

HUMAN RIGHTS COMMITTEE

Kitok v. Sweden

Communication No. 197/1985

27 July 1988

VIEWS

Submitted by: Ivan Kitok

Alleged victim: The author

State party concerned: Sweden

Date of communication: 2 December 1985 (date of initial letter)

Date of decision on admissibility: 25 March 1987

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 July 1988,

Having concluded its consideration of communication No. 197/1985, submitted to the Committee by Ivan Kitok under the Optional Protocol to the International Covenant on Civil and Political Rights,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication (initial letter dated 2 December 1985 and subsequent letters dated 5 and 12 November 1986) is Ivan Kitok, a Swedish citizen of Sami ethnic origin, born in 1926. He is represented by counsel. He claims to be the victim of violations by the Government of Sweden of articles 1 and 27 of the Covenant.

2.1 It is stated that Ivan Kitok belongs to a Sami family which has been active in reindeer breeding for over 100 years. On this basis, the author claims that he has inherited the "civil right" to reindeer breeding from his forefathers as well as the rights to land and water in

Sorkaitum Sami Village. It appears that the author has been denied the exercise of these rights because he is said to have lost his membership in the Sami village ("sameby", formerly "lappby"), which under a 1971 Swedish statute is like a trade union with a "closed shop" rule. A non-member cannot exercise Sami rights to land and water.

2.2 In an attempt to reduce the number of reindeer breeders, the Swedish Crown and the Lap bailiff have insisted that, if a Sami engages in any other profession for a period of three years, he loses his status and his name is removed from the rolls of the lappby, which he cannot re-enter except with special permission. Thus it is claimed that the Crown arbitrarily denies the immemorial rights of the Sami minority and that Ivan Kitok is the victim of such denial of rights.

2.3 With respect to the exhaustion of domestic remedies, the author states that he has sought redress through all instances in Sweden, and that the Regeringsrätten (Highest Administrative Court of Sweden) decided against him on 6 June 1985, although two dissenting judges found for him and would have made him a member of the sameby.

2.4 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

3. By its decision of 19 March 1986, the Working Group of the Human Rights Committee transmitted the communication, under rule 91 of the provisional rules of procedure, to the State party concerned, requesting information and observations relevant to the question of the admissibility of the communication. The Working Group also requested the State party to provide the Committee with the text of the relevant administrative and judicial decisions pertaining to the case, including (a) the decision of 23 January 1981 of the Lansstyrelsen, Norrbottens lan (the relevant administrative authority), (b) the judgement of 17 May 1983 of the Kammarrätten (Administrative Court of Appeal) and (c) the judgement of 6 June 1985 of the Regeringsrätten (Highest Administrative Court of Sweden) with dissenting opinions.

4.1 By its submission, dated 12 September 1986, the State party provided all the requested administrative and judicial decisions and observed as follows:

"Ivan Kitok has alleged breaches of articles 1 and 27 of the International Covenant on Civil and Political Rights. The Government has understood Ivan Kitok's complaint under article 27 thus: that he - through Swedish legislation and as a result of Swedish court decisions - has been prevented from exercising his 'reindeer breeding rights' and consequently denied the right to enjoy the culture of the Sami.

"With respect to the author's complaint under article I of the Covenant, the State party observes that it is not certain whether Ivan Kitok claims that the Sami as a people should have the right to self-determination as set forth in article 1, paragraph 1, or whether the complaint should be considered to be limited to paragraph 2 of that article, an allegation that the Sami as a people have been denied the right freely to dispose of their natural wealth and resources. However, as can be seen already from the material presented by Ivan Kitok himself, the issue concerning the rights of the Sami to land and water and questions

connected hereto, is a matter of immense complexity. The matter has been the object of discussions, consideration and decisions ever since the Swedish Administration started to take interest in the areas in northern Sweden, where the Sami live. As a matter of fact, some of the issues with respect to the Sami population are currently under consideration by the Samerattsutredningen (Swedish Commission on Sami Issues) appointed by the Government in 1983. For the time being, the Government refrains from further comments on this aspect of the application. Suffice it to say that, in the Government's opinion, the Sami do not constitute a 'people' within the meaning given to the word in article 1 of the Covenant ... Thus, the Government maintains that article 1 is not applicable to the case. Ivan Kitok's complaints therefore should be declared inadmissible under article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights as being incompatible with provisions of the Covenant."

4.2 With respect to an alleged violation of article 27, the State party

"admits that the Sami form an ethnic minority in Sweden and that persons belonging to this minority are entitled to protection under article 27 of the Covenant. Indeed, the Swedish Constitution goes somewhat further. Chapter 1, article 2, fourth paragraph, prescribes: 'The possibilities for ethnic, linguistic or religious minorities to preserve and develop a cultural and social life of their own should be promoted.' Chapter 2, article 15, prescribes| 'No law or other decree may imply discrimination against any citizen on the ground of his belonging to a minority on account of his race, skin colour or ethnic origin.'

"The matter to be considered with regard to article 27 is whether Swedish legislation and Swedish court decisions have resulted in Ivan Kitok being deprived of his right to carry out reindeer husbandry and, if this is the case, whether this implies that article 27 has been violated. The Government would, in this context, like to stress that Ivan Kitok himself has observed before the legal instances in Sweden that the only question at issue in his case is the existence of such special reasons as enable the authorities to grant him admission as a member of the Sorkaitum Sami community despite the Sami community's refusal ...

"The reindeer grazing legislation had the effect of dividing the Sami population of Sweden into reindeer-herding and non-reindeer-herding Sami, a distinction which is still very important. Reindeer herding is reserved for Sami who are members of a Sami village (sameby), which is a legal entity under Swedish law. (The expression 'Sami' community' is also used as an English translation of 'sameby'.) These Sami, today numbering about 2,500, also have certain other rights, for example, as regards hunting and fishing. Other Sami, however - the great majority, since the Sami population in Sweden today numbers some 15,000 to 20,000 - have no special rights under the present law. These other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated in Swedish society. Indeed, the majority of this group does not even live within the area where reindeer-herding Sami live.

"The rules applicable on reindeer grazing are laid down in the 1971 Reindeer Husbandry Act [hereinafter the 'Act']. The ratio legis for this legislation is to improve the living conditions for the Sami who have reindeer husbandry as their primary income, and to make the

existence of reindeer husbandry safe for the future. There had been problems in achieving an income large enough to support a family living on reindeer husbandry. From the legislative history it appears that it was considered a matter of general importance that reindeer husbandry be made more profitable. Reindeer husbandry was considered necessary to protect and preserve the whole culture of the Sami ...

"It should be stressed that a person who is a member of a Sami village also has a right to use land and water belonging to other people for the maintenance of himself and his reindeer. This is valid for State property as well as private land and also encompasses the right to hunt and fish within a large part of the area in question. It thus appears that the Sami in relation to other Swedes have considerable benefits. However, the area available for reindeer grazing limits the total number of reindeer to about 300,000. Not more than 2,500 Sami can support themselves on the basis of these reindeer and additional incomes.

"The new legislation led to a reorganization of the old existing Sami villages into larger units. The Sami villages have their origin in the old siida, which originally formed the base of Sami society, consisting of a community of families which migrated seasonally from one hunting, fishing and trapping area to another, and which later on came to work with and follow a particular self-contained herd of reindeer from one seasonal grazing area to another.

"Prior to the present legislation, the Sami were organized in Sami communities (lappbyar). Decision to grant membership of these villages was made by the Landsstyrelsen (County Administrative Board). Under the present legislation, membership in a Sami village is granted by the members of the Sami village themselves.

"A person who has been denied membership in a Sami village can appeal against such a decision to the County Administrative Board. Appeals against the Board's decision in the matter can be made to the Kammarrätten (Administrative Court of Appeal) and finally to the Regeringsrätten (Highest Administrative Court of Sweden).

"An appeal against a decision of a Sami community to refuse membership may, however, be granted only if there are special reasons for allowing such membership (see sect. 12, pars. 2, of the 1971 Act). According to the legislative history of the Act, the County Administrative Board's right to grant an appeal against a decision made by the Sami community should be exercised very restrictively. It is thus required that the reindeer husbandry which the applicant intends to carry out within the community be in an essential way useful to the community and that it be of no inconvenience to its other members. An important factor in this context is that the pasture areas remain constant, while additional members means more reindeers.

"There seems to be only one previous judgement from the Regeringsrätten concerning section 12 of the Reindeer Husbandry Act. However, the circumstances are not quite the same as in Ivan Kitok's case ...

"The case that Ivan Kitok has brought to the courts is based on the ' content of section 12, paragraph 2, of the Reindeer Husbandry Act. The Landsstyrelsen and the courts have thus

had to make decisions only upon the question whether there were any special reasons within the meaning of the Act to allow Kitok membership in the Sami community. The Landsstyrelsen found that there were no such reasons, nor did the Kammarrätten or the majority of the Regeringsrätten ...

"When deciding upon the question whether article 27 of the Covenant has been violated, the following must be considered. It is true that Ivan Kitok has been denied membership in the Sami community of Sorkaitum. Normally, this would have meant that he also had been deprived of any possibility of carrying out reindeer husbandry. However, in this case the Board of the Sami community declared that Ivan Kitok, as an owner of domesticated reindeer, can be present when calves are marked, reindeer slaughtered and herds are rounded up and reassigned to owners, all this in order to safeguard his interests as a reindeer owner in Sami society, albeit not as a member of the Sami community. He is also allowed to hunt and fish free of charge in the community's pasture area. These facts were also decisive in enabling the Regeringsrätten to reach a conclusion when judging the matter.

"The Government contends that Ivan Kitok in practice can still continue his reindeer husbandry, although he cannot exercise this right under the same safe conditions as the members of the Sami community. Thus, it cannot be said that he has been prevented from 'enjoying his own culture'. For that reason the Government maintains that the complaint should be declared inadmissible as being incompatible with the Covenant."

4.3 Should the Committee arrive at another opinion, the State party submits that:

"As is evident from the legislation, the Reindeer Husbandry Act aims at protecting and preserving the Sami culture and reindeer husbandry as such. The conflict that has occurred in this case is not so much a conflict between Ivan Kitok as a Sami and the State, but rather between Kitok and other Sami. As in every society where conflicts occur, a choice has to be made between what is considered to be in the general interest on the one hand and the interests of the individual on the other. A special circumstance here is that reindeer husbandry is so closely connected to the Sami culture that it must be considered part of the Sami culture itself.

"In this case the legislation can be said to favour the Sami community in order to make reindeer husbandry economically viable now and in the future. The pasture areas for reindeer husbandry are limited, and it is simply not possible to let all Sami exercise reindeer husbandry without jeopardizing this objective and running the risk of endangering the existence of reindeer husbandry as such.

"In this case it should be noted that it is for the Sami community to decide whether a person is to be allowed membership or not. It is only when the community denies membership that the matter can become a case for the courts.

"Article 27 guarantees the right of persons belonging to minority groups to enjoy their own culture. However, although not explicitly provided for in the text itself, such restrictions on the exercise of this right ... must be considered justified to the extent that they are necessary

in a democratic society in view of public interests of vital importance or for the protection of the rights and freedoms of others. In view of the interests underlying the reindeer husbandry legislation and its very limited impact on Ivan Kitok's possibility of 'enjoying his culture', the Government submits that under all the circumstances the present case does not indicate the existence of a violation of article 27.

"For these reasons the Government contends that, even if the Committee should come to the conclusion that the complaint falls within the scope of article 27, there has been no breach of the Covenant. The complaint should in this case be declared inadmissible as manifestly ill-founded."

5.1 Commenting on the State party's submission under rule 91, the author, in submissions dated 5 and 12 November 1986, contends that his allegations with respect to violations of articles 1 and 27 are well-founded.

5.2 With regard to article 1 of the Covenant, the author states:

"The old Lapp villages must be looked upon as small realms, not States, with their own borders and their government and with the right to neutrality in war. This was the Swedish position during the Vasa reign and is well expressed in the royal letters by Gustavus Vasa of 1526, 1543 and 1551. It was also confirmed by Gustavus Adolphus in 1615 and by a royal judgement that year for Suondavare Lapp village ...

"In Sweden there is no theory, as there is in some other countries, that the King or the State was the first owner of all land within the State's borders. In addition to that, there was no State border between Sweden and Norway until 1751 in Lapp areas. In Sweden there is the notion of allodial land rights, meaning land rights existing before the State. These allodial land rights are acknowledged in the travaux preparatoires of the 1734 law-book for Sweden, including even Finnish territory.

"Sweden has difficulty in understanding Kitok's complaint under article 1. Kitok's position under article 1, paragraph 1, is that the Sami people has the right to self-determination ... If the world Sami population is about 65,000, 40,000 live in Norway, 20,000 in Sweden, 4,000 to 5,000 in Finland and the rest in the Soviet Union. The number of Swedish Sami in the heartlands between the vegetation-line and the Norwegian border is not exactly known, because Sweden has denied the Sami the right to a census. If the number is tentatively put at 5,000, this population in Swedish Sami land should be entitled to the right to self-determination. The existence of Sami in other countries should not be allowed to diminish the right to self-determination of the Swedish Sami. The Swedish Sami cannot have a lesser right because there are Sami in other countries ...".

5.3 With respect to article 27 of the Covenant, the author states:

"The 1928 law was unconstitutional and not consistent with international law or with Swedish civil law. The 1928 statute said that a non-sameby-member like Ivan Kitok had reindeer breeding, hunting and fishing rights but was not entitled to use those rights. This

is a most extraordinary statute, forbidding a person to use civil rights in his possession. The idea was to make room for the Sami who had been displaced to the north, by reducing the number of Sami who could use their inherited land and water rights

"The result is that there are two categories of Sami in the Sami heartlands in the north of Sweden between the vegetation-line of 1873 and the Norwegian 1751 border. One category is the full Sami, i.e., the village Sami; the other is the half-Sami, i.e., the non-village Sami living in the Sami village area, having land and water rights, but prohibited by statute to use those rights. As this prohibition for the half-Sami is contrary to international and domestic law, the 1928-1971 statute is invalid and cannot forbid the half-Sami from exercising his reindeer breeding, hunting and fishing rights. As a matter of fact, the half-Sami have exercised their hunting and fishing rights, especially fishing rights, without the permission required by statute. This has been common in the Swedish Sami heartlands and was valid until the Regeringsrätten rendered its decision on 6 June 1965 in the Ivan Kitok case ... Kitok's position is that he is denied the right to enjoy the culture of the Sami as he is just a half-Sami, whereas the Sami village members are full Sami ... The Swedish Government has admitted that reindeer breeding is an essential element in the Sami culture. When Sweden now contends that the majority of the Swedish Sami have no special rights under the existing law, this is not true. Sweden goes on to say 'these other Sami have found it more difficult to maintain their Sami identity and many of them are today assimilated in Swedish society. Indeed, the majority of this group does not even live within the area where reindeer-herding Sami live'. Ivan Kitok comments that he speaks for the estimated 5,000 Sami who live in the Swedish Sami heartlands and of whom only 2,000 are sameby members. The mechanism of the sameby... diminishes the number of reindeer-farming Sami from year to year; there are now only 2,000 persons who are active sameby members living in Swedish Sami heartlands. When Sweden says that these other Sami are assimilated, it seems that Sweden confirms its own violation of article 27.

"The important thing for the Sami people is solidarity among the people (folksolidaritet) and not industrial solidarity (naringssolidaritet). This was the great appeal of the Sami leaders, Gustaf Park, Israel Ruong and others. Sweden has tried hard, however, to promote industrial solidarity among the Swedish Sami and to divide them into full Sami and half-Sami ... It is characteristic that the 1964 Royal Committee wanted to call the Lapp village 'reindeer village' (renby) and wanted to make the renby an entirely economic association with increasing voting power for the big reindeer owners. This has also been achieved in the present sameby, where members get a new vote for every extra 100 reindeer. It is because of this organization of the voting power that Ivan Kitok was not admitted into his fatherland Sorkaitum Lappby.

"Among the approximately 3,000 non-sameby members who are entitled to carry out reindeer farming and live in Swedish Sami heartland there are only a few today who are interested in taking up reindeer farming. In order to maintain the Sami ethnic-linguistic minority, it is, however, very important that such Sami are encouraged to join the sameby."

5.4 In conclusion, it is stated that the author, as a half-Sami,

"cannot enjoy his own culture because his reindeer-farming, hunting and fishing rights can be removed by an undemocratic graduated vote and as a half-Sami he is forced to pay 4,000 to 5,000 Swedish krona annually as a fee to the Sorkaitum sameby association that the full Sami do not pay to that association. This is a stigma on half-Sami."

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee noted that the State party did not claim that the communication was inadmissible under article 5, paragraph 2, of the Optional Protocol. With regard to article 5, paragraph 2 (a), the Committee observed that the matters complained of by Ivan Kitok were not being examined and had not been examined under another procedure of international investigation or settlement. With regard to article 5, paragraph 2 (b), the Committee was unable to conclude, on the basis of the information before it, that there were effective remedies in the circumstances of the present case to which the author could still resort.

6.3 With regard to the State party's submission that the communication should be declared inadmissible as incompatible with article 3 of the Optional Protocol or as "manifestly ill-founded", the Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in article 1 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, article I of the Covenant deals with rights conferred upon peoples, as such. However, with regard to article 27 of the Covenant, the Committee observed that the author had made a reasonable effort to substantiate his allegations that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. Therefore, it decided that the issues before it, in particular the scope of article 27, should be examined with the merits of the case.

6.4 The Committee noted that both the author and the State party had already made extensive submissions with regard to the merits of the case. However, the Committee deemed it appropriate at that juncture to limit itself to the procedural requirement of deciding on the admissibility of the communication. It noted that, if the State party should wish to add to its earlier submission within six months of the transmittal to it of the decision on admissibility, the author of the communication would be given an opportunity to comment thereon. If no further submissions were received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee would proceed to adopt its final views in the light of the written information already submitted by the parties.

6.5 On 25 March 1987, the Committee therefore decided that the communication was admissible in so far as it raised issues under article 27 of the Covenant, and requested the State party, should it not intend to make a further submission in the case under article 4, paragraph 2, of the Optional Protocol, to so inform the Committee, so as to permit an early decision on the merits.

7. By a note dated 2 September 1987, the State party informed the Committee that it did not

intend to make a further submission in the case. No further submission has been received from the author.

8. The Human Rights Committee has considered the merits of the communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol. The facts of the case are not in dispute.

9.1 The main question before the Committee is whether the author of the communication is the victim of a violation of article 27 of the Covenant because, as he alleges, he is arbitrarily denied immemorial rights granted to the Sami community, in particular, the right to membership of the Sami community and the right to carry out reindeer husbandry. In deciding whether or not the author of the communication has been denied the right to "enjoy [his] own culture", as provided for in article 27 of the Covenant, and whether section 12, paragraph 2, of the 1971 Reindeer Husbandry Act, under which an appeal against a decision of a Sami community to refuse membership may only be granted if there are special reasons for allowing such membership, violates article 27 of the Covenant, the Committee bases its findings on the following considerations.

9.2 The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant, which provides:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

9.3 The Committee observes, in this context, that the right to enjoy one's own culture in community with the other members of the group cannot be determined in abstracto but has to be placed in context. The Committee is thus called upon to consider statutory restrictions affecting the right of an ethnic Sami to membership of a Sami village.

9.4 With regard to the State party's argument that the conflict in the present case is not so much a conflict between the author as a Sami and the State party, but rather between the author and the Sami community (see para. 4.3 above), the Committee observes that the State party's responsibility has been engaged, by virtue of the adoption of the Reindeer Husbandry Act of 1971, and that it is therefore State action that has been challenged. As the State party itself points out, an appeal against a decision of the Sami community to refuse membership can only be granted if there are special reasons for allowing such membership; furthermore, the State party acknowledges that the right of the Landsstyrelsen to grant such an appeal should be exercised very restrictively.

9.5 According to the State party, the purposes of the Reindeer Husbandry Act are to restrict the number of reindeer breeders for economic and ecological reasons and to secure the preservation and well-being of the Sami minority. Both parties agree that effective measures are required to ensure the future of reindeer breeding and the livelihood of those for whom

reindeer farming is the primary source of income. The method selected by the State party to secure these objectives is the limitation of the right to engage in reindeer breeding to members of the Sami villages. The Committee is of the opinion that all these objectives and measures are reasonable and consistent with article 27 of the Covenant.

9.6 The Committee has none the less had grave doubts as to whether certain provisions of the Reindeer Husbandry Act, and their application to the author, are compatible with article 27 of the Covenant. Section 11 of the Reindeer Husbandry Act provides that:

"A member of a Sami community is:

"1. A person entitled to engage in reindeer husbandry who participates in reindeer husbandry within the pasture area of the community.

"2. A person entitled to engage in reindeer husbandry who has participated in reindeer husbandry within the pasture area of the village and who has had this as his permanent occupation and has not gone over to any other main economic activity.

"3. A person entitled to engage in reindeer husbandry who is the husband or child living at home of a member as qualified in subsection 1 or 2 or who is the surviving husband or minor child of a deceased member."

Section 12 of the Act provides that:

"A Sami community may accept as a member a person entitled to engage in reindeer husbandry other than as specified in section 11, if he intends to carry on reindeer husbandry with his own reindeer within the pasture area of the community.

"If the applicant should be refused membership, the Landsstyrelsen may grant him membership, if special reasons should exist."

9.7 It can thus be seen that the Act provides certain criteria for participation in the life of an ethnic minority whereby a person who is ethnically a Sami can be held not to be a Sami for the purposes of the Act. The Committee has been concerned that the ignoring of objective ethnic criteria in determining membership of a minority, and the application to Mr. Kitok of the designated rules, may have been disproportionate to the legitimate ends sought by the legislation. It has further noted that Mr. Kitok has always retained some links with the Sami community, always living on Sami lands and seeking to return to full-time reindeer farming as soon as it became financially possible, in his particular circumstances, for him to do so.

9.8 In resolving this problem, in which there is an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the ratio decidendi in the Lovelace case (No. 24/1977, Lovelace v. Canada), namely, 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. After a careful review of all the elements involved in this case, the Committee is of the view that there is no violation of article 27 by the State party. In this context, the Committee notes that Mr. Kitok is permitted, albeit not as of right, to graze and farm his reindeer, to hunt and to fish.

d/ Communication No. 24/1977 (previously Communication No. R.6/24); Sandra Lovelace v. Canada, submitted on 29 December 1977; admissibility decision on 14 August 1979; views adopted on 30 July 1981.