



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2668/2015

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<i>Communication submitted by:</i>	Tiina Sanila-Aikio (represented by counsel, Mr. Martin Scheinin)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Finland
<i>Date of communication:</i>	2 October 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 4 November 2015 (not issued in document form) and admissibility decision adopted on 28 March 2017 (CCPR/C/119/D/2668/2015)
<i>Date of adoption of Views:</i>	1 November 2018
<i>Subject matter:</i>	Right to vote for elections to the Sami Parliament
<i>Procedural issues:</i>	Victim status, exhaustion of remedies, non- substantiation
<i>Substantive issues:</i>	Right to self-determination, non-discrimination, political rights, minority rights
<i>Articles of the Covenant:</i>	1, 25, 26, 27
<i>Articles of the Optional Protocol:</i>	1, 2

\* Adopted by the Committee during its 124th session (8 October – 2 November 2018).

\*\* The following members of the Committee participated in the examination of the communication:  
Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands-Kehris, Sarah Cleveland, Ahmed Amin  
Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia VJ Kran, Duncan Laki  
Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, Margo Waterval,  
Andreas B. Zimmermann.

\*\*\* Individual opinion (concurring) by Committee member Olivier de Frouville is annexed to the present  
Views.

1.1 The author of the communication is Tiina Sanila-Aikio, a Finnish national born on 25 March 1983. She submits the communication on her behalf, on behalf of the Sami People of Finland and in her capacity as President of the Sami Parliament of Finland (“the Parliament”), as authorized by its Executive Board. The Optional Protocol entered into force for the State party on 23 March 2012. The author is represented.

1.2 The author submits that the 2011 decision of the Supreme Administrative Court of the State party departed from the consensual interpretation of Section 3<sup>1</sup> of the Sami Parliament Act (the “Parliament Act”) defining who is entitled to enter the electoral roll to the elections to the Sami Parliament, and that the Court subsequently gave the right to vote to 93 persons who had been found ineligible to vote by the Sami Parliament. She claims that this action has weakened the voice of the Sami people in the Parliament and the effectiveness of the Parliament in representing the Sami people in important decisions taken by the State party implicating their lands, culture, and interests. She claims that this unlawful interference by the State party in the Sami people’s right to define who is entitled to participate in elections to their Parliament violates article 1 of the Covenant and dilutes the right of the author and the Sami people’s vote, in violation of their rights to political participation under article 25 of the Covenant. The author also contends that the decisions regarding what persons were admitted and not admitted into the electoral roll were arbitrary, in violation of article 26 of the Covenant. She finally submits that, since the Sami Parliament plays an essential role in the protection of the Sami people’s rights to enjoy their culture and language, and is established by the State party to be the conduit for securing the free, prior and informed consent of the Sami people in matters implicating their interests, this dilution violates article 27 of the Covenant.

1.3 On 2 November 2015, the Committee, through its Special Rapporteur on new communications and interim measures decided not to grant the author’s request, under Rule 92 of the Committee’s Rules of Procedure to issue an urgent request to the State party not to appoint the members of the new Sami Parliament before the Human Rights Committee would be able to address the merits of the communication.

1.4 On 28 March 2017, the Committee, in accordance with rule 93 of its rules of procedures, found that the communication is admissible insofar as it appears to raise issues with respect to articles 25, 26 and 27 of the Covenant. It also found that the author, as a member of the Sami indigenous people and member of the Sami Parliament of which she is the elected President, may be affected, as an individual, by the facts presented in the present communication. Furthermore, the Committee found that the author’s claim regarding violations of article 1 of the Covenant is inadmissible under article 1 of the Optional Protocol but that the Committee may interpret article 1, when relevant, in determining whether rights protected in parts II and III of the Covenant have been violated. The Committee requested the parties to provide further information on the merits of the communication. For further information about the facts, the author’s claims, the parties’ observations on admissibility and the Committee’s decision on admissibility, refer to *Sanila-Aikio v. Finland*, decision adopted on 28 March 2017 (CCPR/C/119/D/2668/2015).

#### **State party’s observations on merits**

2.1 The State party submitted observations on the merits on 4 May 2016. It reiterates its previous submissions that the Parliament Act provides a definition of a Sami. In 2012, the Ministry of Justice established a working group to prepare a proposal for the revision of the Parliament Act. The memorandum of the working group stated that the overall objective of the revision was to improve the operational preconditions of Sami cultural autonomy and of the Sami Parliament. Based on the proposal of the working group, a Bill was submitted to Parliament on 25 September 2014 which contained, inter alia, provisions for the revision of

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<sup>1</sup> Section 3 of the Act defines a Sami for the purposes of being allowed to vote in the elections for the Parliament as follows: “A Sami means a person who considers himself a Sami provided: (1) That he himself or at least one of his parents or grandparents has learned Sami 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 Sami Delegation or the Sami Parliament”.

the definition. The proposed definition was supported by the Sami Parliament. During the discussion of the Bill at the level of parliamentary committee it became clear that the Parliament of Finland would not approve the definition proposed. Since the question of the definition was the most important part of the Bill the Government decided, on 12 March 2015, to cancel the Bill. The Ministry of Justice intends to present a new Bill to the Parliament of Finland.

2.2 The State party indicates that in its 2009 concluding observations to Finland, the Committee on the Elimination of Racial Discrimination reiterated that the State party's approach to the definition of who may be considered a Sámi under the Parliament Act and as interpreted by the Supreme Administrative Court "is too restrictive."<sup>2</sup> In its 2012 concluding observations, the CERD Committee noted that although the Supreme Administrative Court had relied on that Committee's prior concluding observations in its 2011 decision defining who is a "Sámi" entitled to vote for Members of the Sámi Parliament, that decision gave "insufficient weight to the Sámi people's rights, recognized in the United Nations Declaration on the Rights of Indigenous Peoples, to self-determination (art. 3), in particular their right to determine their own identity or membership in accordance with their customs and traditions (art. 33), as well as their right not to be subjected to forced assimilation or destruction of their culture (art. 8) (art. 5 of the Convention)." Accordingly, the Committee recommended that, in defining who is eligible to vote for Members of the Sámi Parliament, 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>3</sup>

2.3 As regards the definition of the Sami, the Government respects self-identification as a key criterion for the determination of a group of peoples or an individual as indigenous, as stipulated, *inter alia*, by article 1(2) of the International Labour Organization's Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. The Government also respects the Sami Parliament's right to determine its membership in accordance with Sami customs and traditions. Accordingly, measures have been taken to protect the identity of the Sami people and the rights of its members to enjoy and develop their culture and language in community with the other members of the indigenous community. These measures respect articles 2(1) and 26 of the Covenant.

2.4 The State party recalls the Committee's General Comment No. 25, that the rights under article 25 of the Covenant are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1(1) of the Covenant, peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.<sup>4</sup>

2.5 As article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs, the State party emphasizes that the right to vote at the elections of the Sami Parliament is established by law. In this regard, the Government has taken measures to ensure that all persons entitled to vote are able to exercise that right.

2.6 In principle, voting in the elections is based on a certified electoral roll. However, the Parliament Act provides for a procedure by which a person may, by a demand for rectification, request to be entered in the electoral roll, if they consider that they have been unlawfully omitted from it. Ultimately, the matter may be referred to the Supreme Administrative Court by appeal. Therefore, Section 26d of the Parliament Act stipulates that a person can vote if before the counting of the ballots they produce to the Election Committee, or on the election day to the polling committee, an order of the Court confirming their right

<sup>2</sup> CERD, Concluding Observations regarding the 17th to 19th periodic reports of Finland under the International Convention on the Elimination of All Forms of Racial Discrimination, CERD/C/FIN/CO/19 (13 March 2009), para. 13.

<sup>3</sup> *Id.*, para. 12.

<sup>4</sup> General Comment No. 25, The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) (CCPR/C/21/Rev.1/Add.7), para. 2.

to vote. The person is also obliged to hand over the court order or a certified copy of it to the Election Committee or the polling committee for an entry to this effect in the electoral roll.

2.7 The State party reiterates its arguments regarding admissibility. The State party concludes that no violations of the Covenant have taken place in the present case.

### **Author's comments on the State party's observations on merits**

3.1 The author submitted comments on the State party's observations on 28 November 2016. The author reiterates that the Court rulings of 30 September 2015 violated the rights of the author and her fellow members of the Sami indigenous people under article 26, both on its own and in conjunction with article 1 of the Covenant. A close analysis of the 182 Court rulings of 30 September 2015, where 93 persons were admitted into the voters' registered and the remainder rejected, shows that the Court ignored the explicit statutory criteria spelled out in Section 3 of the Parliament Act and applied its own indeterminate construction of "overall consideration", resulting in lawlessness, unforeseeability, arbitrariness and ultimately discrimination, as identical cases were treated differently and different cases identically. The rulings not only adversely affected persons whose applications were rejected as a result of being treated differently from others who were admitted. The author and all Sami are affected by this arbitrariness, which hinders the capacity of the Parliament to represent the Sami indigenous people and its individual members, and violates article 26, in conjunction with article 1 of the Covenant.

3.2 The main principles enshrined in the Parliament Act show that the effective functioning and the capacity to adequately represent the views of the Sami indigenous people are essential for the State party's implementation of articles 25 and 27 of the Covenant. The Parliament is an important instrument for the Sami, individually and collectively, to enjoy and exercise their rights under articles 25 and 27 of the Covenant. Section 9 of the Act, in particular, imposes upon all authorities an obligation to negotiate with the Parliament for a long list of matters that concern the Sami as an indigenous people or developments within the Sami homeland. Therefore, the recent court rulings violate these provisions. Through the violations of articles 25, 26 and 27, the State party also violates the right of the Sami indigenous people to enjoy their right of self-determination, as protected under article 1 of the Covenant.

3.3 Under the current composition, the Parliament continues to defend the rights and interests of the Sami indigenous people, but often this is delayed or compromised because of the time and effort that is consumed in resolving internal disagreements that very often relate to the question of how the Parliament should relate to the Finnish State and its continuing interventions on Sami lands and livelihoods. As a result, the Parliament was unable to stop the Government and Parliament of Finland from enacting a new Act on the Government Forestry Agency,<sup>5</sup> thus ignoring the concerns by the Sami people and denying their future participation.

3.4 A similar ongoing development relates to a project of a new treaty between Finland and Norway concerning the border river Tenosjoki. The Sami have largely been excluded from effective participation in the negotiations between the two governments, despite the fact that since time immemorial this river has been used by the Sami for salmon fishing. This activity has always constituted the main source of livelihood for the local Sami population and is part of their way of life and culture. It determines their social organisation, weekly and annual cycle of work, cross-border cooperation, handicraft and arts, and folklore. The aim of the project is publicly presented as seeking to protect the sustainability of the salmon stock, while in fact it would constitute large-scale expropriation of the immemorial fishing rights of the Sami indigenous people. It would permanently exclude large parts of the Sami currently allowed to practice traditional forms of fishing, while at the same time disproportionately allowing holiday fishermen to practice this activity. This is another practical example of the impact of the Court rulings of 30 September 2015, not only on the lives of the author and her fellow members of the elected Sami Parliament, but also on the lives of all Sami individuals in Finland.

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<sup>5</sup> The Act entered into force on 15 April 2016.

3.5 The Court's consultation with the Board of the Parliament before issuing its rulings of 30 September 2015 were a mere formality. In September 2015, the Parliament was confronted with almost 200 simultaneous appeals by persons who sought to be enrolled in the electoral list. The Court gave it only 3-5 working days to respond. The Board did its best to provide an individualised assessment by determining whether the conditions prescribed in Section 3 of the Parliament Act were met. However, the views and arguments of the Parliament did not affect the conclusions of the Court, which were not based on a proper factual assessment and legal interpretation of the Parliament Act but, in most cases, on what the Court characterised as an "overall consideration" and "human rights friendly interpretation of the law", without a basis in factual circumstances or proper legal assessment, and without reference to the Covenant, the rights of indigenous peoples or any other specific individual human right.

3.6 The present case originates from the expansive application, especially by the Court, of Section 3 of the Parliament Act. For the 2011 elections to the Parliament, the Court deviated from the wording of the Parliament Act to include in the electoral roll individuals who did not meet any of the objective criteria of Section 3, in addition to the subjective criterion of individual self-identification. Those rulings triggered the CERD concluding observations of 2012 and the Human Rights Committee's concluding observations of 2013,<sup>6</sup> both calling upon Finland to give more weight to Sami self-determination in decisions concerning membership. The rulings also resulted in a negotiation process between the Government and the Sami Parliament. A solution that satisfied the Sami was reached in 2013 and the Bill was presented to the national Parliament on 24 September 2014. The Bill did not get enough support, largely because of pressure from the non-Sami majority population on northernmost Finland. This allowed the Court to continue its expansive application of Section 3 beyond its wording.

3.7 The author does not object to the Court being entitled in principle to review the application of Section 3 of the Parliament Act by the pertinent bodies of the Sami Parliament. However, in order to be compatible with the Covenant, the standard for external judicial review of the decisions of those bodies should be arbitrariness or discrimination. The Court, however, did not conclude in any of the 93 cases that the decisions by the pertinent organs of the Parliament not to accept the individuals in question as eligible voters would have amounted to arbitrariness or discrimination.

3.8 The Court's ruling of 13 January 2016 constitutes a new violation of the rights of the author and her fellow members of the Sami indigenous people under articles 25 and 27, both on their own and in conjunction with article 1. The ruling weakened the capacity of the Parliament to defend the rights and interests of the Sami indigenous people, including the rights of the author and other Sami individuals to enjoy their culture in community with other members of the group. As a result of this ruling the Parliament also had to pay the legal costs of the 27 people who contested the decision to hold new elections, amounting to 11,645 euros. This has put an important financial burden on the Parliament's already very limited budget.

#### **State party's further explanations as requested by the Committee**

4.1 By Notes verbales of 27 July 2017, 29 November 2017 and 12 July 2018, the State party responded to the Committee's request for further explanations. The State party reiterates that the author failed to substantiate in what way she has been directly affected by the Supreme Administrative Court rulings. A person entitled to vote should be free to vote for any candidate and the State party will always respect the results of genuine, democratic elections of the Sami Parliament. The State party also will not take a stand on any possible internal disagreements within the Sami Parliament.

4.2 Currently three different communications regarding the same substance matter are pending before treaty bodies, two before the Committee and one before the CERD Committee. The other communication submitted before the Committee is submitted on

<sup>6</sup> CCPR/C/FIN/CO/6, para. 16 (recommending that "the State party should advance the implementation of the rights of the Sami by strengthening the decision-making powers of Sami representative institutions, such as the Sami parliament").

behalf of 25 persons, two of whom are members of the Sami Parliament. The communication submitted before the CERD Committee was submitted on behalf of the members of the Sami Council and 23 persons, two of whom are members of the Sami Parliament.

4.3 Section 14 of the Parliament Act provides that the Sami Parliament shall appoint an Election Committee. Section 26 (as amended in 2002) stipulates that individuals who believe they have been unlawfully omitted from the electoral roll can request the Election Committee to rectify the matter urgently. This decision can be appealed to the Board of the Sami Parliament. According to Section 26b (as amended in 2002) Board decisions can be appealed the Supreme Administrative Court within 14 days of the date when the person concerned received notice of the decision. The Court supervises the lawfulness and uniformity of the decisions taken.

4.4 A recent report of the Prime Minister's Office<sup>7</sup> indicates that the Supreme Administrative Court decisions of 2011 and 2015 applied the recommendation issued by the CERD Committee in its Concluding Observations regarding the 9<sup>th</sup>, 10<sup>th</sup> and 17<sup>th</sup> to 19<sup>th</sup> periodic reports of Finland to take better into account an individual's self-identification within the Sami definition.<sup>8</sup>

4.5 Section 9 of the Parliament Act addresses the obligation of public authorities to negotiate with the Sami Parliament:

“(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.”

4.6 On 8 November 2017, the Ministry of Justice appointed a committee to draft a number of amendments to the Parliament Act. Its work was mandated by the fundamental rights and other obligations imposed by the Constitution of Finland, international human rights treaties binding on Finland, and the UN Declaration on the Rights of Indigenous Peoples (UN Declaration). It also took into account the initialled Nordic Sami Convention and the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169). The committee's proposed amendments include modifications to the right to vote in elections to the Sami Parliament. The relevant provision as modified would, as do the criteria currently in force, require both subjective consent and fulfilment of certain objective criteria: that the person, or at least one of his or her parents, grandparents or great-grandparents, have learned Sami as their first language or that at least one of the parents has been included in the electoral roll. The proposed text is largely similar to the corresponding provision of the initialled Nordic Sami Convention. Another proposed modification provides for an obligation to cooperate and negotiate with the Sami Parliament on certain matters which may affect the status of the Sami, however, this would not imply a right to veto.

4.7 Modifications to the procedures for inclusion on the electoral role are also being proposed. These include an extension of the time limits for seeking inclusion in the electoral roll, to allow sufficient time for considering applications and possible requests for review by the Election Committee. An independent and autonomous Review Committee, formed by a legally-trained chairperson and three members, would be created to review the decisions of the Election Committee in case of appeal. The Review Committee's decisions could be

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<sup>7</sup> See “Actualizing Sami Rights: International Comparative Research” of 25 January 2017 Publications of the Government's analysis, assessment and research activities, 4/2017.

<sup>8</sup> See CERD Committee Concluding observations, A/45/18 (1990) para. 91; CERD/C/63/CO/5 (2003) para.11, and CERD/C/FIN/CO/19 (2009), para. 13.

appealed to the Supreme Administrative Court. The goal is to have the amendments to the Parliament Act enter into force in sufficient time before the next Sami Parliament elections, to be held in 2019. The Sami Parliament has not yet considered the current draft, and the Government will not proceed without the Parliament's consent.

#### **Author's further explanations as requested by the Committee**

5.1 By letters of 23 February 2017, 28 July 2017, 13 April and 3 August 2018, the author responded to the Committee's request for further clarifications.

5.2 The author first emphasizes that she submitted the communication on her own behalf and on behalf of the members of the indigenous Sami people in Finland, as authorised by the Executive Board of the Sami Parliament. This authorisation follows the criteria established by the jurisprudence of the Committee in *Chief Barnard Ominayak and the Lubicon Lake band v. Canada*<sup>9</sup>. She therefore requests the Committee to take into account the individual and collective dimensions of the case, as well as her right to represent all members of her group.

5.3 Any communications submitted by another individual concerning the same conduct by the State party does not affect the author's right to present a communication or her right to represent other members of her group.

5.4 In view of the Committee's admissibility decision, the author modifies her request for an effective remedy and requests that such remedies include: (a) a public apology for the violations of the rights of the author and the Sami indigenous people to their right to non-discrimination, to political participation and to enjoy their own culture interpreted in light of their right to self-determination; (b) immediate discontinuation of ongoing legislative, treaty-making or administrative processes that would significantly affect the rights and interests of the Sami indigenous people where the free, prior and informed consent of the Sami has not been obtained; (c) immediate initiation of an amendment to Section 3 of the Sami Parliament Act, towards defining the criteria for eligibility to vote in Sami Parliament elections in a manner that respects the right of the Sami people to exercise its self-determination and that limits the external judicial review by State courts of decisions by the organs of the Sami Parliament to situations where a decision has been arbitrary or discriminatory; (d) compensating the Sami Parliament for the legal fees it paid as a result of the ruling of 13 January 2016; (e) compensating the Sami Parliament for its own legal expenses involved in litigation in matters pertaining to the 2015 elections.

5.5 The author argues that the State party does not refer to the two most recent CERD Concluding Observations, which considered that the rulings of the Supreme Administrative Court violated the self-determination of the Sami people<sup>10</sup>.

5.6 With respect to the process for drafting amendments to the Sami Parliament Act, the current proposal satisfies the Sami. This process would partially remedy the author's claims for Covenant violations, but would not end the ongoing effects of these violations. In fact, by submitting information on the proposed changes to the Parliament Act, the State party is implicitly admitting that the interpretation by the Supreme Administrative Court of current section 3 violated the Covenant. In addition, half the members of the drafting committee are not Sami and belong to political parties predominantly voted by non-Sami Finns, when the matter discussed should be decided by the Sami alone. Additionally, a transition clause has been included in the current draft, delaying the entry into force of the amendments to at least 2020. The current draft thus does not ensure free, prior and informed consent of the Sami people, as requested by the UN Declaration and the Committee's jurisprudence<sup>11</sup>. The Sami people therefore confront a dilemma: Section 3 of the Parliament Act will only be amended if they consent to the current proposal, but this proposal does not follow international

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<sup>9</sup> See *Lubicon Lake Band v. Canada* (CCPR/C/38/D/167/1984), paras. 13.4, 14 and 33.

<sup>10</sup> See CERD Concluding Observations (CERD/C/FIN/CO/20-22) para. 12 and (CERD/C/FIN/CO23) para. 15.

<sup>11</sup> *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006) para 7.6.

standards regarding free, prior and informed consent. Finally, an attempt to reform the Act failed in the past<sup>12</sup> and there is no assurance that the proposal will be accepted this time.

5.7 The author refers to some Court decisions in response to the Committee's question regarding the Supreme Administrative Court's assessment in the 93 rulings and its interpretation of the Act's definition of Sami. In the first example<sup>13</sup>, the Sami Parliament had rejected the appellant's request, because she did not meet the objective criteria in Section 3 of the Act. The Court agreed that the appellant did not meet these criteria, but then found that she had demonstrated a strong devotion to Sami language and culture. It concluded that, in an overall consideration, the appellant should be regarded as a Sami. The author also presents the examples of two siblings<sup>14</sup> with the same family history. The appeal of one was accepted under the Court's "overall consideration" rationale, while the sibling's appeal was rejected. The only difference between these two appeals was the description of their self-identification as a Sami. The Court's assessment thus relies on self-identification of each individual as a Sami, which interferes with the Sami people's right to self-determination and their aspiration to apply the law in a foreseeable and coherent manner. The author wishes to highlight that two of these rulings have been published in FINLEX, the Ministry of Justice database for Finnish legal documents, which implies that they are considered authoritative legal precedents. The author also refers to a report from a research project commissioned by the Government of Finland<sup>15</sup> which considers that some of the Court rulings provide different outcomes to identical claims and that it cannot be the task of the Supreme Administrative Court to determine who is a Sami in Finland, as its main task is to control the lawfulness of decisions.

5.8 Regarding the Committee's question on the impact of the Supreme Administrative Court decisions on the functioning of the Parliament, the author reiterates her previous arguments<sup>16</sup>. It is speculative to assess the consequences of the inclusion of new voters because of the secrecy of ballots, but as a conservative estimate, at least two members of the parliament were elected due to modification of the electoral roll. The current composition of the Parliament is also more divided, resulting in compromises between Sami self-determination and indigenous people's rights and some individual members seeking compromises with the Finnish state and the mainstream Finnish population. This trend is also undermining the increasing leadership of young Sami women, of which the author is one example.

5.9 In response to the Committee's question relating to forestry and other commercial activity, the obligation of consultation with the Parliament established by Section 9 of the Parliament Act falls short of the current international standard reflected in the UN Declaration and the Committee's jurisprudence<sup>17</sup>. Adequate guarantees were deleted from the new Act on the Government Forestry Agency. The rulings by the Administrative Supreme Court contribute towards this atmosphere of disregard towards the Sami Parliament, and the obligation of consultation is being increasingly ignored by governmental authorities. This tendency is further illustrated by the Ministry of Transport's announcement, in March 2018, of its plans to build a railway to the Arctic Ocean, cutting through the reindeer herding lands of the Sami and destroying their way of life, after the Sami "were heard" but not genuinely consulted.

5.10 Regarding the Committee's question on the negotiations with Norway concerning salmon fishing in the River Teno, the new bilateral treaty has been signed between the two

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<sup>12</sup> See *Sanila-Aikio v. Finland*, Admissibility decision (CCPR/C/119/D/2668/2015) (2017), para. 2.1.

<sup>13</sup> Supreme Administrative Court decision KHO:2015: 145.

<sup>14</sup> Supreme Administrative Court decision KHO 2731/3/15 of 30 September 2015, and KHO 2837/3/15 of 30 September 2015.

<sup>15</sup> Leena Heinämäki, Christina Allard, Stefan Kirchner, Alexandra Xanthaki, Sanna Valkonen, Ulf Mörkenstam & Nigel Bankes, Jacinta Ruru, Jérémie Gilbert, Per Selle, Audra Simpson, Laura Olsén: *Actualizing Sámi Rights: International Comparative Research*. Publications of the Government's analysis, assessment and research activities 4/2017. Published by the Prime Minister's Office, 25 January 2017.

<sup>16</sup> *Sanila-Aikio v. Finland* Admissibility decision (CCPR/C/119/D/2668/2015) (2017), para 2.11.

<sup>17</sup> *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006), para 7.6.

countries, but the Sami Parliament was excluded from the negotiations. The decisive phase of the negotiations coincided with the time when the Sami Parliament was weakened by the Court rulings. The uncertainty that followed the election directly impacted the Parliament's capacity to successfully intervene. The new treaty will adversely impact the fishing activities and culture of the Sami people in Finland. Both the Constitutional Law Committee of the Finnish Parliament<sup>18</sup> and the Government's internal legality oversight office<sup>19</sup> concluded that the Sami Parliament had not been duly consulted. The Parliament of Finland approved the treaty by a majority of 111 votes out of 200 members, of which none are Sami. This lack of full consultation constitutes a separate violation of the rights of the author and her colleagues at the Sami Parliament under articles 25 and 27 of the Covenant, as informed by article 1.

5.11 Regarding the Committee's question on the impact of the Court decisions on the author's cultural and linguistic rights, the author recalls her initial claims<sup>20</sup>. She further notes that she is a reindeer herder and fisherwoman, so that these nature-based activities have remained constitutive of her Sami identity and culture at an individual level. She sees it as an important part of her identity to transmit to the following generations her knowledge of the Sami methods of reindeer herding and fishing.

### **Issues and proceedings before the Committee**

#### *Consideration of the merits*

6.1 The Committee has considered the present communication in light of all the information made available to it by the parties, as required under article 5(1) of the Optional Protocol.

6.2 The Committee notes the author's allegations that the decision of the Supreme Administrative Court violated articles 25 and 27 of the Covenant by preventing the author from taking part in genuine periodic elections and negatively impacting the author and the Sami people's use of their language and enjoyment of their culture in community with other members. According to the author, these decisions have produced a situation of lawlessness and arbitrariness and greater division within the Parliament, which has become less efficient in promoting and protecting the rights of the Sami people. The Committee also notes that, according to the State party, the Court's review was provided by law and in full compliance with article 25 of the Covenant, and respects the right of each voter to be free to vote for any candidate.

6.3 The Committee notes the State party's submission that it fully respects self-identification as a criterion for the determination of a person as indigenous, in compliance with CERD Committee recommendations. It also notes the author's assertion that the State party fails to acknowledge the CERD Committee's concern that the definition adopted by the Supreme Administrative Court gives insufficient weight to the Sami people's rights to determine their own identity or membership in accordance with their customs and traditions and their right not to be subjected to forced assimilation or destruction of their culture, as recognized under articles 33 and 8 of the UN Declaration on the Rights of Indigenous Peoples.<sup>21</sup>

6.4 The Committee notes that a process is currently ongoing to amend the Sami Parliament Act, including the criteria for determining the right to vote. It further notes the author's unrefuted submission that the amendments could not enter into force before 2020

<sup>18</sup> Constitutional Law Committee of Finnish Parliament's approval to the ratification of the Teno treaty of 23 February 2017 ("According to materials received by the Committee, the duty of consultation, as prescribed by Section 9 of the Sami Parliament Act, was in certain respects disregarded in the negotiations").

<sup>19</sup> Internal legality oversight office, decision of 23 March 2017 ("Similarly to the Constitutional Law Committee, I take the view that the Ministry for Agriculture and Forestry has in certain respects failed to comply with the duty of consultation as prescribed in the Sami Parliament Act.").

<sup>20</sup> *Sanila-Aikio v. Finland* Admissibility decision (CCPR/C/119/D/2668/2015), para. 3.1 - 3.5.

<sup>21</sup> CERD, Concluding observations regarding the 20th to 22nd periodic reports of Finland, CERD/C/FIN/CO/20-22 (23 October 2012), para. 12.

and would only partially remedy the violations suffered, since they would not end the effects of the alleged violations. The author considers that the very fact that the State party has sought to modify the Parliament Act is an implicit recognition of the violation of the Covenant.

6.5 The Committee recalls that, according to General Comment No. 25 on article 25, any conditions on the exercise of the rights to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, should be based on objective and reasonable criteria.<sup>22</sup> The Committee also recalls its jurisprudence in *Lovelace v. Canada* that the category of persons belonging to an indigenous people may in some instances need to be defined to protect the viability and welfare of a minority as a whole<sup>23</sup>. In *Kitok v. Sweden*, the Committee considered that “a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole”<sup>24</sup>.

6.6 The Committee recalls that under article 33 of the UN Declaration, “indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions (...) and the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.” Article 9 of the UN Declaration provides that “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.” According to Article 8(1) of the Declaration, “indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”

6.7 In this context, the Committee notes that according to section 3 of the Parliament Act, for a person to be considered as a Sami for the purposes of being allowed to vote in the elections for the Parliament, he or she must “consider[] himself a Sami, provided: (1) that he himself or at least one of his parents or grandparents has learned Sami 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 Sami Delegation or the Sami Parliament”. The Committee also notes that, as undisputed by the parties, the objective elements were not applied by the Supreme Administrative Court in a majority of cases.

6.8 The Committee recalls its General Comment No. 23 on article 27 that the exercise of cultural rights manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.<sup>25</sup> The Committee further observes that article 27, interpreted in light of the UN Declaration and article 1 of the Covenant, enshrines an inalienable right of indigenous peoples to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>26</sup> Article 1 and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law.<sup>27</sup>

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<sup>22</sup> General Comment 25 – The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) (CCPR/C/21/Rev.1/Add.7).

<sup>23</sup> *Lovelace v. Canada* (CCPR/C/OP/1 at 83), para 15.

<sup>24</sup> See *Kitok v. Sweden* (CCPR/C/33/D/197/1985), para 9.8.

<sup>25</sup> General Comment No. 23: The rights of minorities (Art. 27) (CCPR/C/21/Rev.1/Add.5) (1994) para. 7.

<sup>26</sup> UN Declaration on the Rights of Indigenous Peoples, article 3; 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”). See also General Comment No. 12, Article 1 (right to self-determination) (1984), para. 2.

<sup>27</sup> General Comment No. 12, para 2.

6.9 The Committee notes that, according to the State party, the author failed to establish in what way she had been directly affected by the Supreme Administrative Court rulings. It also notes the author's request that the Committee take into account the individual and collective dimensions of the case. In this regard, the Committee recalls its General Comment No. 23 on the rights of minorities under article 27, which recognises that "the protection of these rights is directed to ensure the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant."<sup>28</sup> Moreover, "although the rights protected under article 27 are individual rights, they depend in turn on the ability of the group to maintain its culture, language or religion."<sup>29</sup> The Committee further recalls that the preamble of the UN Declaration establishes that "indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples". In view thereof, the Committee considers that in the context of indigenous peoples' rights, articles 25 and 27 have a collective dimension and some of them can only be enjoyed in community with others. The rights to political participation of an indigenous community in the context of internal self-determination under article 27, read in light of article 1 of the Covenant, and in pursuance of the preservation of the rights of members of the community to enjoy their own culture or to use their own language in community with the other members of their group, are not enjoyed merely individually. Consequently, when considering the individual harm in the context of this communication, the Committee must take into account the collective dimension of such harm. With respect to dilution of the vote of an indigenous community in the context of internal self-determination, harm directly imposed upon the collective may injure each and every individual member of the community. The author is a member of an indigenous community and all of her claims are related to her rights as such.

6.10 The Committee notes the author's claim that owing to the Parliament's mandate, the effective functioning and the capacity to adequately represent the views of the Sami are essential for the implementation by the State party of articles 25 and 27 of the Covenant, and that the Parliament is an important instrument for the Sami, individually and collectively, to enjoy and exercise these rights. The Committee notes that the powers of the Sami Parliament include looking after the Sami language and culture as well as taking care of matters relating to the Sami's status as an indigenous people; to act as representative of the Sami people nationally and internationally in matters pertaining to its tasks; and to be consulted by all authorities in a long list of matters that concern the Sami as an indigenous people or developments within the Sami homeland. The Committee accordingly considers that the Sami Parliament constitutes the institution by which the State party ensures the effective participation of the members of the Sami people as an indigenous community in the decisions that affect them. Consequently, the State party's obligations contained in article 27 depend on the effective role that the Sami Parliament may play in decisions that affect the rights of members of the Sami community to enjoy their own culture or to use their own language in community with the other members of their group. The electoral process for the Sami Parliament accordingly must ensure the effective participation of those concerned in the internal self-determination process, which is necessary for the continued viability and welfare of the indigenous community as a whole. Pursuant to article 25, the Committee also considers that restrictions affecting the right of members of the Sami indigenous community to effective representation in the Sami Parliament must have a reasonable and objective justification and be consistent with the other provisions of the Covenant<sup>30</sup>, including the principle of internal self-determination relating to indigenous peoples.

6.11 In the current case, the author is a member of the Sami people and a member and President of the Sami Parliament, and as such is actively engaged in the electoral process. The Committee observes the author's uncontested submissions that the decisions of the Supreme Administrative Court, from 2011 onwards, departed from the consensual interpretation of Section 3 of the Sami Parliament Act for determining membership in the

<sup>28</sup> General Comment No. 23, para. 9.

<sup>29</sup> General Comment No. 23, para. 6.

<sup>30</sup> *Lovelace v. Canada*, para. 16.

electoral rolls of that Parliament. In particular, the Supreme Administrative Court failed to require satisfaction of at least one of the objective criteria in the majority of cases, instead applying an “overall consideration” and examining whether a person’s own opinion about considering themselves a Sami was “strong”, and that the Court thereby infringed on the capacity of the Sami people, through its Parliament, to exercise a key dimension of Sami self-determination in determining who is a Sami.<sup>31</sup> The Committee considers that the Supreme Administrative Court rulings affected the rights of the author and of the Sami community to which she belongs to engage in the electoral process regarding the institution intended by the State party to secure the effective internal self-determination and the right to their own language and culture of members of the Sami indigenous people. The Committee further considers that by departing in this manner from the consensual interpretation of the law determining membership in the electoral rolls of the Sami Parliament, the Supreme Administrative Court’s interpretation was not based on reasonable and objective criteria. Accordingly, the Committee considers that the facts before it amount to a violation of the author’s rights under article 25, read alone and in conjunction with article 27, as interpreted in light of article 1 of the Covenant.

6.12 Having found a violation of article 25, read alone and in conjunction with article 27, the Committee does not consider it necessary to examine the author’s other claims under the Covenant.

7. In light of the above, the Committee, acting under article 5(4) of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of article 25, read alone and in conjunction with article 27 of the Covenant.

8. In accordance with article 2(3)(a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to review Section 3 of the Sami Parliament Act with a view to ensuring that the criteria for eligibility to vote in Sami Parliament elections are defined and applied in a manner that respects the right of the Sami people to exercise their internal self-determination, in accordance with articles 25 and 27 of the Covenant. The State party is also under an obligation to take all steps necessary to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee’s Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State Party, including ensuring their accessibility to the members of the Sami indigenous community.

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<sup>31</sup> See *Sanila-Aikio v. Finland*, admissibility decision (CCPR/C/119/D/2668/2015) (2017), paras. 2.8-2.10.

## **Opinion individuelle (concordante) de M. Olivier de Frouville.**

1. Je suis en accord avec la conclusion à laquelle parvient le Comité dans cette affaire, à savoir qu'il y a eu violation de l'article 25, lu seul et en conjonction avec l'article 27, interprétés à la lumière de l'article 1er du Pacte international sur les droits civils et politiques.

2. La décision sur la recevabilité dans cette affaire apporte des précisions importantes par rapport à celle qui a été adoptée antérieurement par le Comité dans l'affaire n°2668/2015 *Tiina Sanila-Aikio c. Finlande*. Dans sa décision du 28 mars 2017, le Comité constatait « qu'en présentant la communication en son nom propre, l'auteur le saisit en sa qualité de membre du peuple autochtone Sâme et de membre du Parlement Sâme, dont elle est la Présidente. Il est d'avis qu'en tant que telle, elle pourrait être personnellement concernée par tous problèmes relatifs au fonctionnement du Parlement et aux élections législatives. » De même, un peu plus loin dans la même décision, le Comité relevait que « les décisions des institutions de l'État finlandais qui influent sur la composition du Parlement Sâme et sur l'égalité de représentation des Sâmes peuvent avoir des répercussions sur le droit des membres de la communauté Sâme d'avoir leur propre vie culturelle et d'utiliser leur langue avec les autres membres du groupe, ainsi que sur leur droit à l'égalité devant la loi » La décision de recevabilité reposait donc sur le constat de l'existence d'un double lien de causalité : entre les jugements de la Cour suprême administrative, et la composition et le fonctionnement du Parlement Sâme d'une part ; entre la composition et le fonctionnement du Parlement Sâme, et les droits des membres du peuple Sâme en vertu de l'article 27 du Pacte, d'autre part. Or les arguments développés par l'auteur ne venaient pas clairement étayer ce double lien de causalité et la décision du Comité restait tout aussi évasive. Elle ne démontrait pas en quoi l'application du principe d'auto-identification avait véritablement affecté de manière significative la composition du corps électoral et encore moins affecté la composition ou le fonctionnement du Parlement Sâme. Et aucun exemple concret n'était donné pour démontrer que, dans un cas particulier, ces changements dans la composition du corps électoral avaient eu une incidence sur les droits que les membres du peuple Sâme tenaient de l'article 27. Le Comité n'expliquait donc pas clairement en quoi l'auteur pouvait se prétendre « victime » de violations de ses droits tirés des articles 25, 26 ou 27 du Pacte. La présente décision sur la recevabilité vient remédier a posteriori à ce défaut de motivation.

3. D'abord, elle se recentre à juste titre sur les griefs tirés de l'article 25 du Pacte. L'affaire concerne en effet, avant tout, le droit de prendre part à la direction des affaires publiques des membres du peuple Sâme, en tant qu'ils appartiennent à un peuple autochtone – ce qui justifie par ailleurs pleinement que l'article 25 soit lu en conjonction avec l'article 27, mais aussi avec l'article 1er du Pacte. Ce qui est en cause ici, c'est le droit des Sâmes de décider de leur propre identité ou appartenance, conformément à leurs coutumes et traditions, ainsi que leur droit de déterminer les structures et leurs institutions et d'en choisir les membres selon leurs propres procédures, droits qui sont reconnus par l'article 33 de la Déclaration des Nations Unies sur les peuples autochtones. Les décisions de la Cour administrative d'appel ont effectivement eu un impact important sur cette capacité du peuple de régler collectivement sa composition et, par suite, son droit de prendre part à la direction des affaires publiques par l'intermédiaire de représentants élus au sein d'un organe constitué. Et cela d'autant plus qu'avec ces décisions, la Cour n'a pas correctement appliqué la législation nationale, qui mettait pourtant en avant clairement un critère objectif d'appartenance, tel que voulu par les Sâmes eux-mêmes. En n'appliquant pas ce critère et en lui substituant un critère d'auto-identification, dont elle se faisait elle-même l'interprète au cas par cas, la Cour a restreint les droits des Sâmes d'exercer leur droit de prendre part à la direction des affaires publiques dans le contexte des institutions ayant vocation à garantir leurs droits en tant que membres d'un peuple autochtone, tels que garantis à l'article 27 du Pacte.

4. Par ailleurs, la décision sur la recevabilité vient expliciter le lien de causalité existant entre les décisions de la Cour suprême administrative et les droits politiques des Sâmes. Au paragraphe 8.1., le Comité prend note de l'allégation de l'auteur selon laquelle l'application du critère d'auto-identification pourrait potentiellement conduire à l'inclusion dans le corps électoral de 512 000 personnes non reconnues comme Sâmes par le Parlement des Sâmes. Le

Comité note également l'allégation inquiétante, non contestée par l'Etat partie, selon laquelle, des organisations anti-Sâmes, feraient campagne et aideraient des personnes non-Sâmes à soumettre des demandes pour être reconnues en tant que Sâmes et inclus dans le corps électoral, compte tenu des enjeux économiques sous-jacents. Ces éléments de faits justifient à mon sens la qualité de « victime », au moins potentielle, des 22 auteurs reconnus comme tels par le Comité.

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