

2021.06.16

Open letter from the Saami Council and Vapsten Sami Reindeer Herding Community with respect to the Swedish government's response to the UN Committee on the Elimination of Racial Discrimination's decision in *Vapsten Sami Reindeer Herding Community v. Sweden*

Background and introduction

On 26 November 2020, the UN Committee on the Elimination of Racial Discrimination (the "CERD" or the "Committee") decided *Vapsten Sami Reindeer Herding Community v. Sweden* (Communication No. 53/2013) (the "Decision").¹ There, the CERD adjudged that Sweden discriminated against Vapsten Sami Reindeer Herding Community (the "Reindeer Herding Community", the "Community" or "Vapsten") when its government granted a concession to a major mining project in the heart of the Community's traditional reindeer pasture land (the "Mining Project"). The concession further breached the Reindeer Herding Community's rights to property and to an effective remedy under the International Convention on the Elimination of all Forms of Racial Discrimination (the "ICERD" or the "Convention") articles 5 (d) (v)² and 6³, respectively, the Committee further proclaimed.

The CERD called on Sweden to revise the mining concession and put an end the mining project.⁴ Reaching its conclusion, the Committee observed that although the mining concession decision *effectuated* the discrimination and human rights abuses under the Convention, the decision was not the *root cause* of these offences. Rather, these materialized as a result of Swedish environmental and mining legislation systematically discriminating against Sami reindeer herding communities. In other words, the generally inherently discriminatory nature of Swedish legislation precluded a non-discriminatory outcome in the particular instance. Consequently, the CERD called on Sweden to revise its legislation so to root out discriminatory elements and avoid future human rights abuses.⁵

¹ Due to formalities, the members of Vapsten, rather than the Community as such, were the formal complainants in the case. For all practical purposes though, the complainant was the Reindeer Herding Community.

² The Decision, para. 6.22 and 7.

³ The Decision, para. 6.29 and 7.

⁴ The Decision, para, 8.

⁵ The Decision, para., 8.

The Committee called on Sweden to submit within 90 days information on what measures it intends to take to comply with the Decision.

On 23 February 2021, Sweden answered the Committee (the “Response”). The gist of it is as follows:

- The Swedish government will not revise the concession decision, nor in other ways put an end to the mining project.
- Sweden will ignore future decisions by UN treaty bodies if the human rights violations Sweden has inflicted has been effectuated by a court of law or an administrative authority, because Sweden has enacted domestic legislation that forbids it from rectifying such human rights abuses.
- Sweden will not revise national legislation, even if the CERD has held such systematically discriminatory.
- Sweden will comply with only such UN treaty body decisions that Sweden agrees with.

Sweden’s decision to defy the CERD’s call to rectify discrimination and human rights abuses in the concrete situation

The law

In the Response, Sweden submits that from the facts that i) pursuing the Mining Project presupposes an environmental permit issued by the Land and Environmental Court,⁶ and ii) the Swedish Constitution ensures courts of law freedom from interferences by the parliament, the government and other official authorities,⁷ follows that Sweden cannot revise the exploitation concession.⁸

Sweden’s chain of argument is evidently non-sensical, as it lacks one critical link. Missing between fact i) and ii) is “the fact” – necessary should Sweden’s argument not be inane – that the Land and Environmental Court (or any other court) has actually made a decision which Sweden would have to revise to comply with the CERD’s Decision. But there is no such decision. Indeed, it could not be, since the Land and Environmental Court was in no way involved in the case. The Committee *explicitly concluded* that the discrimination of the Reindeer Herding Community and the ensuing human rights violations *were complete and final* when the Swedish government granted the mining concession.⁹ The case closed there and then – without the Land and Environmental Court ever being part of it. Consequently, there simply is no Land and Environmental Court decision that the Swedish Constitution

⁶ The Response, para. 5 and 6.

⁷ The Response, para. 7.

⁸ The Response, para. 8.

⁹ Decision adopted by the Committee under article 14 of the Convention, concerning communication No. 54/2013, CERD/C/92/D/54/2013 (16May 2017), para. 12.4.

prevents the government from interfering with. This “decision” is a chimera, which Sweden has seemingly imagined in an attempt to construe a rationale for not having to comply with the CERD’s Decision.¹⁰ In the real world, to comply with the Decision, the Swedish government only has to revise its own decision. Nothing in the Swedish Constitution prevents it from doing that.

The facts

In the Response, Sweden alludes that its refusal to revise the mining concession decision in any event carries no practical implications for the Reindeer Herding Community, as the Mining Project is in effect aborted.¹¹ The information is incorrect. In a press release of 19 May 2021, Bluelake Mineral AB (publ), announces its plans to commence with the mining operations. In the press release, the mining corporation simply ignores the fact that the Committee has called on Sweden to revoke the very license on which the mining corporation intends to base its mining activities.

The wider implications of Sweden’s position; defiance of UN treaty body decisions in general

The court decision Sweden posits the principle of the independence of the courts prevents it from revising to comply with the CERD’s Decision is thus only a chimera. As such, it can *in the particular case* be ignored as a nonsensical and interesting attempt to escape taking the measures the Committee calls on Sweden to take to adhere to the Decision. But Sweden’s position has *wider implications*.

What Sweden submits is in fact that it has no obligation *ever* to end or rectify discrimination and other human rights violations it subjects the indigenous Sami and others to under the ICERD as confirmed by the CERD, when such abuses have materialized through a ruling or decision by a court of law. But it does not end there. Sweden adds that the same applies to decisions by administrative authorities. What emancipates Sweden from its obligations in this respect, it posits, is the Swedish Constitution, i.e. domestic law.¹² In other words, Sweden understands that its duty to end and rectify discrimination and other human rights violations under the Convention only applies if Sweden has not relieved itself from such obligations through domestic law.

The implications of Sweden’s said position presumably do not end with the ICERD. The argument advanced is, from Sweden’s point of view, seemingly equally relevant to other UN human right treaties and treaty bodies. Assumably, when other UN human rights oversight mechanisms hold Sweden in breach of other human rights conventions, and such violations have materialized through rulings or decisions by Swedish courts or administrative authorities, Sweden will again, with reference to domestic law, declare that it is under no duty to end or rectify such human rights abuses.

¹⁰ The Swedish government argued before the CERD that the Land and Environmental Court was relevant to the matter. However, as mentioned, the Committee *explicitly* overruled this argument, concluding that the breaches of the Convention were final with when the government decided to grant of the mining concession, hence without any involvement by the Court.

¹¹ The Response, paras. 9-11.

¹² The Response, para. 7 and 8.

The Saami Council in no way contests that independence of administrative authorities, and in particular of courts of law, are fundamentally important values and principles. These are cornerstones in states governed by the rule of law. We submit that Sweden seriously depreciates these values and principles when invoking them to justify human rights violations.

The refusal to revise inherently discriminatory legislation

As seen (inane as it might be), Sweden's view is that it is forbidden from ending and rectifying the discrimination and other human rights violations it subjects Vapsten to. Feeling prevented from addressing the *materialized such abuses in the concrete instance*, one could perhaps expect Sweden to be keen to address these abuses' *root causes*, ensuring that no similar (in Sweden's view non-remediable) human rights violations occur in the future. It is not. Sweden explicitly declares that it will not rectify the underlying reasons behind the materialized human rights violations either. Here, it presents no argument for its position. Sweden simply posits that its legislation conforms with the engaged Convention articles,¹³ irrespective of that this is evidently untrue as CERD has concluded otherwise.

Sweden will hence i) neither end or rectify the concrete discrimination and other human rights abuses it subjects Vapsten to (invoking that a law it has itself enacted relieves it from complying with the CERD's decision), ii) nor revise the legislation which is the root cause of those and other ongoing systematic discrimination and other human rights violations of Vapsten and other reindeer herding communities (invoking that it does not agree with the Committee). In sum, in its Response Sweden announces that it will do nothing to respect and comply with human rights of Sami reindeer herding communities, irrespective of the CERD's call on it to do so.

Again, Sweden's defiance of the Committee has wider implications. What Sweden is in fact announcing is that it will respect and comply with UN treaty bodies' decisions only insofar the position of the treaty body and that of Sweden coincide. In other words, in Sweden's view, disagreeing with the UN human rights oversight mechanism on the content and scope of human rights relieves Sweden from its obligation to comply with the findings of UN treaty bodies.

Response in want of apparent purpose

Sweden thus *tout court* dismisses the CERD's demands directed at it, offering either no or only non-sensical rationales for doing so. Instead of engaging with the Decision, Sweden devotes most the Response lecturing on various aspects of consultation.¹⁴ Why it does so is unclear, given that what Sweden discusses has no bearing on the calls the CERD directs at Sweden in the Decision.¹⁵

¹³ The Response, para. 26

¹⁴ The Response, para. 12-25.

¹⁵ In addition to being irrelevant, what Sweden writes includes certain irregularities. In para. 13, Sweden misrepresents the Swedish Supreme Court's ruling in the *Girjas Case*. In this landmark pilot case, the Supreme Court confirmed that Girjas (and other) Sami reindeer herding communities hold exclusive usufruct rights to hunting and fishing in the mountainous areas of the communities' traditional territories. (Formally, the Supreme Court identified the members of the community as right holders. For all practical purposes though, the distinction

Conclusions

The Response renders it abundantly clear that Sweden will simply ignore the UN criticism and not end or rectify the discrimination and other human rights abuses it subjects Vapsten to. Nor will it amend its legislation to end systematic discrimination of Sami reindeer herding communities in general, irrespective of how many times and regardless of in how plain language the UN calls on it to do so. Apparently, Sweden's disdain for the Sami reindeer herding's land and resource rights is so entrenched that it prefers resorting to chimeras and alternative facts before recognizing, respecting or implementing such.

The Response further makes clear how Sweden understands its duties to comply with human rights more generally. Sweden posits that it can emancipate itself from its "obligations" to respect and implement decision by UN treaty bodies by adopting national legislation to that effect. Sweden also more broadly pronounces that its duty to adhere to decisions taken by the UN human rights oversight mechanism ends where Sweden disagrees with the World Organization.

Taking this position, Sweden aligns itself with those states that hold the position that when their understanding of human rights clashes with that of others (including the UN), its own view prevails. Consequently, no international criticisms of human rights abuses are relevant to the state; in this particular case Sweden.



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Annexes

The Decision

The Response

Saami Council legal brief on the *Rönnbäcken Case* (in Swedish)

is negligible.) Further, in para. 14-16 Sweden refers to recent amendments to the Mineral Act. However, it transpires that these "recent amendments" entered into force on January 1, 2018, i.e. almost two years before the Decision. These aspects of the Mineral Act were hence part of the Committee's considerations (or if they were not, this was due to Sweden's choosing).