

To the Secretariat of the Committee on the Elimination of Racial Discrimination

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## **TO THE COMMITTEE FOR THE ELIMINATION OF RACIAL DISCRIMINATION**

### **Observations submitted by the Saami Council with regard to Sweden's 22<sup>nd</sup> and 23<sup>rd</sup> Periodic Reports to the Committee for the Elimination of Racial Discrimination (the Committee)**

#### **A. Briefly about the Sami people and the Saami Council**

1. Traditionally, the Sami people enjoyed a nomadic lifestyle, with hunting, fishing, and gathering as main livelihoods. Later, several Sami communities took up semi-nomadic reindeer herding, while other complimented their traditional livelihoods with farming. Yet others maintained and developed fishing as their main livelihood. With time, however, reindeer herding became the dominant and most important among the Sami traditional livelihoods, and the most cardinal among the Sami cultural denominators. Such is certainly the case today in Sweden. The Sami people inhabited, and had established its own society, in its traditional territory – covering what today constitute the northern parts of Finland, Norway, Sweden as well as the Kola Peninsula in the Russian Federation – well before present day states drew their borders across the Sami territory. The Sami people is hence indigenous to its traditional territory, something the State party also formally recognizes.

2. The Saami Council, established in 1953, is a non-governmental organization with consultative status with the Economic and Social Council and the International Labour Organization. It is also a Permanent Participant to the Arctic Council.

## B. Introduction

3. In the outset, the Saami Council feels compelled to draw the attention to, although the members of the Committee have surely already been observant to this fact, that the section on Sami issues in the State party's 22<sup>nd</sup> and 23<sup>rd</sup> Period Report to the Committee (the Periodic Report) lacks meat; space but more importantly content wise.<sup>1</sup> Already from this circumstance, the Committee may find itself in a position to draw certain conclusions as to the State party's progress when it comes to addressing persistent structural discrimination of the Sami as an indigenous people. This would then include examples of such that the Committee has already identified in previous Concluding Observations, and thus called on the State party to rectify (often along with the Committee's sister treaty bodies and/or the Special Rapporteur on the Rights of Indigenous Peoples), but to no avail.

4. In the Saami Council's view, however, lack of progress made when it comes to complying with Sami human rights as an indigenous people, including the right to non-discrimination, is not an excuse not to report on the situation of the Sami. We refer here for instance to the Committee's general call on "State parties with indigenous peoples in their territories to include in their periodic reports full information on the situation of such peoples, taking into account all relevant provisions of the Convention"<sup>2</sup> [our underlining].

5. The initial and general observation that the Periodic Report is in want of real substance becomes further underscored if dissecting what the State party does report to the Committee. Thus, in our comments below, the Saami Council will largely follow the structure of the Periodic Report, as it pertains to discrimination of the indigenous Sami people and its members (paras. 112-120). This leads our observations to focus on three main subject areas. First, we address the structural discrimination of the Sami built into the State party's law and policy on predators (the Periodic Report, para. 112). We subsequently turn our attention to the discriminatory practices associated with industrial activities in the traditional Sami territories (the Periodic Report, paras. 113-16).

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<sup>1</sup> For an illustration of this point, the Saami Council invites the Committee members to revisit for instance para. 118 in the Periodic Report. This paragraph, as well as the others contained in the section on what the State party does to combat discrimination of the indigenous Sami population, could be compared with the sections in the Periodic Report on what the State party does to address discrimination of the various segments of the non-indigenous population. These sections are, in contrast to the Sami section, notably loaded with concrete facts.

<sup>2</sup> General Recommendation No. 23, para. 6.



Finally, we offer certain observations with regard to two ongoing standard-setting projects (one national and one Nordic), both in which the State party aims to define what legal obligations it should have towards the indigenous Sami people and its members in various respects (the Periodic Report, paras. 117 and 119).

### **C. The State party's legislation and policy on predators as it pertains to Sami reindeer herding**

6. In the outset, the Saami Council finds it noteworthy in itself that the State party has indeed reported on its predatory law and policy as it pertains to Sami reindeer herding. This is not only commendable. It also underlines that such laws and policies should be subject to human rights, including discrimination, scrutiny, and that these must conform with such normative frameworks, in the same way as any other state legislative, regulative, or practical action.

7. It is often difficult for non-insiders to even begin to comprehend the enormous impact state law and policy on predators can have on the possibilities for Sami reindeer herders to continuously pursue their traditional livelihood; the fundament for their personal cultural identity. Still, scientific studies have repeatedly documented how members of the Sami reindeer herding population are highly overrepresented when it comes to psychosocial illness compared with the Swedish population in general, with many documented worst possible outcomes. Moreover, in such surveys, in particular young Sami reindeer herders repeatedly identify the impotence they experience with regard to the predator situation, placed on them by state law and policy, as the greatest contributing factor to their illness.<sup>3</sup> Essentially all Sami communities have documented heavy losses of reindeer to predators, for some it can amount to up to around 40 % of their herd annually. Under such circumstances, individual Sami reindeer herders can easily loose around half of their herd each year, only to predators. Many reindeer herders loose more reindeer to predators than they can harvest themselves, some so many times more that they can hardly slaughter at all although they rely on the reindeer to sustain themselves. The state does provide certain monetary compensation, but in particular when the losses reach high levels, such compensation falls well below the real damage suffered, making it untenable to continuously pursue traditional Sami reindeer herding. But as indicated, the harm caused to Sami

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<sup>3</sup> E.g. Renäringsbarometern, Södra Lapplands Forskningsenhet i Vilhelmina, autumn 2007.



reindeer herders by the State party's predator policy is not only financial. It is mentally challenging to almost every morning encounter animals that are your life in so many ways maimed, at the same time as your hands are tied as the state largely prevents you from protect your herd. In short, the State party's predator law and policy constitutes an imminent existential threat to in particular young Sami reindeer herders, and thereby also in the longer perspective to the collective Sami reindeer herding culture as a fundament for the Sami society.

8. It took time, but in a commendable initiative, the State party eventually agreed to enter into consultations with the Sami as to how many predators it is at all possible for Sami communities to sustain in their respective traditional territories, and still be able to pursue traditional Sami reindeer herding. The outcome of these consultations is the predator policy the State party reports on in para. 112 of the Periodic Report. This predator policy, agreed between the Sami and Sweden, could stand out as a tangible achievement and an example of good practice when it comes to end discrimination of the Sami – had Sweden decided to honour its side of the agreement. It has, however, made no such efforts. Since the agreement was reached in 2013, no predator policy or regulation has been changed. Neither has the agreement been implemented through individual decision making by Swedish governmental authorities; if anything these have become more protective of the predators, sometimes in explicit contradiction to the agreed predator policy. Consequently, instead of standing out as an example of good practice, the “predator policy” now constitute rather the opposite, as many Sami reindeer herders see little point in entering into further discussions with state authorities as it would appear doubtful whether any possible common ground reached has any value.

*Proposed draft recommendations for the Committee's consideration*

- a. The Committee recommends that the State party honors the agreement reached with the Sami on a predator policy, and takes immediate legislative measures to implement this policy, meaning that no Sami community shall have to sustain a predator presence in its traditional territory causing losses that exceeds ten per cent of the winter herd.
- b. The Committee recommends that the State party takes effective measures in order to ensure that Sami reindeer herders are fully compensated

for damages caused to them by the State party's predator regulation and policy.<sup>4</sup>

#### D. Industrial activities in the Sami traditional territories

9. Illustrative of the Saami Council's overarching observation above, the Periodic Report (paras. 113-16) jumps between various aspects of Swedish mining law and regulation without apparent purpose, as it barely brushes upon such elements of that law and regulation which are problematic from the perspective of discrimination of the indigenous Sami. In that sense, the Periodic Report simply reaffirms that the State party's mining law and policy continues to disregard the fact that the Sami is an indigenous people, and that the reindeer herding pursued by Sami communities is a traditional indigenous livelihood, with rights as such, including the right to property and the right to non-discrimination. Instead, Swedish mining law and regulation insists on treating *Sami* communities as any *Swedish* land user, refusing to acknowledge and adjust to the fact that the right to non-discrimination calls not only for equal treatment of equal situations, but also for differential treatment of and respect for indigenous communities that are distinct from the majority society when it comes to their relationship to their land. The result is that the State party drives Sami reindeer herders off lands in the same way as it does with members of the Swedish population, but with the from a legal perspective highly relevant distinction that where members of the former group can be held largely unharmed through monetary compensation, the latter suffer detrimental harm to their traditional livelihood, and thus to their cultural identity.<sup>5</sup>

10. As the Committee surely recalls, this is not the first time the Saami Council brings this matter before it (as we will continue to do, until we see any respect for fundamental Sami rights in Swedish mining law and policy). As the Committee is further aware, when the State party last appeared before it, the Committee expressed concern over that Swedish legislation allows industrial projects to proceed in the Sami territories without the impacted community's consent, and called on the State party to adopt legislation and adopt other

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<sup>4</sup> Essentially the same recommendation was made by Special Rapporteur James Anaya in his Report on the Situation of the Sami People, A/HRC/18/35/Add.2, para. 87.

<sup>5</sup> It is misleading as the State party does at the bottom of para. 113 of the Periodic Report to refer to Sami communities as holders of "special rights", as well as to their involvement in mining permit processes as "consultation", under Swedish mining legislation. Rather, their such status could perhaps be labelled "interest holders", and their involvement as the Swedish "samråd", which translates more into informal talks.



measures that ensures respect for such communities to offer or withhold their consent whenever their rights may be affected by mining or other industrial projects.<sup>6</sup> As is clear also from the Periodic Report, the State party has not responded to this the Committee's call on it. It would therefore be highly relevant for the Committee to remind the State party of its obligations under international human rights law, including under the Convention, when it comes to industrial activities in the Sami traditional territories. However, given the State party's repeated disregard for the Committee's (as well as for other treaty bodies' and the Special Rapporteur's) recommendations as far as the indigenous Sami people is concerned, and given the devastating effects caused by this failure to the Sami society, culture, and livelihoods, it would in the Saami Council's opinion in addition be pertinent for the Committee to revisit a previous recommendation made to Cambodia, to halt industrial concessions in indigenous communities' territories until such a point in time when the State party has adequately assessed such communities' right to control their traditional territories.

*Proposed draft recommendations for the Committee's consideration*

c. The Committee repeats its recommendation that the State party enacts legislation and take other effective measures in order to ensure respect for Sami communities' right to offer or withhold their consent with regard to natural resource extraction and other industrial activities in their traditional territories.

d. The Committee recommends that the State party halts all natural resource extraction and other industrial activities in the Sami traditional territories until it has adequately assessed Sami communities' rights to control such areas.

**E. A Consultation Standard and the Nordic Sami Convention**

11. In paragraphs 117 and 119 of the Periodic Report, respectively, the State party reports on two ongoing projects which both aim to define what legal obligations the State party should have towards the indigenous Sami people and its members in various respects. The first is a domestic effort; to enact a

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<sup>6</sup> CERD/C/SWE/CO/19-20, para. 17. As it is further aware, the Committee has expressed similar concerns with regard to the Finnish Mining Act, as that act too allows mining activities to proceed in the Sami territories without Sami communities offering their free, prior, and informed consent; CERD/C/FIN/CO/20-22.



legislative act (coupled with explanatory preparatory works) that defines in what situations and to what extent various branches of the State party are under duty to “consult”<sup>7</sup> the Sami (the Consultation Instrument) (para. 117). The second is a pan-Nordic affair; to agree on a Nordic Sami Convention laying out what rights the Sami as an indigenous people should have in the countries of Finland, Norway, and Sweden (the Nordic Sami Convention) (para. 119).<sup>8</sup>

12. The Saami Council is in the outset positive to both these standard-setting efforts by the State party. (Indeed, the Committee might be aware that it was the Saami Council that tabled the proposal that a Sami Convention should be agreed upon many years ago.) That said, for either of these instruments to be acceptable it is, however, obviously a prerequisite that they do not fall below the standard set by the international indigenous rights discourse on what rights the Sami possess as an indigenous people, including the right to non-discrimination as enshrined in the Convention. Were that to be the case, either the Consultation Instrument or the Nordic Sami Convention or both would by definition serve to undermine those internationally established rights, as they apply to the Sami, rather than to implement such.<sup>9</sup> It is therefore of grave concern to the Saami Council that both instruments, although as mentioned constituting commendable initiatives, and although that both drafts do include positive elements, have been criticised for failing to conform with international law, in critical respects. Just by example, it might here be illustrative to return to the matter of industrial activities in the Sami traditional territories, as discussed above.

13. The proposal for a Consultation Instrument<sup>10</sup> contains a chapter where the Swedish government outlines its position on international indigenous rights law on the right to consultation and related rights. It is understood that the Consultation Instrument should be understood against the backdrop of this view on international law.<sup>11</sup> The chapter cites the Committee’s

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<sup>7</sup> “Consultation” is the label the State party itself has chosen in order to describe the level of involvement in decision making it is suggesting that the indigenous Sami should have. Whether such involvement does in fact amount to consultation under international law must obviously be determined based on the merits of the proposal.

<sup>8</sup> The Committee is surely quite familiar with the Nordic Sami Convention process by now, as it has been ongoing for quite a while, wherefore the Committee has been informed about it and has had the opportunities to provide observations with regard to it previously.

<sup>9</sup> In addition, the predator policy consultations reported on above exemplifies how any consultation instrument must be crystal clear on the State party’s obligations, should there not be an immediate risk that it brings no or little flipside to the Sami.

<sup>10</sup> Ds 2017:43.

<sup>11</sup> Avsnitt 2.2.





General Recommendation No. 23, para. 4 (d) on indigenous individuals' right to participate in public life (thus referring to indigenous individuals' right to consent in this regard). Notably absent is, however, in contrast a mention of para. 5 on the right of indigenous peoples to control etc. communal lands. The chapter further refers to the Committee's above-mentioned previous Concluding Observation with regard to the State party. Here, the Swedish government refrains from citing the Committee, opting instead to transcribe the Committee's wording, in the government's own way. When what the Committee did express was "its concern that the State party allows major industrial and other activities affecting the Sami, including under the Swedish Mining Act, to proceed in the Sami territories without Sami communities offering their free, prior and informed consent" [our underlining], the Swedish government instead proclaims that the Committee has "criticized Sweden for that major activities concerning Sami interests occur without Sami representatives having had the opportunity to influence the decisions in question" [our translation].

14. In a similar vein, in the same chapter of the Consultation Instrument, the Swedish government makes reference to the International Covenant on Civil and Political Rights art. 27, and the interpretation of the provision by the Human Rights Committee (HRC), including a rather lengthy quote from its General Comment No. 23(50), again highlighting indigenous individuals' right to participate in the making of decisions that affect them. No mention is made of contemporary HRC jurisprudence on the rights to free, prior and informed consent and to consultation, including of *Poma Poma v. Peru*. Otherwise in the chapter, the Swedish government emphasises that Sweden has not ratified and is thus not bound by ILO Convention No. 169, makes references to the Convention on Biological Diversity and the Paris Convention on Climate Change (both of which are not human rights instruments, and lack relevance to indigenous communities' rights to consultation and consent), addresses the European Framework Convention on the Protection of National Minorities (which is a minority and not an indigenous rights instrument), and declares that the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) only entails an expression of intent, at the same time as it is careful to point out that the UNDRIP's provisions on free, prior and informed consent should be understood as calling for *samráđ* and dialogue, in contrast to consent. Finally, the Swedish government clarifies that the Consultation Instrument's take on consultation shall be understood to conform with the draft Nordic Sami Convention's consultation provisions.





15. Unsurprisingly therefore, on the issue of industrial activities in the Sami traditional territories, draft Nordic Sami Convention art. 30(1) do require the state, when contemplating whether to grant permission to such activities, to particularly consider whether the activity would be substantially harmful to *the Sami culture in general*. The provision does not, however, require the state to consider the damage the industrial activity would cause to *the affected Sami community*, holding a property right to the land area in question, nor need the state involve the community in the decision-making, irrespective of whether the damage caused to it would be detrimental. Section 30(2) provides, however, that the state must provide the Sami community with monetary compensation for its land, the amount of which the state determines itself through national law.

16. Also other draft Nordic Sami Convention provisions' conformity with international standards on indigenous rights have been questioned. For instance, preambular paragraph 10 explicitly provides that a state is free to decide that individuals that consider themselves to be Sami, and have a close connection to the Sami culture, *but that by definition are not Sami*, shall nevertheless be enlisted in the Sami parliament's electoral roll. In other words, pursuant to the provision, the State party may decide that individuals that are not of Sami, but of Swedish, origin are in fact Sami nevertheless. Clearly, this is one example of a draft Nordic Sami Convention provision that must be said not to conform with international legal standards, including the right to non-discrimination as enshrined in the Convention.

*Proposed draft recommendations for the Committee's consideration*

e. The Committee recommends that the State party consults Sami people representatives on the proposed act on consultation on issues that concern the Sami people, in a manner that conforms with international legal norms on the right to consultation, paving the way for an adoption of such an act with a content that complies with indigenous rights under international law. Sami communities whose rights are affected by the proposed consultation act should also be consulted in the said manner.

f. The Committee recommends that the State party consults Sami people representatives on the proposal for a Nordic Sami Convention, in a manner that conform with international legal norms on the right to consultation, paving the way for an adoption such a Convention with a content that complies with indigenous rights under international law. Sami



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Yours Sincerely,

Åsa Larsson-Blind  
President of the Saami Council