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Who Owns the Land? Norway, the Sami and the ILO Indigenous and Tribal Peoples Convention¹

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Abstract

In 1986, the International Labour Organization (ILO) started a process aimed at revising its 1957 Indigenous and Tribal Populations Convention (C107). This process was completed in 1989 with the adoption of the Indigenous and Tribal Peoples Convention (C169). Simultaneously, national legal and political processes in many Western states addressed the rights of their own indigenous populations. These states voted in favour of C169, but only Norway chose to ratify it – indeed, as the first country in the world, in June 1990. This article details the internal political processes within the Norwegian government, to shed light on the significance of the domestic situation in Norway for its support for C169. We find that a low degree of perceived need for domestic changes may enable states to take a leading role in creating new human rights conventions. Furthermore, the participation of government officials in international horizontal and vertical policy networks may shape the policies of their ministries and thereby those of the state.

Keywords: please provide three to five keywords

1. Introduction

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The United Nations (UN) and the International Labour Organization (ILO) started drafting instruments for the protection of indigenous peoples² in the mid-1980s. It was only after more than 20 years of deliberations that the UN General Assembly adopted the Declaration on the Rights of Indigenous Peoples in 2007.³ The ILO, however, worked more swiftly – its International Labour Conference adopted the Convention on Indigenous and Tribal Peoples in Independent Countries (C169) in 1989.⁴ Today, these instruments constitute the core of the international system for the protection of the rights of indigenous peoples.

The UN Declaration and the ILO Convention represent significant developments in the history of international law. The concept of ‘indigenous populations’ has featured in international legal thought since the beginning of the European overseas expansion.⁵ The first efforts by international organizations to improve the conditions for such populations can be traced back to the League of Nations and the ILO in the inter-war years.⁶ In 1957 the ILO adopted its Indigenous and Tribal Populations Convention (C107), which encouraged the

² For an overview of international and scholarly definitions of the term “indigenous peoples”, see R. Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Berkeley, 2003) pp. 18–23. For historical discussions of the term, see L. Rodríguez-Piñero, *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime, 1919–1989* (Oxford University Press, Oxford, 2005) pp. 4 *et seq.* In this article we use the term “indigenous peoples” unless the term “indigenous populations” is used in the sources.

³ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, <www.unhcr.org/refworld/docid/471355a82.html> visited on 10 January 2013. For a discussion of the content of the Declaration, see S. Errico, ‘The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview’, 7:4 *Human Rights Law Review* (2007) pp. 741–755.

⁴ International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, <www.unhcr.org/refworld/docid/3ddb6d514.html>, visited on 10 January 2013.

⁵ M. J. Fonseca, ‘The Colonization of American Nature and the Early Development of International Law’, 12 *Journal of the History of International Law* (2010) pp. 189–225; G. C. Mark, ‘Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de las Casas’, 13 *Australian Yearbook of International Law* (1993) pp. 1–51; B. Bowden, ‘The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization’, 7 *Journal of the History of International Law* (2005) pp. 1–23; J. S. Anaya, *Indigenous Peoples in International Law* (Oxford University Press, New York, 2004) pp. 15 *et seq.*; and Rodríguez-Piñero, *supra* note 2, pp. 4–8, 17–38.

⁶ On the ILO’s efforts, see Rodríguez-Piñero, *supra* note 2; and D. Maul, *Human Rights, Development and Decolonialization: The International Labour Organization, 1940–1970* (Palgrave Macmillan, Basingstoke, 2012) pp. 17–30. On the League’s mandate system, see S. Pedersen, ‘The Meaning of the Mandate System: An Argument’, 32:4 *Geschichte und Gesellschaft* (2006) pp. 560–82; and ‘Back to the League of Nations’, 112:4 *American Historical Review* (2007): 1091–1117. See also Anaya, *ibid.*, pp. 31–34 and P. G. Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination*, 2nd edition (Westview Press, Boulder, 1996) pp. 12 *et seq.*

integration of indigenous populations into the dominant social and economic order of the states in which they lived.⁷ With the late 1960s came a radical re-conceptualization. International focus turned to efforts to protect the cultures of these populations, and destruction of such cultures was increasingly understood as a global phenomenon and concern. The UN took up the issue of discrimination against indigenous populations in the 1970s. In the mid-1980s, instruments were drafted to enumerate the human rights of such populations. These designated them as ‘peoples’⁸ and recognized their individual and collective rights.⁹

The new instruments for the protection of indigenous peoples were created in response to advocacy by the emerging international indigenous peoples’ movement, through processes facilitated by sympathetic officials of the ILO and UN secretariats.¹⁰ In addition, two kinds of governments supported indigenous issues at the international level. The one group sought to criticize Western governments in a Cold War context; in the other group were West European governments which sympathized with the vulnerable and marginalized indigenous

⁷ International Labour Organization (ILO), Indigenous and Tribal Populations Convention, C107, 26 June 1957, <www.unhcr.org/refworld/docid/3ddb66804.html>, visited on 10 January 2013.

⁸ On the relationship between the right to self determination and the idea of a people, see J. J. Summers, ‘The Right of Self-Determination and Nationalism in International Law’, 12:4 *International Journal on Minority and Group Rights* (2005) pp. 325–354.

⁹ For an overview of the developments in late 1960s and later, see Anaya, *supra* note 5, pp. 56 *et seq.*; and H. Minde, ‘The Destination and the Journey: Indigenous Peoples and the United Nations from the 1960s through 1985’, in H. Minde et al. (eds.), *Indigenous Peoples: Self-determination, Knowledge, Indigeneity* (Eburon, Delft, 2008) pp. 49–86. See also M. Barelli, ‘The Interplay Between Global and Regional Human Rights System in the Construction of the Indigenous Rights Regime’, 32 *Human Rights Quarterly* (2010) pp. 951–979.

¹⁰ For a good account of the ILO process, see Rodríguez-Piñero, *supra* note 2. No similar archive-based study exists for the UN process. For the UN process, see M. J. Peterson, ‘How the Indigenous Got Seats at the UN Table’, 5 *Review of International Organization* (2010) pp. 197–225; D. Sanders, ‘The U.N. Working Group on Indigenous Populations’, 11:3 *Human Rights Quarterly* (1989) pp. 406–433; and R. Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate, Farnham, 2011). For accounts by several key actors, see C. Charters and R. Stavenhaven (eds.), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, Copenhagen, 2009) IWGIA Document no. 127; R. L. Barsh, ‘Indigenous Peoples: An Emerging Object of International Law’, 80:2 *The American Journal of International Law* (1986) pp. 369–385; R. L. Barsh, ‘Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force’, 18:4 *Human Rights Quarterly* (1996) pp. 782–813; L. Swepston, ‘A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989’, *Oklahoma City University Law Review* (1990) pp. 677–714.

populations in Latin America.¹¹ Once the standard-setting activities got underway, Western governments with indigenous populations on their territories expressed support. These included the governments of Australia, Canada, Denmark, Finland, New Zealand, Norway, Sweden and the United States.¹²

In a way, the support of these Western governments is puzzling. As democratic governments, they could be expected to support international-level initiatives if pressured by strong national organizations. However, these governments also risked opening a Pandora's Box of troubles, as instruments on indigenous rights would be directly relevant to on-going domestic political or legal processes. In their most radical form, demands for self-determination by indigenous activists threatened the territorial integrity of states. Even when limited to protection of indigenous lands, these demands regularly conflicted with the economic and other interests of other groups, and with the economic and security interests of the states.¹³ Governments with indigenous populations on their territory could be expected to be cautious when negotiating international instruments, especially when such were legally binding. All of the Western governments with indigenous populations expressed support for and participated actively in the negotiations that aimed at revision of ILO Convention 107 (and that resulted in a new convention, C169). In June 1989, they voted in support of the final text of C169, even though it contained elements that many of them had opposed during the

¹¹ Peterson, *ibid.*, pp. 201–202; Barsh, *ibid.*, p. 369; Sanders, *ibid.*, esp. pp. 414–415.

¹² For a discussion of the role of these governments in negotiating the UN declaration, see Barsh, *ibid.*, esp. pp. 377 *et seq.* For a discussion of the historical experiences of the indigenous populations of these states, see S. Wiessner, 'The Rights and Statuses of Indigenous Peoples: A Global Comparative and International Legal Analyses', 12:57 *Harvard Human Rights Journal* (1999) pp. 58–74, 92.

¹³ J. Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', 28:1 *Rights Quarterly* (2006) pp. 186–206. See also A. Eide, 'United Nations Action on the Rights of Indigenous Populations', in R. Thompson (ed.), *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-Determination* (University of Saskatchewan, Native Law Centre, 1987) esp. p. 24; R. Niezen, 'Recognizing Indigenism: Canadian Unity and the International Movement for Indigenous Peoples', 42:1 *Comparative Study of Society and History* (2000) pp. 119–148.

negotiations. In the end, however, only Norway ratified C169 in June 1990, followed by Denmark in 1996.¹⁴

In order to contribute to the understanding of why instruments for the protection of indigenous peoples were developed and how Western governments dealt with the challenges of having parallel national and international processes on the rights of indigenous peoples, this article focuses on the decision-making processes of the Norwegian government. Why did Norway support the ILO process, and how did domestic and international processes interact during the ILO negotiations and through to its decision to ratify C169? The article is organized as follows. It opens with a discussion of the Sami and the internationalization of indigenous peoples' policy. Thereafter it progresses chronologically from the early initiatives on the rights of indigenous peoples to Norway's decision to ratify C169 in 1990. A main point is the issue of land rights. The article concludes with considerations on the various factors that explain Norway's contributions to C169 and the decision to ratify the new Convention. It is based on hitherto unexplored archival materials from all involved government ministries and the confidential internal papers of the governments of Gro Harlem Brundtland (1986–89) and Jan Peder Syse (1989–90), supplemented by archival materials of the Sami Parliament and the Sami Rights Commission, and by the recollections and private papers of some of the key actors.¹⁵

2. The Sami and the Internationalization of Indigenous Peoples' Policy

¹⁴ As of February 2013, 22 states have ratified C169:

<www.ilo.org/dyn/normlex/en/f?p=1000:11300:4227926804783738::NO:11300:P11300_INSTRUMENT_ID:312314>, visited on 7 February 2013. See A. J. Semb, 'Why (not) Commit? Norway, Sweden and Finland and the ILO Convention 169', 30:2 *Nordic Journal of Human Rights* (2012) pp. 122–147 for a comparative analysis of the ratification behaviour of these Nordic countries.

¹⁵ We are grateful to Lee Swepston for granting us access to his private papers, to Dalee S. Dorough for sharing with us her unpublished manuscript 'The Revision of International Labor Organization Convention No. 107: A Subjective Assessment', and to participants at the conference 'Indigenous peoples' rights: Their emergence in international law and their contemporary implementation', Oslo 7–9 March 2012, (hereafter Oral History Conference) for sharing their experiences and recollections with us. A volume edited by Gudmundur Alfredsson, Asbjørn Eide, Roxanne Dunbar-Ortiz, Dalee Sambo Dorough, Lee Swepston and Petter Wille with the working title 'Indigenous Peoples' Rights in International Law: Emergence and Application', based on the conference, is in preparation.

With de-colonialization and advocacy by anthropologists in the 1960s and the emergence of an international indigenous peoples' movement in the 1970s, the concept of 'indigenous peoples' gradually gained its contemporary meaning.¹⁶ Assimilation efforts were replaced with an indigenous rights perspective as indigenous activists, academics and specialists of international organizations argued with increasing force that indigenous peoples could be found across the world, suffering in various ways as the result of external or internal colonization. Claims like that by Native American leader Jimmie Durham that "[i]ndigenous peoples are colonised peoples" rang true to indigenous activists across the world, and support-NGOs agreed.¹⁷ The "majority of the 200 million indigenous peoples of the world", the International Work Group for Indigenous Affairs (IWGIA) argued, have found their "resources, societies and cultures" under the control of others.¹⁸

Among the intergovernmental organizations, the UN, through the Commission of Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities, took the lead in re-defining the concept of 'indigenous populations'. Major developments included the Study of the Problem of Discrimination Against Indigenous Populations (the Cobo Report),¹⁹ submitted to the Sub-Commission from 1981 to 1984, and the establishment of the Working Group on Indigenous Populations (WGIP) in 1982. In the course of the 1980s, a separate international policy field emerged with rapidly expanding horizontal and vertical relations among actors at various political levels.²⁰

¹⁶ On the indigenous peoples' movement, see Niezen, *supra* note 1, esp. pp. 29 *et seq.*; and H. Minde, 'The Making of an International Movement of Indigenous Peoples', 21:3 *Scandinavian Journal of History* (1996) pp. 221–246.

¹⁷ IWGIA Yearbook 1986, *Indigenous Peoples and Human Rights* (IWGIA, Copenhagen, 1987) p. 3.

¹⁸ *Ibid.* For a discussion of the international literature on indigenous peoples, see C. Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature from 1945–1993', 16:2 *Human Rights Quarterly* (1994) pp. 1–57.

¹⁹ Full text: <<http://social.un.org/index/IndigenousPeoples/Library/Mart%C3%ADnezCoboStudy.aspx>>, visited on 6 September 2012.

²⁰ For a theory-oriented discussion of the process of internationalization, see S. Tarrow, *The New Transnational Activism* (Cambridge University Press, Cambridge, 2005) esp. pp. 7 *et seq.*

Geneva became the main site for the internationalization of indigenous issues. In a radical departure from established UN practice, the WGIP decided to allow indigenous representatives to take part in its meetings as observers. Their numbers increased rapidly, from about 25 indigenous representatives in 1982, to 150 by 1985.²¹ The ILO decision to revise C107 added to the significance of Geneva as the main site for transnational indigenous activism and to the deepening and broadening of networks between activists and individuals representing governments and various international organizations.

Representatives of the Norwegian government and the Sami participated in this internationalization of indigenous issues. In 1992, it was estimated that 40,000 persons in Norway were ‘Sami’.²² A smaller number of Sami live in Sweden, Finland and Russia. International impulses have been essential to Sami self-identification as an indigenous people. In the inter-war years, the Sami, according to historian Henry Minde, had “neither the knowledge nor the expertise in international law and the rights of minorities that was necessary if they were to see their own predicament within an international perspective, nor any idea that they could raise an issue in an international forum”.²³ Historian Ketil Zachariassen concludes that the Sami first started to consider themselves as “one people, a community of Sami, independent of subsistence basis or where they lived” after the Second World War.²⁴ What sociologist Sidney Tarrow has termed ‘global framing’, *i.e.* “the mobilization of international symbols to frame domestic conflicts”, was absent at the time.²⁵

²¹ Petersen, *supra* note 10, p. 204; Barsh, *supra* note 10, p. 384; Sanders, *supra* note 10, p. 410. For personal accounts see A. W. Díaz, ‘How Indigenous Rights Reached the UN’, in Charters and Stavenhaven, *supra* note 10, p. 16 *et seq.*; A. Eide, ‘The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration of the Rights of Indigenous Peoples’, in Charters and Stavenhaven, *supra* note 10, pp. 32 *et seq.*

²² MFA 76.14/20B, F 4. Norway. First Report on ILO C169 for the period ending 30 June 1992. Censuses in Norway do not register ethnic affiliation, so the answer to the question of how many Sami live in Norway depends on criteria like language, kinship or self-identification.

²³ Minde, *supra* note 15, p. 229.

²⁴ K. Zachariassen, *Samiske nasjonale strategar: Den samepolitiske opposisjonen i Finnmark ca. 1900–1940*. (Unpublished PhD dissertation, University of Tromsø, Tromsø, 2012) p. 25.

²⁵ Tarrow, *supra* note 19, pp. 32, 59 *et seq.*

Sami political activism increased from the 1960s. During the 1970s, Sami activists increasingly understood and framed their claims within a global context, and contributed actively to the founding of the World Council of Indigenous Peoples (WCIP) in 1975. This in turn promoted the development of a specific indigenous peoples' perspective on the future situation of the Sami, and accentuated the "increasing *aboriginalization* of Sami ethnopolitics and self-understanding throughout the 1970's and 80's".²⁶ From the early 1970s, when key Sami actors encountered representatives of the embryonic global indigenous movement, the Sami started to compare their situation to that of Native Americans and other similar populations.²⁷ However, the Sami were a heterogeneous group, as reflected in the contested nature of Sami-ness and the divergent political orientations of Sami organizations.²⁸

The image of the Sami in the Norwegian society changed dramatically from the late 1970s. In 1958, the Norwegian ILO Committee (which, in accordance with the ILO tripartite structure, consisted of representatives of the Norwegian government, the trade unions and the businesses) had advised against ratification of C107. Reflecting the then-current understanding of the term 'indigenous' and the corresponding criteria stipulated in C107, the Committee had argued that this Convention "applies to groups that do not exist in our country". The Ministry of Social Affairs followed this advice, and the Standing Committee on Social Affairs of the *Storting* (the Norwegian Parliament) concurred.²⁹ At that time, the Sami were seen as a rural minority, a Sami-speaking part of Norway's population in need of better integration into mainstream Norwegian society.

²⁶ H. Eidheim, *Stages in the Development of Sami Selfhood* (Working paper no. 7, Department of Social Anthropology, University of Oslo, Oslo, 1992) p. 14, italics in the original.

²⁷ H. Minde, 'Urfolksoffensiv, folkerettsfokus og styringskrise: kampen for en ny samepolitikk 1960–1990', in B. Bjerkli and P. Selle (eds.), *Same, makt og demokrati* (Gyldendal Akademisk, Oslo, 2003) esp. pp. 98–106.

²⁸ See for example the discussion in IWGIA Document 58, 'Self-determination and Indigenous Peoples: Sami Rights and Northern Perspectives' (Copenhagen, 1987) pp. 2–5.

²⁹ St.prp. nr. 36, 1958, p. 4; Innst. S. nr. 68, 1958. On the concept of 'indigenous populations' in the 1950s, see Peterson, *supra* note 10, pp. 210–211.

By the late 1970s, some national politicians had adopted the understanding of the Sami as an indigenous population, most prominently State Secretary Thorvald Stoltenberg of the Ministry of Foreign Affairs (MFA).³⁰ It took a national crisis to alert national politicians to the existence of Sami grievances towards the majority population and to associate the Sami with indigenous populations of other countries. This crisis was what became known as the ‘Alta controversy’. In November 1978, the *Storting* agreed to a hydroelectric power project that included a dam in the Alta River, which flows through central parts of Finnmark, Norway’s northernmost country. Finnmark has a multi-ethnic population pattern, but its inner parts are generally considered Sami heartland. The Alta decision led to massive protests by Sami and environmental activists, including non-violent demonstrations near the venue of the projected dam. A traditional Sami tent, a *lavvo*, was erected in front of the *Storting* in Oslo, and some Sami initiated a hunger strike. The climax was reached in January 1981 when 600 policemen were ordered to Finnmark to remove the activists.³¹ The Alta controversy stood in glaring contrast to the international human rights profile of the Norwegian government. As early as 1977, as the second country in the world, Norway’s *Storting* had adopted a strategy for the promotion of human rights, based on the view of Norway as a model for others to emulate.³²

With the Alta controversy, the question of the political and legal status of the Sami as an indigenous population was put firmly on the national political agenda. In 1980, the government initiated a range of new measures concerning the Sami population, including the

³⁰ Minde, *supra* note 9, p. 65.

³¹ H. 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, Delft, 2003) pp. 75–104. See Ø. Dalland, *Altakrønike: En innfallsport til og fra Demningen* (Davvi Girji, Karasjok, 1994) for a chronological account of the Alta affair.

³² St. meld. [White Paper] no. 93 (1976–77). On the missionary impulse in Norwegian foreign policy, see O. Riste, *Norway’s Foreign Relations: A History* (Universitetsforlaget, Oslo, 2005) esp. pp. 254 *et seq.* See also H. K. Svenbalrud, *Foundation and Ornament: The United Nations as ‘Cornerstone of Norwegian Foreign Policy,’ 1970–2005* (Unpublished PhD thesis, Department of Archaeology, Conservation and History, University of Oslo, Oslo, 2012).

establishment of the Sami Rights Commission. The Commission's mandate stretched from cultural and political rights to land rights in Finnmark and in other parts of the country with a Sami population.³³ The same year an official report (green paper) reviewed Norway's decision to not ratify ILO C107. In contrast to the 1958 conclusion, this report concluded that the criteria stipulated in its Article 1 were flexible enough to cover the Sami.³⁴ Norway did not, however, change its policy of non-ratification of C107. The report concluded that Norway did not fulfil the Convention's requirements on land rights.³⁵ An additional problem was what was seen as the Convention's 'profile', which diminished the relevance of the Convention in the case of Norway.³⁶ The subsequent public hearing revealed that many respondents agreed that C107 was outdated and reflected a paternalistic mode of thinking.³⁷ In addition, the Sami Rights Commission advised that the question of ratification ought to be postponed until the Commission had submitted its final report.³⁸ Ratification of C107 was for these reasons not proposed to the *Storting*.³⁹

International instruments were, however, beginning to impact on Norwegian Sami policies. The mandate of the Sami Rights Commission made reference to how international conventions and resolutions "to a considerable degree" had been invoked in the public debates about the legal status of the Sami, and instructed the Commission to examine and evaluate what significance international law "ought to have" for its recommendations.⁴⁰ With the

³³ The terms of reference are set out in NOU 1984:18, pp. 43–45. For the role of the Alta controversy in changing the national political sentiment on Sami rights, see H. Minde, 'Sami Land Rights In Norway: A Test Case for Indigenous Peoples', 8:2–3 *International Journal on Minority and Group Rights* (2001) pp. 113–114.

³⁴ NOU 1980:53, pp. 16–24. For documents pertaining to the inter-departmental work in preparation for the 1980 report, see MFA, 76.14/20B, F 1.

³⁵ NOU 1980:53, pp. 38–41.

³⁶ *Ibid.*, pp. 62–63.

³⁷ NOU 1984:18, pp. 309–310.

³⁸ *Ibid.*, pp. 613–616.

³⁹ MFA, 76.14/20B, F 1, Letter from the State Secretary of the Ministry for Social Affairs to the State Secretary of the MFA, dated 7 April 1982.

⁴⁰ NOU 1984:18, p. 44.

phrase “ought to have”, the mandate reflected the dominant view in Norway’s legal community in the early 1980s that for an international treaty to become operative in Norwegian domestic law it had to be incorporated through national legislation.⁴¹ In line with this view, only national legislation could establish new rights for individuals or groups in Norway. However, it was clear that such instruments might provide an additional source from which legal and political arguments could be constructed and strengthened, also as a legal source of some weight when interpreting domestic law.⁴²

The question of what weight to accord to non-incorporated international conventions in establishing Norwegian law became a matter of some controversy in the Sami Rights Commission. In its 1984 report, the Commission emphasized how international law restricted what the “Norwegian government has the legal right to do to the Sami”.⁴³ It argued, for example, that Article 27 of the International Covenant on Civil and Political Rights (ICCPR) placed Norway under international obligation to secure the ‘material foundations’ of the Sami culture.⁴⁴ The willingness of the Commission to construct specific obligations on the Norwegian government from a human rights treaty, however, did not imply that the Commission recognized the supremacy of international law over domestic laws. This is illustrated by a caveat in the 1984 report in which Carsten Smith (professor of law and

⁴¹ This dualist principle for the relation between international and domestic law was modified by other principles, including the principle of presumption which directed Norwegian laws to be interpreted so that they accorded with international law. For a then contemporary analysis of the development of legal thinking in Norway on the relationship between international and domestic law in Norway, see Carsten Smith and Lucy Smith, *Norsk rett og folkeretten*, 2nd edition (Universitetsforlaget, Oslo, 1982) pp. 14–31, and on the principles that give international law weight when establishing current Norwegian law, see also C. A. Fleischer, *Folkerett* 5th edition (Universitetsforlaget, Oslo, 1986) pp. 244 *et seq.* For an early statement on the dualist principle in the Norwegian legal system, see F. Castberg, *Norges Statsforfatning*, Vol II (O. Christiansens Boktrykkeri, Oslo, 1935) pp. 164 *et seq.*

⁴² For historical accounts of the significance of anticipated domestic effects of treaty-ratification for the policies of individual countries regarding human rights instruments, see A. W. Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (Oxford University Press, New York, 2001); H. H. Vik, ‘How constitutional concerns framed the US contributions to the international human rights regime from its inception, 1947–53’, 34:4 *International History Review*, pp. 887–909.

⁴³ NOU 1984:18, pp. 15, 264–265.

⁴⁴ NOU 1984:18, pp. 19, 342–344.

Commission chairman, later Chief Justice) noted that he “tended to see” the decision by the Norwegian Supreme Court in the Alta case as “the final breakthrough for the principle of the supremacy of international law in Norwegian courts”.⁴⁵ This view, however, had limited support elsewhere in the legal community.⁴⁶ On the other hand, the 1984 report, as well as statements by other legal experts and judges, signalled that a movement might be under way towards placing greater weight on non-incorporated international treaties when establishing Norwegian law.⁴⁷

3. Norwegian Support for the ILO Initiative to Revise C107

Initiatives by the ILO to revise C107 came as a surprise to the Norwegian government. In 1982, Norwegian researcher and WGIP Chairman Asbjørn Eide had advised the MFA that he believed it would be “close to impossible” to revise C107 and that indigenous rights did not naturally belong in the ILO. In his opinion, a UN declaration was the “most realistic” track. MFA officials had seemed to agree.⁴⁸ The ILO, however, bandwagoned on the surge of interest in indigenous issues. Its historic engagement for the rights of indigenous workers made it a possible institutional home for a new instrument on indigenous peoples. By now,

⁴⁵ *Ibid.*, pp. 15, 338. See also Smith and Smith, *supra* note 41, pp. 225 *et seq.*

⁴⁶ For statements in opposition to Smith’s argument, see E. Smith, ‘Om samerettigheter og rettighetsvern’, *Tidsskrift for Rettsvitenskap* (1986) pp. 338 *et seq.* and Fleischer, *supra* note 41, pp. 256–257. See also C. A. Fleischer, *Studier i folkerett* (Universitetsforlaget, Oslo, 1997) pp. 24 *et seq.*

⁴⁷ Changing legal theories are illustrated by the views expressed in NOU 1972:16 and NOU 1993:18. For an early statement on the supremacy of human rights treaties over Norwegian domestic laws, see T. Wold, ‘Den européiske menneskerettighetskonvensjon og Norge’, in *Legal Essays: A Tribute to Frede Castberg on his 70th Birthday* (Universitetsforlaget, Oslo, 1963) pp. 358–376. See also Smith and Smith, *supra* note 41, esp. pp. 207 *et seq.*; R. Ryssdal, ‘The Relation between the Judiciary and the Legislative and Executive Branches of the Government in Norway’, *57 North Dakota Law Review* (1981) pp. 527–540, esp. pp. 534–535; J. Helgesen, *Teorier om folkerettens stilling i norsk rett* (Aschehoug, Oslo, 1982). For retrospective accounts, see M. Ruud and G. Ulfstein, *Innføring i folkerett* (Universitetsforlaget, Oslo, 2006) pp. 50 *et seq.*, esp. pp. 56–58 and 65; and O. Jebens, *Om eiendomsretten til grunnen i Finnmark* (Cappelen akademisk forlag, Oslo, 1999) pp. 559–578; and C. A. Fleischer, *Folkerett* (Universitetsforlaget, Oslo, 2005) esp. pp. 361–362 and pp. 392–395. For a comparative account of human rights treaties in Nordic legal systems, see the special issue 11:3 *Mennesker og rettigheter*, ‘Menneskerettigheter i nordisk rett’ (1993).

⁴⁸ MFA, 26.8/54, F 10, Draft minutes from Nordic civil servant meeting on indigenous populations, Oslo, 21 September 1982.

however, C107 and Recommendation 104⁴⁹ had become largely irrelevant instruments, and when attention was directed at them, it was mainly in the form of criticism by representatives of the indigenous peoples' movement. In the autumn of 1982, the ILO Office's Department of Labour Standards decided to present the issue of revising C107 to the ILO's decision-making bodies.⁵⁰

None of the three constituencies of the ILO membership – the governments', workers' or employers' caucuses – had been particularly interested in the rights of indigenous populations. In 1985, Blanchard and Swepston were nevertheless able to garner the necessary support in the ILO Governing Body to establish a committee of experts to review C107.⁵¹ To succeed in getting C107 accepted for the agenda of the International Labour Conference, however, Swepston needed a supportive committee, not least with government experts who would favour the proposals of the Secretariat. Swepston contacted Mexican anthropologist Rodolfo Stavenhagen who, on his own initiative, had served as Mexican government observer to the WGIP meetings – an appointment he later saw as reflecting the ignorance of the Mexican government as to international efforts in the field of indigenous issues.⁵² Stavenhagen became the chair of the expert committee. Swepston also contacted Halldor Helldal of the Norwegian Ministry for Local Government and Labour, who suggested the

⁴⁹ C107 and its accompanying Recommendation 104, Indigenous and Tribal Populations Recommendation, were adopted by the International Labour Conference in 1957. C07 is available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C107,/Document>, visited 8 May 2013. Recommendation 104 is available at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REC,en,R104,/Document>, visited 8 May 2013.

⁵⁰ Rodríguez-Piñero, *supra* note 2, p. 273, and esp. ch. 8 for an analysis of the factors that triggered the initiative to revise C107 as well as the main actors involved.

⁵¹ Interview with Lee Swepston, Ferney-Voltaire, 9 November 2010; Rodríguez-Piñero, *supra* note 2, p. 284, fn 132. For two opposing assessments of the potential power of officials in international organizations in determining the outcomes of multilateral negotiations, see A. Moravcsik, 'A New Statecraft? Supranational Entrepreneurs and International Cooperation', 53:2 *International Organization* (Spring 1999) pp. 267–306; and O. R. Young, 'Comment on Andrew Moravcsik "A New Statecraft? Supranational Entrepreneurs and International Cooperation"', 53:4 *International Organization* (Autumn 1999) pp. 805–809.

⁵² Interview with Rodolfo Stavenhagen, Oslo, 8 March 2012.

young jurist Einar Høgetveit.⁵³ Other members of the Expert Committee included government experts from Australia, Botswana, Canada, India and Peru, three worker and three employer delegates as well as one representative from the WCIP and one from Survival International.⁵⁴

It was through Høgetveit's appointment that Norway made its first contribution to the ILO revision process. Høgetveit acted without official instructions, conscious of his appointment as an expert.⁵⁵ In the deliberations, he reported home after the meeting, he had argued that the report should reflect the views of the indigenous populations "without all kinds of reservations from someone like me". Høgetveit had nevertheless informed the Committee of the on-going efforts in Norway to review Sami rights, and how it was still too early to know the details of how land rights would be solved as parts of these efforts.⁵⁶ These were issues he knew well. Høgetveit had authored the 1980 green paper that concluded against Norwegian ratification of C107. He had served as the main secretary for the Sami Rights Commission from 1980 to 1983, and had subsequently continued working full-time with its first report, now from his position in the Legislation Department in the Ministry of Justice. Høgetveit's participation in the Committee of Experts shows how the development of new international instruments became a vehicle for entangling local, national and international political levels relating to indigenous peoples.

The Committee of Experts unanimously recommended that C107 should be revised "in order to bring it into conformity with changed circumstances and views".⁵⁷ A main conclusion was that "[t]he Convention's integrationist approach is inadequate and no longer

⁵³ Lee Swepston's private papers (hereafter LS), handwritten note.

⁵⁴ Rodríguez-Piñero, *supra* note 2, pp. 285–286, fn 141.

⁵⁵ The MFA had initially wanted to instruct him: MFA 76.14/20B, F 2, Memo from First Legal Office to First Political Office, 5 February 1985.

⁵⁶ MFA 76.14/20B, F 2, Report by Høgetveit from the Committee of Experts, September 1986, esp. p. 6.

⁵⁷ Extracts from the Report of the Meeting of Experts appended to Report VI (1) *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Office, Geneva, p. 105.

reflects current thinking”.⁵⁸ Reporting home, Høgetveit emphasized that the aim of the revisions was to “remove paternalistic formulations”. Terms such as ‘self-determination’, ‘participation’ and ‘people/population’ would have to be clarified and considered. Furthermore, the Committee had suggested that land rights should continue to have a central place in the Convention.⁵⁹ By pointing out these matters, Høgetveit had identified the issues that would become intensely controversial during the negotiations over C107, as they already were in the WGIP drafting process. Relevance for the Sami in Norway was acknowledged, and Høgetveit pointed out that the ILO efforts were part of “an evolutionary process in which the thinking on the international and national levels will be mutually reinforcing.”⁶⁰

In November 1986, the ILO Governing Body decided to place the issue of revision of C107 on the agenda for the 1988 International Labour Conference.⁶¹ That decision was primarily the result of a convenient turn of affairs rather than genuine interest in the issue of indigenous peoples’ rights by the delegates: The trade union caucus had disliked the agenda item preferred by the employers’ caucus for the 1988 conference, and vice versa – but both had C107 as their second item.⁶² The Norwegian government delegate in the Governing Body was among those government delegations that supported revision of C107 as an agenda item for the 1988 Conference.⁶³

C107 was taken up under a ‘double discussion procedure’ which implied that it would be on the International Labour Conference agenda for two consecutive years.⁶⁴ If agreement had not been reached by the second year, the Governing Body would have to vote to place it

⁵⁸ *Ibid.*, p. 117.

⁵⁹ MFA, 26.8/54, F 21, Minutes from the Meeting of the Committee of Nordic Senior Officials on Indigenous Populations Issues, 10–11 October 1986.

⁶⁰ MFA, 76.14/20B, F 3, Report by Høgetveit from the Committee of Experts, September 1986.

⁶¹ Report VI (2) *Partial Revision of the Indigenous and Tribal Populations Convention*, 1957 (No. 157) p. 1.

⁶² Interview, Swepston *supra* note 50; Intervention by Leif Dunfjeld at the Oral History Conference 8 March 2012. Dunfjeld represented the World Council of Indigenous Peoples in Geneva.

⁶³ MFA 76.14/20B, F 3, Letter from MFA to Ministry of Local Government and Labour, 10 November 1986.

⁶⁴ Report VI (1), *supra* note 57 (No. 107), p. 1.

back on the agenda. Given the lack of interest in indigenous issues in the ILO, Swepston and many others involved were acutely aware that this would be a theoretical option only. If they did not succeed at the 1989 International Labour Conference, the ILO would not get a revised instrument on indigenous rights in the foreseeable future. ILO procedural rules thereby created a process marked with a sense of urgency, in clear contrast to the parallel UN process.⁶⁵

4. The Ministry of Foreign Affairs Trumps the Preparatory Phase

The details of the Norwegian contribution to C169 were carved out in an atmosphere of broad, albeit not very specific, pro-Sami and pro-indigenous sentiments among the vast majority of the national political establishment. Administrative responsibility for Sami issues was divided among several ministries, with varying levels of knowledge about indigenous issues at an international level. The first head of the division for Sami affairs in the Ministry of Local Government and Labour has described a sense of “naïve overenthusiasm” for Sami issues among ministry bureaucrats in the early 1980s.⁶⁶

The MFA had since the late 1970s become increasingly active in supporting indigenous populations. In 1979, it had initiated the establishment of a Nordic committee of high-ranking civil servants to coordinate efforts to improve conditions for indigenous peoples, including coordinating Nordic policy in the UN. The Ministry of Justice was responsible for the Sami Rights Commission. The Ministry of Agriculture was responsible for reindeer husbandry, including dealing with recurring conflicts of interest between reindeer herders and farmers. The Ministry of Local Government and Labour had coordinating responsibility for Sami policies, and was also responsible for ILO issues. Government officials of these four ministries took part in the emerging internationalization of indigenous issues, including the

⁶⁵ Interview with Gudmundur Alfredsson, Strasbourg, 17 June 2010. Alfredsson is a former staff member UN Centre for Human Rights and secretary of the WGIP.

⁶⁶ Johan Klemet Kalstad, interviewed by Wenke Brenna in U. Sand (ed.), *Kommunaldepartementet 1948–1998: Lokaldemokrati og velferd* (Kommunal og regionaldepartementet, Oslo, 1998) p. 150.

drafting of international instruments and participation in meetings organized by indigenous organizations.

In addition, several other ministries dealt with issues that directly affected the Sami, but had only limited exposure to the international activities related to indigenous populations. The Ministry of Church and Education was responsible for language policies and education. The Ministry of Fisheries was responsible for fishing regulations – including quotas for the coastal fishing which was very important for Sea Sami population. The Ministry of the Environment was responsible for laws pertaining to the use of non-cultivated lands, including hunting rights. The Ministry for Commerce dealt with sub-surface minerals. Finally, the Ministry of Defence dealt with security policies and military operations: here, Finnmark was important due to its border with Russia as well as the attractiveness of its vast and scarcely populated territory for use for training purposes.

The MFA regularly negotiated human rights treaties and had well-established bureaucratic procedures through which such matters were handled. Regular and relatively detailed memoranda in the archives show that top officials and political leadership were kept informed of the progress in the ILO revision process. However, the officials of other ministries who followed indigenous issues at the international level had colleagues and superiors with limited experience with direct involvement in creating international human rights treaties. It is likely that these officials consulted their political superiors prior to declaring Norwegian support for the ILO revision efforts, and that these emphasized the political importance of getting a revised convention that Norway could ratify. The archives, however, give no indication that the political leaderships of the ministries of Local Government and Labour, or Justice, felt the need for a closer consideration of the relevance of the revision efforts for the domestic situation. That the discussions that prepared Norwegian

positions were held on a low level, indicate that neither the politicians nor the top officials expected the ILO process to have significant bearing on the on-going domestic processes.⁶⁷

The government officials most involved in the ILO drafting and ratification processes were Arne G. Arnesen of the Ministry of Agriculture, Einar Høgetveit of the Ministry of Justice, Mari Holmboe Ruge of the Ministry of Local Government and Labour and Petter Wille of the MFA. Arnesen had a background as a legal adviser for the Norwegian Reindeer Herders' Association and had written a PhD on relevant legal issues. He became the main government representative in the negotiations in Geneva pertaining to C107.⁶⁸ Høgetveit, presented above, did not take part in the negotiations in Geneva but delivered essential legal advice, especially during the final phase of the ratification preparations.⁶⁹ Holmboe Ruge had not been involved in Sami issues before the ILO revision process, except for her association with such issues through her daughters who had been engaged in the Alta controversy. She chaired the Norwegian delegations to the 1988 and 1989 ILO conferences and served as the coordinating official for the ratification process, but was little involved in the day-to-day negotiations of C107.⁷⁰ Wille, a junior official at the Norwegian delegation in Geneva and later head of division in the First Legal Office in the MFA in Oslo, became a key contributor to the group. C107 was one of his first experiences of drafting an international convention.⁷¹ Sami representatives participated actively in shaping Norwegian contributions to the ILO

⁶⁷ The ILO process was first discussed by the Norwegian government when the Minister of Local Government on 25 April 1990 proposed a resolution in support of ratification of C169: *Riksarkivet* (Norwegian National Archive, hereafter RA), Office of the Prime Minister, Resolutions by the authority of His Majesty the King and Minutes from Government Conferences, Second Brundtland Government, 04.01.1988–13.10.1989; and *ibid.*, Syse Government, 02.04.1990–19.07.1990.

⁶⁸ Interview with Arne G. Arnesen, Oslo, 20 May 2010.

⁶⁹ Interview with Einar Høgetveit, Oslo, 13 June 2010.

⁷⁰ Interview with Mari Holmboe Ruge, Oslo, 25 May 2010.

⁷¹ Interview with Petter Wille, Strasbourg, 17 June 2010; Intervention by Petter Wille at the Oral History Conference, 8 March 2012.

process; in particular, Aslak Nils Sara, Leif Dunfjeld and Leif Halonen of the Nordic Sami Council developed close relations to Arnesen and Wille.⁷²

The ILO revision process started in 1987 with a questionnaire containing 80 specific questions related to possible revisions of C107. This included proposals to replace the term ‘populations’ with ‘peoples’, and to strengthen the land rights provisions.⁷³ As was normal procedure on ILO issues, the Ministry for Local Government and Labour was the lead agency in Norway. It consulted with other relevant ministries, the Norwegian Employer’s Confederation (NAF) and the Confederation of Trade Unions in Norway (LO), before a draft reply was discussed in the tripartite Norwegian ILO Committee. The Ministry also consulted four Sami organizations.⁷⁴

As to whether the revised Convention ought to replace C107’s consistent use of ‘indigenous populations’ with ‘indigenous peoples’, Norway answered with an unconditional ‘yes’.⁷⁵ In his report from the Expert Meeting, Høgetveit had stated that there was little reason to expect that such a terminological change would have any significance at home.⁷⁶ In 1987, the *Storting* had, based on the recommendations of the Sami Rights Commission, passed what has become known as the Sami Act, which established a separate Sami Parliament. In 1988, a special clause dealing with the Sami was included in the Norwegian Constitution. These changes, it was reasoned, would bring Norway in compliance with the political rights of the revised Convention. When the issue of terminology later became the source of some concern, it was because Norway wanted a convention that would be widely ratified by countries with

⁷² Interviews: Arnesen, *supra* note 68; Wille, *ibid*. The Nordic Sami Council was established in 1956 as a joint coalition between Sami organizations from Finland, Norway and Sweden. When Russian Sami organizations later joined the Council, it changed its name to the Sami Council.

⁷³ Report VI (1), *supra* note 57 (No. 107).

⁷⁴ Archive of the Norwegian Ministry of Justice (hereafter MJ), 082240, Letter from the MLG, dated 26 June 1987.

⁷⁵ MFA, 76.14/20B, F 3, Letter, Ministry of Local Government and Labour to the Director-General of the ILO, 13 October 1987.

⁷⁶ MFA, 76.14/20B, F 2, Report by Høgetveit from the Committee of Experts, September 1986, pp. 4–5.

indigenous populations, and some of these countries objected strongly. Sweden had concluded that the use of ‘peoples’ would be “inappropriate”.⁷⁷ Canada similarly preferred to use ‘populations’.⁷⁸

Where Norway encountered problems was on phrasing the rights of indigenous peoples to land and natural resources.⁷⁹ The most important land rights article was C107’s Article 11, which read: “The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized.” The Committee of Experts had proposed including stronger protection of indigenous property rights, an express reference to consultations regarding surface and sub-surface natural resources, and stricter rules for the removal of indigenous communities from their territories.⁸⁰ For Norway this gave rise to two questions. First, it necessitated re-examining whether Norwegian laws were in compliance with the existing land rights provisions of C107. And second, there was the question of whether Norway could accept these provisions and the proposed changes to them.

The answer to the first question was relatively clear. In an official Norwegian report (green paper) of November 1980, Høgetveit had concluded that Norwegian domestic laws did not fulfil C107’s provisions concerning land rights. In his assessment, the Convention built on the view that “control over natural resources forms the foundation for indigenous populations’ development”. C107 equated control over natural resources with collective or individual ownership to the lands traditionally occupied by these groups. In Norway, however, the state

⁷⁷ MFA, 76.14/20B, F 3, Memorandum by Swedish Ministry of Labour, attached to telefax Swedish Foreign Ministry to Norwegian Foreign Ministry, 21 October 1987.

⁷⁸ *Ibid.*, Norwegian Delegation in Geneva to MFA, 20 April 1988.

⁷⁹ For a discussion of the historical and contemporary basis of Sami land rights claims, see A. Eide, ‘Legal and Normative Bases for Saami Claims to Land in the Nordic Countries’, 8:2–3 *International Journal on Minority and Group Rights* (2001) pp. 127–149. See also S.Tønnesen, *Retten til jord i Finnmark* (Universitetsforlaget, Oslo, 1972); O. Jebens, *Om Eiendomsretten til grunnen i Indre Finnmark* (Cappelen Akademisk Forlag, Oslo, 2000).

⁸⁰ Extracts from the Report of the Meeting of Experts, appendix 1 in Report VI (1), *supra* note 57 (No. 107).

had proclaimed itself the owner of 96 per cent of the land in Finnmark. This had happened during the 18th century, in contravention of “ordinary legal views, especially in the Sami counties”.⁸¹ There was some legal protection of the rights of the local population to use land for certain activities, regardless of formal ownership, and the Sami had privileged rights as regards reindeer herding. It was nevertheless “absolutely clear that the legal situation of the Sami areas in Finnmark did not satisfy C107”.⁸² In view of that strong conclusion, the ministries could hardly conclude differently seven years later, especially since the Sami Rights Commission had not yet completed its review of Sami land rights.

Support for the existing land rights provisions of C107 would therefore require Norway to disregard the discrepancies between domestic laws and the ILO Convention concerning land rights. In Norway, there is a tradition of building political consensus prior to introducing major reforms. When a commission is appointed, this is done after political consultations and is followed by expectations among officials and politicians that the work will result in changes in laws and practices to which governments of varying political orientations will remain loyal. Thus, as regards the on-going efforts of the Sami Rights Commission, it was widely expected that this process would lead to changes. Given the prevailing national political climate, it was reasonable to anticipate that these would strengthen the rights of the Sami as an indigenous people in Norway. Such changes would be in line with the direction of the international processes.⁸³ When the ILO revision process started, however, the Sami Rights Commission was caught in a stalemate on land rights. The divisions partly reflected competing local interests, particularly between reindeer herders and

⁸¹ NOU 1980:53, p. 39. On the efforts to improve national control over Northern Norway after the dissolution of the union between Sweden and Norway in 1905, see O. Riste, *Norway's Foreign Relations: A History*. (Universitetsforlaget, Oslo, 2004) pp. 84–85. On the security dimension of minority policies in Northern Norway, see K. E. Eriksen and E. Niemi, *Den finske fare: Sikkerhetsproblemer og minoritetspolitikk i nord 1860–1940* (Universitetsforlaget, Oslo, 1981).

⁸² NOU 1980:53, p. 40.

⁸³ Interview, Arnesen, *supra* note 68.

farmers, and partly reflected ideational differences between locally-oriented Sami and those dedicated to what Nietzen has called the ‘indigenist identity’.⁸⁴ These internal divisions in the Commission meant that government officials and politicians could not know when the Commission would be able to finish or what kinds of changes it would propose.

The various ministries differed in their basic views as to whether Norway could accept the land rights provisions and the proposed changes to them. The MFA suggested that Norway should avoid supporting any specific proposals regarding land rights. The key dilemma, it held, was that it would be “highly unfortunate” if Norway should endorse a particular solution at the international level and then conclude at a later stage that it was too far-ranging to allow Norwegian ratification. Even with a flexibility clause, “Sami usage rights could not be equated with property rights, even if this Sami concept of ownership can be substantiated”. Since it was politically impossible for Norway to negotiate a human rights instrument with the aim of limiting the measures in order to be able to align them to current conditions in Norway, it should avoid supporting any specific solution regarding land rights at this stage.⁸⁵ The Ministry of Justice, however, offered some surprising advice. It argued that C107’s main provision on land rights should “remain unchanged”, as it was “one of the most important articles of the Convention and meets a widespread desire of indigenous peoples across the world”. The Ministry furthermore supported most of the changes proposed by the ILO regarding land rights, including expanding these to include sub-surface natural resources.⁸⁶

For the MFA it would be highly embarrassing if Norway should fail to ratify a human rights convention that it had advocated internationally. Seeking to reduce the risks of such an outcome, the Ministry found itself in a classic two-level game where the domestic level

⁸⁴ Nietzen, *supra* note 2, esp. p. 6 *et seq.*; interview with Jon Gauslaa, Oslo, 24 April 2010. Gauslaa served as the secretary of the Sami Rights Commission from 1988–1996.

⁸⁵ MFA, 76.14/20B, F 3, Internal memorandum, First Legal Office of the MFA, 8 September 1987.

⁸⁶ MJ, 082383, Ministry of Justice to Ministry of Local Government and Labour, 1 September 1987.

constrained which solutions were possible to pursue at an international level.⁸⁷ It was the Ministry of Justice that was acting out of character. Arriving at policy recommendations that would enable Norway to play a leading role in the negotiations was in line with the current political climate, which was pro-Sami and pro-indigenous peoples. However, as administratively responsible for the Sami Rights Commission, the Ministry of Justice would know that the ILO Convention, if negotiations succeeded, would be completed *before* the Norwegian government would be ready to present proposals based on the work of the Sami Rights Commission. Even though international law was not directly operative as part of Norwegian domestic laws, the Ministry's bureaucratic interest was to avoid placing the government and the *Storting* in a situation where these were presented with a convention with which Norwegian laws did not comply.⁸⁸ Høgetveit recalls that Sami issues did not attract much attention in the Legislation Department and that he was on his own when he crafted specific policy documents pertaining to the ILO process.⁸⁹ His advice to disregard inconsistent national laws at this stage can therefore best be understood in the context of what is known as the 'socialization effect' of international cooperation.⁹⁰ Høgetveit's international experience gave him insight into, and possibly sympathy for, the views of indigenous activists and international experts, so that he tended to give preference to the views of indigenous representatives over concerns about possible discrepancies between Norwegian laws and the revised Convention.

⁸⁷ R. Putnam, 'Diplomacy and domestic politics: the logic of two-level games', 42:3 *International Organization* (1988) pp. 427–460.

⁸⁸ Both Arnesen and Høgetveit recall that they shared this view of the relation between international and domestic law in Norway: Interviews: Arnesen, *supra* note 68, Høgetveit, *supra* note 69. On bureaucratic politics, see M. H. Halperin, P. A. Clapp and A. Kanter, *Bureaucratic Politics and Foreign Policy* (Brookings Institution Press, Washington, DC, 2006).

⁸⁹ Interview, Høgetveit, *supra* note 69.

⁹⁰ P. M. Haas, 'Introduction: epistemic communities and international policy coordination', 46:1 *International Organization* (1992) pp. 1–35; T. Risse and K. Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction', in *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, Cambridge, 1999) pp. 1–38; Tarrow, *supra* note 19, p. 26; L. L. Martin and B. A. Simmons, 'Theories and Empirical Studies of International Institutions', 52:4 *International Organization* (1998) pp. 729–757.

What came to prevail was the view held by the MFA: Norway should not recommend any specific solutions as regards land rights at this stage.⁹¹ The official Norwegian response pointed out how C107's articles on land rights had been drafted without regard for either the traditions of the Sami in Norway or for legal developments as regards property law in Norway. An account of the current situation in Norway and the work of the Sami Rights Commission followed. Due to the on-going process, it was emphasized, Norwegian authorities were "precluded from pre-judging the final outcome of this process"; thus, "the absence of definitive responses to specific questions on land rights should be considered in this light".⁹²

This position placed the Norwegian government in line with the governments of other Western countries with indigenous populations. Their replies showed that these governments preferred a convention that did not move beyond existing domestic laws, or laws that were in the process of being adopted, while at the same time allowing them to express support for the indigenous peoples' movement and suppressed groups in other countries.⁹³ Sweden, for example, had been silent on land rights.⁹⁴ Canada had proposed that the revised Convention should recognize other ways of controlling lands than by way of ownership, and that Article 11 should read: "Governments shall ensure that possession, use or ownership, collective or individual, of lands which the members of the populations concerned occupy, is recognized."⁹⁵ The majority of the government respondents came from countries with no

⁹¹ MFA, 76.14/20B, F 3, Internal memorandum by the First Legal Office, 8 September 1987.

⁹² *Ibid.*, Letter Royal Ministry of Local Government and Labour to the Director-General of the International Labour Office, 13 October 1987. *See also ibid.*, Telegram MFA/ Irvin Høyland to the MJ/responsible official, 22 September 1987.

⁹³ For a summary of governments' replies, *see* Report VI (2), *supra* note 61 (No. 107).

⁹⁴ MFA, 76.14/20B, F 3, Memorandum by Swedish Ministry of Labour, attached to telefax Swedish Foreign Ministry to Norwegian Foreign Ministry, 21 October 1987.

⁹⁵ Report VI (2), *supra* note 61 (No. 107), p. 47. For brief summaries of indigenous groups' land claims in Canada, Australia, New Zealand and elsewhere, *see e.g.* NOU 1984:18, pp. 321–332. *See also* R. P. Hill, 'Blackfellas and Whitefellas: Aboriginal Land Rights, the Mabo Decision and the Meaning of Land', 17:2 *Human Rights Quarterly* (1995) pp. 303–308.

recognized indigenous populations on their territories: they preferred to keep Article 11 unchanged.⁹⁶

The ILO Office admitted that the use of the terms ‘lands’ and ‘territory’ gave rise to complex issues. It chose, however, to leave out ‘use’ and include only a reference to ‘possession’ in the proposed main article on land rights.⁹⁷ The new expression “rights of ownership and possession” did not make a fundamental difference to the Norwegian MFA, which expected Australia, Canada, Finland, New Zealand and Sweden to conclude similarly.⁹⁸ The MFA instructed the Norwegian delegation to the ILO Conference to voice support for the Canadian proposal and to make it clear that Norway would not be able to “ratify a convention that obliged her to recognize ownership rights”.⁹⁹

5. Land Rights in the ILO Negotiations

Land rights were one of the two key issues for the indigenous peoples’ movement when negotiating revisions of C107. The WGIP decision to allow indigenous representatives to take part in its meetings had triggered expectations among indigenous peoples that they would be directly involved in the development of future international standards. Such arrangements were not possible under ILO regulations, however.

In the ILO revision process, a small number of indigenous organizations achieved a status that allowed them to attend as observers when the 1988 International Labour Conference opened. Representatives of indigenous organizations also were invited to speak to

⁹⁶ MFA, 76.14/20B, F 3, Norwegian Delegation in Geneva to MFA, 20 April 1988.

⁹⁷ Report VI (2), *supra* note 61 (No. 107) pp. 48–49.

⁹⁸ MFA, 76 14/20B, F 3, Internal memorandum by the First Legal Office of the MFA, 16 May 1988. For theory-oriented discussions of the problem of involuntary defection, see Putnam, *supra* note 87, pp. 438–439; and K. Iida, ‘Involuntary Defection in Two-level Games’, 89 *Public Choice* (1996) pp. 283–303.

⁹⁹ MFA, 76 14/20B, F 3, Instructions to the Norwegian governmental delegation to the ILO conference, 30 May 1988.

the Conference at certain points during the negotiations.¹⁰⁰ This very limited formal representation of indigenous peoples was to some degree compensated by the close cooperation between indigenous activists and the workers' caucus, which gave indigenous representatives a channel through which they could propose changes and voice their opinions. Some also gained a voting seat as part of the workers' caucus. Furthermore, encouraged by the ILO, some governments included representatives of indigenous peoples in their delegations. In the group of Western governments with indigenous populations, Australia, Denmark, Finland, Norway and Sweden similarly had representatives of indigenous peoples in their delegations. The Norwegian government delegation included Aslak Nils Sara from the Norwegian Sami Council. Furthermore, indigenous organizations had been invited to be part of the Canadian government delegation, but had set conditions for their participation which the government did not agree to.¹⁰¹ Indigenous activists from Canada nevertheless played an active role in the negotiations, through the workers' caucus.¹⁰² Hans Jacob Helms, the Danish delegate and representative of the Inuit of Greenland, served as reporter for the agenda item of revision of C107.¹⁰³ The fact that indigenous peoples were not represented with full rights *qua* indigenous peoples in the negotiations, however, was a source of intense frustration.¹⁰⁴

¹⁰⁰ Interview, Swepston, *supra* note 51; interventions by Dunfjeld and Dalee S. Dorough at Oral History Conference, 8 March 2012. Dorough represented the Inuit Circumpolar Conference during the 1988 and 1989 ILO conferences and served as one of two lead spokespersons on behalf of the Indigenous Rights Group.

¹⁰¹ MFA, 76.14/20B, F 3, Norwegian Delegation in Geneva to MFA, 20 April 1988.

¹⁰² Interview, Swepston, *supra* note 51; Interventions by Dunfjeld and Wilton Littlechild at the Oral History Conference 8 March 2012. Littlechild is Cree and an active advocate for indigenous issues at an international level. He was a member of the Canadian Parliament from 1988 to 1993.

¹⁰³ Helms was Danish by ethnicity, but was raised in Greenland and worked for the home rule government. Intervention by Hans Jacob Helms at the Oral History Conference 8 March 2012. Helms has written a semi-fictional book based on his experiences in Geneva, titled *Dansen i Geneve: Fortællinger fra Verden* (Forlaget Ries, Charlottenlund, 2004).

¹⁰⁴ MFA, 26.8/54, F 26, Report from MFA's First Legal Office from WGIP's 7th Session from 31 August to 4 September 1989, p. 2; intervention by Dorough at the Oral History Conference 8 March 2012; interview with Swepston, *supra* note 51 .

Indigenous activists advocated expansive land rights provisions, which they saw as the “soul” of the Convention.¹⁰⁵ In Geneva, the Norwegian government delegation was faced with the daunting task of trying to communicate the content of a proposal that referred to a legal practice largely unknown outside the Nordic states and for which no adequate English or Spanish legal term existed.¹⁰⁶ Equating ‘use’ with ‘ownership’ was perceived as an effort at weakening, rather than broadening, the measures on land rights. The proposition to include ‘use’ in the land rights provisions was not controversial in Norway, however. In March 1988, the Norwegian Sami Reindeer Herding Association had urged the Minister of Local Government and Labour to do his utmost to amend the ILO Secretariat’s draft articles on land rights, so as to enable Norwegian ratification of the revised Convention.¹⁰⁷ That meant that the government delegation was not running the risk of jeopardizing their close relations with the Sami delegates and observers in Geneva by sticking to its position, even if other indigenous representatives strongly opposed it. The section on land rights provoked 77 proposals for amendments.¹⁰⁸ A working group was set up, but proved unable to reach agreement. According to the Norwegian report from the conference, the main problem had been that the workers’ caucus had presented proposals on behalf of indigenous activists, but without the necessary interest in reaching compromises.¹⁰⁹ The questions of land rights and of people/population were both postponed to the 1989 conference.

This situation illustrated how parallel international processes may interact. Negotiating a convention that would be ratified by many states was a key concern for some actors but was less important to others, especially some indigenous activists, who feared the possible

¹⁰⁵ Dorough, ‘Revision’, pp. 5 and 19; MFA 76.14/20B, F 3, Memorandum by IWGIA, ‘Concerning Revision of ILO Convention 107 and Questionnaire’, p. 2.

¹⁰⁶ Interview, Arnesen, *supra* note 68.

¹⁰⁷ MFA, 76.14/20B, F 3, Letter Norwegian Sami Reindeer Herding Association to William Engseth, 21 March 1988.

¹⁰⁸ International Labour Conference, *Provisional Record*, 75th session, 32, p. 15.

¹⁰⁹ MFA, 76.14/20B, F 3, Report of the Norwegian government delegation to the 1988 International Labour Conference, p. 8.

spillover effect on the parallel UN process. The WGIP had started preparations for a declaration in 1986. A very preliminary draft was developed at the 1987 session, before serious headway was made towards a declaration in the late summer of 1988.¹¹⁰ The WGIP Chairman Erica Daes pointed out how the most important achievements of the draft declaration prepared by the UN Human Rights Center were its consistent use of indigenous ‘peoples’ over ‘populations’, the combination of individual and collective rights with an emphasis on the latter, the introduction of indigenous autonomy, and the reaffirmation of land and resource rights.¹¹¹ Petter Wille of the Norwegian Delegation in Geneva predicted that governments would object to several aspects of the draft. Problems included the use of the concept of ‘collective rights’, the unconditional right to the use of indigenous languages in the schools and before the courts and public administration, and the use of “their state” to refer to institutions of self-government. Most problematic, however, were the draft articles on land rights, including the affirmation of indigenous peoples’ rights to ownership and possession of the lands they have traditionally occupied.¹¹² However, such concerns did not prove decisive, and the WGIP proposed to the Sub-Commission that the draft should serve as a basis for the continued work towards a universal declaration on the rights of indigenous peoples. This first draft declaration represented a great victory for the indigenous peoples’ movement.

In the early autumn of 1988, the ILO Office completed a new draft of the revised Convention.¹¹³ Norway had not changed its positions. It reiterated to the ILO Office the Canadian proposal during the 1988 negotiations, which had gained the support of the governments of the USA, Sweden, Norway, Australia, New Zealand, Denmark and Finland

¹¹⁰ MFA, 76.14/20B, F 3, Telefax Norwegian Delegation in Geneva to MFA, 27 June 1988; *see also* Sanders, *supra* note 10, pp. 427 *et seq.*, which includes the full text of the 1988 draft.

¹¹¹ MFA, 76.14/20B, F 3, Erica-Irene A. Daes, Chairman/Rapporteur of the Working Group on Indigenous Populations, Introduction of item 5 and of document E/CN.4/Sub.2/1988/25, Sixth session of WGIP, 1–5 August 1988.

¹¹² MFA, 76.14/20B, F 3, Telefax, Norwegian Delegation in Geneva to MFA, 27 June 1988.

¹¹³ The text forms the bulk of Report IV (1) *Partial revision of the Indigenous and Tribal Populations Convention, 1957* (No. 107) International Labour Office, Geneva.

during the 1988 negotiations.¹¹⁴ This proposal read: “The rights of possession, use or ownership of the (peoples/populations) concerned over the lands which they traditionally occupy shall be (i) recognized, or (ii) equitably addressed through procedures established according to Article 19.” In addition, Norway proposed some changes in the measures concerning expropriation of land.¹¹⁵ Both of these proposals aimed at bringing the new Convention in line with Norwegian domestic legislation. In addition, government officials believed that amending C107’s measures on land rights would increase the prospects for ratification from a substantial number of states with indigenous groups.¹¹⁶ The Norwegian Sami Council proposed equating ‘preferential use’ with the right to ownership and possession in the main article on land rights.¹¹⁷ The 1989 instruction to the Norwegian delegation raised the bar: Should it prove impossible to arrive at a “satisfactory solution” with regard to Article 14, it would be more natural for Norway to vote against these measures than to abstain from voting. Norway should then explain its negative vote. Should this situation arise, the MFA should preferably be consulted prior to such actions.¹¹⁸

When the negotiations re-opened in Geneva, the two most controversial issues remained unresolved – the terminology people/population, and the land-rights provisions. The overarching goal of many indigenous representatives was to ensure that the revised ILO Convention would not contain expressions or articles that might serve to undermine the WGIP draft declaration. On the first controversial issue, many such representatives wished to include

¹¹⁴ LS, 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.).

¹¹⁵ LS, Telefax from the Ministry of Local Government and Labour to the International Labour Office, 14 December 1988.

¹¹⁶ Interview, Arnesen, *supra* note 68.

¹¹⁷ LS, Telefax from the Ministry of Local Government and Labour to the International Labour Office, 14 December 1988.

¹¹⁸ MFA, 76.14/20B, F 3, Memo dated 5 June 1989 and Instruction to the Norwegian government delegation. The instruction and the memo are discussed in H. Minde, ‘Sami Land Rights in Norway: A Test Case for Indigenous Peoples’, 8 *International Journal on Minority and Group Rights* (2001) pp. 118–119.

the indigenous within the scope of the principle of self-determination, as defined in post-Second World War international law. That would be possible only if they were not defined as ‘populations’ or ‘minorities’, but as ‘peoples’. After much wrangling, the final compromise text consistently employed the term ‘peoples’, but included Article 1(3) which explicitly stated: “The use of the term *peoples* in this convention shall not be construed as having any implication as regards the rights which may attach to the term under international law.”

Land rights kept the conference on its toes to the very last moment. Over a hundred proposals for amendments to the land rights provisions were put forward. As in 1988, these were referred to a working group, in which the Norwegian government was one of five governmental members.¹¹⁹ The working group was unable to reach agreement on all aspects of these provisions. Regarding the right to use, the ILO Office had concluded an agreement with the view that “to assimilate the term ‘use’ to ownership and possession would weaken the revised convention”. It had proposed, however, adding a new paragraph on ‘use’ to the Article “to distinguish between the right to use and the rights of ownership and possession”.¹²⁰ As before, the government members argued that the inclusion of user rights in Article 14 would make the measure flexible enough to reflect a wide range of “constitutional and legal circumstances”,¹²¹ and the workers’ members held that the term could reduce “the effect of the obligation incorporated in the Article”.¹²²

To cut through this Gordian knot, the Chairman proposed a ‘package text’ on land rights which included all articles in the chapter on land rights with the exception of Article 17(2).¹²³ The final compromise text on the main article on land rights, Article 14(1), opened

¹¹⁹ International Labour Conference Provisional Record, 76th Session, 25, p. 16.

¹²⁰ International Labour Conference, 76th Session 1989, Report IV (2A) *Partial revision of the Indigenous and Tribal Populations Convention*, 1957 (No.107), p. 36.

¹²¹ International Labour Conference Provisional Record, 76th Session, 25, p. 17.

¹²² *Ibid.*

¹²³ *Ibid.*, pp. 18–23.

with the right of indigenous peoples to “ownership and possession” over lands which they “traditionally occupy”. The next sentence added that “[i]n addition” measures should be taken “to safeguard the right of the peoples concerned to use lands not exclusively occupied by them”. The final sentence stipulated that “[p]articular attention shall be paid to the situation of nomadic peoples”. On behalf of the four Nordic countries, Norway’s Arne Arnesen explained how the four understood the land rights provisions, in an exercise clearly aimed at influencing how the Convention would be interpreted in the future. Article 34 in the final text of C169 stated: “The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.” “[F]lexibility stands out as a sheer necessity ... especially ... in the part dealing with land rights”, Arnesen explained, and quoted the explanation by the ILO Office that “the firm assurance of possession” had not been found to be a violation of the requirement of ‘ownership’ under ILO C107.¹²⁴

On 27 June 1990, ILO Convention 169 was adopted with 328 votes in favour, one opposed and 49 abstentions. All Western governments, including Norway, voted in favour, except France and the UK, which abstained. Among the Latin American countries only Colombia, Ecuador, Mexico and Nicaragua voted in favour, with the rest abstaining. Also Indonesia and Japan abstained.¹²⁵

6. The Ministry of Justice Persuades Sceptics

Reporting home after the ILO conference, Petter Wille asserted that Article 14 of C169 had become “more flexible” than Article 11 of C107. The references to the right of use and to nomadic use were well suited for the Nordic countries “where the right of use for reindeer herding was the common form”, even though it would have been better if “the right of use had

¹²⁴ MFA, 76.14/20B, F 3, Telefax, Norwegian Delegation in Geneva to MFA, 27 June 1989.

¹²⁵ *Ibid.* Available sources do not reveal what contacts were established between the government delegation and the MFA before Norway voted in favour.

been put on equal terms as the rights of ownership and possession”.¹²⁶ Despite the interpretative exercise of the Nordic government delegations in Geneva, the fact remained that in the final revised Convention the right of use had not been explicitly placed on a par with the rights of ownership and possession.

ILO regulations require that new conventions be submitted to competent authorities for ratification at the earliest practicable moment and no later than 18 months after their adoption.¹²⁷ Norway’s Ministry of Local Government and Labour wanted swift ratification of C169.¹²⁸ That autumn of 1989 the Conservative-Liberal government coalition of Jan P. Syse replaced the Social Democratic government of Gro Harlem Brundtland.¹²⁹ This did not delay the treaty ratification process, however, because both governments shared a supportive attitude to the international engagement for the rights of indigenous peoples and to Sami rights – as was evident when the *Storting* adopted legislation to establish a popularly elected body for the Sami, the Sami Parliament. Only three of the 157 *Storting* representatives voted against the Sami Act.¹³⁰ Furthermore, adding a sense of urgency, the Sixth World Congress of the World Council for Indigenous Peoples would take place in Tromsø, Norway, in the fall of 1990.

As was normal in any process of treaty ratification or law proposal, the Ministry of Local Government and Labour invited the other ministries and interested organizations to comment on the ILO Convention and Norway’s possible ratification. Interestingly, the

¹²⁶ MFA, 76.14/20B, F 3, Telefax, Norwegian Delegation in Geneva to MFA, 23 June 1989.

¹²⁷ Archive of the Ministry of Local Government and Labour (hereafter MLL), 063.531 Konvensjon nr. 169 (hereafter C169), International Labour Office, ‘Memorandum Concerning the Obligation to Submit Conventions and Recommendations to the Competent Authorities’, Appl. 19 S (Rev 3), 1980.

¹²⁸ Interviews: Høgetveit, *supra* note 69; Arnesen, *supra* note 68; Wille, *supra* note 71.

¹²⁹ The Syse government re-organized the ministries, with new names for some of them, as of 1 January 1990.

¹³⁰ *Stortingstidende*, forhandlinger i Odelstinget 1986–87, p. 501; *Stortingstidende*, forhandlinger i Lagtinget 1986–87, p. 84. For indigenous peoples in Norwegian development aid policies, see Svenbalrud, *supra* note 32, pp. 181 *et seq.*

Ministry of Finance was not invited to comment.¹³¹ In line with how this issue had been dealt with so far, that decision gives further confirmation that the involved officials did not expect any significant domestic economic, administrative or security effects to ensue from ratifying ILO C169.

Responses were slow in coming. The first came from ministries which had not taken part in the negotiations in Geneva. The Ministry of Industries informed that it already had practices that ensured that the local population, including representatives of the reindeer herders, were consulted.¹³² The Ministry of Education and Research found Norwegian laws pertaining to education and language to be in accordance with the Convention.¹³³ The Ministry of Fisheries provided a general overview over current laws, pointing out that these did not allow for privileged rights to fishing for specific population groups. Biological arguments against certain methods of fishing could be made, in practice reserving areas for smaller vessels, and this would indirectly serve to protect the livelihoods of the Sea Sami population. Thus, it found Norwegian laws to be in accordance with C169 as regards fishing.¹³⁴ The Ministry of Defence had no objections to ratification.¹³⁵

The ministries that had been represented in the government delegation to the ILO conferences were positive to ratification. The Ministry of Agriculture pointed out that, given the “flexible design” of the Convention, Norwegian legislation was in accordance. It mentioned, however, that the Convention might provide “additional support for potential Sami claims to formal ownership for local users”.¹³⁶ Similarly, the MFA emphasized

¹³¹ MLL, C169, Letter Ministry of Local Government and Labour to several ministries and others, 24 October 1989.

¹³² MLL, C169, Letter Ministry of Industries to the Ministry of Local Government, 31 January 1990.

¹³³ MLL, C169, Letter Ministry of Education and Research to the Ministry of Local Government, 31 January, 1990.

¹³⁴ MLL, C169, Letter Ministry of Fisheries to the Ministry of Local Government, 28 February 1990.

¹³⁵ MLL, C169, Ministry of Defence to the Ministry of Justice, 30 January 1990. Why the communication was not between the Ministry of Local Government and the Ministry of Defence is not revealed.

¹³⁶ MLL, C169, Letter Ministry of Agriculture to Ministry of Local Government, 29 January 1990.

Norway's very active support for the Convention. This, the Ministry noted, included participation in negotiating the land rights clauses which established "a minimum standard for legal protection of the uses of land by indigenous populations". Prior to ratification, some further clarifications might be needed regarding state ownership to land in Finnmark, but the Ministry could not see that this represented an obstacle to ratification.¹³⁷ Compared to the MFA's previous persistent mention of the discrepancies between draft versions of the articles on land rights in the revised Convention and domestic laws, this represented a willingness to downplay discrepancies between the newly completed Convention text and domestic legislation. The MFA's bureaucratic interest now had shifted to achieving Norwegian ratification. Possibly contributing to the positive reply, Wille acted as the official with responsibility for this matter, now from his position within the MFA in Oslo.

Sami organizations supported ratification, and pointed out that domestic legislation would have to be changed at a later stage in order to put Norway in compliance with the Convention. The Norwegian Reindeer Herders' Association found that the land rights provisions "required legal recognition of land rights, and that the actual use of the areas had to get real legal protection". Although Norwegian laws were not "in direct conflict" with the Convention, they were unclear and had deficits regarding protection of the use of land.¹³⁸ The Nordic Sami Council supported ratification, which it believed would be attainable within the set time-frame thanks to the "positive activity" within the Sami polities of the national government. Adjustments were needed in regulations concerning the slaughter of reindeers and the treatment of food in order to protect traditional eating habits. Also the privileged rights of Sami to river fishing in the Tana River, to coastal fishing, the gathering of cloudberries and grouse hunting would have to be protected.¹³⁹

¹³⁷ MLL, C169, Letter MFA to the Ministry of Local Government, 30 January 1990.

¹³⁸ MLL, C169, Norske Reindriftsamers Landsforbund, 1 February 1990.

¹³⁹ MLL, C169, Nordic Sami Council, 6 February 1990.

“We were of course aware”, President of the Sami Parliament Ole Henrik Magga has recalled, “that the Norwegian legislation was not quite in harmony with the convention”.¹⁴⁰ Against the views of some in the Sami Parliament who believed that Norway could not ratify without major changes in domestic legislation, Magga insisted that the Sami Parliament should express support for a swift ratification.¹⁴¹ This argument reflected a desire to use the Convention to lock in the domestic political process, a strategy that resembled how international law had become the “motor” of national legal developments in the work of the Sami Rights Commission.¹⁴² In line with Magga’s view, the Sami Parliament in its reply pointed out how the new Convention acknowledged and expressed respect for cultural and ethnic pluralism, and required states to consult indigenous populations. It noted that the land rights provisions of the Convention gave indigenous populations qualified rights to their traditional areas, including by recognizing “a certain collective aspect” to these rights. Norwegian laws and practices, however, were “probably not completely in compliance with C169”. This was not a problem, the Parliament argued, as the on-going work of the Sami Rights Commission “aimed at arriving at new legislation”. The changes in domestic legislation “are not a necessary condition for ratification at the present time”, but “ratification will require a timely clarification and likely legislative changes on certain points later”. The Parliament did not specify within which areas or what kinds of changes were needed, but emphasized that the Convention only stipulated minimum requirements.¹⁴³ Also the Nordic Sami Institute pointed out that it was doubtful that Norwegian laws and practices were in accordance with C169.¹⁴⁴

¹⁴⁰ Intervention by Ole Henrik Magga at the Oral History Conference, 8 March 2012.

¹⁴¹ *Ibid.*

¹⁴² Interview with Carsten Smith, Oslo, 20 December 2010.

¹⁴³ MLL, C169, Sami Parliament, 2 February 1990.

¹⁴⁴ MLL, C169, Nordic Sami Institute, 16 February 1990.

Noticeably, the Sami Rights Commission had been asked to issue a consultative report, but had chosen not to do so.¹⁴⁵ The archives of the Commission do not reveal why, but it is likely that its leadership proposed this approach because of the high level of internal disagreements. Trying to get the Commission members to agree on C169 would probably have been very difficult. The Commission probably also did not wish to bind itself to any particular direction for its work at this early stage.¹⁴⁶

In March 1990, things became more complicated. The Ministry of the Environment, which had not been involved in the negotiations in Geneva, asserted that Norwegian laws were “clearly not in accordance” with Article 14 of the Convention. The problem was partly state ownership of the land in Finnmark, and partly that rights to use the land were generally protected for the local population, not specifically for the Sami. The letter cited a whole array of potential areas of conflict between different kinds of usage of the land and natural resources. These, the letter concluded, meant that “it was essential” to postpone the decision on ratification until the Sami Rights Commission had completed its work. Following the opposite sequence would “establish the framework for” the Sami Rights Commission in a “highly undesirable way”.¹⁴⁷ This non-ratification stance of the Ministry of the Environment could easily have derailed the ratification process, had it not been for the report submitted by the Ministry of Justice.

In a reply authored by Einar Høgetveit, the Ministry of Justice recommended ratification. The Ministry asserted that “significant time” would pass before the Sami Rights Commission could reach its conclusions on land rights. In order not to impose restrictions upon the Commission beyond those included in its mandate or in existing laws, the Ministry

¹⁴⁵ MLL, C169, Sami Rights Commission to Ministry of Local Government, 30 November 1989.

¹⁴⁶ Interview, Gauslaa, *supra* note 84; Norwegian National Archive (hereafter RA), unsorted archival material ‘Samerettsutvalget 1’ [Sami Rights Commission 1], including minutes of meetings 1987–1992 and correspondence 1987–1993.

¹⁴⁷ MLL, C169, Letter Ministry of the Environment to Ministry of Local Government, 7 March 1990.

identified the key question regarding ratification as being whether the land rights provisions had been changed in such ways that one could assume with “reasonable certainty” that Norwegian laws and practices were in accordance with the new Convention. The main change from the Norwegian perspective, the letter argued, was the inclusion in C169 of the concept of ‘possession’ of land, where the relevant Norwegian term would be *bruksrett* (literally “the rights of use”). If strong protection of the rights of use, without formal ownership, was sufficient to comply with the Convention, the Ministry asserted that Norway was in a position to ratify. Several factors supported such an interpretation of Article 14, including the stated purpose of C169 to protect indigenous peoples’ traditional ways of life, the ‘promotional’ character of the Convention and several statements by ILO officials and committees. However, there were other factors pointing in the opposite direction, including the chronology of proposals and certain statements made during negotiations on the provision. All in all, the Ministry concluded, the Convention allowed for greater flexibility in methods for implementation of the land rights provisions in the different states, in particular as regards nomadic use, rights to areas no longer occupied by indigenous peoples, and rights to compensation for expropriation. Furthermore, it argued, C169 did not require privileged rights for indigenous peoples unless this was the only way to safeguard traditional use. Revealing concern for public opinion and international prestige, the Ministry added that Norway’s active participation in the negotiations and its “positive attitude to human rights in general and indigenous peoples issues specifically” had created “certain expectations internationally” that Norway would ratify. Conscious of uncertainties surrounding the interpretation of the main article on land rights, however, the letter recommended that the most important documents pertaining to the Norwegian ratification be translated into English and sent to Geneva, to

inform the ILO about the interpretation that had informed the Norwegian ratification.¹⁴⁸ This was never done.

The legal opinions of the Legislation Department of the Ministry of Justice normally ranked above those of the Ministry of the Environment. Moreover, Høgetveit recalls that this Ministry was “not as close to the issues” as the MFA, the Ministry of Agriculture and the Ministry of Justice, and that it had been less imbued with the “positive spirit” and the “desire and desirability” of taking a leading role than the three other ministries.¹⁴⁹ Probably in order to pressure the Ministry of the Environment to change its non-ratification position, the Ministry of Local Government emphasized that Minister of Local Government Johan J. Jacobsen on 8 March had stated to the *Storting* that the government would put the Convention before the *Storting* sometime during the spring. When reviewing its position, the Ministry was encouraged to consult other relevant ministries, in particular those of Foreign Affairs, Justice and Agriculture.¹⁵⁰

As requested, the Ministry of the Environment withdrew its previous recommendation and presented one that did not oppose ratification of C169.¹⁵¹ It still voiced concerns, however. It was not clear, the Ministry pointed out, what should be recognized as “traditional use” by the Sami. Furthermore, scarcity of resources could arise in the future, in particular between Sami and non-Sami population groups. In such situations, the Ministry expected Sami demands for privileged rights as an indigenous people. If this happened, and Norway had ratified the Convention, Norwegian laws would have to be changed. Therefore, the

¹⁴⁸ MLL, C169, Letter Ministry of Justice and Police Affairs to Ministry of Local Government, 6 March 1990. ILO officials later subscribed to the view that in some circumstances the right to possession and use of land would satisfy the conditions laid down in the Convention. This included instances where “there is shared use of certain lands, in which case the right to possession may be more appropriate than full title”, in the pamphlet M. Tomai and L. Swepston, ‘A Guide to ILO Convention No. 169 on Indigenous and Tribal Peoples’ (International Labour Office, Geneva, 1995) p. 14. Copy in authors’ possession.

¹⁴⁹ Interview, Høgetveit, *supra* note 68.

¹⁵⁰ MLL, C169, Letter Ministry of Local Government to Ministry of the Environment, 12 March 1990.

¹⁵¹ MLL, C169, Letter Ministry of the Environment to Ministry of Local Government, 21 March 1990.

Ministry preferred that the Sami Rights Commission had been allowed to complete its task prior to Norwegian ratification. If Norway ratified C169, however, the letter emphasized that it was important that ratification should “not constrain” the work and proposals of the Sami Rights Commission. Given the interpretative report by the Ministry of Justice, the Ministry of the Environment “would not oppose ratification”.¹⁵²

The use of the expression “not constrain” is ambiguous in this context. Arnesen, Wille and Høgetveit knew well how the adopted Convention text reflected conflicting interests and interpretations, moulded into a compromise text. This fact, the flexibility clause of the Convention itself and their view that international law had relatively limited weight when domestic law is established meant that they believed that the Norwegian government would have significant freedom to implement C169 in ways best suited to local circumstances.¹⁵³ ILO official Lee Swepston recalls that he on many occasions emphasized that the Convention did not require any specific action in specific situations in individual countries. His advice was that although not all actions would be consistent with the Convention, there was flexibility in national implementation.¹⁵⁴ The key government officials must have realized that the Sami Rights Commission could not disregard a ratified international treaty when preparing their proposals. Ratification of C169 would limit the options available to the Sami Rights Commission and would further strengthen the impetus for changes in domestic legislation.¹⁵⁵ Given the pro-Sami rights political climate, it is reasonable to assume that the officials concluded that this would not be a problem.

In the decision memorandum prepared for Minister for Local Government Johan J. Jacobsen in early April 1990, the Ministry of Local Government recommended ratification of

¹⁵² *Ibid.*

¹⁵³ Interviews: Høgetveit, *supra* note 69; Arnesen, *supra* note 68.

¹⁵⁴ Interview, Swepston, *supra* note 51.

¹⁵⁵ For a theory-oriented discussion of ratified human rights treaties as a supportive argument in political processes, see Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, Cambridge, 2009) pp. 135–148.

C169. The memorandum mentioned that the Sami Parliament and Sami organizations had pointed out in their consultative reports that Norwegian laws were not in accordance with the land rights clauses of ILO C69. This was not a problem, the memorandum argued, as none of the ministries had “concluded that Norwegian laws and practises – with some conditions as mentioned in the consultative reports – represented obstacles to ratification”. The Minister concurred with the proposal.¹⁵⁶

On 23 April, the Ministry of Finance finally entered the scene, remarking that it had taken note of the views of the other ministries that C169 could be ratified without prior changes in laws and regulations. The Convention alone would therefore not have administrative or economic consequences. It had also noted that ratification could be used to support Sami claims for ownership in Finnmark and other places, but that the Ministry of Local Government assumed that the Convention would not affect how such claims would be evaluated. However, in the opinion of the Ministry of Finance, Norway should not ratify the Convention until after the Sami Rights Commission had completed its work on Sami land rights. The Ministry would not oppose ratification, but requested that these concerns be included as a formal note in the government resolution.¹⁵⁷

The Ministry of Local Government pointed out to the government that the aim of the Convention was to “ensure the rights of indigenous people to protection and development of their own culture”, and that it “provides protection of indigenous peoples’ traditional exercise of ownership and rights of use of land”. With ratification, national governments committed “to actively support” the “uniqueness of indigenous populations”, and in Norway the Convention would apply to the ‘Sami population’. Mention was made of the views of the Sami Parliament, and the Ministries of Environment and Finance. But, invoking the

¹⁵⁶ MLL, C169, ‘Memorandum to the Minister’ of 4 April 1990, and signature and written note of 18 April 1990 by the Minister on this document.

¹⁵⁷ MLL, C169, Ministry of Finance to the Ministry of Local Government, 23 April 1990.

consultative report of the Ministry of Justice, the decision memorandum concluded that Norway was in a position to ratify the Convention “without changes in existing laws and regulations”.¹⁵⁸ The memorandum included the caveat from the Ministry of Finance, however, which showed that other interpretations were possible.

On 30 April 1990, the Norwegian government supported ratification of C169. None of the Cabinet ministers took the floor on this agenda item, and on this issue the minutes of the meeting simply reiterated the resolution to be presented by the government to the *Storting* in support of ratification. This short resolution mentioned the “strong wishes” of the Sami Parliament and Sami organizations for swift ratification, and Norway’s active support for the rights of indigenous peoples in international arenas. There was no mention of Norwegian domestic legislation or the on-going work of the Sami Rights Commission.¹⁵⁹ The ministers’ general lack of interest in the potential domestic effects of C169 becomes clear when compared to another issue of relevance to the Sami which was discussed at this same Cabinet meeting. This other proposal concerned the right of the Sami to communicate in the Sámi language(s) with the local and national government. The potential costs of recognizing this right were uncertain, but were stipulated to be between NOK 12 and 15 million. A long discussion followed in which nine of the 15 ministers present participated. Potential costs were weighed against the strong wishes of the Sami Parliament. The final decision was postponed; a later meeting proposed a geographically limited Sami Administrative Area

¹⁵⁸ RA, Office of the Prime Minister, Resolutions by the authority of His Majesty the King and Minutes of the Government Conferences, the Syse Government, 02.04.1990–19.07.1990, Aa L0056B (hereafter the Syse Government), Minister of Local Government to Members of the Government, Memorandum for Government Conference, 25 April 1990, *St. prp. nr. (1989–90) om Den internasjonale arbeidskonferanse i Geneve 1989 om urbefolkninger og stammefolk – spørsmål om norsk ratifikasjon* [White Paper No. (1989–90) on the International Labour Conference in Geneva 1989 on indigenous and tribal populations – the question of Norwegian ratification’].

¹⁵⁹ RA, Syse Government, Government Conference of 30 April 1990, Item 7.

(*samisk forvaltningsområde*) where the Sami gained the right to communicate with the local government in Sami.¹⁶⁰

On 18 May 1990, the government presented the proposal to ratify C169 to the *Storting*, where it was unanimously endorsed on 7 June.¹⁶¹ This swift parliamentary process further strengthens the impression that the national political establishment did not expect any significant effects on Norwegian domestic laws and practices to result from ratification of C169. On 15 June, the Norwegian government took the formal decision to ratify C169.¹⁶²

7. Conclusion

As the very first country in the world, Norway ratified C169 in June 1990. The Convention entered into force following Mexico's ratification one year later. For the Norwegian government, international instruments on the rights of indigenous peoples were one of several promising instruments for protecting vulnerable population groups, especially those in Latin America. They formed a natural extension of existing Norwegian efforts to promote human rights internationally, including the rights of indigenous peoples. Moreover, contributing to the revision of C107, an international legal instrument that was perceived by Sami organizations and the international indigenous peoples' movement as paternalistic, outdated and at odds with the spirit of the recent domestic policy changes regarding the Sami in Norway, was expected to send important political signals to international as well as domestic audiences in the aftermath of the Alta controversy. Foreign policy considerations as well as domestic political considerations therefore led the Norwegian government to support ILO

¹⁶⁰*Ibid.*, Items 4; *also* Government Conference of 10 May 1990, Item 2.

¹⁶¹ St.prp. nr. 102 (1989–90); MLL, C169, Department of Conditions of Work and Security of the Ministry of Local Government to the Minister, 7 June 1990.

¹⁶² MLL, C169, Resolution by His Majesty the Crown Prince of Norway, H.K.H., 15 June 1990.

efforts at revising C107, the only legally binding international instrument that regulated the relations between states and indigenous peoples.

From the first discussions on revising C107 within the ILO, Norwegian government officials acknowledged the relevance for the Sami in Norway. The main challenge during the negotiations was that Norwegian domestic legislation did not fulfil the Convention's requirements on land rights. In Norway, a common form of land rights was legally protected rights to use land which is formally owned by other individuals or groups for various purposes. C107, however, had required states to recognize indigenous ownership of land, and made no explicit mention of rights to use land. Indigenous activists worked to strengthen C107's land rights provisions, and proposals to include rights to use land were perceived as attempts to weaken the Convention. Norway manoeuvred during the negotiations as could be expected from an actor in a two-level game: Its representatives worked to achieve a convention that Norway would be able to ratify, and its negotiating position reflected existing Norwegian legislation on land rights, especially as regards land rights in Finnmark. This position was worked out by a handful of ministry officials. With the exception of the MFA, the political leadership in the involved ministries and their top officials displayed scant interest in the ILO's efforts or even the question of possible future domestic consequences of Norway's efforts at contributing to establishing legally binding international standards.

The final measures of C169 on land rights deviated from the preferred Norwegian solution. During the ratification process, several Sami organizations and the Sami Parliament pointed out that domestic legislation would have to be changed at a later stage in order to put Norway in compliance with this part of the Convention. In contrast, Norwegian politicians ignored questions of the relevance of this instrument for future domestic laws and practices. None of the ministers asked for the floor on the issue of ratification of C169 during the Cabinet meeting where this question was discussed, and all members of the *Storting*

supported ratification. This in itself is quite remarkable, and should be understood in the context of the earlier Alta controversy. For national politicians it was politically advisable to avoid conflicts with the Sami Parliament in a situation where the Sami seemed to have broad popular support. Our analysis has shown that, at the final stage, a report issued by the Ministry of Justice played a decisive role in making swift Norwegian ratification possible, even before the on-going domestic political process on Sami land rights had been brought to a conclusion. As explained, the report of the Ministry of Justice argued that it could be reasonably assumed that Norway already fulfilled the Convention's requirements on land rights, and that ratification would not impose additional constraints on the work of the Sami Rights Commission. When confronted with this report, sceptical ministries decided to not oppose ratification. With the recommendation from the Ministry of Local Government, backed by the recommendations of the MFA and the Ministry of Justice, politicians could agree on ratification as a symbolic act of solidarity – with the Sami in Norway, and with indigenous peoples worldwide.

Two aspects of the process are of particular relevance to the theory-oriented literature on why states create and ratify human rights instruments. First, only a small group of government officials were involved in carving out the details of Norway's negotiating positions. Some of these individuals became part of the emerging horizontal and vertical networks that characterize an internationalized policy area. The relative closeness of the responsible government officials to the international process seems to have played an important role in determining the position of their ministries in the negotiation and ratification processes. Secondly, top-level officials and politicians seem to have assumed that the ILO Convention would have low immediate relevance for domestic political processes. The prevailing view among legal scholars and officials in Norway in the 1980s and early 1990s – that international law and domestic law were largely two separate legal systems – added to the

general lack of alertness and corresponding low levels of attention to the potential domestic consequences of ratifying international human rights treaties. Supporting and ratifying such treaties was predominantly seen as a risk-free way for Norway to assist vulnerable or persecuted individuals and groups in other states. This was to change, however. After the turn of the millennium, Norway became markedly more cautious in treaty ratification practices in the field of human rights, carefully evaluating any discrepancies between domestic law and treaties before ratifying.

With hindsight, we see that international legal norms became an important source of legitimacy in the processes that reshaped Sami rights in Norway from the early 1980s. In its first report, the Sami Rights Commission had actively and deliberately made reference to obligations under international law in arguing for specific changes in domestic laws and practices. Obligations under international law occupied a prominent position in the *Storting* debates that preceded the adoption of the Sami Act in 1987 and the constitutional amendment in 1988. It took until 1997 for the Sami Rights Commission to conclude on the issue of land rights in Finnmark, and eight more years were to pass before the *Storting* passed the Finnmark Act. This Act assigned a registered title to the land in Finnmark which was formally owned by the state in 1990 – an area the size of the whole of Denmark – to a new body, the Finnmark Estate. The Finnmark Estate is controlled by a board consisting of six persons, three appointed by the Sami Parliament and three appointed by Finnmark County Council. The question of whether Norwegian domestic laws were in accordance with the requirements of C169 and what specific changes would align domestic legislation on land rights with the requirements of Article 14 was subject to much political and legal controversy between 1990 and 2005. Although it may be difficult to delineate the precise impact of C169 on Sami rights to land in Norway, there is little doubt that Einar Høgetveit was correct when he in 1986

predicted that international and national processes would become entangled and that Sami rights develop in a dynamic relation between international and domestic political processes.