

International tribunals: legalization and constitutionalization – implications for national constitutional structures

1. Presentation of the project

1.1 General introduction

When preparing this project, we have searched for a project that will bring together researchers with backgrounds in different areas of international law and that opens up to international cooperation. In our view, the topic “International tribunals: legalization and constitutionalization – implications for national constitutional structures” fulfils these criteria. By engaging researchers that contribute specialized knowledge in various fields, we expect that the project will generate new insight into general phenomena, and that researchers will be inspired to analyse their specialized research areas from new perspectives.

The project is based on the assumption that international law in general and treaties in particular, are increasingly specified and developed through decisions by international tribunals (the process of specification and development is hereinafter referred to as “legalization”).¹ This assumption, which is broadly accepted among scholars, public servants and diplomats, is based on the following facts: The number of international tribunals and the number of cases that they deal with increase; many of the tribunals allow cases to be brought by individuals and non-governmental legal persons; and for those tribunals that depend on cases being brought by governments we see some examples of national legislation mandating public authorities to take action when certain conditions are fulfilled.² International tribunals are not the only actors contributing to legalization of treaty law. Nevertheless, this project will, due to its limited scope, only focus on the role of these actors.

The project will pursue two main objectives. The first is to identify the role played by international tribunals in the legalization of treaty law. There is a broad range of tribunals that may possibly be of interest.³ The project will have to focus on a selection of tribunals. We have decided to focus on four main groups of tribunals, namely human rights tribunals,⁴ tribunals facilitating international trade,⁵ tribunals protecting the rights of foreign investors,⁶ and international criminal tribunals.⁷ The

¹ One main task will be to define and further develop the concept of “legalization”, and to relate it to other key concepts and principles of international law, such as the principle of sovereignty and principles of interpretation of treaties.

² Both the US and the EU have adopted such legislation in relation to the WTO.

³ Relevant examples include the European Court of Human Rights (ECHR), the EFTA Court, the European Court of Justice, the International Court of Justice (ICJ), arbitration tribunals dealing with investment disputes, the dispute settlement system of the World Trade Organization (WTO), the Human Rights Committee under the UN Covenant on Civil and Political Rights, the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination against Women, the Committee against Torture, the International Tribunal on the Law of the Seas (ITLOS), and the International Criminal Court (ICC).

⁴ ECHR and the UN Covenant on Civil and Political Rights Committee.

⁵ The EFTA Court and the dispute settlement system of the WTO.

⁶ Investment tribunals established under the International Centre for the Settlement of Investment Disputes.

tribunal-driven legalization of international law takes place in fields covering inter-state issues (e.g. the International Court Justice), issues between States and individuals and other members of the private sphere (e.g. the European Court of Human Rights), and issues between the international community and the individuals (e.g. the International Criminal Court). Our main focus will be on the latter two perspectives. The reasons are that these tribunals have a high number of cases and deal with issues that are closely linked to domestic legal systems. Moreover, the tribunals chosen are treaty based tribunals with jurisdictions that are limited to topics under specific treaties. Finally, the tribunals chosen all have either automatic or voluntary arrangements for mandatory jurisdiction.

The second main objective is to identify the effects that legalization of treaty law have for domestic constitutional structures, in particular in the context of Norway, and identify possible implications for reforms of domestic constitutional structures. The reference to constitutional structures is related to such issues as decision-making procedures in national governments and parliaments, involvement of interested parties in negotiations and decision-making processes, distribution of competences among public authorities, and implications for the national judicial system. It will thus be an objective to analyse how international tribunals and their practice contribute to new forms of interplay and interdependence between national and international institutions, regarding both lawmaking and administrative and judicial decision-making.

1.2 International tribunals and legalization of treaty law

The project will identify the role played by international tribunals in the legalization of treaty law. The project will carry out case studies related to selected tribunals. Based on these studies, it will be determined whether and to which extent the respective tribunals actually develop the treaty law, which principles they apply when developing the law, and to which extent States are bound by and actually accept the development of the law. The case studies will focus on a selection of key decisions from the selected tribunals. The main selection criteria will be whether the cases are regarded as leading cases in subsequent case law, opinions of States and the legal doctrine. An in-depth analysis of the cases will be carried out, taking into account how the cases were argued by the claimant and the defendant, the reasoning and conclusion of the court, and how States and treaty bodies subsequently have related to the decision. Given the limited scope of the project, a limited number of cases will be addressed, and the analysis will to some extent be based on literature studies.

A comparative perspective will be added to the above analysis, focusing on similarities and differences between tribunals in order to identify factors of particular importance to the role played by the tribunals. The comparative perspective is of importance, since there are few studies comparing tribunals, since such studies may contribute significantly to providing a representative overall picture of the tribunals, and since they will serve to identify factors that are essential for establishing the potential role of international tribunals under treaties. The comparative studies will explore the extent to which there are specific similarities or differences between the four groups of tribunals as to their role with regard to legalization of the treaties, and

⁷ The International Criminal Court, and the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

the reasons why such similarities and differences occur. These issues are closely related to the general topic of treaties as “self-contained regimes”, in the sense that an objective will be to identify the extent to which and in what ways the tribunals develop independently from general norms and principles of international law.

To the extent that the allocated resources permit, the project will explore the impact of the tribunals' contribution to legalization of treaty law on the legitimacy of the treaty law in light of underlying values and considerations, in particular *legality, democracy, sovereignty, accountability and efficiency*. We will specifically analyse whether and to what extent the tribunals' role with regard to legalization:

- undermines or supports accountability under the treaty,
- undermines or supports the sovereignty of States,
- enables a more efficient enforcement of international law,
- undermines or secures individual rights,
- fits the idea of a *Rechtsstaat*, and
- spills over into other areas of international law.⁸

Essential factors to be taken into account when analysing these issues will be the design of the tribunals, the procedural rules governing their work, the legal and political status of their decisions, and the issues over which the tribunals have jurisdiction.

Our findings will contribute to discussions about general trends in the development of international law, and about the future role of international tribunals in this context. We aim to identify those properties of international tribunals that are likely to be essential in the context of the long term development of international law. We will focus on the four areas of international law covered by the tribunals. The findings here may be of relevance to the discussion as to whether one should work in favour of establishing tribunals in other areas of international law, such as in the field of international environmental law.

1.3 Implications of the legalization for national constitutional structures

The second part of the project will be to analyse the effects that the legalization through international tribunals have on domestic constitutional structures, with a main focus on Norway. In many cases, in particular through the eyes of domestic legal experts, the proliferation and increased importance of international tribunals are regarded as problems, and the tribunals driven legalization of treaty law is regarded as a challenge to the domestic legal system. Such claims will be addressed. However, the project also aims at identifying those effects that legalization have in order to strengthen valuable features of domestic constitutionalism. For instance, legalization may provide valuable new opportunities for mutual self-binding of sovereign states to achieve certain collective goods otherwise out of reach as a consequence of standard problems of collective action (e.g. the problems of “free riders” and “tragedy of the commons”).

The relationship between internal and international law will be discussed, with an emphasis on organisational and structural aspects of States. The project will discuss

⁸ The latter question concerns the role that a tribunal may play for the development of law in areas that formally fall outside their jurisdiction, such as the role of trade tribunals for international environmental law, or human rights tribunals for international refugee law.

the effects that the legalization have for the legislative, judicial and executive branch, including an analysis as to whether legalization through tribunals is adequately considered – if considered at all – when states ratify treaties establishing such tribunals. We expect that the four main groups of tribunals identified will provide a range of different experiences with regard to their effects on constitutional structures, and a main objective will be to identify such differences and explain why they occur.

As to the implications for the legislative branch, a main focus will be on how the role of international tribunals has been and can and should be addressed when the legislator decides on how to implement the treaty in the domestic legal system. A second main focus will be on the extent to which the legislative branch will accept the interpretation provided by international tribunals as binding when considering new legislation.

As to the implications for the executive branch, our main focus will be on how future legalization through international tribunals has been and can be addressed during the negotiation of international treaties, and how the executive branch convey their assessment to the legislative branch. Moreover, we will identify the impact that international tribunals have on the executive branch when it carries out its main functions, such as to adopt general regulations and decide specific cases. Finally, an issue to be addressed is how the executive branch relates to international tribunals, in particular the extent to which it brings cases before such tribunals and how it deals with cases brought against the government.

As to the implications for the judicial branch, one main issue will be how domestic courts relate to decisions by international tribunals. This is partly a question concerning the extent to which and how decisions of international tribunals are presented to the domestic courts by the parties to the dispute. Moreover, it is a question of how the courts take into account the decisions in their own reasoning and conclusions. A second main issue is the potential for domestic court decisions to be overruled by international tribunals, and the effects that this has for the approach taken by domestic courts. Finally, it will be of interest to examine how the way in which treaties have been implemented in the domestic legal system affects the approach that domestic courts take in relation to decisions by international tribunals.

In addition to these three main perspectives, our project will address a cross cutting issue, namely the extent to which legalization of treaties through international tribunals interfere with the distribution of competences and the checks and balances in the domestic constitutional system. In this context, we will identify measures that have been taken to avoid unwanted effects or enhance positive effects, and examine their effectiveness. The project will discuss different methods for domestic implementation of treaties, in particular incorporation and transformation, and how they may impact on the effect that legalization through international tribunals have for the domestic constitutional structure.

Moreover, we will identify the effects that the legalization poses from the perspective of legitimacy in light of its underlying values and considerations, i.e. *legality, democracy, sovereignty, accountability and efficiency*. We will specifically analyse whether and to what extent the tribunals' role with regard to legalization:

- affects the role of parliaments and parliamentary influence,

- leads to increased or decreased legal certainty or complexity,
- undermines or secures individual rights at the national level, and
- fits the idea of a *Rechtsstaat*.

Legitimacy will thus be discussed both on the level of treaty law and on the level of domestic constitutional structures. Legalization may be seen as part of an international constitutionalization of treaty regimes, in which case such regimes will have a certain parallelism with domestic constitutional structures. The analysis of legitimacy at these two levels may thus contribute to the discussion of whether and the extent to which such parallelism occurs.

All the issues in this sub-section must be examined from a domestic legal perspective. The focus of our research will be on the Norwegian legal system, but we will consult our international contacts and invite guest researchers and guest lecturers in order to prepare and develop comparative perspectives to our studies. Moreover, we would like to invite to in-depth seminars on whether and why certain impacts are different in different states. Such seminars should also address differences in how the states have addressed the domestic constitutional effects of legalization of treaty regimes.

Some international tribunals are well known to the Norwegian legal system and to politicians and the public, such as the European Court of Human Rights and the EFTA Court. Awareness concerning decisions of these tribunals appears to be on the rise among lawyers, judges, public servants and researchers. Other tribunals are far less known and have received scant attention, such as arbitration tribunals dealing with investment disputes, the dispute settlement system of the World Trade Organization, the human rights committees with individual complaints procedures, and the international criminal tribunals. One important objective of the project will be to generate and spread knowledge about the latter tribunals to the Norwegian legal community and to other interested persons and institutions.

2. Tribunals that will be included in the project

2.1 Introduction

Above, we have indicated the main research questions that will be addressed in the project. In the following, we will specify which questions will be of most relevance in relation to which tribunals and how they will be addressed. This part of the project description will serve to identify the state of the art with respect to research questions under the various tribunals.

It will be unrealistic in this project to plan for general studies of the activities and nature of the tribunals. Such studies can be found elsewhere. But such basic information will form a basis and starting point for our project. Our project will have to focus on a selection of case studies that are well suited to demonstrate the extent and nature of legalization that takes place due to the decisions of the tribunal, and the implications for domestic (in particular Norwegian) constitutional structures. Against this background, priority in a first phase of the project will be to identify leading cases under each tribunal, and to identify cases of particular relevance to Norwegian topics.

2.2 Human rights tribunals

The contribution of the ECHR to the legalization of the European Convention for the Protection of Human Rights and Fundamental Freedoms is well known, and has been

extensively addressed in various publications both internationally and in a Norwegian context. There has been less focus on legalization as a consequence of decisions by the Human Rights Committee under the UN Covenant on Civil and Political Rights (CCPR). However, also this Committee has been subject to substantial analysis as to its role under the CCPR. Our project will thus be limited to identify specific topics that may merit further analysis in relation to the ECHR and the Human Rights Committee and to carry out literature studies, in order to identify factors and conclusions that can be used when comparing these tribunals to tribunals established under other treaty regimes. One example of a general topic to be addressed is: what issues of democratic legitimacy are raised by the human rights tribunals' invocation of the so-called principle of dynamic interpretation, whereby the tribunals exercise their supervisory authority by infusing assumed present-day perceptions of human rights tolerance into the treaty provision for the purpose of effective treaty protection? This topic raises a number of sub-issues, for example: How does this mode of treaty interpretation relate to theories of democratic legitimacy? Does dynamic interpretation enhance the democratic legitimacy of international decision-making (by referring to social acceptance as interpretative basis), does it undermine democratic legitimacy by challenging the sovereignty of national legislative authorities, or is the situation far more complex? Another example of a general topic to be addressed is the effect that legalization through human rights tribunals has for the relationship between human rights treaties and other treaties of relevance to human rights issues, such as treaties on refugees, international trade, and international investment. For instance, the articulation within the European Convention on Human Rights of fundamental rights that are paramount to foreign direct investment protection may be beneficial for international investors and investment regimes.

The main focus in relation to human rights tribunals will be the effects that the legalization has on domestic constitutional structures. This is an issue that has received some attention internationally and in Norwegian literature. Human rights treaties have been incorporated into Norwegian law through Act no. 30 of 1999. The human rights treaties incorporated through this Act have an unclear status in the Norwegian legal system, and few human rights are protected in the Norwegian constitution. Hence, there is a need for analyzing the impact of the human rights tribunal on the Norwegian constitutional structure. There is a lack of studies that address the role of human rights tribunals from a general and a comparative perspective. Moreover, there is no in-depth study of the issues from a Norwegian perspective. The abovementioned issue concerning dynamic interpretation is an example of an issue that needs to be addressed also in this context.

2.3 Tribunals facilitating international trade

The two tribunals to be addressed, namely the EFTA Court and the WTO dispute settlement system differ significantly. The EFTA Court has jurisdiction over issues arising under the Agreement on the European Economic Area (EEA) concerning Norway, Iceland and Lichtenstein. The Court has received little attention in international literature. There is thus a need for analysis of its role in relation to legalization of the EEA Agreement. This Court cannot be analysed without relating the analysis closely to the role of the European Court of Justice (ECJ). The issue of legalization has been extensively addressed in the context of the ECJ, and it will go beyond the scope of this project to aim at addressing ECJ and legalization in depth.

Attention will have to be paid to the effect that the approaches and practice of the ECJ has for the EFTA Court.

The WTO dispute settlement system is the only tribunal under the project that solely operate at an interstate level. It is the most used interstate tribunal under a multilateral treaty, and it plays an essential role in the process of legalization of the Agreement Establishing the WTO. This is even more so due to the problems one has faced in the context of efforts to conclude negotiations under the Agreement. In recent years, a number of authors have addressed the role of the WTO dispute settlement system. However, these studies have not covered all aspects of the role that the dispute settlement system plays in relation to legalization of the WTO Agreement. Hence, there are several issues that need to be addressed, including issues such as the extent to which states and international institutions explicitly or implicitly accept the interpretations set out in the decisions of panels and the Appellate Body.

While the EEA Agreement has been incorporated into Norwegian law through Act no. 109 of 1992, which gives a special (quite unclear and controversial) status to the Agreement itself and secondary legislation, it was not considered necessary to amend Norwegian legislation when joining the WTO. The project will assess how the legalization of the treaties through the tribunals was considered during the ratification process and how the conclusions reached in this context compare to the actual role played by the tribunals. As the rules of relevance under the EEA Agreement and the WTO Agreement are similar, it will be of interest to compare the way in which the two regimes affect the constitutional structures. It can be expected that the nature of the effect of the EEA Agreement, being concrete, identifiable and legal, plays a different role than the more general, diffuse and political effects of the WTO Agreement. The project will identify and analyse factors that can contribute to explain whether this or other relevant hypotheses are valid.

2.4 Tribunals protecting the rights of foreign investors

There are three main groups of arbitration tribunals dealing with investment disputes, namely the tribunals established under the International Centre for the Settlement of Investment Disputes (ICSID), under the UN Commission on International Trade Law, and under the Arbitration Institute of the Stockholm Chamber of Commerce. So far, almost all investment disputes under these tribunals are investor-state disputes, and concern questions on treatment of individual investors.

In contrast to the other tribunals to be examined in the project, investment tribunals are ad hoc tribunals, and the investment agreements that the tribunals apply are almost exclusively bilateral agreements. Hence, the role of the decisions in the context of legalization of investment treaties raises issues that differ from the issues raised by the other tribunals. Moreover, the substantive provisions of investment agreements vary significantly, even between agreements entered into by the same country. Finally, contrary to human rights treaties, which generally require exhaustion of domestic remedies, most investment treaties give the investor a right to bring a case directly before an international tribunal. Against this background, one specific topic in relation to these tribunals will be the extent to which the decisions of the tribunals under one agreement can lead to legalization of provisions under other agreements, in other words to what extent tribunals are likely to take into account decisions rendered by other tribunals under other agreements. One issue of particular interest is how

countries undertake to respect the decisions of the tribunals. Under the ICSID, countries undertake to make awards of the tribunals directly binding in domestic law.

So far, little attention has been paid to investment treaties or to their related arbitral tribunals in most domestic legal systems. This is certainly true in a Norwegian context. However, this is about to change as establishment of rules on international investment is coming higher on the political agenda and as bilateral investment treaties increasingly frequently are being invoked by investors. Moreover, regulation of investments and investors is a key element of the sovereignty of countries. Against this background, investment tribunals may potentially have significant impact on the constitutional structure of states. The main focus of the project will thus be to predict the potential effect on the constitutional structure of states that legalization of investment treaties through arbitration tribunals may have in the future.

2.5 International criminal tribunals

The ICC has jurisdiction to interpret the provisions in the Rome Statute and determine the existence and content of customary international law and it may derive law from “national laws of legal systems of the world”. It may also “apply principles and rules of law as interpreted in its previous decisions”.⁹ Hence, the ICC differs from the other tribunals in the sense that it has a broader range of international law available when deciding cases. There are differences between international tribunals in terms of the range of international law available when deciding cases. This requires analysis.

As the ICC has not yet concluded any case, and as it may take substantial time before it does so, the assessment of the role of the ICC must to a large extent be based on an assessment of cases decided under the ICTY and ICTR. Hence, cases from these tribunals will be chosen for case studies. However, it is quite uncertain whether the ICC will follow the approach of the ICTY and ICTR, as the nature of the ICC and the ICTY and ICTR differs significantly. Comparison with other tribunals may serve to identify elements of the ICC that can be expected to be essential for predicting how the ICC may contribute to legalization of international criminal law. One example is the application of the principle *nullum crimen sine lege* which according to an ICTY ruling “does not prevent [an international] court from interpreting and clarifying the elements of a particular crime” or “preclude the progressive development of the law by the court”, as long as the crime has been defined with “sufficient clarity for it to have been foreseeable and accessible”.¹⁰ The inherent tension between efficiency and legality is evident. In light of the principle of equality, perpetrators of international crimes should arguably be treated equally, according to a common international standard, regardless of their nationality and where the offence took place.

Once the ICC develops law and procedures one may have reason to believe that states and non-state parties will follow up, and that the activities of the ICC will have significant impact on the constitutional structures of states. The ICC will deal with cases that are of essential political importance on the basis of rules and procedures that are deeply rooted in the domestic legal systems. The ICC may presumably function as a model criminal court, amplified by the unrivalled attention international trials receive. Due to the complementary nature of the ICC's jurisdiction, states are

⁹ Article 21 of the Rome Statute.

¹⁰ *Vasiljevic* (ICTY, 2002).

likely to apply international criminal law as interpreted by the ICC in order to prevent the Court from deeming the national proceeding inadequate and thus interfere with the workings of the domestic legal system. More and more states parties to the Rome Statute have adopted penal provisions identical to those of the Rome Statute, making it all the more likely that they will apply ICC interpretations.

2.6 The general picture

One common feature of all the above tribunals is that they have jurisdiction over rules that *prima facie* give states a broad margin of appreciation. The process of legalization must also be weighted against the interests that states have in maintaining such margins of appreciation. A general objective of the project will be to identify why, how and to what extent tribunals affect the balance between leaving states with a broad margin of appreciation and thus protecting their sovereignty, and ensuring effective implementation of treaties.

As follows from what has been stated in sections 2.2-2.5, for most tribunals one has broad knowledge about why, how and the extent to which tribunals contribute to legalization. In these cases, a comparison with other tribunals may serve to shed additional light on the process of legalization through tribunals.

One main aim of the project will be to analyse the potential general effects for domestic constitutional structures of the most relevant processes of legalization through tribunals. Hence, even if there has been an extensive analysis of the effects of certain legalization processes for specific constitutional issues of certain tribunals, there is a lack of analysis both of the effects of legalization for the constitutional structures in general, and of the overall effects of legalization through a broad range of tribunals.

3. The carrying out of the project

The way in which the project will be carried out are presented in the Application Form, and will not be repeated here. Suffice it here to mention that the following permanent staffs have contributed to the preparation of this project proposal, and have expressed clear interest in participation in the project: professors Andreas Føllesdal, Ola Mestad, Giuditta Cordero Moss, Inger-Johanne Sand and Geir Ulfstein, associate professors Marius Emberland, Ole Kristian Fauchald and Gro Nystuen, and post doctoral researcher Cecilia Bailliet. The post doctoral researcher will be asked to carry out a range of specific research projects with the aim of producing articles. The person will also be asked to contact members of the Research Group on the Internationalization of Law with a view to initiate joint research projects. The project falls within the core of the research interest of the Research Group, and within the ambit of all the sub-groups that have been established by the Research Group. We thus aim at giving the permanent staff opportunities to participate in the project, and at contributing to long-term competence building and a closer cooperation between the Faculty's staff coming from different fields of research. The PhD project will be asked to focus on impacts of legalization through (a selection of) international tribunals for (certain) domestic constitutional structures. The PhD project will thus draw and build on the other research activities in the project. It is thus important that a post doctoral researcher starts working on the project as soon as possible.

Our draft application has been circulated to researchers with whom we would like to cooperate. Those letters of confirmation that we so far have received are attached to the Application. We have obtained letters of confirmation from at least one main external researcher under each of the four groups of tribunals and at least one main external researcher with a general focus on issues of constitutionalism and legitimacy. Access to funding for guest lecturers, guest researchers, seminars and conferences is instrumental in promoting such cooperation.

4. Relevant literature

(For literature of relevance published by the project participants, see CVs enclosed with the Application)

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