

# SHOULD NORWAY RATIFY THE OPTIONAL PROTOCOL TO THE ICESCR? – THAT IS THE QUESTION

STEIN EVJU\*

**Abstract:** *Is there sound reason for Norway to not ratify the Optional Protocol to the ICESCR? This question is discussed in view of general principles of international law, the author's experience as an adjudicator within the European human rights system and developments in domestic case law. It is submitted that the better arguments are in favour of ratifying the Optional Protocol and that not doing so may prove to be counter-productive, in particular at the international level.*

**Keywords:** *United Nations, Economic Social and Cultural Rights, Council of Europe European Social Charter, Human Rights, Complaints Procedures, Norway.*

## A. INTRODUCTION

At issue is whether Norway should ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>1</sup> This question begs being asked in reverse. Is there any reason why Norway should fear the Protocol?

Answering this question draws one into wider socio-legal and political theory perspectives and a long-standing debate in Norway on the role of human rights standards and their possible impact on domestic law, democracy and governance.<sup>2</sup> The issue has proliferated in a variety of contexts and the opening article of this Special Issue also discusses two of the proposals made by Norway during the drafting of the Optional Protocol which arise from this domestic debate. I begin my discussion though by commenting briefly on the nature of the human rights standards concerned, and subsequently turn to their enforcement and the possible consequences of either acceding or not acceding to the Optional Protocol. In this article, I

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\* (b. 1946), cand. jur. (Oslo), Professor of Labour Law, Department of Private Law, University of Oslo; member of the European Committee of Social Rights 1996-2008, President 2001-2003, from 2003 General Reporter, and *ad hoc* Judge, European Court of Human Rights. E-mail: stein.evju@jus.uio.no. This article was reviewed independently by two referees.

<sup>1</sup> Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008).

<sup>2</sup> This was brought to the fore in the preparatory work to the 1999 Human Rights Act (Act No. 30 of 21 May 1999 on “styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven)”; see NOU 1993: 18 Lovgivning om menneskerettigheter and Ot.prp. nr. 3 (1998-99).

will draw particularly on the experience of the European human rights system and its relationship with Norwegian domestic law.

## B. STANDARDS OF A DIFFERENT NATURE?

A frequently used and familiar argument against economic, social and cultural rights is that such rights are not truly justiciable. They are vague, discretionary, and do not really lend themselves to enforcement.<sup>3</sup>

For nearly 60 years this debate has rumbled, creating something of a schism between classic civil and political rights and freedoms on the one hand and social and economic rights and standards on the other hand. Whereas both sets of rights are encompassed by the Universal Declaration of Human Rights (UDHR), they have been divided in the subsequent elaboration of some human rights treaties, eschewing the indivisibility and interdependence of human rights expressed in the UDHR. This is the case at the UN and European level with largely separate treaties on both sets of rights: International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>4</sup> and the International Covenant on Civil and Political Rights (ICCPR).<sup>5</sup> However, more recent treaties on children rights and rights of persons with disabilities accept the indivisibility of human rights, incorporating both groups of rights and not drawing overly sharp distinctions between them.<sup>6</sup>

Still, the argument of non-justiciability is largely untenable. Pushed to the extreme, it amounts to reducing economic, social and cultural rights to non-binding declarations of good intentions. On a principled level, it rejects the very notion of the indivisibility and interdependence of human rights. Notwithstanding the ideological schism captured in older international and European human rights treaties, the indivisibility, interdependence and interrelationship remains at the core of human rights and has been reiterated and reinforced, on a general level as well as in specific contexts by States.<sup>7</sup>

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<sup>3</sup> See also discussions in this Issue by Langa and Langford.

<sup>4</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>5</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>6</sup> See generally, e.g., Tadeusz Jasudowicz: "The Legal Character of Social Rights from the Perspective of International Law as a Whole", in: Krzysztof Drzewicki, Catarina Krause and Allen Rosas (eds.): *Social Rights as Human Rights. A European Challenge* (Åbo: Institute for Human Rights 1994), 23-42; Roman Wieruszewski: "Some Comments concerning the Concept of Economic and Social Rights", *ibid.* 67-71; Jeff Kenner: "Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility", in: Tamara Hervey and Jeff Kenner (eds.): *Economic and Social Rights in the EU Charter of Fundamental Rights – A Legal Perspective* (Oxford/Portland 2003), 1-25; Håkan Gustafsson, "Taking social rights seriously", in "Om sociala rättigheters status", 2005 *Tidsskrift för rettsvetenskap*, 439."

<sup>7</sup> See, e.g., the Vienna Declaration and Programme of Action (1993) (UN General Assembly, A/CONF.157/23), para. 5; and the Preamble to the European Social Charter (revised), 1996 (RevESC) (ETS 163).

Pragmatically, it is difficult to distinguish between civil and political and economic, social and cultural rights. From a functional perspective there simply is no sharp dividing line. First, whether a provision is contained in a civil and political rights or an economic, social and cultural rights instrument cannot be decisive. Notwithstanding the historical background, the division into different instruments is essentially formal. The European conventions serve as a useful illustration in this regard. The European Convention on Human Rights (ECHR)<sup>8</sup> also encompasses social rights, covering several dimensions of the right to health, access to health-care, rights to social benefits, the right to a healthy environment, and the right to housing, respectively.<sup>9</sup> These topics are also addressed by the European Social Charter,<sup>10</sup> i.e., specifically Articles 11, 12 and 13, and 31.<sup>11</sup> In short, the ESC is the European social and economic rights convention, albeit the legal protection it gives is not the same as that provided by the ECHR. Likewise, Article 11 of the ECHR (freedom of assembly and association) intersects with the broader rights to organise and to collective bargaining in Articles 5 and 6 of the European Social Charter. All in all, there is considerable overlap in the scopes of the two conventions and the two traditionally classified sets of rights. The classic distinction does not correspond to a dichotomy in substance.

Second, there is no clear-cut distinction between the two types of instruments as regards the level of precision of these provisions. For example, Articles 8, 9, and 10 of the ECHR, or Article 6(1) for that matter, can hardly be seen to lay down precise rules or easily applicable standards devoid of discretionary assessments. While many provisions of a similarly abstract nature can be identified in the European Social Charter, e.g., Articles 11-13, 30 and 31, a number of other Charter provisions are very precise, down to minute details, such as Articles 2 and 7. The examples could easily be multiplied but there is no reason here to elaborate; they are plain for all to see.

The key point is straightforward: there is no principled or systematic distinction between rights conventionally denoted civil and political and those denoted economic, social and cultural rights. Which of these rights are the more problematic in terms of (lack of) precision or the more ominous as regards possible impact at national level? There is no simple answer to this question; it depends on the individual provisions and circumstances pertaining to a pos-

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<sup>8</sup> Formally, the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ETS 5).

<sup>9</sup> See from recent case law of the European Court of Human Rights (ECtHR) e.g. the judgments in *Tysiac v Poland* (20.03.2007; Article 8), *Dybeku v Albania* (18.12.2007; Article 3), *Luczak v Poland* (27.11.2007; Article 14 + P1-1), *Lemke v Turkey* (05.06.2007; Article 8), *Wallowa and Walla v The Czech Republic* (26.10.2006; Article 8 – implicitly, see para. 77). For an in-depth discussion, see Luke Clements and Alan Simmons: “Sympathetic Unease: European Court of Human Rights”, in Malcolm Langford: *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press 2008), 409-427.

<sup>10</sup> European Social Charter, 1961 (ETS 35) and European Social Charter (revised), 1996 (RevESC). For an overview of the various ESC instruments, see Stein Evju: “The European Social Charter – Instruments and procedures”, (2007) 25 *Nordic Journal of Human Rights*, 58.

<sup>11</sup> ESC Article 11 concerns the right to health, Articles 12 and 13 deal with the right to social security and the right to social assistance, and Article 31 is concerned with the right to housing.

sible problem situation. Provisions on economic, social and cultural rights as set out in the ESC are not *per se* less or more justiciable or suited to judicial enforcement than are ECHR provisions, whatever their substantive topic.

Obviously, human rights standards may impinge on governmental decision-making. That is in their very nature and purpose. In so doing, human rights standards may have fiscal consequences and affect domestic policy-making and resource allocation. The impact may potentially be considerable. Issues to do with protecting the environment are but one example, and may be illustrated by the judgment of the European Court of Human Rights in *Lemke v Turkey*<sup>12</sup> and the European Committee on Social Rights in *Marangopoulos Foundation for Human Rights (MFHR) v Greece*.<sup>13</sup> The same is true for many other human rights matters.

Arguably, provisions contained in economic, social and cultural rights instruments can be seen to possess a larger potential to impact on governmental decision making and, in particular, resource allocation than those concerning civil and political rights. But civil and political rights are also not cost free. Again, the dividing line is not clear. Either way, in discussing which human rights provisions are more or less worthy of acceptance, citing differing financial impacts is a rather tenuous argument. It amounts, in the end, to ranking rights not by content but by costs – which is evidently unacceptable purely as a matter of principle.

## C. THE OPTIONAL PROTOCOL – THREAT OR INCONVENIENCE?

### 1. SETTING AND PERSPECTIVES

The question, then becomes whether ratification by Norway of the Optional Protocol is likely to have a negative impact at domestic level, either in quantitative or in qualitative terms, or both. One observation is self-evident as a point of departure. The Convention itself, ICESCR, has been ratified by Norway, albeit with a reservation regarding one point,<sup>14</sup> and is incorporated into domestic law.<sup>15</sup> That is, the substantive human rights standards have been subscribed to and are as such applicable at the national level. Whether to accede to the Optional Protocol is, therefore, primarily, a question of enforcement and the enforceability of the standards already accepted.

Whether ratifying the Protocol turns out to be negative is a multi-faceted question. To start with, it should be recalled that Norway *has* ratified the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)<sup>16</sup> and the complaints mechanism of the European Social Charter supervisory system. The latter, in particular, may add perspective and provide a background for reflection in particular on the point of quantitative impact.

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<sup>12</sup> Application No. 17381/02.

<sup>13</sup> Collective Complaint No. 30/2006.

<sup>14</sup> Norway signed in 1968 and ratified on 13 September, 1972, without accepting Article 8(1)(d) on the right to strike, however.

<sup>15</sup> By the Human Rights Act, 1999 (see note 2 above).

<sup>16</sup> Optional Protocol of 1966 (UNTS vol. 999, p. 171), signed by Norway in 1968 and ratified on 13 September, 1972.

## 2. THE ESC AND COLLECTIVE COMPLAINTS

Norway has ratified the European Social Charter (1961) as well as the Revised European Social Charter (1996) which superseded the former upon ratification.<sup>17</sup> At the outset, there were only minor differences between the 1961 Charter and the ICESCR as far as their thematic scope is concerned. Now, the situation is different. The Revised Charter spans a broader spectrum of rights than those encompassed by the ICESCR. Further, the provisions of both Charters are generally framed in more detail and more precisely formulated than those of the ICESCR.

Nonetheless, it was considered undesirable to include the European Social Charter among the human rights instruments being incorporated into domestic law by the 1999 Human Rights Act. The underlying reasoning is flawed and rather tenuous.<sup>18</sup> It may however be perceived as an expression of reluctance to accept more precise and thus more binding norms into the universe of immediately applicable rules in domestic law.

On the other hand, Norway has acceded to the specific complaints mechanism which is now a part of the supervisory machinery of the Charters, the Collective Complaints Procedure.<sup>19</sup> Just like the Optional Protocol to the ICESCR, it spans the full scope of the Charter; the Collective Complaints procedure covers all of the substantive provisions of the relevant Charter. But there are other and quite significant differences between the two.

Firstly, under the Collective Complaints procedure there is no requirement for anyone to be a “victim” of a violation of a protected right, as under Article 2 of the Optional Protocol to the ICESCR. On the contrary, collective complaints under the Charters are “collective”. They cannot deal with alleged violations of rights of individuals, be they moral or legal persons. The procedure is reserved for “complaints alleging unsatisfactory application of the Charter” (Articles 1 and 4). Secondly, the Collective Complaints Procedure has no requirement of exhaustion of domestic remedies, which differs from Article 3(1) of the Optional Protocol. Thirdly, under the Collective Complaints Procedure the right of complaint is not vested in individuals or groups of persons. The right of complaint rests with national and international trade unions and employers associations and international (potentially also national) NGOs.<sup>20</sup> This complaints procedure now has been in operation for more than ten years. By the end of 2008 a total of 53 collective complaints had been registered, 48 of which had been decided.

The Collective Complaints Procedure can hardly be said to have caused trouble for Norway or domestic policy-making or the application of domestic law.

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<sup>17</sup> On 26 October, 1962, and 7 May, 2001, respectively.

<sup>18</sup> See NOU 1993: 18 Lovgivning om menneskerettigheter, 119-122, and Ot.prp. nr. 3 (1998-99), 36.

<sup>19</sup> Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995 (CCP) (ETS 158). Norway ratified the Protocol on 20 March, 1997, as the third State Party. The Protocol entered into force on 1 July, 1998.

<sup>20</sup> CCP Articles 1 and 2.

### 3. THE QUANTITATIVE ASPECT

If we first look at this, it is notable that none of the 53 complaints filed so far have been filed against Norway. Under the Protocol, States may make a declaration permitting national NGOs to file complaints.<sup>21</sup> Norway has not made use of this option. The fact that Norwegian NGOs are not able to file complaints can, however, not account for the absence so far of complaints against Norway. In most cases, a national organisation can easily solicit the assistance of its international counterpart and have a complaint filed by the latter. It is unlikely, too, that the absence of Norwegian cases is due to a lack of knowledge of the Collective Complaints Procedure. Perhaps, then, the explanation is that there is little to complain about, or potential complainants see little “added value” in having recourse to the complaints procedure. This latter point is possibly of some significance. The complaints procedure is not the sole means of supervision but an addition to the original and basic reporting procedure.<sup>22</sup>

The reporting procedure under the European Social Charters is certainly more comprehensive and elaborate than that under the ICESCR. In addition, the Optional Protocol would open up for a significantly higher number of complainants than does the ESC Collective Complaints Procedure, although the threshold for commencing the complaints procedure is significantly higher under the Optional Protocol.<sup>23</sup> All in all, there is little reason to assume accession to the Protocol resulting in a large number of complaints or creating significant trouble for the State in terms of expending work and resources.

### 4. THE QUALITATIVE ASPECT

To start with, it should be recalled that the Optional Protocol does not impose new substantive obligations. The substantive norms are in the ICESCR itself – and they have been accepted by Norway and are part of the domestic legal order. Consequently, the issue must be whether there is a risk that the ICESCR will be subject to expansive interpretation by the UN Committee on Economic, Social and Cultural Rights (CESCR), with the creation of more intrusive or burdensome obligations on the State. This question may be asked with reference specifically to ratification of the Protocol by Norway, but also raised independently with regard to the operation of the Protocol complaints procedure and the development of case law regardless of a Norwegian ratification.

Reluctance to accept the Optional Protocol may be perceived as expressing Norwegian reservations about the supervisory body, the UN Committee on Economic, Social and Cultural Rights, and how it will develop its case law. Such apprehension may be understandable not only on general grounds, but also in light of the Committee’s membership and comparable lack of legal expertise. We may recall an old view expressed by Torkel Opsahl. Emphasis-

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<sup>21</sup> CCP Article 2. Only Finland has so far availed itself of this option.

<sup>22</sup> On this *see* Stein Evju, *l.c.* (note 10 above), and for an updated overview of the technical aspects the ESC website at [http://www.coe.int/t/dghl/monitoring/socialcharter/ReportCalendar/CalendarNRS\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/ReportCalendar/CalendarNRS_en.asp).

<sup>23</sup> See text at notes 19-20 above.

ing the important role of independent international treaty bodies and their case law in the development and for the implementation of human rights law, he still added a *caveat*. Discussing the role of specialised supervisory bodies within this context, he stated that there is good reason for domestic courts not to accept their case law as decisive just in itself.<sup>24</sup> From personal experience of sitting on one such body, I can easily sympathise with this view.<sup>25</sup> However, this is not specific to complaints procedures, or to the one at issue here.

Abstaining from ratification of the Optional Protocol would not solve the problem either. First, supervision and case law develop through, perhaps most of all, the regular reporting procedure. Second, once the Optional Protocol enters into force developments will take place through the complaints procedure regardless of whether it is ratified by Norway.

Further, Norwegian courts take into account and accord weight not merely to judgments of the ECtHR but to case law of other supervisory bodies as well. This is true of international conventions regardless of whether they are included in the Human Rights Act. Supreme Court cases from the past decade or so provides ample illustrations. Rt. 2001 p. 1006, dealing with freedom of religion, is one example. Rt. 2001 p. 418 and Rt. 2001 p. 1413, both of which concern freedom of association issues, draw not only on the ECHR but also on ILO conventions and the European Social Charter and case law pertaining to these instruments. A special reference should be made to the Supreme Court decision *Elin Tåsås et al. v Norsk Sjømannsforbund*,<sup>26</sup> on freedom of association issues. There the Supreme Court, citing also RCHR Article 11, focused primarily on ESC Article 5 on “the right to organise”, but based its elaboration of standards in domestic law expressly on the particular case law of the European Committee on Social Rights.

The simple but fundamental point is that through the supervisory procedures and the case law of the supervisory bodies the substance of convention standards is developed and development will continue to take place, with or without the operation of the Optional Protocol and certainly independently of whether or not Norway accedes to the Protocol.

## 5. EFFECTS OF ABSTENTION

If Norway decides not to ratify the Optional Protocol, would it also refuse to accept or abide by the interpretations of convention standards that are developed in CESC case law? One may recall the Supreme Court decision in Rt. 1997 p. 580, where the issue at hand was a strike ban and protection of collective bargaining and collective action pursuant to ECHR, ESC and ILO standards. Part of the Court’s reasoning for accepting the ban was a rejection of ILO case

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<sup>24</sup> Torkel Opsahl: *Internasjonale menneskerettigheter* (Oslo: NCHR 1991), at 16-17 et seq. Opsahl was a member of the European Commission of Human Rights, 1970-1986, and of the UN Human Rights Committee, established pursuant to the ICCPR, 1977-1986. Hans Petter Graver expressed a similar opinion, in “Internasjonale konvensjoner som rettskilde”, 2003 *Lov og Rett* 468, 477.

<sup>25</sup> The author was a member for 12 years (1996-2008) of the special supervisory body for the ESC, the European Committee of Social Rights (ECSR).

<sup>26</sup> November 2008 (HR-2008-2036-A) (dissent 3-2) (n.y.p.).

law on the right to strike. The conventions concerned, Nos. 87 and 98,<sup>27</sup> could not, in the Court's view, entail obligations beyond those Norway had read into the texts and to which it intended to accede when ratifying them.<sup>28</sup>

A subjectivist approach like this is not viable or sustainable. It also seems to have been abandoned given subsequent developments in legislation and case law, including the Norwegian Supreme Court decisions referred to above.<sup>29</sup>

More generally, to reject case law developments within the framework of human rights conventions is an untenable position. It would conflict with general principles of legal method in public international law, including those set out in the Vienna Convention,<sup>30</sup> and would in the end amount to discarding the dynamic nature of public international law. Moreover, since the 1997 decision, this has been the prevailing approach of the Norwegian Supreme Court with regard to case law pertaining to the ECHR and European Social Charter. Obviously, it would be problematic to apply a different approach to other conventions, such as the ICESCR. In addition, it would be difficult to decide where to draw the line against conventions for which case law of supervisory bodies should be disregarded, and even more difficult to explain and defend why the State or national courts consider themselves entitled to pick and choose and thus differentiate.

On a wholly different note, such an approach would not serve as a desirable model for the international community at large. It is, of course, wholly appropriate to recall that technically, and with the exception of the ECtHR, case law from international supervisory bodies is not legally binding. It is not so that by accepting a complaints procedure, power is irrevocably transferred to the international level; national courts still have the opportunity to scrutinize and censure case law from international bodies when considering its potential influence on domestic decision-making. Acceding to a complaints procedure is not a case of selling one's soul to the devil, or to Geneva in this case. There is a balance to be struck between pure subjectivism and system conform assessments and criticism.

#### D. CONCLUSIONS AND CLOSING REMARKS

My starting point is simple. The ICESCR is incorporated into and thus part of domestic law. Developments concerning the construction and application of the convention, through the reporting procedure or through a complaints procedure, will be of significance for Norway and impact domestic law – whether we like it or not, and regardless of whether Norway decides to ratify the Optional Protocol.

The question, then, is whether it might not be preferable to ratify the ICESCR Optional

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<sup>27</sup> ILO Convention No. 87, Freedom of association and protection of the right to organise convention, 1948, and ILO Convention No. 98, Right to organise and collective bargaining convention, 1949.

<sup>28</sup> See Stein Evju: "NORWAY, Supreme Court, Rt. 1997 p. 580 [annotated]", in (1999) 17: *International Labour Law Reports* 109-124.

<sup>29</sup> For a broader overview see Hans Petter Graver, *l.c.* (note 24 above).

<sup>30</sup> Vienna Convention on the Law of Treaties, 1969.

Protocol anyhow, and thus be in a position to take part in the shaping of prospective developments. My answer to this question is in the affirmative. If a complaint is lodged against Norway, the State will have the opportunity to argue not only the specificities of the case but also the interpretation of convention provisions more broadly, regardless of whether the state of the law at issue is based on the reporting procedure or on complaints case law. Experience from the ESC Collective Complaints Procedure shows that with a specific case, one has the opportunity to elaborate and to argue much more in detail than is possible in the regular reporting procedure. This offers a much better platform for discussing those issues that are important. In short, it is better to be a player on the field than to stand on the sidelines.

The resource allocation argument is a recurring one. To set things straight it should be emphasised that economic, social and cultural rights are about much more than just allocation of resources. Articles 6, 7, and 8 of the ICESCR and Articles 1(2)-(4), 2, 4, 5, 6, and 7 of the European Social Charter may be taken as examples. In conjunction with the resource allocation argument it is occasionally suggested, in the domestic debate, that matters falling within the scope of the ICESCR are not suitable for review by an international complaints body. An international body, so the argument goes, is far removed from the national reality and would lack the national courts' intimate knowledge of the national legal system and domestic reality. At a closer look, this is a rather peculiar line of reasoning. It presupposes that economic, social and cultural rights provisions are justiciable and suited for judicial review (which is the case in Norwegian law), including those involving resource allocations. But Norwegians, or Norway, would not want any international "outsiders" to have a say in how to construe and apply such public international law norms. The reality at the national level is so complex and vulnerable that this task should be reserved for domestic bodies. On the one hand, such reasoning takes us full circle back to square one – i.e., the potential impact of ratifying or not ratifying the optional Protocol. On the other hand, it does add to objections likely to be raised against the standpoint it so endeavours to promote. To invoke national circumstances as a ground for not accepting the case law of treaty bodies does not accord well with the principle embodied in Article 27 of the Vienna Convention that provisions of internal law cannot serve as justification for failure to perform a treaty.

A final observation is more political than legal, but should still be made. In many contexts Norway seeks to attain and maintain a high profile in the field of international human rights. A decision not to ratify the Optional Protocol to the ICESCR would not correspond well with Norway's efforts in this regard. Such a decision would convey a negative impression and an unfortunate message to other States, and may in consequence attenuate efforts to promote and protect human rights internationally, and economic, social and cultural rights in particular. This would not chime with the aims and ideas accentuated as key components of Norwegian foreign and international development policies. Far more importantly, however, adopting such a position might jeopardise substantive developments in the field of economic, social and cultural rights, also in countries where the need for reinforcement and development is far stronger than in Norway. When considering what to do, this perspective ought not to be lost from sight.

To sum up, it is my view that the better arguments are in favour of ratifying the Optional Protocol and that not doing so may prove to be counter-productive, in particular at the international level.