Why (not) Commit?
Norway, Sweden and Finland and the ILO Convention 169

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Abstract: This article tries to explain an apparent legal anomaly: Norway, Sweden and Finland seem generally quite similar, but they have differed in their behaviour vis-à-vis the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries. Norway was the very first state to ratify C169, in June 1990. Sweden and Finland, however, are yet to ratify. How can the differing actions of these three neighbouring northern states as regards ratification of C169 be explained?

Keywords: ILO Convention 169; Indigenous Peoples’ Rights; The Sami; Nordic States; Ratification of Human Rights Treaties.

I. Introduction: The Puzzle

Human rights treaties regulate matters that traditionally belong to the prerogatives of sovereign states: the relation between the state and its citizens or sub-sections of its citizenry. By ratifying a human rights treaty, a state becomes obliged to subject this rather crucial part of its domestic domain to international standards. Why, then, do some states choose to ratify a particular human rights treaty, whereas other states choose not to ratify? This article compares Norway, Sweden and Finland’s ratification behaviour vis-à-vis the ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries (hereafter C169). Norway

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1 The bulk of the work for this article was completed when I was affiliated with the research project “Should States Ratify Human Rights Conventions?”, Centre for Advanced Study (CAS) at the Norwegian Academy of Science and Letters, in the autumn 2009 and spring 2010. The author wants to thank CAS for excellent working conditions and financial support. A warm thanks to colleagues at CAS for encouragement and numerous constructive comments to early versions of the article. A draft version of the article was presented at the workshop ‘Citizenship as New Notions of Belonging and Identity’, which was part of the conference entitled “The Dynamics of Citizenship in the Post-Political World”, hosted by the University of Stockholm in May 2010. Thanks to the workshop participants for several useful suggestions.

ratified this Convention in June 1990. Sweden and Finland, however, have as yet refrained from ratifying.

The many striking similarities among the three states might lead one to expect a uniform ratification practice. First, all three are stable democracies, a feature which increases the prospect of ratifying a human rights convention. Second, all three have a record of ratifying human rights conventions: they have previously ratified a wide range of important human rights conventions that in various ways constrain the state's relations to its own citizens or sub-sections of the citizenry. Third, C169 deals with groups that are officially recognised as indigenous and tribal peoples. Many states have been very reluctant to categorise groups as 'indigenous'. In Norway, Sweden and Finland, however, the Sami (previously often called 'Lapps'), who live scattered in the northernmost parts of these states as well as in Russia, have official status as an indigenous people. Thus, the content of C169 is politically and legally relevant to all three states. But despite this shared feature, and many other striking similarities, these three neighbouring northern states have acted differently as regards ratification of C169. How can this be explained?

II. Theoretical Framework: Why do States Commit to Human Rights Treaties?

It is common to distinguish between theories of why states choose to ratify human rights conventions on the one hand, and theories of why states actually comply with those treaties, once ratified, on the other. However, a crucial factor in the decision to ratify in the first place may be states' expectations and intentions as to compliance. In short, states will tend to ratify human rights conventions if they expect to comply with them; similarly, they will fail to ratify if they expect not to comply with them. Expectations of complying with a specific human rights convention may be generated by at least two different beliefs. First, the government may believe that the content of the convention is normatively desira-

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3 Beth Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (Cambridge University Press, New York) 82.
4 All three states are parliamentary democracies and have strong civil services with little turnover in the bureaucracies.
5 See Simmons (n 3) ch 3 and 4, for an overview of theories of commitment and compliance, respectively.
ble. Acting on this assumption, a government will ratify a particular human rights treaty when there is congruence between the content of the convention and existing governmental normative preferences; likewise, it will opt to remain a non-party when there is incongruence between its content and such preferences. According to this line of reasoning, perceptions of normative legitimacy play a central role in decisions to ratify. If the Norwegian government saw the content of C169 as legitimate, whereas the normative preferences of the Swedish and Finnish governments were, and have remained, at odds with important parts of C169, that could explain the difference in ratification behaviour. I will term this the value congruence hypothesis.

Second, expectations of compliance may be generated by a government’s belief that the benefits of complying with the requirements of the convention will exceed the costs involved. In other words, a state will ratify a particular human rights convention when the government believes that it will gain some kind of advantage, material or non-material, by ratifying, and that ratification will not generate comparable costs. As Hathaway notes, ‘[T]he anticipated positive and negative effects of international laws on states deeply influence the choice of states to accept international legal commitments in the first place’. Thus, ratification by Norway of the C169 in 1990 may be explained by a possible belief that ratification would involve rather few costs and greater benefits. On the other hand, past and current cost/benefit analysis by Sweden and Finland may have resulted in the opposing conclusions, accounting for the difference between the states. I will term this the cost/benefit hypothesis.

As Norway ratified C169 in 1990, whereas Sweden and Finland have not yet ratified, the variation of interest is both spatial and temporal. This allows us to examine some of the important propositions to emerge from the growing body of academic literature on the dynamics of human rights norms. Whereas the value congruence hypothesis suggests that the alleged gap between the content of C169 and existing governmental normative beliefs is constant, it is not unthinkable that this gap might lessen over time. A gradual reduction in the gap between existing governmental normative preferences and the content of human rights conventions could be due to two different processes. First, there might be a gradual convergence between governmental normative beliefs and the content of a convention because the content of the convention becomes further clarified, while gov-

6 Ibid 65.
ernmental normative preferences remain more or less unchanged. The Swedish and Finnish governments might have believed that there was a discrepancy between their normative preferences and the content of the convention because parts of the text were unclear. In that case, once the content of the convention becomes elucidated, whether through domestic processes or perhaps through the process whereby important articles in the convention are interpreted and implemented in Norway, the Swedish and Finnish governments may realise the content of the convention is closer to their normative preferences than previously assumed. Finnemore and Sikkink have argued that states are more likely to accept norms that are clear and unambiguous than norms that are unclear.8 Thus, further clarification through interpretation of the content of vital parts of C169 could serve to reduce the gap between governmental normative preferences and the content of the Convention, thereby increasing the prospects of Swedish and Finnish ratification. Such an assumption will be termed the clarification hypothesis.

Second, there may be a gradual convergence between a government’s normative beliefs and the content of the convention because of changes in the former. A government may come to alter its stance regarding the rightfulness of standards that it previously perceived as non-legitimate, and thus come to reassess the legitimacy of the content of a particular human rights convention, such as C169.9 The assumption that the Swedish and Finnish governments have changed their perception of the normative legitimacy of C169 since ratification was first placed on the agenda will be termed the revised beliefs hypothesis.

Moreover, states may choose to ratify a particular human rights treaty because they adopt the behavioural patterns and beliefs that are a part of the surrounding culture, even if they may not be convinced about the rightfulness of the content of the treaty as such.10 If key actors in a state that has chosen not to ratify a particular human rights treaty otherwise identify strongly with a group of states that have opted to ratify, these actors may experience internal cognitive and/or external social pressure to conform to the ratification behaviour of these other “like-minded” states.

This general mechanism is termed “acculturation” by Goodman and Jinks.11 Acculturation may induce change in a state’s ratification behaviour through inter-

9 See e.g. Finnemore and Sikkink (n 8) for a discussion of some of the mechanisms that may account for changes in normative beliefs.
11 Ibid.
nal cognitive as well as external social pressures. Goodman and Jinks points out that ‘[s]ubstantial empirical evidence demonstrates that individuals experience discomfort – including anxiety, regret, and guilt – whenever they confront cognitions about some aspect of their behaviour inconsistent with their self-concept (including any social roles central to their identity)’. 12 This suggests that key actors who experience cognitive dissonance caused by ratification behaviour that is inconsistent with their self-conception may push for changes in states’ ratification behaviour. External pressure includes actors’ deliberate attempts at creating or boosting the social psychological costs of non-ratification (as through shaming), as well as efforts at bestowing social psychological benefits of ratification (as through public expressions of approval). 13 With exactly which states do the governments of Sweden and Finland identify? This probably varies with different policy areas. However, since C169 is relevant to the Sami population, and since there exists formalised co-operation among the administrations as well as the relevant ministers in the three states on Sami issues, it seems plausible that the Swedish and Finnish governments include Norway among the states with which they identify in this particular case. 14 The fact that Denmark, another Nordic democratic neighbour state, ratified C169 in 1996 may also be relevant. 15 The assumption that the prospect of Swedish and Finnish ratification of C169 will be influenced by the psychological need to be part of the ‘Nordic group of C169-ratifiers’ will be termed the acculturation hypothesis.

Since C169 is a recent human rights convention which replaced the previous C107 in 1989, this article starts by briefly reviewing the negotiations that preceded the final adoption of the new Convention. We will see what issues were considered crucial during the negotiations, as well as their outcome. Moreover, the various positions adopted by Norway, Sweden and Finland during the negotiations can provide valuable information about the content of the governments’ normative preferences at the end of the 1980s, important for the purposes of assessing several of the proposed hypotheses.

12 Ibid 640.
13 Ibid 640-41.
14 To date, 22 states have ratified ILO Convention 169. Of these, 15 are in Latin America, the other parties being Denmark, Fiji, Nepal, the Netherlands, Norway, Spain and the Central African Republic. See <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> for a list of the parties to the Convention.
15 This may be so even if the Danish case is special: for Denmark, the measures in C169 apply only in Greenland, which is home to a large indigenous population.
III. The Negotiations

The question of revising Convention 107 was discussed during the 75th International Labour Conference in 1988. The negotiations continued and were completed at the 76th International Labour Conference in Geneva in 1989, which approved the revised Convention, International Labour Convention 169 On Indigenous and Tribal Peoples. The 1988 International Labour Conference had chosen to move the negotiations on the issue of land rights to the subsequent conference, and the entire section dealing with land rights was negotiated during the 1989 conference. The report of the Norwegian delegation to the conference described the work with the Convention as difficult, not least since the issues addressed in no way fitted the tripartite ILO structure. In particular, work with the section dealing with land rights was said to be extremely time-consuming and difficult.

Article 11 in C107 stated that, ‘the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised’. One main controversy during the 1989 negotiations was whether the ‘right to use’ land should be put on a par with the ‘right to ownership and possession’ in the revised Convention. In commenting on the draft Convention presented by the ILO Office in a report based on the 1988 discussions, the Canadian and Norwegian governments proposed that the right to use land be made equal to the right to ownership and possession. The Swedish government also proposed the inclusion of a provision concerning the rights of users of land. Concerning the Canadian/Norwegian proposal, an ILO Office commentary noted:

18 Ibid 25.
21 Ibid 35 and 39.
...[T]he Office considers that to assimilate the term “use” to ownership and possession would weaken the revised convention by comparison with Convention No. 107, which recognises the right to ownership; it has therefore dealt with this question separately...An additional paragraph has ... been inserted to distinguish between the right to use and the rights of ownership and possession.22

Still, during the negotiations in 1989, Norway, Sweden, Finland, Denmark the United States and Canada put forward a joint proposal for an amendment to have the ‘right to use’ land on par with the ‘right to ownership and possession’ in the first paragraph of the draft article 14.23 This shows the content of the normative preferences of all the Nordic governments at the time: a clear predilection for equalising the right to use land with the rights of ownership and possession.

After lengthy negotiations characterised by deep disagreement between governments and labour representatives, a “package text” on land rights was finally proposed by the Chairman. In an effort to reach a negotiated settlement, the joint Nordic proposal of including usufruct rights in the first paragraph of article 14 was withdrawn, to accommodate the conditions set by Labour representatives for them to accept the package text.24

The final compromised text includes measures that aim at providing indigenous groups with the right to ownership and possession over lands which they traditionally occupy. It also contains measures aimed at safeguarding usufruct rights to areas which are also inhabited by other groups, but to which indigenous groups have had access for traditional utilisation of natural resources.25

Several government representatives declared that they did not want to destroy the carefully negotiated compromise, but that parts of it, in particular the wording of the new article 14, would significantly decrease the prospects of their states ratifying the Convention. In an intervention on behalf of the governments of Denmark, Sweden, Finland and Norway during the plenary session on 26 June 1989 that preceded the adoption of the final text, a Norwegian governmental advisor presented the Nordic countries’ view on the revised Convention. He stressed that none of the Nordic countries had been parties to C169’s predecessor, C107, as ‘its integrationist approach and paternalistic form ... is acceptable nei-

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22 Ibid 36.
24 Proposition to the Storting nr. 102 (n 17) 26.
25 See C169 arts 14 and 15, respectively.
ther to our indigenous peoples nor to our governments.\textsuperscript{26} He reiterated and underscored the point about the need for flexible implementation of the Convention’s measures, including those on land rights. The advisor also referred to the Committee of Experts’ interpretation of the term “ownership” in the ILO Convention 107, in particular to their conclusion that while it ‘had not found an exact equivalence between “possession” and “ownership”, it had not found the firm assurance of possession and use to be in violation of the requirement for ownership’.\textsuperscript{27} Thus, a main message conveyed in the joint Nordic intervention was that the four states were pleased that a revised Convention would replace the previous assimilationistic and paternalistic Convention, and that these states could live with the measures on land rights included in the package, as they allowed for flexibility.\textsuperscript{28}

IV. The Norwegian Ratification Process

The Norwegian government’s recommendation to the Storting (Parliament), to approve ratification of the new ILO Convention was prepared by the Standing Committee on Municipal and Environmental Affairs on the basis of a proposition prepared by the Ministry of Municipal and Labour Affairs\textsuperscript{29} and presented to the Storting as a unanimous recommendation.\textsuperscript{30} A total of 20 relevant bodies (including ministries, organisations, research institutes and Norway’s Sami Parliament) had been asked to state their opinion on ratification of C169 in a public hearing prior to the completion of the proposition. The vast majority of those taking part in the hearing argued that Norway’s existing laws and domestic practices were in accordance with the requirements of C169, and recommended ratification. There were, however, a few notable exceptions. First, the Sami Parliament wrote that it was highly doubtful whether domestic Norwegian law fulfilled the Convention’s requirement concerning the right to “ownership and posses-

\textsuperscript{26} International Labour Conference ‘Provisional Record’, 76th Session, 31, 13.
\textsuperscript{27} Ibid 13-14.
\textsuperscript{29} Proposition to the Storting nr. 102 (n 17)
sion” to lands traditionally occupied by the Sami. The Sami Parliament recommended ratification, but also pointed out that the Sami Rights Commission was currently evaluating the need for new legislation on land rights, and that ratification would most likely necessitate new legislation at a later stage.31

The Ministry of Justice looked into the issue of congruence between domestic Norwegian law and C169 requirements as to land rights, in particular the requirements of article 14(1).32 Ten years earlier, a governmental green paper had addressed the question whether Norway should ratify the predecessor to C169, ILO C107, and concluded that domestic legislation did not fulfil the C107’s requirements as to land rights.33 The core question now, according to the Ministry, was therefore whether the measures on land rights in C169 had been amended to such an extent that Norwegian law might be seen to meet the requirements on land rights in C169. The statement from the Ministry argued that the measures on land rights in C169 were considerably more flexible than those in C107, and that article 14(1) could be fulfilled not only by granting the Sami ownership rights to the territory in question, but also by recognising usufruct rights to those areas. The lengthy review by the Ministry of Justice concluded that Norway could and should ratify C169.

The Ministry of Environmental Affairs (MEA) expressed deep-seated doubts as to whether Norwegian domestic law in fact fulfilled the requirements on land rights in the C169, but stated that it would not resist ratification, on the condition that the Ministry of Justice’s interpretations of the relevant articles were valid, and that ratification would not affect the work of the Sami Rights Commission. Likewise, the Ministry of Finance concluded it would not resist ratification, on the same conditions as those specified by the MEA.

The content of the Convention that was finally presented to the Norwegian cabinet was thus heavily influenced by the assessments and conclusions of the Ministry of Justice. The issue of ratification of C169 was dealt with at the cabinet meeting of 30 April 1990. The government decided to recommend to the Storting that it approve ratification of C169. The Standing Committee on Municipal and Environmental Affairs had no remarks regarding the proposition, but instead referred to the strong desire by the Sami Parliament and Sami organisations for Norway to ratify C169, as well as to Norway’s international engagement for the

31 Proposition to the Storting nr. 102 (n 17) 12.
32 Ibid 4–8.
rights of indigenous populations worldwide. The Committee unitedly recom-
mended that the Storting approve ratification of C169, whom unanimously
adopted this recommendation on 7 June 1990. The ratification document was
signed on 15 June 1990.34

Jon Elster has pointed out that at times the desire that something be the case
can lead to the belief that the thing in question is possible. When beliefs are
caused by desires in this way, ‘we face a case of wishful thinking’.35 In cases of
such wishful thinking, evidence that something is not possible ‘is not so much
denied as ignored’.36 No doubt, the Norwegian government had a strong desire to
be able to ratify the revised ILO convention. This is evident from Ministry of
Foreign Affairs instructions to the Norwegian government delegation, according
to which the delegation was to work actively for change, in order to align the con-
tent of the revised Convention with the Norwegian government’s positive atti-
dudes to the culture of these indigenous groups.37 This desire must be seen against
the background of the Norwegian foreign policy aspirations to become the
world’s leading moral power at the time as well as the Alta affair concerning
hydropower plans in Finnmark.38 The political wounds from the 1979–1981 Alta
affair, which had caused severe tensions between the Norwegian government and
parts of the Sami population, were still fairly fresh. Moreover, the Sami Parlia-
ment as well as Sami organisations had urged Norway to ratify C169.

The Alta affair had triggered large-scale changes in the political relations
between the state and the Sami. Several important reforms that marked the final
end of the era of assimilation had taken place in the 1980s, including the adop-
tion of legislation to establish a Sami Parliament in 1987 and the adoption of a
constitutional amendment about the Sami in 1988. The belief that there was
congruence between governmental normative preferences and the content of
C169 was therefore far from unfounded. Significant parts of the revised Conven-
tion and very recent and important political domestic changes in Norway had a
generally common assimilation-sceptical stance. But although there existed no

34 Recommendation to the Storting nr. 197 (n 30)
35 Jon Elster, Explaining Social Behavior: More Nuts and Bolts for the Social Sciences (Cam-
36 Ibid.
37 Henry Minde, ‘Urfolksoffensiv, Folkerettsfokus og Styringskrise: Kampen for en Ny Same
politikk 1960-1990’, in Bjørn Bjerklie and Per Selle (eds.) Samer, Makt og Demokrati: Sametinget
og den Nye Samiske Offentligheten (Gyldendal akademisk, Oslo 2003) 118-119.
38 See Rolf Tamnes, Oljealder: 1965-1995: Norsk Utenrikspolitikk Historie Vol 6 (Universitets-
forlaget, Oslo 2007) ch 5, for an account of these aspirations.
undisputed evidence that ratification would probably necessitate large-scale domestic legal changes on land rights at a later stage, indications that it was highly uncertain whether domestic law fulfilled the requirements on land rights in C169 seem to have been systematically ignored by the vast majority of the actors involved. It is also important to acknowledge that it was, at the time, largely taken for granted that Norwegian legislation and practices were already in accordance with international human rights instruments. This general belief and the corresponding lack of alertness to ratification hurdles may also have contributed to create the more specific belief that Norwegian domestic law fulfilled the requirements of C169. Moreover, as the very first state to ratify C169, Norway had a “first-mover disadvantage”, in that it could not draw on the experiences of other states in interpreting and clarifying the content of the revised ILO convention.

It goes well beyond the scope of this article to give a full account of the process that followed the ratification of C169 in Norway. Suffice it here to point out that the period between 1990 and 2005, when the Storting finally adopted the Finnmark Act (Finnmark being the northernmost county in Norway), was characterised by deeply contested and rivalling interpretations of the articles on land rights in C169 in general and article 14 in particular. The Finnmark Act assigned a registered title to all lands in the Finnmark county for which no private ownership had previously been established – in practice, some 96 per cent of Finnmark’s total area of 48,649 km², or approximately 1.5 times the area of Belgium – to a new body: the Finnmark Estate (Finnmarkseiendommen). Norwegian ratification of C169 impacted on the process as well as the content of the Finnmark Act: The final Act was the result of formal consultations between the Standing Committee on Justice and the Sami Parliament as well as Finnmark county council to accommodate the requirements in article 6 in C169. The final Act was also heavily influenced by an interpretation of the requirements of article 14(1) stating it could not be fulfilled solely by granting the Sami strong legally protected rights to use the land in question. The Finnmark Commission was also established under the Act, given the task to map existing user- and ownership rights on the ground currently owned by the Finnmark Estate, to accommodate the requirements in article 14(2).

39 Anne Julie Semb and Hanne Hagtvedt Vik, Interview with Peter Wille, Ambassador, Strasbourg, 17 June 2010.
V. Sweden and C169

We have seen that the Norwegian government in 1990 probably believed that domestic law fulfilled the requirements stipulated in C169, also as regards land rights. That implies that the government saw congruence between the content of the Convention and its own normative preferences. The question of possible Swedish ratification of C169 has been taken up several times and in different contexts, starting in December 1990, when the government presented a note on the issue of ratification to the Swedish parliament, the Riksdag. Based on the opinions of those taking part in the public hearing that domestic legislation, including laws on ownership to land, did not fulfil the C169 requirements, the government argued that Sweden should not ratify. In addition, both the Riksdag and Sami organisations had wanted the question of ratification to be seen in a broader political context and had requested the government to present a more comprehensive proposal on Sami issues. The Swedish government added that it considered it a long-term goal to ratify C169. Similarly, the Standing Committee on Foreign Affairs agreed that Sweden should not ratify C169 at present, but that it too saw ratification as a long-term ambition for Sweden.

In 1992, the Social Democratic government was replaced by a Centre-Conservative coalition. In a government bill on the Sami and Sami culture, including the question of establishing a separate Sami Parliament in Sweden, this government repeated the view that Sweden should not ratify C169. The Bill noted that the C169 measures on land rights were clearly inconsistent with Swedish domestic law; it went on to state that article 14 seemed to have been designed for circumstances totally different from those facing the Sami in Sweden, and thus constituted a fundamental ratification hurdle. The Swedish government clearly did not perceive

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42 According to the Reindeer Husbandry Act, those Sami who are members of a “Sami village”, which is both an organisational and a geographic unit, are granted the legally protected right to use large areas for purposes of reindeer herding, but are not granted rights to ownership or possession of those areas. The 51 Sami villages in Sweden have approximately 2500 members; reindeer herding areas constitute about one third of the total land area of the country. A map of the herding areas is available at <http://www.regeringen.se/sb/d/108/a/58257> The status of some parts of this area is contested.
the content of the Convention as normatively legitimate in a Swedish context in 1992. Furthermore, the Bill noted that the Convention had not been widely accepted, and referred to the low number of ratifying states (only four at the time) as indicating that acculturation processes and pressures were not involved. In dealing with the Bill, the Standing Committee on Constitutional Affairs agreed that there was a mismatch between the requirements on land rights in C169 and Swedish domestic law and that article 14, in its current form, constituted a ratification hurdle. However, the committee argued that the question of Swedish ratification might take on a new aspect if article 14 could be reformulated – for instance, if user rights could be included as an alternative to the right to ownership and possession; or if implementation of C169 showed that the article on the right to ownership and possession might come to be interpreted as roughly on par with a legally protected right to use the land in question, adding that it was therefore of particular interest to monitor the ILO’s assessment of Norway’s implementation of C169. As stipulated in the clarification hypothesis, Sweden’s Standing Committee on Constitutional Affairs was clearly open to the possibility that a clarification, through Norwegian implementation, of the content of the Convention might narrow the apparent gap between existing normative preferences and its content. The Riksdag adopted the Committee’s recommendation, and numerous requests from individual MPs on the issue of Swedish ratification of C169 were subsequently answered by reference to the previous statements and ongoing exchange between Norway and the ILO on the application of C169 in a Norwegian context. Thus we see that the issue of clarification of the content of C169 was a salient point.

In September 1997 the Swedish government appointed a committee mandated to consider whether Sweden could ratify C169, and, if so, what measures would be necessary to enable Sweden to comply with the provisions of the Convention.

47 This proposition is identical with the joint proposition that was put forward by Norway, Sweden, Finland, Denmark, Canada and the USA during the 1989 negotiations, but was rejected in the course of the negotiations.
49 Jordbruksdepartementet [Ministry of Agricultural Affairs] Kommittédirektiv 1997:103 ILO:s konvention nr.169 om ursprungsfolk och stamfolk i självstyrande lander [Instructions to the committee].
The background for setting up this committee was that the Swedish government had appointed an Indigenous Populations Delegation in 1995 on the occasion of the initiation of the International Decade of the World’s Indigenous People 1995–2004. The delegation discussed the question of the interpretation of article 14 with the ILO in Geneva and finally recommended that the Swedish government examine the issue of ratification. In the Terms of Reference, the Swedish government now stated that the exchange between the ILO and Norway indicated that it was no longer obvious that existing Swedish legislation failed to meet the requirements of C169 article 14 – which shows that the government wanted to examine whether the content of C169 was closer to their normative preferences than previously assumed.

This so-called ILO report was completed and issued in 1999. The main author, Mr Sven Heurgren, concluded, ‘in my view, Sweden already fulfils the requirements set out in the Convention in most respects. The main stumbling block is the rules concerning Sami land rights’, adding that there were good reasons to believe that a strong legally protected right to possess and use the land in question would fulfil the requirements of C169. Discussions of the Norwegian experiences are included in the review of obstacles to ratification:

Norway was the first country to accede to the Convention. My assignment included considering how the Norwegian government has interpreted the Convention with regard to the provisions concerning Sami rights to land. In conjunction with ratification, the Norwegian government’s assessment was that the Sami usufructuary right to land in Norway which applied at the time satisfied the conditions of the Convention. Later, the Sameretsutvalget, a commission of inquiry appointed by the Norwegian government, came to a different conclusion, and the issue does not appear to have been finally resolved in Norway.

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52 This conclusion is based on the ILO guide, statements by the ILO Committee, written exchanges between the Norwegian government and the ILO, as well as a comparison with the relevant articles of C107.
According to the report, the lands which have traditionally been occupied by the Sami and which therefore correspond to the lands where Sami rights to “ownership and possession”, according to article 14(1), first sentence, are to be recognised, are identical with those parts of the year-round pastures ‘which the state has owned in modern times’. The lands which the Sami have used together with others, and where the Sami right to use the land, according to article 14(1), second sentence, is to be safeguarded, are identified as ‘land in the winter pasture area’. However, the report also argued that the boundaries of these areas are unclear and sometimes disputed, and that Sweden should not ratify C169 until these boundaries have been established and domestic law amended so as to satisfy the conditions stipulated in the Convention. The report was not unanimous, however. While the Sami experts generally supported the conclusions of the main author, two representatives from the forest industry and agriculture were highly critical to future Swedish ratification and stated that the anticipated costs of complying with the requirements of C169 included serious conflicts between the Sami and the non-Sami and harm to the agriculture and forest industry. Moreover, they argued that the processes ensuing from Norway’s ratification ought to serve as a warning for Swedish decision-makers.

The conclusions of this report gave rise to several questions later taken up in various new committees. Here we will focus on the Boundary Delimitation Commission \( (\text{Gränsdragningskommissionen för renskötselområdet}) \), appointed by the Swedish government in 2002. The terms of reference for its work included identifying lands traditionally occupied by the Sami and lands not exclusively occupied by the Sami. Consequently, one of the main tasks was to consider application of the terms set out in article 14 in C169 to Swedish conditions and thus to clarify important parts of the Convention. The Boundary Delimitation Commission submitted its report in February 2006.

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54 Ibid 26.
55 Ibid.
56 Ibid 267-268.
57 Ibid 261-266.
58 See also SOU [Governmental green paper] 2001:101 \( \text{En ny rennäringspolitik – öppna samebyar och samverkan med andra markanvändare} \) [A new policy for the reindeer herding industry] and SOU [governmental green paper] 2005:116 \( \text{Fakt och fiske i samverkan} \) [On hunting and fishing rights].
59 Jordbruksdepartementet [Ministry of Agricultural Affairs] Kommittédirektiv 2002:7 \( \text{En gränsdragningskommission för renskötselområdet} \) [Instructions to the Commission].
60 SOU [Governmental green paper] 2006:14, \( \text{Samernas sedvanemarker} \) [Sami customary lands].
This report emphasised that the articles on land rights that had finally been adopted in the course of ILO negotiations were highly controversial, and that it was crucial to clarify the actual impact of possible Swedish ratification. The conclusions regarding the existence and scope of lands traditionally occupied by the Sami differed significantly from those conclusions of the 1999 'ILO inquiry'. The Boundary Delimitation Commission declared:

...we do not share the view of the ILO Inquiry that all state-managed year-round land shall be classed as land possessed by the Sami under the Convention. In our view, which is based on the current law, there is no large continuous area to which the Sami have a right that is as strong as the right to which the Convention’s requirements concerning rights of ownership and possession refer.

However, the Commission did not rule out the possibility that some more limited areas might be classified as lands traditionally occupied by the Sami. It stated that the Sami ought to be awarded ownership and the right to deal with these lands independently of the Reindeer Husbandry Act, but also that this issue raised many questions not covered by the Commission’s terms of reference.

The report made frequent reference to Norwegian experiences, not least with regard to the interpretation and thus clarification of article 14(1), first sentence. It stated that there had been some uncertainty about the exact meaning of the terms "ownership and possession" and argued that developments in Norway that followed ratification, not least the process that preceded the final adoption of the Finnmark Act, made it clear beyond doubt that the Convention’s requirement concerning the right to ownership and possession of lands traditionally occupied by the Sami could not be fulfilled merely by granting the Sami a legally protected right to use the land in question. However, the report also made reference to the 1995 statement of the ILO Committee of Experts in its report on Norway, that article 14 does not require that formal ownership rights to the land in dispute be recognised, even though recognition of ownership rights by the indigenous peoples would always be consistent with C169. The Commission argued that such rights must achieve a minimum level to be applicable, and that this minimum

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61 Ibid 439.
62 Ibid 49.
63 Ibid 461-462.
64 Ibid 442 and 465-470.
level was ‘not fulfilled by the reindeer herding rights that the Sami have under reindeer husbandry legislation’.65

It was not a part of the Commission’s terms of reference to propose new legislation, nor to recommend or argue against Swedish ratification of C169. In that sense, the work of the Commission did not clarify exactly what domestic legal changes in land rights would make it possible for Sweden to ratify. It is interesting to note that the report mentioned some differences (mainly demographic) between Norway and Sweden that complicated comparisons between the two countries: the Sami population of Norway is larger in absolute numbers and also constitutes a larger portion of the total population of Finnmark county than of the total population in any Swedish county or municipality. The Commission argued that this had facilitated the establishment of the Finnmark Estate, and then referred to the work done by the Norwegian Sami Rights Commission to clarify the question of Sami land rights south of Finnmark county, where demographic conditions are more comparable to those in Sweden. The Commission argued that this particular report would be of great interest to Sweden.66 The Commission also noted that the Finnish government still seemed to be some way from ratification of C169. However, the Boundary Delimitation Commission’s report was also not unanimous.67 While the Sami representatives disagreed with the main report’s conclusions regarding the scope and content of Sami land rights, representatives from the forest industry disputed the location of the “outer” boundary. In addition, the Office of the Chancellor of Justice criticised this and previous reports on Sami issues for ignoring the rights of non-reindeer herding Sami and warned that ratification of C169 might worsen current injustices concerning membership admission criteria to Sami villages.68


65 Ibid 48.
66 Ibid 502. The third main report by the Norwegian Sami Rights Commission, NOU 2007:13 Den nye sameretten [The new Sami law] was completed and issued in 2007. This report proposes several changes in existing land ownership arrangements, several new laws as well as changes in existing legislation in order to accommodate various requirements in C169.
noted that 14 states, among them Norway and Denmark, had now acceded to C169, and that the UN as well as the Council of Europe had recommended that Sweden ratify the Convention. While this may be an indication of internal as well as external pressures to ratify, there was little in the Action Plan as such to suggest that the Swedish government was experiencing considerable social psychological costs of being outside the “group of Nordic ratifiers”, or that the government was now close to ratifying C169 merely to achieve the socio-psychological benefits of being publicly acclaimed for ratifying – from, for example, the Council of Europe. The government repeated its intention to ratify C169 ‘as soon as possible’, but also stated that ratification would have such wide-ranging implications that a decision could not be rushed: after all, a whole range of rights concerning one third of Sweden’s territory would be affected. The Riksdag agreed with this view, based on the recommendation prepared by the Standing Committee on Constitutional Affairs71 and repeated this view in March 2007, on the basis of a similar recommendation.72

In March 2009, under a majority Centre-Conservative government, the Ministry of Agriculture issued a ministerial analysis.73 This document contained a proposal for amending portions of the Reindeer Herding Act as well as a proposal for establishing procedures for consultations between the Swedish Sami Parliament and the Swedish government. The document was intended as the basis for a government bill on Sami issues, but was withdrawn as a reaction to massive protests by the Sami Parliament. The current Swedish government (as of autumn 2011) is also a Centre-Right coalition of four political parties. Three of these have recently declared that they do not want to ratify C169 now.74 The party leaders have justified their stand by referring to the wide-ranging legal consequences of ratification, to fears that ratification might lead to conflicts between the Sami and the non-Sami population, and to the view that the natural resources of the areas in question belong to the entire Swedish population and not solely to

70 Ibid 56.
71 Konstitutionsutskottets betänkande 2005/06: KU19 Minoritetsfrågor [Report by the Standing Committee on Constitutional Affairs on minority issues].
72 Konstitutionsutskottets betänkande 2007/08:KU13 Minoritetsfrågor [Report by the Standing Committee on Constitutional Affairs on minority issues].
73 Jordbruksdepartementet [Ministry of Agriculture]. Ds 2009:40 Vissa samepolitiske frågor [Some Sami policy-issues].
74 These are the Conservative Party, the Centre Party and the Christian Democrats. The People’s Party, the fourth party in the Swedish government, is in favour of ratification <http://sverigesradio.se/sida/gruppsida.aspx?programid=3615&grupp=9765>
In other words, the gap between the perceived content of C169 and governmental normative preferences is still sizeable, and the perceived costs of ratification considerable.

VI. Finland and C169

In November 1990, the president of Finland submitted a proposal to the Finnish national parliament about ratification of ILO Convention 169. The proposition concluded that Finnish domestic law did not completely fulfill the Convention’s requirements on land rights. The President consequently advised against Finnish ratification, and the parliament agreed.

The Finnish constitution of 2000 grants the Sami the right to cultural autonomy within the Sami homeland, which consists of the municipalities of Utsjoki, Inari, Enontekiö and the northernmost parts of the municipality of Sodankylä – in all, more than 30,000 km². The right to cultural autonomy does not, however, include land rights. In contrast to Norway and Sweden, where reindeer herding in the northern parts of these countries is an exclusively Sami occupation, both Sami and non-Sami are involved in the reindeer herding industry in the northern parts of Finland. The Finnish reindeer herding area covers approximately one third of Finland’s territory.

The issue of ratification and Sami land rights was, however, in no way finally settled by the parliament’s decision in 1990. Since the late 1990s, the Finnish government has initiated several reports on the matter of Sami land rights. International conventions that are ratified by Finland are incorporated into Finnish domestic legislation by means of an Act of Transposition. This means that Finnish domestic law needs to be in accordance with the requirements of international conventions before the act of ratification can take place.

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75 Ibid.
76 Regeringens proposition [proposition from the government] RP nr.306/1990 rd
77 According to Anne Salmi, “The Ratification Process of the ILO Convention no. 169 in Finland: Recent Developments 1999-2002” (Paper International Work Group for Indigenous Affairs, 2000) 6-7. Utsjoki is the only municipality in the Sami homeland where Sami constitute a majority. Approximately 70 per cent of the total population of slightly less than 1,400 persons are Sami. In Inari approximately 2,200 out of the total population of approximately 7,500 are Sami. In Enontekiö and Sodankylä, the number of Sami is approximately 170 and 140, respectively, out of total populations of approximately 2,200 and 9,900.
78 Interview with Johanne Suurpää, Director, Finland’s Ministry of Justice (Helsinki, 2 June 2010)
In May 1999 the Ministry of Justice appointed Dr Pekka Vihervuori to prepare a report on how to remove obstacles to ratification of C169 – the issue of clarification was thereby put on the political agenda. The mandate for this work did not include the question of land ownership rights, however, and the ensuing report did not present recommendations as to whether Finland should ratify C169.79 However, the report did contain several proposals, including one to establish a special Land Rights Council of the Sami Homeland, with four representatives from the Sami Parliament and one representative from each of the four municipalities in the Sami Homeland. The Council was to be granted a say in decisions concerning the use of land and waters in this area. Although its decision-making competence was not identical to that of an owner of land, certain activities could not be initiated without the consent of the Council. The Finnish state would remain the formal owner of the land, however.

In the hearing, 57 stakeholder bodies were asked to state their opinion on the report. Reactions ranged from largely positive to highly negative, and a wide range of very different concerns were raised.80 Even if the report did not in itself take up the question whether Finland should ratify C169, many of those participating in the hearing still commented upon the issue. The Ministry of Agriculture and Forestry strongly opposed ratification. Other bodies, including the Ministry of Foreign Affairs, the Ministry of the Interior, the Ministry of Labour and the Advisory Board for Sami Affairs, argued that implementing the proposals in the report would essentially remove ratification hurdles – a view that seems to build on the assumption that C169’s requirements for recognition of the rights of indigenous peoples to ownership and possession to lands traditionally occupied by them can be fulfilled by granting the groups in question the legally protected right to use and administer these lands.81 Other voices raised the issue of the need for clarifying and preferably relaxing the criteria for determining Sami-ness, by putting more emphasis on self-identification. The value congruence hypothesis at least implicitly builds on the assumption that government’s normative preferences are unitary. This was clearly not the case in Finland in the late 1990s: There was profound disagreement within the Finnish government on the issue of Sami land

80 See Salmi (n 77) 11-13, for a summary of the statements in the hearing to the proposal to establish a Land Rights Council.
81 Ibid 17.
rights and the closely related question of ratification of C169 at this time, and the report never became a government bill.

In 2000, a new Sami Committee, headed by the governor of the province of Lappland, Dr Hannele Pokka, was appointed by the Ministry of Justice to propose measures that would enable the Sami to maintain and develop their culture and traditional livelihoods while taking due account of local conditions. The proposals should also fulfil the minimum requirements of the C169 and thus make it possible for Finland to ratify the Convention, and the Committee was to assess whether the measures proposed by Dr Vihervuori could be implemented or required modification. In connection with the work of this Committee, the Ministry of Justice in November 2000 also appointed a new rapporteur, Dr Juhani Wirilander, to examine the issue of Sami land rights from an ownership perspective. Wirilander’s report was submitted in August 2001.82 The report argued that it was hard to find evidence that the Sami villages had collectively owned the areas that they had been using for a long time, but that some families and individuals may have owned some lands and fishing waters close to their dwellings. However, it also held that the land-rights question could not be settled without further historical research based on primary sources.

The Sami Committee submitted its report in December 2001.83 The Committee proposed that the state should continue to hold title to the lands in question, but that decision-making competence regarding the actual use be transferred from the Forest and Park Service to a new body, the Sami Homeland Board. This Board should consist of 11 members, 5 to be appointed by the Sami Parliament and 5 to be appointed by the municipalities of the area in question, whereas the head of the Board was to be appointed by the Finnish government.84

The recommendations were not unanimous, however. Committee representatives from the Ministry of Finance, the Ministry of Agriculture and Forestry and the Forest and Park Service strongly opposed the transfer of decision-making power to a new body. This shows that the disagreement within the government was still rife, and that important sectors within the government had not changed their normative beliefs. The recommendations of the Sami Committee were also

not supported by any of its Sami members, who argued that the proposals would not give the Sami the degree of decision-making competence comparable to that of an owner, and that the proposals were consequently not sufficiently comprehensive for Finland to ratify C169. In all, 66 different stakeholder bodies and representatives participated in the public hearing following the submission of the Sami Committee’s report, and their viewpoints varied greatly. Many were highly critical towards the proposals and argued that the new Board would violate the principle of equality, which is embedded in the Finnish constitution. The Finnish Sami Parliament rejected the proposals outright and withdrew from the follow-up process for the opposite reason. It held that the Committee had paid too much attention to the non-Sami local population, and pointed out that C169 is not meant to apply to local populations as such, but exclusively to indigenous peoples. The Sami Parliament was clearly not willing to accept interpretations of the measures on land rights that were regarded as overly lenient.

Even though the Sami Parliament had withdrawn from the follow-up process, the Ministry of Justice continued the work of preparing new legislation, based on the report of the Sami Committee. In June 2002 the Ministry sent a government bill out for hearing. This bill involved establishing a special Advisory Board for the Sami Homeland, a body which would give its opinions on the central principles concerning land use in the area of what was to become the Sami Homeland under the National Forestry and Park Service’s Wilderness District Management. The boundaries of this district were to coincide with the boundaries of the Sami Homeland, but the Finnish state would continue to hold title to the land in question. Under one of the two alternative models presented, the Sami would, for practical purposes, constitute a majority in the Advisory Board. Although the Board was not to have formal decision-making powers, the National Forestry and Park Service could act against the Advisory Board’s opinion only in special cases. According to the Ministry of Justice, this bill satisfied the minimum requirements of the C169 and therefore removed the hurdles to Finnish ratification.

A large number of relevant parties were asked to state their opinion on the bill in the subsequent hearing. Several were highly critical to the proposal. While some held that the proposal would give the Sami too much influence, others

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85 Salmi (n 77) 24.
87 The content of the bill is summarised in Ot.prp. [Norwegian governmental bill] 53 (2002-03), section 4.5.3.
88 Salmi (n 77) 27.
argued that Sami interests were not sufficiently secured by the proposed solution. The Finnish Sami Parliament rejected the bill, which was subsequently withdrawn by the government and not presented to the national parliament.

But even if this bill was withdrawn, in a report to the parliament on the human rights policy of Finland submitted in 2004, the government repeated that it 'continues its efforts to find ways to remove obstacles to the ratification of the ILO Convention 169'.

As will be recalled, Juhani Wirilander had recommended the establishment of a historical research project, based on primary sources, to clarify the issue of land rights. The hitherto most recent major work on Sami land rights in Finland is a research project on the history of populations and settlement in the Kemi and Tornio regions of Lapland, *Markrättigheter i Lappmarken* [Land rights in Lappmarken] initiated by the Ministry of Justice early in 2003, on the backdrop of the question of Finnish ratification of C169. The project was completed in 2006, and four reports, comprising approximately 1300 pages, were then submitted to the Ministry of Justice. Project coordinator Jouko Vahtola has described the results as 'very divergent'.

The programme of Prime Minister Matti Vanhanen's second government repeated its commitment to securing Sami cultural autonomy, but without mentioning the issue of land rights. However, in a report to the national parliament on the human rights policy of Finland from 2009, the government stated that 'there is a need to examine how consistently Finland’s international objectives [i.e. the promotion of the rights of indigenous peoples – author’s remark] are implemented in national policy’. The report further noted that various monitoring bodies have urged Finland to ratify C169 and that Finland has also been recommended to do so in connection with the Universal Periodic Review in the spring of 2008. Finland thus faces external pressure to ratify C169, but the social psychological costs of remaining a non-ratifier may be more readily felt in the Ministry of Foreign Affairs than elsewhere within the government. The report repeated that the aim is to ratify C169. The current Finnish government, which came to

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90 Justitieministeriets publikationer 2006:8, 75. [Publications from the Ministry of Justice].  
power in June 2011, has stated that ‘the rights of the Sami people as an indige-
nous people will be developed, for instance, by clarifying the legislation concern-
ing the use of land’. The question of ownership as such thus does not seem to be
on the government’s political agenda, but rather the broader issue of land rights.

VII. Conclusion

We have seen that the Norwegian government in 1990 seemed to believe that
there was congruence between its normative preferences and the content of
C169. Ever since 1990, when the Swedish and Finnish governments first raised
the issue of ratification, both these governments have seen land-rights measures as
the main barriers to ratification. Thus, it would be erroneous indeed to conclude
that there has been incongruity between the normative preferences of shifting
Swedish and Finnish governments and the content of C169 as such. What seems
safer to conclude is that there was, and still is, incongruence between the percep-
tions of the Swedish government as well as significant parts of the Finnish gov-
ernment as to what would be a desirable situation in Sweden and Finland and
C169’s measures on land rights, and that this is an important reason why these
governments have opted not to ratify C169. Thus we find support for the value
congruence hypothesis.

According to the clarification hypothesis, a gradual convergence between gov-
ernmental preferences and the content of C169 may occur as unclear and ambig-
uous parts of the Convention are clarified. The clarification of the content of
C169 that has emerged as the result of domestic Swedish and Finnish processes
have no doubt been important, but this has not led to a situation where the meas-
ures on land rights stand out as “clear and unambiguous”.

In Finland, interpretations of crucial parts of C169 are rather hotly contested,
as the fate of the government bill that was presented in 2002 demonstrated.
While it seems unlikely that the Finnish government will present to the national
parliament a bill on land rights that is strongly opposed by the Sami Parliament,

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94 Finnemore and Sikkink (n 8); See International Labour Organisation, Indigenous and Tribal
Department, ILO 2009) part 7, for an overview of how ILO’s supervisory bodies have interpreted
C169’s measures on land rights, including article 14.
it also seems unlikely that the sceptical sectors of the Finnish government are ready to accept interpretations of the measures on land rights that are strict.

As for Sweden, none of the reports commissioned by its governments have so far led to government bills on Sami land rights, and the consequences of a possible Swedish ratification have never been fully clarified. The crucial question of how to interpret article 14 in the specific Swedish context is thus still unclear. The clarification of C169 to emerge from Norway’s implementation of C169 does not seem to have contributed to closing the gap between governmental preferences and the content of the Convention – perhaps rather the contrary. However, whereas demographic differences between Norway and Sweden complicate the transferability of the Norwegian interpretation and substantial clarification of C169’s articles on land rights, Norway’s experiences have contributed to an important procedural clarification that has significantly lowered the prospect that Sweden will ratify C169 before the consequences of ratification have been carefully clarified and – preferably – national legislation on land rights has been amended to accommodate the requirements in C169.95

At least thus far, there have been few indications of any gradual convergence between governmental normative preferences and the content of the articles on land rights through substantial changes in the former. That means that support has not been found for the revised beliefs hypothesis.

What then of costs and benefits? Since the Norwegian government in 1990 seemed to believe that domestic laws and practices were in accordance with the requirements of C169, it did not anticipate any major costs of ratification. Indeed, early ratification was deemed politically advantageous for Norway, as it would send important political signals about the ‘post-Alta’ era in relations between the Norwegian state and the Sami, at home as well as abroad, and also be in line with the foreign policy aspiration to become the world’s leading moral power. The perceived benefits of ratifying thus clearly exceeded the anticipated costs. By contrast, in Sweden and Finland the perceived costs of ratification are far from negligible. The Swedish forest industry and large private landowners who own parts of the extensive reindeer herding areas are strongly opposed to ratification. Concerns that ratification may harm relations between Sami and non-Sami are also a part of the picture in Sweden. In Finland, various governments have declared that the goal is to ratify C169, but as yet no government has presented to the national parliament a bill on land rights that would remove ratifica-

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95 Interview with Göran Ternbo, Ministry of Agriculture (Stockholm 20 May 2010).
tion hurdles. This has proved extremely difficult for several reasons – including the principle of equality, which is embedded in the Finnish constitution, and fears that ratification would require measures damaging to the country’s important forest industry. Thus we cannot reject the cost/benefit hypothesis.

Contrary to what is suggested by the acculturation hypothesis, there are few signs that Sweden is about to ratify C169 in order to fulfil a perceived need to be part of the group of “Nordic C169 ratifiers”. Of course, this may reflect the fact that neighbouring Finland is also still among the non-ratifiers. The circumstance that ratifier Norway finds itself in a minority position – for instance, during the annual joint Nordic ministerial meetings on Sami issues as well as in the ongoing negotiations on the Draft Nordic Sami Convention – probably reduces the social psychological costs of remaining a non-party to C169 for key actors in Sweden as well as in Finland. One specific feature of Finnish ratification procedures – that ratified treaties become domestic law through an Act of Transposition – significantly decreases the prospect that a Finnish ratification decision will to any considerable extent be driven by key actors’ psychological need to belong to the “Nordic group of ratifiers”, or by the mere desire to avoid criticism for being a non-party to C169. The mechanisms suggested by the acculturation hypothesis are consequently not immediately relevant in the Finnish case. The analysis of important factors that explain why states choose to ratify human rights conventions does not lead us to expect any short-term changes in current ratification patterns vis-à-vis C169 among the Nordic states.