of the child, Norwegian ambassador Tom Vraalsen stated at the UN, should not reflect ‘the lowest common denominator of national legislation’ containing ‘no elements of progress towards an improvement of the situation for children’.⁸⁸ This and similar statements rested on a belief that Norwegian law already protected the rights at the same or a higher level, and that where there might be discrepancies, these represented a greater rather than a lesser level of protection at home – or, in the case of indigenous rights, these were cases in which domestic laws were already under review and expected to yield the needed improvements. In contrast, stakeholders in children’s rights and indigenous rights on the home front called for multiple changes in laws and practices to ensure Norwegian compliance. Although bureaucrats and politicians occasionally underlined the need for a continuous improvement of rights in a domestic context and welcomed international enforcement mechanisms, the overwhelming sense one gets from the archival materials is that no significant domestic changes were foreseen as a consequence of ratification. Tellingly, in 1991 a Swedish representative speaking at the UN on behalf of the Nordic countries on the new convention on children’s rights once again spoke exclusively about problems in other countries, never acknowledging its domestic relevance.⁸⁹

Underlying the assumptions by the politicians and bureaucrats at the time of ratification were narrow, literal investigations of the treaties and domestic law, made possible by the way in which the dualist system was practiced in Norway at the time. Even where discrepancies were identified, these were – with only minor exceptions – interpreted in the way that was most favourable to a supportive Norwegian position and the goal of unconditional ratification. Yet, in all three cases, Norwegian representatives were aware of potential discrepancies between municipal law and the treaties that were being drafted. Notwithstanding, legal harmony was assumed and the treaty ratified without reservations, save for one in the case of the UN Convention on the Rights of the Child. In none of the cases were changes to domestic laws proposed prior to ratification.

⁸⁸ FAD, Da102, 063.33, 1988-1989, Ambassador Tom Vraalsen, 14 November 1988.

⁸⁹ ANMFA 26.8/37, 10, Statement by Anders Rönquist to the UNCHR, 28 February 1991.

Norway's active participation in the drafting process – which afforded the incremental and early review and identification of potential domestic consequences – might explain the swift and almost unconditional ratifications that followed. When studying the archival documents, a more convincing explanation arises: the use of passive transformation, underpinned by the prevailing legal theories on the proper place of international law in courts, allowed potential conflicts with domestic legislation to be assessed in a narrow way. Had Norway's system and legal culture been more interventionist on behalf of international law, the review might have been more imaginative and focused on potential future implications. Due to the way passive transformation was practiced, the responsible ministries and the Cabinet could argue that there was no need to change domestic laws and that ratification would have no budgetary consequences. This happened regardless of which party or coalition made up the Cabinet. It also effectively meant that Norwegian representatives at the UN and elsewhere had almost free rein to support new human rights treaty initiatives and could easily conduct a foreign policy based on unconditional support for international human rights.

What seems very likely is that, in line with Johan Karlsson Schaffer's main argument, the calculations of political elites changed as the international human rights frameworks became more complex and gained greater authority at home.⁹⁰ In other words, when read in conjunction with other works mentioned in the introduction: when the dualist doctrine as it had been practiced was collapsing, this resulted in an end to 'virtue'. The significance of human rights treaties gradually increased in the domestic sphere. International supervision bodies, including the European Commission and Court of Human Rights, received an increasing number of cases pertaining to the Nordic states, and opined in several of them, and also discussed problem areas in the domestic implementation of a wide range of treaty commitments. Norwegian courts, more than those of its neighbors, cited international human rights law.⁹¹ The Norwegian parliament helped further perforate the division of international and domestic law when in 1999, it passed a law strengthening the position of human rights, incorporating five human rights conventions by ranking them below the Constitution but above ordinary laws. These were the European Convention on Human Rights; the UN Covenant on Economic, Social and Cultural Rights; the UN Covenant on Civil and Political Rights; and the UN Convention on the Rights of the Child; the UN Convention on the Elimination of All Forms of Discrimination against Women was added in 2009. Several

⁹⁰ Schaffer, 'The Reluctant Activists', p. 2.

⁹¹ Wind, 'Scandinavian Judges' Citation Practice'; Schaffer, 'The Reluctant Activists', 24-30.

optional protocols linked to the conventions were also incorporated. The law of 1999 resulted in a significant strengthening of the position of international human rights law domestically and bolstered changes already under way in legal theory and courts.⁹² The combined effect of the activities of international supervision bodies, heightened attention to international human rights law in the legal profession and beyond, and the move towards a more interventionist method of securing domestic implementation of new and existing treaties all created a new situation for Norwegian support of new human rights initiatives.

The recognition of a much broader and more immediate domestic relevance seems to have yielded greater attention to the preparations for treaty ratification, as reflected in 2004-5 by the coalition government led by the Christian Democrat Kjell Magne Bondevik when it decreed that the consequences of international agreements be properly evaluated prior to ratification.⁹³ Norway spent more time when considering new treaties, including by proposing changes in domestic laws prior to ratification, as with the UN Convention on the Rights of Persons with Disabilities (adopted in 2006, ratified by Norway in 2013). Thus, at the time when human rights treaties became ever more consequential on the domestic front during the 1990s and especially in the 2000s, the country became ever more circumspect when dealing with new treaties. For now, this is an hypothesis that needs to be substantiated by analysis based on materials that allow for more in-depth insights into the government's internal deliberations. However, based on this present article, and the clues in the publicly available record, it certainly seems likely that when the division between international and domestic law as practiced in prior decades was collapsing, government officers and politicians would develop a heightened level of attention to potential domestic changes resulting from new or stronger human rights frameworks both during their negotiation and also when preparing (or not) ratification of these.

⁹² For a critical view on the effects on democracy of the increased significance of international law in domestic law, see NOU 2003:19; and Øyvind Østerud, Fredrik Engelstad, and Per Selle, *Makten og demokratiet: en sluttbok fra Makt- og demokratiutredningen* (Gyldendal Akademisk 2003). See also Hirschl who calls this a 'march toward juristocracy': Hirschl, 'The Nordic Counternarrative', 450.

⁹³ Meld. S. 17 (2004-2005), 75.