

# UNITED NATIONS

## The Expert Mechanism on the Rights of Indigenous Peoples

### Country Engagement Mission (10-16 February 2018)– Finland

28 March 2018

#### ADVISORY NOTE

##### I. Context and purpose of the Mission

1. The EMRIP's revised mandate provides for technical assistance upon the request of States, indigenous peoples and other stakeholders, including the private sector, pursuant to paragraph 2 of Human Rights Council resolution 33/25. Under this mandate, the EMRIP can provide technical advice regarding, "the development of domestic legislation and policies relating to the rights of indigenous peoples" (see the terms of reference in Annex 2). This advice is provided by the EMRIP in response to a request from the Sámi Parliament for country engagement under this resolution. The terms of reference for this country engagement was prepared in consultation with the Sámi parliament, the State and the EMRIP.

2. The purpose of the EMRIP's country engagement with Finland, as agreed upon by both parties, was to contribute to proposed amendments to the Sámi Parliament Act 1995 ("the Act")<sup>1</sup>. The Sámi Parliament established under the Act is an independent institution and not an authority under public law. It promotes the general interests of the Sámi people. There was an attempt to amend the Act in 2014 but the previous government withdrew the proposal before the parliamentary elections of April 2015. The Ministry of Justice appointed a Committee for the revision of the Act with a mandate from 8 November 2017 to 30 April 2018.

3. EMRIP's country engagement with Finland was guided by the objective to provide assistance and advice, and to facilitate dialogue towards the implementation of recommendations made by human rights mechanisms in this regard to Finland, including by the Special Rapporteur on the Rights of Indigenous Peoples, in 2016 (A/HRC/33/42/Add.3) the Committee on the Elimination of Racial Discrimination, in April 2017 (CERD/C/FIN/CO/23) and the Human Rights Committee, in 2013 (CCPR/C/FIN/CO/6)."

##### II. Core of the Advice

###### 1. Understandings grounding the Advice

4. As agreed within the terms of reference (Annex 2), this advice focuses on two specific issues being considered under the proposed amendments to the Act on the Sámi Parliament (974/1995) ("the Act"), namely (1) the definition of the Sámi, and (2) Finland's obligation to negotiate with the Sámi on measures affecting them.

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<sup>1</sup>As the proposed amendments to the Sámi Parliament Act were not available at the time of the visit, the EMRIP provides this advice on the basis of the 1995 Act on the Sámi Parliament.

5. The EMRIP provides this advice based on information received from the parties and other sources of information<sup>2</sup>, including literature on the specific context of the Finnish legal system, experts, and treaty monitoring bodies. The EMRIP appreciates the full cooperation of all parties during this country engagement mission. This advice is grounded in the rights protected under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international standards pertaining to indigenous peoples, including provisions of the international human rights treaties. The EMRIP notes that while Finland has not yet ratified the International Labour Organisation Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169), it is considered to be a persuasive source of interpretation, as indicated for example in the “travaux préparatoires” on section 9 of the Act.

6. The EMRIP grounds its advice in the understanding that the rights protected under sections 3 and 9 of the Act are implementing provisions of the Constitutional rights of the Sámi people guaranteed under sections 17 and 121. Therefore, amendments to the Act should be guided by the intention behind the legislation, as affirmed in the “travaux préparatoires” (the travaux) of both the Constitution and the Act.

## **2. Definition of Sámi for the purpose of the electoral role – Section 3 of the Act**

7. EMRIP understands that language and culture are considered in the Constitution (see sections 17 and 121 in annex 1), as the two pillars on which a legal and policy infrastructure, aimed at protecting the Sámi people, should be built. The travaux of the Finnish Constitution indicates that it would: “oblige the public authorities to allow and support the development of their own language and culture ... and to provide a constitutional basis for the development of the living conditions of the groups within it, respecting their own cultural heritage.”

8. The Finnish Constitution appears to be consistent with UNDRIP to the extent that it considers culture as a central fountain from which many other rights and fundamental freedoms of indigenous peoples flow, including the rights of indigenous peoples over lands and resources, freedom from hate speech and forced assimilation (see article 8 of UNDRIP in annex 1).

9. The Committee on Economic, Social and Cultural Rights underscored the same understanding of the right to culture as a pillar of other rights by establishing a link between the right to take part in cultural life and the right to self-determination<sup>3</sup>. The EMRIP also

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<sup>2</sup> The parties met during the country engagement mission included: members and representatives of the Sámi parliament; Sámi reindeer herders; representatives of the Skolt Sámi Village Administration; Sámi NGOs in the Sámi homeland; government representatives (Ministries); members of the Constitutional Law Committee of the Parliament; the Committee on reviewing the Act on the Sámi Parliament; “non-status” Sámi; NGOs based in Helsinki (City Sámi and Finnish League for Human Rights); academics; representatives of the Parliamentary Ombudsman; representatives of the Office of the Chancellor of Justice, representatives of the Non-Discrimination Ombudsman; representatives of the Human Rights Centre; and representatives of the Association of Finnish Local & Regional Authorities.

<sup>3</sup> The CESCR characterizes culture as a “broad, inclusive concept encompassing all manifestations of human existence”, encompassing – among others – “ways of life, language, (---) customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.” “the right to take part in cultural life is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination”. See CESCR General Comment No. 21

referred to this close relationship between the cultural rights of indigenous peoples and their right to self-determination, as reflected in article 3 of the Declaration: by virtue of their right to self-determination, indigenous peoples may freely pursue their cultural development.<sup>4</sup>

10. The EMRIP underlines that the right to self-determination, including the right to self-identification that section 3 of the Act seeks to protect, is a collective right held by the Sámi people as a whole. The EMRIP notes that the Sámi Parliament, established under the Sámi Parliament Act, as a representative and decision-making institution (sections 5 and 6), allowing for the participation of its members in elections (section 10), is consistent with the constitutional right of “linguistic and cultural self-government, as provided by an Act”, established in section 121 of the Constitution.

11. The EMRIP is of the view that the scope of the rights to be enjoyed by the Sámi Parliament under section 3 should be commensurate to the purpose of this provision, as intended by the Constitution: to preserve the “cultural autonomy” of the Sámi as an indigenous people in accordance with relevant international standards, notably the UNDRIP. The travaux of section 121 of the Finnish Constitution on cultural self-governance specify that, “the Sámi self-government position is to be safeguarded, taking into account the Sámi status as an indigenous people...”. This was also the CERD view in concluding that the State party should accord due weight to the rights of the Sámi people to self-determination concerning their status within Finland, to determine their own membership and not to be subjected to forced assimilation.<sup>5</sup>

12. If the Sámi do not have a right to recognise their own membership, this could place their culture at risk: the right upon which their self-government is based. This could also have a negative impact on other rights including their rights under articles 25 and 27 of the International Covenant on Civil and Political Rights (ICCPR). The Sámi Parliament, as the representative and implementing institution of the constitutional provisions under sections 17 and 121 should therefore be provided with enough authority to preserve the, “cultural autonomy” and “self-government” of the Sámi people, for which it was established.

13. Article 9 of the UNDRIP requires group recognition of who belongs to an indigenous community. In the same article, the UNDRIP specifies that this process should be primarily guided by, “the traditions and customs of the community or nation concerned”. To that end, the Sámi Parliament as a representative and implementing institution of Constitutional provisions should therefore play a more prominent role in deciding who is a Sámi for the purpose of registration on the electoral role. This is the view of the ILO supervisory body, when it indicated in one of its conclusions that, “the important thing is that they should be the result of a process carried out by the indigenous peoples themselves”<sup>6</sup>.

14. However, individual claims under section 3 should be addressed without discrimination, as guaranteed by article 9 of the UNDRIP. Accordingly, the right to appeal and any other recourse mechanisms should be guaranteed to individuals and take a culturally-sensitive approach so that the primary objective of preserving the Sámi culture and autonomy is upheld throughout the process. The review of individual claims could for instance include indigenous experts or other persons with expertise in indigenous peoples’ rights and issues so

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<sup>4</sup>See A/HRC/30/53, para. 10.

<sup>5</sup> CERD/C/FIN/CO/23

<sup>6</sup> Governing Body, 289<sup>th</sup> Session, document GB.282/17/3.

as to ensure that there is a fair balance between the primary objective of preserving Sámi culture and individual rights to belong to a group, as guaranteed under international law.

15. On the basis of the above, the EMRIP advises the parties to the negotiations for a new Sámi Parliament Act to consider the following technical elements:

1. The new Sámi Parliament Act should make references, in its preamble, to the relevant Finnish Constitutional provisions.
2. Section 3 of the Sámi Parliament Act on the definition of a Sámi should be guided by the primary objective of preserving Sámi culture through enhanced group recognition of who is a Sámi, in accordance with their traditions and customs, as required by sections 17 and 121 of the Constitution and article 9 of the UNDRIP.
3. Enhanced group recognition should however include an individual claims process based on non-discrimination, and appeals should take a Sámi culturally-sensitive approach by including in the appeals mechanism indigenous experts or other experts in indigenous peoples' rights and issues.

### **3. Obligation to negotiate - Section 9 of the Act**

16. The EMRIP is of the view that section 9 of the Act appears to have two constitutional anchors. Firstly, the Sámi Parliament is an implementing institution of the Constitution to ensure the preservation of the Sámi culture through the concept of "cultural self-government". The travaux of Section 121 of the Finnish Constitution reveals a wide understanding of the obligation to negotiate: "...The provision would not be confined solely to safeguarding the linguistic rights... but would extend more extensively ...by safeguarding the Sámi people's traditional forms of livelihoods, such as reindeer husbandry, fishing and hunting."

17. Secondly, section 9 of the Act appears to fit within Finland's century-old constitutional tradition of rule of law and devolution of powers to community-based institutions. Thus, the Sámi Parliament appears to constitute a mechanism of devolution of powers regionally, and this could partially explain why section 121 on Sámi self-governance is under the title "Municipal and other regional self-government" and in turn included in Constitutional Chapter 11, on "Administration and self-government".

18. Thus, in EMRIP's view, the new provisions of section 9 of the Sámi Parliament should serve the two constitutional purposes above. Section 9 should therefore be wider in scope and ensure that the Sámi as a people have the capacity, legal rights and prerogatives to preserve their culture and co-exist under a viable mechanism of devolved power, in accordance with Finnish constitutional tradition.

19. As substantiated by Finnish legal doctrine and stakeholders' views, it is widely recognised under the Finnish legal system and practice that the obligation to negotiate is wider in scope and provides for stronger rights than the right to consultation under ILO Convention 169. The Ministry of Justice's Memorandum and Guidelines for Negotiations on this obligation, as provided for in section 9 of the Act, indicates for instance that the obligation to negotiate includes the requirement of free, prior and informed consent, as comprised in the UNDRIP. It notes specific references in the guidelines to articles 18 and 19 of the UNDRIP, the jurisprudence of the treaty bodies, and an explanatory procedure for

engaging with indigenous peoples. The former UN Special Rapporteur on the rights of indigenous peoples, Professor James Anya, also used the term “negotiation” in explaining the scope of the State’s duty to consult: “The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are in the *nature of negotiations* [emphasis added] towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.”<sup>7</sup>

20. The Finnish Office of the Chancellor has also expressed its view on the wide scope of the obligation to negotiate and the corresponding rights enjoyed by the Sámi people. On the Tenno/Deatnu River Fishing agreement between Finland and Norway, the Office of the Chancellor, indicated that the standards as provided for under section 9 of the Act had not been complied with, and highlighted the need for “prior” negotiation to take place. He concluded that the obligation to negotiate had been neglected in this case, as negotiations had taken place so late that the Sámi Parliament had no genuine right to influence the outcome.<sup>8</sup>

21. The 2011 Finnish Mining Act, passed after the adoption of the UNDRIP, also reveals the Finnish wide understanding of the “obligation to negotiate”, as recently expanded upon by the Ministry of Justice’s Memorandum and Guidelines, by for instance instituting the requirement of a prior “impact assessment” to be undertaken in “co-operation” with indigenous peoples. Thus, aligning with the language in the UNDRIP, which also uses the concept of “co-operation”. The Mining Act goes even further in section 38 requiring such impact assessments for, “projects implemented outside the Sámi Homeland that are of considerable significance as regards the rights of the Sámi as an indigenous people”.

22. However, despite the emerging current Finnish State’s practice that takes a wider understanding of the “obligation to negotiate”, as illustrated above, the EMRIP notes that this obligation has been narrowly construed in section 9 of the Act. Neither section 9 nor any other section of the Act makes reference to the UNDRIP, the right to consultation or the requirement for free, prior and informed consent; no indication that consultation should be held on the basis of good faith and of what should happen if agreement is not reached; and no limitation on measures or development projects which might cause significant harm to the language, culture and/or traditional livelihood of the Sámi, including cumulative harm, as expressed in the Human Rights Committee’s jurisprudence.<sup>9</sup> The current formulation of section 9 does not mention the need for prior impact assessments to be undertaken in co-operation with the Sámi people. Nor does the issue of resources, financial and human, appear to be taken into account, with a view to ensuring that the Sámi Parliament has the capacity to effectively negotiate with the Government and other institutions in a balanced way, for example with respect to the current discussions on the Arctic railway project through the Sámi homeland or the drafting of the National Action Plan on Fundamental and Human Rights.

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<sup>7</sup> Report to the Human Rights Council, A/HRC/12/34, 14 July 2009

<sup>8</sup> Deputy Justice Chancellor, OKV / 12/21/2016

<sup>9</sup> See for example, Jouni Lämsmä et al. v. Finland, Communication No. 1023/2001, adopted on 17 March 2005 and Ángela Poma Poma v. Peru, Communication No. 1457/2006, adopted on 27 March 2009.

23. The ILO Supervisory Bodies have indicated that the “obligation to consult” under the Convention is intended to mean that: (1) consultations must be formal, full and exercised in good faith; there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord; (2) appropriate procedural mechanisms have to be put in place at the national level and it has to be in a form appropriate to the circumstances; (3) consultations have to be undertaken through indigenous and tribal peoples’ representative institutions as regards legislative and administrative measures; (4) consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures.”<sup>10</sup>

24. The EMRIP also notes that:section 9 has not been implemented systematically or in a uniform/standard way by the different authorities; due to a lack of resources allocated to the Sámi Parliament it has been impeded from realising this right to engage in negotiations; and when protocols are drafted explanations of why opposing views have not been taken into account are not included in the text. For instance,the EMRIP notes that Metsähallitus has no guidelines on implementation of this right, despite the fact that it manages over 90% of land in the Sámi Homeland.

25. Many authorities spoken to demonstrated a willingness to involve the Sámi in decision making processes but had insufficient awareness of how to do so and referred to the need to have standard guidelines: such standardisation is considered particularly important in a decentralised state such as Finland.

26. The EMRIP is of the view that this lack of a consistent approach to the authorities’ obligation to negotiate with the Sámi people has arisen from the absence of specifications on the steps required and guidance on when the obligation to negotiate has been fulfilled. It has led to controversial decisions and tensions.

27. The EMRIP welcomes the guidelines adopted by the Ministry of Justice and distributed to the relevant authorities as an attachment to the memorandum of 27 November 2017, referred to above. These guidelines set out clearly the process to be undertaken to ensure the right to consultation and the requirement of free, prior and informed consent. However, these guidelines are non-binding and thus have limited legal force. The current process of revision of the Sámi Parliament Act should therefore serve as an opportunity to insert some elements from the Ministry of Justice’s memorandum and guidelines into the Act.

28. The EMRIP is of the view that a broad and robust obligation to negotiate and the corresponding rights of the Sámi as indigenous peoples should be adequately reflected in its legislation to ensure implementation of their rights in the UNDRIP (articles 3, 4, 17, 18, 19, 28, 29, and 32) and other international human rights standards, including articles 2 and 5 of the ICERD<sup>11</sup>, and articles 1, 26 and 27 of the ICCPR<sup>12</sup>. This will ensure that the constitutional potential provided for in sections 17 and 121 is “unlocked” for the benefit of the Finnish State and the Sámi people.

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<sup>10</sup> CEACR, General Observations on Convention No. 169, 2009 and 2011.

<sup>11</sup> As reflected in its concluding observations on Finland, CERD/C/FIN/CO/23).

<sup>12</sup> As reflected in its concluding observations on Finland, CCPR/C/FIN/CO/6.

29. With a view to aligning a revised section 9 of the Sámi Parliament Act with the intention behind the legislation, as expressed in sections 17 and 121 of the Constitution and its travaux, as well as the UNDRIP, the EMRIP advises the following to both parties:

1. Amendments to the substantive rights to the Act should include specific reference to the relevant provisions of the UNDRIP, notably articles 1,3,4, 17, 18, 19, 28, 29, and 32;
2. The substantive part of section 9 of the Act should provide for the following elements as enshrined in the UNDRIP and entrenched in the Finnish State’s emerging practices, as illustrated by the Ministry of Justice’s memorandum:
  - 1) pre-negotiation trust building initiatives;
  - 2) good faith in the conduct of the consultation and in the pursuit of FPIC;
  - 3) adequate resources to the SámiParliament;
  - 4) equality of arms through the consultation period;
  - 5) balanced capacity of the parties to engage throughout the process;
  - 6) culturally appropriate methods of negotiation;
  - 7) impact assessments (human rights, cultural, environmental, and social) to be carried out when development projects are anticipated;
  - 8) a limitation on measures or projects which may cause “significant harm” to the Sámi people's right as an indigenous people to practice their language, culture and traditional livelihoods and include a definition of what constitutes “significant harm” including “cumulative harm” from competing land use forms (in consultation with the Sámi Parliament), beyond which development projects may not be undertaken;
  - 9) protocols to be drawn up at the end of a process including agreements reached and in the case of opposing views the reasons why they were not taken on board; and
  - 10) a mechanism to monitor agreements and provide redress for non-compliance.

## **VI. Follow-up**

30. As provided for in the terms of reference, the parties agreed that this advisory note should be made public. Both parties also expressed an interest in sharing their experiences at dialogue and/or best practices during the agenda item on country engagement at the EMRIP’s annual session in July 2018.

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## **Annex 1**

### **Legal Framework**

## **Constitution of Finland**

The 1999 Constitution of Finland contains two provisions regarding the Sámi<sup>13</sup>.

### **Section 17**

Section 17, subsection 3 stipulates that “the Sámi, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture”.

### **Travaux as provided by the State (unofficial translation)**

Government proposal (HE 309/1993 vp):

Section 17 (3): ...The status of the Sámi as the only indigenous people of the country with the rights arising from the related international treaties has been identified separately....The provision would not confine itself to safeguarding the linguistic rights of minorities but would extend broader to safeguard the cultural forms of minorities. Thus, for example, a provision to safeguard the Sámi people's traditional forms of livelihoods, such as reindeer herding, fishing and hunting (egPeVL 3/1990 vp, PeVL 8/1993 vp). Together with Article 16a (1), the provision would oblige the public authorities to allow and support the development of their own language and culture of the groups referred to therein. The provision also provides a constitutional basis for the development of the living conditions of the groups within it, respecting their own cultural heritage. On the other hand, the provision does not imply the right of the groups referred to in its own culture to depart from the rules laid down by the Finnish legal system.

### **Section 121**

Section 121, subsection 3 states that “in their native region, the Sámi have linguistic and cultural self-government, as provided by an Act”.

### **Travaux**

Section 121

Government proposal (HE 248/1994 vp):

According to the proposed section 51a, the Sámi indigenous people would safeguard the cultural autonomy of their own language and culture in the Sámi Homeland as it is provided by law. In the proposed law, a Sámi means a person defined elsewhere in the law. Today, the

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<sup>13</sup>The Constitution of 1919 had similar provisions “Section 14 [Languages] ...

(3) The Sámi as an indigenous people as well as the Romanies and other groups shall have the right to maintain and develop their own languages and cultures.” And, “ Section 51a [Sámi Minority] As an indigenous people the Sámi shall be guaranteed cultural autonomy in respect of their language and culture within the Sámi homelands in the manner prescribed by Act of Parliament.” See [http://www.servat.unibe.ch/icl/fi01000\\_.html](http://www.servat.unibe.ch/icl/fi01000_.html)



person is defined as Sámi in Section 2, subsection 1 of the Law on the Use of Sámi Language by authorities, and is proposed to be redefined in Section 3, subsection 1 of the Bill on the Sámi Parliament. In both cases, the Sámi concept is basically based on the fact that a person considers himself a Sámi and that he is a Sámi native. The proposed definition is somewhat wider than in the present and is more in line with the Sámi definitions in Norway and Sweden. According to the proposal, the Sámi self-government position is to be safeguarded, taking into account the Sámi status as an indigenous people. The rights are thus intended for the rights of a population group in the same way as Section 52 a of the Parliamentary Order, which safeguards the Sámi hearing in Parliament on a matter specifically concerning them<sup>14</sup>. The Sámi status as the only indigenous people in Finland is evident from international agreements. [The Sámi Homeland would be determined by other legislation. Today it is defined in Section 2, subsection 2 of the Law on the Use of the Sámi Language by authorities and is proposed to be defined in the same way as Section 4 of the Bill on the Sámi Parliament. The Sámi homeland area comprises the territory of the municipalities of Enontekiö, Inari and Utsjoki, and the Lapland reindeer herding area in Sodankylä.]

Section 14, subsection 3, in the constitution, determines the content of the proposed Sámi cultural self-government. This provision proposes that the Sámi indigenous people and some other groups should have the right to maintain and develop their language and culture. In this context, the word culture is widely understood. According to the explanatory statement of the proposal, "the provision would not be confined solely to safeguarding the linguistic rights of minorities, but would extend more extensively to safeguarding the cultural forms of minorities, for example by safeguarding the Sámi people's traditional forms of livelihoods, such as reindeer husbandry, fishing and hunting." In its statement, Parliament demanded that the Sámi self-government be realized "on the basis of cultural autonomy". However, it is not appropriate in this context to delegate the legislative power concerning languages and cultures, but to increase chances of self-government in the political and administrative direction.

Report of the Constitutional Law Committee (PeVM 17/1994 vp):

The new Section 51 of the Constitution of the Government is, by its very nature, declarative.

The committee agrees with the explanatory memorandum of the proposal that the concept of culture should be understood in the same way as the fundamental right reform (HE 309/1993 vp). Thus, the Sámi people's cultural form includes the traditional livelihoods of the Sámi. ...

Section 9 of the draft law contains a requirement for official procedures, which safeguards the position of the Sámi. The proposed obligation to negotiate can not imply greater procedural protection than a party's right to be heard in his case based, for example, on the Administrative Procedure Act. Consequently, the legal effect of the obligation to negotiate is limited to requiring the Sámi Parliament to be heard in the cases referred to in the Article and to negotiate the matter pending. Consultation is about giving the Sámi Parliament possibility

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<sup>14</sup> Unofficial translation states in amendment to the paragraph 52 a of the Parliamentary order made in 1991: "The Sámi people should be heard in the issues which concern them, in a way as more explicitly described in the order of work of the parliament. The Working order of the Parliament says in para 37 «Hearing of experts»: The committee can hear experts. When discussing a citizens' initiative, the committee must reserve the opportunity for the representatives of the initiative to be heard. When dealing with a bill or other matter that concerns, in particular, Sámi, the committee must provide Sámi representatives with an opportunity to be heard, except for situations justified by special reasons.

to give its opinion in writing, for example, the possibility of negotiation means direct interaction with the authorities' representatives.

In order to fulfil the obligation to negotiate, and taking into account the requirements of good administration, the authority must ensure that the Sámi Parliament receives sufficient time to discuss the negotiating question and that the negotiating position is otherwise reasonable for the Sámi representative body. Failure to use opportunity to negotiate cannot, on the other hand, constitute a definitive barrier to the progress of the relevant authority, for example in its decision-making process.

Section 26, subsection 2 of the draft law contains a prohibition of appeal on the decision of the Sámi Parliamentary Government to adopt a decision on the electoral roll. The prohibition of appeal is not appropriate for legal reasons, as the Sámi concept is somewhat interpretative. The committee has therefore removed the prohibition of appeal.

## **Legislation**

### **The Act on the Sámi Parliament (974/1995)**

#### **Section 3**

“A Sámi means a person who considers himself a Sámi provided: (1) That he himself or at least one of his parents or grandparents has learned Sámi as his first language; (2) that he is a descendent of a person who has been entered in a land, taxation or population register as a mountain, forest or fishing Lapp; or (3) that at least one of his parents has or could have been registered as an elector for an election to the Sámi Delegation or the Sámi Parliament”.

#### **Section 5**

Section 5 describes its tasks as follows: “(1) The task of the Sámi Parliament is to look after the Sámi language and culture as well as to take care of matters relating to their status as an indigenous people. (2) In matters pertaining to its tasks, the Sámi Parliament may make initiatives and proposals to the authorities, as well as issue statements (...).”

#### **Section 6**

“In matters pertaining to its tasks, the Sámi Parliament shall represent the Sámi in national and international connections.”

#### **Section 9**

“Section 9 — Obligation to negotiate (1) The authorities shall negotiate with the Sámi Parliament in all far - reaching and important measures which may directly and in a specific way affect the status of the Sámi as an indigenous people and which concern the following matters in the Sámi homeland : (1) community planning; (2) the management, use, leasing and assignment of state lands, conservation areas and wilderness areas; (3) applications for licences to stake mineral mine claims or file mining patents; (4) legislative or administrative changes to the occupations belonging to the Sámi form of culture ; (5) the development of the teaching of and in the Sámi language in schools , as well as the social and health services; or

(6) any other matters affecting the Sámi language and culture or the status of the Sámi as an indigenous people. (2) In order to fulfil its obligation to negotiate, the relevant authority shall provide the Sámi Parliament with the opportunity to be heard and discuss matters . Failure to use this opportunity in no way prevents the authority from proceeding in the matter.”

## **Section 10**

“Section 10 — Composition and period of office

(1) The Sámi Parliament consists of 21 members and 4 deputy members chosen at an election to the Sámi Parliament for four calendar years at a time. There shall be at least three members and one deputy member for each of the municipalities in the Sámi homeland.

(2) On the basis of the results of the elections to the Sámi Parliament, the Government shall order the members and deputy members of the Sámi Parliament to take up their duties, grant them release from their duties at their own request and appoint, on the basis of the said election results, new members and deputy members in place of those who have ceased to be members or deputy members during the electoral period.

...”

## **Travaux translated unofficially**

Government Bill 248/1994 (in Swedish)

Section 9. Negotiation Duty. ILO Convention No. 169 on Indigenous Peoples and Tribal Persons proposes that negotiations with representatives of indigenous peoples always take place when considering legislative or management measures that can directly affect an indigenous people. Therefore, a negotiation obligation for the authorities is proposed for the widespread and important issues specifically addressed in this section in cases where the measures affecting the Sámi homeland areas directly and specifically affect the Sámi's position as an indigenous peoples.

One point of departure is that the delegation for Sámi affairs (note: today: Sámi Parliament) is currently being heard in the Special Committee of the Parliament on the grounds that the Sámi is the only indigenous people in Finland (GrUB 1211990 rd). In addition, the constitutional committee in certain cases has considered that legislation should not be developed in violation of ILO Convention 169 on Indigenous Peoples (GrUU 3011993 rd). In addition, according to section 52 of the Riksdag, the constitutional committee has taken the view that the Sámi should be given an opportunity to be heard when preparing matters that concern them in particular (GrUB 111994).

## **Relevant UNDRIP provisions:**

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights 4 and international human rights law.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

#### Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

#### Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
  - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
  - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
  - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
  - (d) Any form of forced assimilation or integration;
  - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

#### Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

#### Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

#### Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

#### Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

#### Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

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**Annex 2**

**Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)**

## **Country engagement - Finland<sup>15</sup>**

**Terms of Reference, 29 January 2018**

### **I) Mandate**

A. Country engagement mandate:

Pursuant to paragraph 2 of Human Rights Council resolution 33/25, the EMRIP should:

- (a) Upon request, assist Member States and/or indigenous peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples, as relevant, which may include establishing contacts with other United Nations agencies, funds and programmes;
- (b) Provide Member States, upon their request, with assistance and advice for the implementation of recommendations made at the universal periodic review and by treaty bodies, special procedures or other relevant mechanisms;
- (c) Upon the request of Member States, indigenous peoples and/or the private sector, engage and assist them by facilitating dialogue, when agreeable to all parties, in order to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

B. Terms of reference under resolution 33/25:

In accordance with the EMRIP's methods of work (A/HRC/36/57, Annex 1), terms of reference should be agreed for every country engagement activity in the light of the mandate of the Expert Mechanism. Modalities of engagement, timelines and the types of activity envisioned, as well as the expected final product, should be prepared by the Expert Mechanism in consultation with the requester(s) and other relevant stakeholders. The terms of reference should also include modalities for the disclosure of information, in agreement with the requester and other stakeholders.

### **II) Requester**

Sámi Parliament (24 November 2017). The Member State agreed with the request for a country engagement mission and is fully cooperating with the EMRIP in its preparations.

### **III) EMRIP Delegation**

Megan Davis, Head of delegation, and Albert Barume, Chair of the EMRIP. Laila Vars and Alexey Tsykarev will join some meetings to assist the mission as deemed necessary.

### **IV) Dates of country engagement mission**

The EMRIP will undertake a country engagement mission to Finland from 10-16 February 2018, visiting Inari and Helsinki.

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<sup>15</sup> This is the first country engagement mission to be carried out by the EMRIP under its amended mandate (33/25).

## **V) Purpose**

Consistent with the EMRIP's mandate, the EMRIP intends to focus its country engagement mission on the proposed amendments to the Sámi Parliament Act, focusing specifically on the definition of the Sámi and the obligation to negotiate, as agreed upon by both parties. The EMRIP will also provide assistance, advice, and facilitate dialogue towards the implementation of recommendations made in this regard to Finland by the Special Rapporteur on the Rights of Indigenous Peoples, in 2016 (A/HRC/33/42/Add.3,) the Committee on the Elimination of Racial Discrimination in April 2017 (CERD/C/FIN/CO/23) and the Human Rights Committee, in 2013 (CCPR/C/FIN/CO/6).

## **VI) Activities**

The country engagement will consist of the following activities:

- Establish and maintain transparent communications between both parties;
- Attend a meeting of the Committee for the Revision of the Act on the Sámi Parliament (in Helsinki);
- Attend a seminar on preparations for a truth commission (in Inari)<sup>16</sup>;
- Engage bilaterally through meetings with all stakeholders including: members of the Sámi Parliament; government officials; the National Human Rights Institution; NGOs working on indigenous issues; and other interested;
- Facilitate and promote dialogue between the Sámi Parliament and the government of the Member State, including through joint meetings, in Inari and/or in Helsinki;
- Provide technical advice to both the Sámi Parliament and the government of the Member State on the main issues contained in the request;
- Undertake follow-up activities as agreed by both parties.

## **VII) Outputs**

Following the mission and within a timeframe agreed upon by both parties, the EMRIP will submit to the Sámi Parliament and the government of the Member State, an independent Technical Advice Note consisting of an analytical synopsis of issues raised and explored; any agreements that may have been achieved during or after the mission; and recommendations on how to take the situation forward.

This note will be shared with the requester and the government of the Member State, both of whom may submit comments.

## **VIII) Follow-up and disclosure:**

The EMRIP will indicate on its website that it intends to carry out this mission and include general information on the mission;

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<sup>16</sup> This activity will provide the EMRIP with an overall view of the situation of the Sámi in Finland, and contribute to the EMRIP's work on transitional justice (focus of its report on the implementation of the UNDRIP, to be prepared in 2019)

The EMRIP will issue a press statement at the end of its country engagement; this statement should neither reveal the substantive issues or the conclusions of the country engagement;

The Technical Advice Note will be made public as agreed by both parties;

The EMRIP's annual session in July 2018 will include an Agenda Item on country engagement with a view to offering both parties an opportunity to share their dialogue efforts and/or best practices. All parties to the request should agree to participate in such debates;

The EMRIP could also, upon request, offer an opportunity for bilateral closed meetings between the parties during its annual session;

Upon request, and depending on the EMRIP's assessment of future developments and the availability of resources, the EMRIP may undertake a follow-up mission to the Member State.

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