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SUMMARY *The facts* The author, a Canadian citizen, was chairperson of Port Hope Environmental Group.

Between 1945 and 1952, Eldorado Nuclear Ltd, a Federal Crown Corporation, disposed of nuclear waste in dumpsites in Port Hope, Ontario. In 1975 large-scale pollution of houses and other buildings was discovered. Material from dumpsites had been used by residents in building houses. Although the Atomic Energy Control Board ('AECB'), a Federal Government licensing and regulating agency with responsibility for nuclear matters, had excavated and relocated some waste, approximately 200,000 tons of radioactive waste remained in Port Hope, located in eight temporary dumpsites near residences and the public swimming pool. Alpha, beta and gamma emissions and radon gas emissions were above AECB approved levels.

In April 1980 the author submitted a communication to the United Nations Human Rights Committee ('the Committee') on her own behalf and, as chairperson of the Port Hope Environmental Group, on behalf of present and future generations of Port Hope, including 129 residents who had specifically authorised her to act on their behalf. She claimed that nuclear waste dumpsites posed a threat to the life of present and future generations in Port Hope because exposure to radiation caused cancer and genetic defects in violation of Article 6(1) of the International Covenant on Civil and Political Rights, 1966 ('the Covenant').[i] She further claimed that pursuing domestic remedies would have been futile because of the long time it takes for injuries from radiation to become apparent. Even if the author had been successful, the responsibility for finding an alternate dumpsite would still rest with the Government. Litigation would take a long time during which the waste would remain in place. The author requested that the Committee urge the Canadian Government to remove all radioactive waste from Port Hope to a permanent dumpsite away from human habitation.

Canada objected to the admissibility of the communication on the grounds that the author had not exhausted her domestic remedies as required by Articles 2 and 5(2)(b) of the Optional Protocol to the Covenant ('the Optional Protocol').[ii] It also argued

[i] International Covenant on Civil and Political Rights, 16 December 1966. For the text of relevant provisions see Appendix 2.

[ii] Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966. For the text of relevant provisions see Appendix 2.

that future generations did not have the right to submit a communication under Article 1 of the Optional Protocol. It argued that it was the owner of the nuclear waste sites (seven were privately owned, one was owned by an agent of the Crown), rather than the AECB, who were legally responsible for damage caused by the waste. The author's remedy was to bring an action in the Canadian courts against the owners. If an injunction were obtained, the Government would provide compliance assistance to the owners. It dismissed the author's argument that domestic court proceedings would be unreasonably prolonged, because no proceedings had been initiated. The author responded that the legal remedies referred to would not result in removal of the waste, and that lives would be saved by taking speedy action.

The Committee sought further clarification from Canada on the availability of domestic remedies. Canada responded that the AECB was taking steps to remedy the situation at the eight sites, including an attempt to locate a new dumpsite. If the author had found the delay inherent in resolving the problems unacceptable, she could have sought injunctive relief against the site owners. She could also have sought injunctive relief in an action for nuisance against Eldorado Nuclear Ltd and the Crown. Alternatively, the author could have sought a writ of mandamus or an injunction obliging the AECB to clean up the sites. Furthermore, the author could have brought an action pursuant to section 7 of the Canadian Charter of Rights and Freedoms, claiming that her right to life had been infringed.

Held by the United Nations Human Rights Committee (1) The communication was inadmissible (para. 9).

(2) The author had standing to submit a communication on her own behalf and on behalf of the residents of Port Hope who had specifically authorised her to do so. The Committee did not resolve whether she could submit a communication on behalf of future generations (para. 8).

(3) The author had not exhausted domestic remedies, as required under Article 5(2)(b) of the Optional Protocol. The author could have sued the owners of the seven privately owned dumpsites in tort and sought an injunction. The Committee noted that Canada had stated that it would offer the owners assistance in complying with any court order. The author could have brought a

suit for compensation and an injunction against Eldorado Nuclear Ltd, and/or the Crown under the Crown Liability Act 1970. The author could have sought a writ of mandamus, or a declaration and an injunction against the AECB to determine its legal duty under the Atomic Energy Control Regulations. The author could also have invoked section 7 of the Canadian Charter of Rights and Freedoms, which protected the right to life. The Committee could not conclude that domestic remedies, if pursued, would have been unreasonably prolonged within the meaning of Article 5(2)(b) (para. 8).

There follows

Decision of United Nations Human Rights Committee, 27 October 1982

1.1 The author of the communication (initial letter dated 11 April 1980, and further letter dated 4 February 1981) is a Canadian citizen. She submitted the communication on her own behalf and, as Chairman of the Port Hope Environmental Group, on behalf of present and future generations of Port Hope, Ontario, Canada, including 129 Port Hope residents who have specifically authorized the author to act on their behalf. The author describes the facts as follows.

1.2 During the years 1945 to 1952, the Eldorado Nuclear Ltd, a Federal Crown Corporation and Canada's only radium and uranium refinery, disposed of nuclear waste in dumpsites within the confines of Port Hope, Ontario, a town of 10,000 inhabitants, located in an area which is planned to become among those most densely populated in North America. In 1975, large-scale pollution of residences and other buildings was discovered (unsuspecting citizens had used material from the dumpsites as fill or building material for their houses). The Atomic Energy Control Board (AECB), a Federal Government licensing and regulating agency with all responsibility regarding nuclear matters in Canada, initiated a cleaning operation and, from 1976 to 1980, the excavated waste material from approximately 400 locations was removed and relocated elsewhere (at distances ranging from 6 miles to 200 miles away from Port Hope). These new dumpsites have now been closed for further removal of radio-active waste from Port Hope. The author claims that the reasons are political, that is, that no other constituency wishes to accept the waste and that the Federal Government is unwilling to come to grips with the problem. In the meantime, approximately 200,000 tons (AECB estimate) of radio-active waste remains in Port Hope and is being stored, in the continuing clean-up process, in eight 'temporary' disposal sites in Port Hope, near or directly beside residences (one approximately 100 yards from the public swimming pool). The author maintains that this temporary solution is unacceptable and points out that large 'temporary' disposal sites still exist around town more than 30 years after they were licensed. The author claims that the Atomic Energy Control Board is hampered in its efforts on behalf of the inhabitants of Port Hope by the failure of the Federal Government to make alternative dumpsites available. Federal and provincial governments cannot be compelled by the AECB to provide such sites.

1.3 The author claims that the current state of affairs is a threat to the life of present and future generations of Port Hope, considering that excessive exposure to radio-activity is known to cause cancer and genetic defects, and that present health hazards for Port Hope residents include alpha, beta and gamma emissions and radon gas emissions above the approved levels of safety, that is the safety levels approved by AECB, based on the standards of safety set by the International Commission on Radiological Protection.

1.4 As regards the question of exhaustion of domestic remedies, the author states the following: Members of the Port Hope Environmental Group have drawn attention to the problem in person or through letters over a period of five years to AECB officials, legislators and ministry officials. With regard to the possibility of suing the Federal Government, the author implies that such course of action would not constitute an effective remedy: firstly, only injury would be a ground for litigation and it would be most difficult to prove such injury, because of the long lead-time of injury caused by long-term exposure to low-level radio-activity. Secondly, even if litigation were to be pursued and even if the litigants were successful, the responsibility for providing alternate dumpsites would still rest with the Government, a responsibility of which it is aware today but which it nevertheless fails to assume. Thirdly, litigation would be impossible on behalf of future generations, whose rights the Port Hope Environmental Group is seeking to protect. At any rate, litigation would be a long drawn out process, during which the radio-active waste would stay in place.

2 On the basis of the above, the author and the other signatories request the Human Rights Committee to consider the matter and to urge the Canadian Government to remove all radio-active waste from Port Hope to a permanent, properly managed, dumpsite away from human habitation.

3 By its decision of 21 July 1980, 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 admissibility of the communication. The State party was also requested, if it contended that domestic remedies had not been exhausted, to give details of the effective remedies available in the particular circumstances of this case.

4.1 In its reply dated 8 December 1980, the State party objected to the admissibility of the communication on the ground that neither the author nor the persons she represents had exhausted all available domestic remedies as required by articles 2 and 5 (2) (*b*) of the Optional Protocol to the Covenant. In addition, the State party submitted that the communication, in so far as it related to 'future generations', was inadmissible under article 1 of the Optional Protocol, which does not confer the right to submit a communication on behalf of future generations.

4.2 The State party further submitted that in her communication the author admitted that neither she nor the persons she represented had exhausted all available domestic remedies. It was pointed out that numerous recourses in tort were available to persons who contended that the presence of radio-active materials in various sites in Port Hope constituted a danger to the health of Port Hope residents.

4.3 The State party argued in this context that the Atomic Energy Control Board is not in law duty-bound to clean up radiation contamination and that existing recourses are against the owners of the eight remaining sites in Port Hope containing contaminated soil (seven of these being owned by private persons and one by Eldorado Nuclear Ltd, an agent of the Crown) who under Canadian law are responsible for tortious damages resulting from the use or employment of their property.

4.4 The State party contended that the fact that the Federal Government, of its own initiative, embarked upon a clean-up operation, does not relieve the owners of the eight sites from their obligations in law. It maintained that if the author of the communication was of the view that the clean-up operation was not proceeding quickly enough or did not deal with sites which she considered to constitute a threat to the life of present or future generations, she must institute proceedings against the owners of these sites. Then, if she proved that the levels of radiation found on these sites constituted a threat to the life of present and future generations and obtained an injunction ordering the owners of these sites to deal with this situation, the Federal Government would consider the possibility of providing to these persons the assistance necessary to give effect to the injunction.

4.5 The State party admitted that such legal proceedings could be lengthy, particularly if one or more parties exercised its right of appeal. However, it was the State party's position that it could not be said that 'the application of the (domestic) remedies was unreasonably prolonged' since no legal proceedings had been instituted by the author. The length of proceedings should not, in the submission of the State party, be confused with 'undue prolongation'. Whether, in a given case, proceedings would be unduly prolonged is a question of fact, not speculation. Only after having examined the particular circumstances of a case should the Committee pronounce itself on whether or not the application of domestic remedies has been unduly prolonged.

5 On 4 February 1981 the author forwarded her comments in reply to the State party's submission of 8 December 1980. She argued that the legal remedies referred to by the State party would not be effective to achieve the removal of the waste and that the length of any legal proceedings would unreasonably prolong

the application of a remedy. There were grounds to believe, she concluded, that lives may be saved by the speedy remedial action sought and that any delay in the application of such remedy would be unreasonable.

6 By a decision dated 9 April 1982, the Human Rights Committee decided to seek further clarification from the State party on the grounds on which it contended that available domestic remedies had not been exhausted. Specific questions were submitted to the State party in this regard.

7 In its additional observations dated 21 July 1982, the State party replied to the Committee's questions as follows:

> *Question 1:* In its submission of 8 December 1980, the State party indicated that if the author proved 'that the levels of radiation found (on the dumpsites) constituted a threat to the life of present and future generations and obtained an injunction ordering the owners of these sites to deal with this situation, the Federal Government would consider the possibility of providing to these persons the assistance necessity to give effect to the injunction'. If such an injunction having been obtained, the owners of the sites were unable to deal with the situation without the assistance of the Federal Government or the Atomic Energy Control Board, is the Federal Government in a position to assure the Committee that the necessary assistance will be given?
>
> *Response:* In its response to the communication of the author, the Government of Canada pointed out that steps were being taken, through the Atomic Energy Control Board, to remedy the situation which exists on the eight sites mentioned in the communication. Resolving the problem is a matter which necessarily involves delay due to certain practical and technical considerations. If the author of the communication is unwilling to accept the delay inherent in resolving the problem, the Government of Canada has indicated that the author could seek injunctive relief against the owners of these sites. Should Court proceedings prove successful and an injunction be issued against the owners of these sites, governmental assistance might be required. The requirement for and the nature and extent of governmental assistance to the owners of the sites could only be ascertained in light of the precise nature of the relief granted by the Courts.
>
> In its 8 December 1980 response to the author's communication, the Government of Canada indicated, on pages 10 and 11, that:
>
> > '. . . the federal government, even though it does not consider that the radiation level found in the eight sites mentioned in the author's communication are a hazard to the life of present or future generations, has undertaken to clean them up and to that effect has taken steps to locate a disposal site.'
>
> If the Courts were to order the removal of contaminated soil from one or more contaminated sites, the Government of Canada would offer these persons every possible assistance to facilitate compliance with the order of the Court. However, the Courts might decide that these persons are only required to take steps to reduce access to their property, for example by erecting better fencing. In such a case, little or no assistance would be required. But to the extent that technical or similar assistance available only from government sources was necessary to the fulfilment of the Court order, the Government of Canada would provide the requisite assistance.

The question is, however, abstract and it is therefore impossible to give an unqualified undertaking that assistance would be given in all circumstances.

Question 2: In its submission, the State party also suggests that the author could seek to obtain an injunction or a writ of mandamus to force the Atomic Energy Control Board to clean up the contamination. Does the Federal Government contend that this is a remedy which it is incumbent on the author or the persons she represents to exhaust, in the sense that it constitutes an effective remedy in the particular circumstances of the case?

Response: The Government of Canada does not share the author's view that the Atomic Energy Control Board has a legal duty under section 21 of the Atomic Energy Control Regulations, C.R.C. 1978, C.365 to clean up the eight contaminated sites mentioned in her communication. The matter being disputed, the author could seek a writ of mandamus or an injunction to ascertain the exactitude of her assertions. However, to the knowledge of the Government of Canada, she has initiated no legal proceedings to this effect. If she were to institute legal proceedings and if those proceedings upheld her view, there is no reason to think that the Court would be unable to grant an effectual remedy.

Question 3: Are there any other remedies against the Federal Government or the Atomic Energy Control Board which, in the view of the State party, it is incumbent on the author or the persons she represents to exhaust?

Response: In its response, the Government of Canada indicated that the author could seek injunctive relief against Eldorado Nuclear Ltd an agent of Her Majesty in Right of Canada. Canadian law recognizes an action for nuisance, and in an appropriate case, a mandatory injunction can be awarded against the owner or occupant of the property from which the nuisance emanates.

Although it is customary that corporate entities which are agents of Her Majesty in Right of Canada are sued in their corporate name, the author might also sue the Crown in lieu of or in addition to Eldorado Nuclear Ltd. Under paragraph 3 (1) (*b*) of the *Crown Liability Act*, R.S.C. 1970, c. C-38, the Crown may be held liable in tort in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

Further, since Canada submitted its response to the communication of the author, the *Canadian Charter of Rights and Freedoms* has come into force on 17 April 1982. The Charter applies to the Parliament and Government of Canada in respect to all matters within the authority of Parliament (subparagraph 32 (1) (*a*)). Section 7 of the Charter states that 'everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principle of fundamental justice'. Therefore, anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply, under subsection 24 (1) of the Charter, to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. If the author believes that the Government or an agency thereof, such as the Atomic Energy Control Board, is denying her the right to life in a manner contrary to the provisions of section 7, she can ask the Courts to remedy this situation.

In the present case, the Government of Canada reaffirms the views expressed in its original response that the failure of the complainant to take any proceedings constitutes a failure to exhaust domestic remedies as required by Article 2 of the

Optional Protocol to the Covenant and that as a consequence the communication submitted by the author is inadmissible under Article 5 (2) (*b*) of the Optional Protocol.

8 The Committee observes that the present communication raises serious issues, with regard to the obligation of States parties to protect human life (article 6 (1)). Nonetheless, before considering the merits of the case, the Committee has to determine, (*a*) whether the author of the communication has the standing to submit the communication and (*b*) whether the communication fulfils other admissibility criteria under the Optional Protocol, in particular the condition relating to exhaustion of domestic remedies set out in article 5 (2) (*b*) of the Optional Protocol:

(A) THE STANDING OF THE AUTHOR

The Committee considers that the author of the communication has the standing to submit the communication both on her own behalf and also on behalf of those residents of Port Hope who have specifically authorized her to do so. Consequently, the question as to whether a communication can be submitted on behalf of 'future generations' does not have to be resolved in the circumstances of the present case. The Committee will treat the author's reference to 'future generations' as an expression of concern purporting to put into due perspective the importance of the matter raised in the communication.

(B) EXHAUSTION OF DOMESTIC REMEDIES

In the light of the State party's additional observations as to the availability of domestic remedies in order to obtain the removal of the contaminated soil from the eight dumpsites, the Committee concludes that,

(i) as to the seven privately owned dumpsites, the author could sue the owners of these sites and seek a mandatory injunction; the Committee has noted that the Government of Canada would then offer the owners every possible assistance to facilitate compliance with the court order;

(ii) as to the dumpsite owned by Eldorado Nuclear Ltd, an agent of Her Majesty in Right of Canada, the author could bring suit for compensation and a mandatory injunction either against that agency, or the Crown under the Crown Liability Act 1970, or both;

(iii) as to any legal duty of the Atomic Energy Control Board under the *Atomic Energy Control Regulations*, the author could seek a writ of mandamus or a declaration and an injunction to determine such duty.

Accordingly, all available domestic remedies have not been exhausted, as required under article 5 (2) (*b*) of the Optional Protocol. The Committee cannot conclude that these remedies, if pursued, would be unreasonably prolonged within the meaning of article 5 (2) (*b*) of the Optional Protocol. As to the effectiveness of domestic remedies, the Committee notes that the author could now also invoke the Canadian Charter of Human Rights and Freedoms which explicitly (section 7) protects the right to life.

9 The Human Rights Committee therefore decides:

(*a*) The communication is inadmissible;

(*b*) This decision shall be communicated to the author and to the State party.

[Report: 2 Selected Decisions of the Human Rights Committee 20]

Kitok *v.* Sweden
Communication No. 197/1985

United Nations Human Rights Committee

27 July 1988

Rights and interests – human rights – right of self-determination – International Covenant on Civil and Political Rights – Article 1, right of self-determination – admissibility – author claiming that restriction of his reindeer breeding rights as member of Sami minority violated Article 1 – author as an individual could not claim to be the victim of a violation of the right of self-determination which was conferred only on peoples – communication under Article 1 inadmissible

Rights and interests – human rights – right of minorities – International Covenant on Civil and Political Rights – Article 27, right of minorities to enjoy own culture, to profess or practise own religion, or to use own language – member of Sami minority's reindeer breeding rights restricted – economic activity constituting an essential element of culture of an ethnic community falling under Article 27 – reindeer husbandry an essential element of Sami culture – in circumstances, restrictions having a reasonable and objective justification and necessary for continuing viability and welfare of the minority as a whole – no violation of Article 27

Conservation – Sami culture of reindeer breeding – author claiming restriction of his reindeer breeding rights violated Article 27 of the International Covenant on Civil and Political Rights – in circumstances, restrictions having a reasonable and objective justification and necessary for continuing viability and welfare of minority as a whole

Indigenous peoples – Sami minority – author claiming that restriction of his reindeer breeding rights as member of Sami minority violated Articles 1 and 27 of the International Covenant on Civil and Political Rights – conflict between rights of individual and rights of minority as a whole – restrictions *on individual's reindeer breeding rights having a reasonable and objective justification and necessary for continuing viability and welfare of minority as a whole*

Standing – peoples – Optional Protocol to the International Covenant on Civil and Political Rights providing procedure for 'individuals' not 'peoples' to submit communications to the United Nations Human Rights Committee

SUMMARY *The facts* The author, a Swedish citizen of ethnic Sami origin, had lost his status as a member of his Sami village, and thus his entitlement to exercise traditional Sami rights to land and water, and to breed reindeer in the wild.

The Sami community had denied membership to the author pursuant to the Reindeer Husbandry Act 1971 ('the Act') because he had engaged in a profession other than reindeer husbandry for three years. The Act provided for appeal from the decision of the community only if there were 'special reasons' for granting membership. The author appealed to the County Administrative Board, the Administrative Court of Appeal and the Supreme Administrative Court without success.

In order to protect his interests as an owner and breeder of domestic reindeer, the author was allowed by the Sami Community Board, although not as of right, to be present when the Sami village marked, slaughtered, rounded up and reassigned Sami reindeer.

The author submitted a communication to the United Nations Human Rights Committee alleging that Sweden had arbitrarily denied his right as a member of the Sami minority to breed reindeer, as his family had done for over 100 years, in violation of Articles 1 and 27 of the International Covenant on Civil and Political Rights, 1966 ('the Covenant').[i]

Sweden argued that the Sami were not a people for the purposes of Article 1 of the Covenant. It admitted that the Sami were an ethnic minority entitled to protection under Article 27 of the Covenant, and stated that such protection was guaranteed under the Swedish Constitution, Chapter 1, Article 2(4), and Chapter 2, Article 15. The purpose of the Reindeer Husbandry Act 1971 was 'to improve the living conditions for the Sami who have reindeer

[i] International Covenant on Civil and Political Rights, 16 December 1966. For the text of relevant provisions see Appendix 2.

husbandry as their primary income, and to make the existence of reindeer husbandry safe for the future'. Protection of reindeer husbandry was considered important to the preservation of the Sami culture. However, because reindeer husbandry could not generate sufficient income to support all those Sami who wished to engage in it, legislation was passed to limit the number of those entitled to breed reindeer. Sweden claimed that the area available for reindeer grazing would support only 300,000 reindeer, and that reindeer husbandry could support no more than 2,500 Sami. The limitation was effected by reserving reindeer husbandry to the approximately 2,500 members of Sami villages. The remaining 15,000 to 20,000 Sami, the majority of whom did not live in the reindeer herding area, had no special rights under Swedish law. Sweden contended that the case should be declared inadmissible as manifestly ill-founded.

The author responded that, as to Article 1 of the Covenant, Lapp villages were self-governing entities holding allodial land rights. The Swedish Sami people had the right of self-determination. With respect to Article 27 of the Covenant, he argued that the categorisation of Sami into the village Sami who held land, water and reindeer herding rights, and the non-village Sami ('half Sami') who were prohibited from exercising those traditional Sami rights but who lived in the same area, violated the non-village Samis' right to enjoy their own culture. The latter group were in effect forced by Swedish laws and policy to become assimilated.

In its decision on admissibility of 25 March 1987 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 under Article 1 of the Covenant because that right was conferred only on peoples. However, with regard to the claim brought under Article 27, the author had made a reasonable effort to substantiate his allegation that he was the victim of a violation of his right to enjoy the same rights enjoyed by other members of the Sami community. The case was accordingly admissible for consideration on the merits.

Held by the United Nations Human Rights Committee (1) The author's right to enjoy his own culture under Article 27 had not been violated. An economic activity which was an essential element in the culture of an ethnic community was covered under Article 27

of the Covenant. But the purpose of the Act, to limit reindeer husbandry in order to preserve it as an important part of Sami culture and to provide a reasonable income for traditional Sami, did not violate Article 27 (paras. 9.1–9.3).

(2) The Committee expressed grave doubts as to whether sections 11 and 12 of the Act, which defined membership in a Sami community, were compatible with Article 27 because they created a conflict between the rights of the individual Sami and the rights of the minority as a whole. However, applying its previous case law it decided that the restrictions imposed by the Act had a reasonable and objective justification and would be necessary for the continuing viability and welfare of the minority as a whole. In addition, the author was permitted, albeit not as of right, to graze and farm his reindeer, and to hunt and fish (paras. 9.6–9.8).

(3) Although the initial decision concerning the author's membership in the village was made by the village, Sweden's enactment of the Act providing for appeals from Sami village decisions, and the decisions taken on appeal, constituted state action (para. 9.4).

There follows

Views of United Nations Human Rights Committee, 27 July 1988

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 Sörkaitum 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 unless by 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 Länsstyrelsen, Norrbottens *län* (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 (supreme administrative court) 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 1 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 Swedish Commission on Sami issues (Samerättsutredningen) 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 of 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 the discrimination of 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 Sörkaitum 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*), an entity 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, e.g. 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 into 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 the 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 County Administrative Board (Länsstyrelsen). 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 Administrative Court of Appeal (Kammarrätten) and finally to the Supreme Administrative Court (Regeringsrätten).

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, para. 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 run 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 Supreme Administrative Court 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 contents of section 12, paragraph 2, of the Reindeer Husbandry Act. The County Administrative Board 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 County Administrative Board found that there were no such reasons, nor did the Administrative Court of Appeal or the majority of the Supreme Administrative Court . . .

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 Sörkaitum. 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 the 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 Supreme Administrative Court 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 préparatoires* of the 1734 law-book for Sweden, including even Finnish territory.

Sweden has difficulty to understand 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 kernel areas 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 kernel Sami areas 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 by statute prohibited 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 kernel lands and was valid until the highest administrative court of Sweden rendered its decision on 6 June 1985 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 according to the present 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 kernel Swedish Sami land 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 kernel Swedish Sami land. When Sweden says that these other Sami are assimilated, it seems that Sweden confirms its own violation of article 27.
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> The important thing for the Sami people is solidarity among the people (*folksolidaritet*) and not industrial solidarity (*näringssolidaritet*). 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 Sörkaitum Lappby.
>
> Among the approximately 3,000 non-*sameby* members who are entitled to carry out reindeer farming and live in kernel Swedish Sami land 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 Sörkaitum *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.