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Moose poaching or native minority right: A struggle for definition in Swedish Saamiland.

By Hugh Beach.

What at first appears to be a simple case of illegal moose bunting is in fact a serious challenge to Swedish Native minority policy. The so-called Vapsten Case confronts the occupational paradigm which divides the Saami into herders, Saami eligible to become herders and Saami who have lost even the right to eligibility. Unfortunately, largely due to these State-imposed distinctions, Saami are pitted against Saami in resource conflicts. A Saami who is eligible to herd might be barred from practicing his herding right by the official members of the herding collective, the Sameby. The issue surfaces again and again and is often submerged in the effort to protect Saami unity; yet, it is only by looking the problem in the eye that true unity can be achieved.

Introduction.

In the following presentation of what is here termed the *Vapsten Case* in northern Sweden, I wish to draw attention to certain fundamental issues of anthropological advocacy. Most importantly, I shall explore the struggle to define the context of this case in court. While the surface crimes for which the defendants are charged concern illegal moose hunting and reindeer herding, the deeper principles at stake involve nothing less than the Native minority rights of the Saami (Lapps) as a whole in Sweden. To date (March, 1985), this case has been heard by the local Court of First Instance, the *Tingsrätt* in Lycksele, has moved through the next higher court, *Hovrätten,* the Court of Appeal in Umeå, rests currently with the Swedish Supreme Court and may later reach the international theater at the European Court in Strasbourg. We shall probably not be able to determine the final outcome of this case for some years.

On the one hand, the State prosecution seeks to confine the scope of the case to the hunting and herding statutes of the Swedish Reindeer Act of 1971. The defendants and their advocate, Mr. Tomas Cramér, on the other hand seek to question the very legality of the Reindeer Act. They wish to broaden the scope of the case to include a discussion of traditional, ancestral Saami rights and the justice of the law which divides the officially acknowledged herding Saami from the non-herding Saami and grants the very exercise of special, Native minority resource rights only to the former. Seen from this larger perspective, the significance of winning or losing the surface case as defined by the State is slight. Even if the case itself were lost, should the Saami defendants succeed in defining the case in the Supreme Court according to the broad scope, it would be a substantial victory. The implications resulting from the framework by which the end decision was reached could justify referral to the International Court in Strasbourg.

While the State hopes to punish three citizens for isolated acts of illegal hunting and herding, the defendants hope to achieve a legal precedent involving all Saami in Sweden and their relations to special resource utilization. In fact, it was largely to test these principles of Swedish Native minority law that the case was purposely precipitated. In September of 1983, Tage Östergren,

a non-herding (but eligible-to-herd) Saami with ancestral bonds to land of the Vapsten herding collective *(Sameby),* shot four moose on Vapsten territory expressly to challenge the authority of the Swedish State's Reindeer Act.

Similar matters of definition apply to the perceived identities of the persons involved as well. Because of the State's legal definitions splintering the Saami minority into official herding Saami, non-herding but elibigle Saami and ineligible Saami, it can cast the Vapsten Case as a conflict between two different Saami groups. It is Cramér's intent to expose the conflict as one between the Saami minority and the Swedish State. Whereas the State hopes to confine the historical context of the case, the defence must try to force the admission of evidence and testimony concerning the earlier phases of the Swedish colonial presence in Saamiland.

My purpose here will be to explain the complex background of this case and with this understanding to analyze the struggle of the advocates over its legal definition. For them, the crucial issue is to establish just what is on trial here. For us, this provides and illuminating view of advocacy in the Native minority rights context. We are presented with a look at the pragmatics of fashioning a major test of minority status from what at first appears to be a simple crime.

Background.

To acquire an understanding of the significant aspects of this case, one must gain a quick orientation to the stage of conflict and its cast of actors. To establish the State's narrow concept of Saami rights according to an uncritical interpretation of the Reindeer Act of 1971, it is necessary to know the general ideological position - cultural preservation through occupational rights - which supports the Swedish Native minority rights paradigm. It is first then that even the surface account of the so-called crimes can be grasped. Deeper understanding of the case must be layered onto this core in a series of applications. Comparisons with other specific cases which constitute the legal heritage of the Vapsten Case will serve this purpose. From this perspective, one can recognize the Vapsten Case as the latest example of a recurring problem in Swedish-Saami relations which finds expression in a great variety of ways.

Occupational Rights.

Vapsten *Sameby* is one of approximately 50 herding territories in Sweden. These territories, or *Samebys,* define zones whose limited use is conferred upon certain specific Saami herders. A *Sameby,* therefore, defines a social as well as a territorial entity. The Swedish government does not recognize any general Saami ownership of land. The Supreme Court in 1981 proclaimed that Saami ownership is possible in Lapland, but just who (individual or collective) is to be considered Saami owner is still left vague. Instead, the Saami herders are given the *use* of the land with respect for their traditional herding occupation, but this use is limited to herding use along with some hunting and fishing privileges (Beach 1981). The Swedish State has granted certain special resource rights to the Saami to preserve their unique culture, but Saami culture is then narrowly recognized by the government to mean only reindeer herding, and to the extent a Saami strays from this livelihood, to that same extent must he give up his special rights. In short, while *eligibility* for certain rights is linked to Saami ancestry, actual *exercise* of special resource rights is controlled by an occupational rather than an ethnic criterion.

Reindeer herding rights constitute the foundation of Saami minority rights in Sweden. Herding affairs are administered under the Department of Agriculture in accordance with the current Reindeer Act of 1971. Parapraph 1 of the Reindeer Act designates who is and who is not eligible to be a reindeer herder in Sweden. Elsewhere, I have traced the evolution of this regulation in Swedish law (Beach 1979). Paragraph 1 of the Reindeer Act of 1971 includes the following statement:

> The right according to this law to utilize land and water for support of oneself

> and one's reindeer (reindeer-herding right) belongs to him who is of Saami ancestry, if his father or mother or one of his grandparents had reindeer herding as steady occupation... (SFS 1971:437).

All Swedish Saami can be divided into two major categories according to this legal distinction: those who are eligible to herd reindeer and those who are not eligible. This last group enjoys no rights beyond those granted to all Swedish citizens. However, of those Saami who are eligible to herd reindeer only a small proportion actually exercise this right.

Estimates of the Saami population in Sweden range from 15,000 to 17,000 people and depend to a great degree on the definition of Saami used, but of this number, only about 900 are active reindeer herders. The special rights which accrue to reindeer herding can only be practiced by the members of the *Samebys,* and it is the existing *Sameby* members whose vote decides whether or not the application of an eligible Saami to join the *Sameby*'s herding ranks will be accepted. It is argued that since the grazing lands are limited and in turn impose a constraint on the herd size maximally permitted on the range, this will also limit the number of herders who, as members of the herding collective, can attain a certain living standard from these reindeer (Beach 1983). The current members are therefore given the right to decide if new, outside members can be accommodated.

Children born to members of the *Sameby* become members automatically and cannot

From left to right: Ivan Kitok, Per-Martin Israelsson and Tage Östergren, April 1984-three Saami who lack the right to practice their herding right and who in different ways have challenged Swedish Native minority policy. (Photo: Hugh Beach).

be barred from practicing herding unless they choose to engage themselves in some other, major form of livelihood. Once a herder has left the *Sameby* for any reason, he must reapply for membership and risk denial should he wish to resume the herding livelihood. Thus the category of Saami who are eligible to herd reindeer can be further subdivided into those that actually do and those that despite their eligilibity do not. One might divide this last group further and distinguish between those eligible, non-herding Saami who wish to herd but have been denied *Sameby* membership and those that have never had the intention to become a herder. Those whose applications have been rejected can be divided again - those who sought re-entry to their old *Sameby* as opposed to those who have never herded in the *Sameby* to which they applied. Only the distinction between active herders and non-herders, carries any legal importance with respect to actual resource utilization according to the Reindeer Act of 1971, but we shall have cause to consider the finer divisions in presenting the case for the defence.

It should also be noted here, that the voting method used by the *Sameby* members in considering a membership application (as well as many other vital herding decisions) is based by law on a graduated system rather than a simple, one-man-one-vote system. By the graduated voting method, a herder's voting power is directly related to the size of his reindeer herd. This too is a result of the occupational paradigm; herders who have the most invested in the herding enterprise should have most to say over its administration. Therefore, herders receive an additional vote for each newly started hundred head. A herder with 199 reindeer has two votes, while a herder with 201 reindeer has three votes. A number of manipulative strategies of reindeer distribution can be generated by these regulations to maximize voting power (Beach 1982).

Armed with this framework, we are now in a position to comprehend the most basic description of the Vapsten Case: The three defendants, Tage Östergren, Per-Martin Israelsson and Thomas Stångberg, are not recognized by Vapsten *Sameby* as members. Nonetheless, all three have practiced reindeer herding on Vapsten grazing land. Tage Östergren has compounded his crime by hunting moose in numbers, during a season and on range only permitted *Sameby* members. All three have been charged with "unlawful interference" for their reindeer herding by the official Vapsten *Sameby* and Mr. Lundvall, local representative of the National Board of Agriculture's Reindeer Division. Tage Östergren is further charged with moose poaching.

No other information is required for the State courts to pass judgment. It is up to the defence to argue for the significance of further facts: 1) The three defendants are Saami; 2) They are eligible to be herders and 3) have parents who have practiced herding as recognized Vapsten members earlier but who have subsequently and in an unclear manner supposedly been dropped from the membership lists; 4) Moreover, each can trace his ancestral utilization of Vapsten territory back many generations, at least to 1799, long before Vapsten *Sameby* ever came to be (1975).

Antecedents.

Supporting Members.

Naturally, a law which divides the Saami population into herders and non-herders and grants special Native rights only to the herders causes a bitter split amongst the Saami and pits the two groups against each other. It was the Reindeer Act of 1928 which first applied the "closed-shop" principle for the *Lappby/Sameby* whereby all herders were forced to become *Lappby* members, and only these members could exercise their herding rights. The current Reindeer Act of 1971 maintains this closed-shop principle. The larger, non-herding group feels that it has been unjustly deprived of its Native rights and seeks means of procuring special resource rights on ethnic rather than occupational grounds. The active herders, however, feel that their resource rights are already severely limited, that the resource ba-

se is too small, and that the opening of resource utilization to all Saami would threaten their livelihood as herders. Aside from the question of principle over what rights non-herding Saami should or should not have, the benefits of Saami solidarity cutting across the occupational-cultural split inspired a movement in the late 1960s to allow non-herding Saami to become at least "supporting members" of *Samebys.*

The program for enrolling supporting members in tile *Samebys* was not only for the benefit of those Saami who had left the herding occupation and often the herding districts but wanted to retain ties with the Saami culture and land. Such ties were also considered to be desirable for the herders' sake. The *Sameby* would gain a broader base of understanding and support. With the active involvement and concern of its supporting members, a *Sameby,* it was thought, would increase its political powers. Its voice, when raised against land encroachments, for example, would be louder (Beach 1981:419).

The Swedish Saami Organization (SSR) in 1968 submitted a proposal to the Swedish Parliament that a new class of membership in the *Sameby* be opened to Saami with herding eligibility or other Saami. With the approval of the *Sameby,* they could become supporting members. As such they would not be granted herding membership but given restricted hunting and fishing rights. The SSR justified this idea as follows:

> The need of binding substance between Saami has been presented above. It is a vital point for the preservation of the Saami as an ethnic group. The *Sameby* should therefore be given the right to accept Saami as supporting members. In this way the herding Saami can show their solidarity with other Saami and vice versa. (SSR Protokoll 1968, bil. 2, p. 49).

Over the years the proposal was refined and furnished with many protection clauses to still the fears of the herders. Various restrictions were considered: which non-herders could become supporting members of which *Samebys* and what such membership would entail. Nevertheless, precisely the fact that non-herders would be given legal privileges in relation to resources on *ethnic grounds* would be a point of paramount importance to the Saami movement. It would constitute a major step in overcoming the State's occupational-cultural split. The incorporation of supporting members into the *Samebys* in the law would mean a final admission on the part of the State that the *Sameby* is more than a business organization with occupational rights. Even if supporting members be limited to the right to catch only one fish each per summer on *Sameby* land, legally it would mean a breakthrough for the Saami movement. It would be a Saami right, not just a herder's right, and it would be designed to protect Saami culture, not by means of division but rather by means of unification.

Advocates of the proposal stressed that all stipulations as to who could be a supporting member, how many of them there should be and what their rights would be would all be left entirely to each individual *Sameby.* The supporting members would have nothing to do with the herding economics of the *Sameby.* The *Sameby's* economic side and its "idealistic side" would be kept strictly separate, if so desired. Various suggestions were made as to how best to restrict the number of possible supporting members. They could, for instance, be those with herding rights living in the area, all those with herding rights or only those with herding rights who had at one time actually been herders. Thus, the ideal of rights based on ethnic identity alone had to be diluted because of opposition from herders.

To date, the opposition between herders and non-herders on this issue has prevented its progress (although many herders have supported it). Just as the Saami as a whole generally feel that they could not survive as an ethnic group if herding were thrown open to all Swedes, so herders of all districts feel threatened by the proposal to make certain rights open to non-herding Saami.

Nonetheless, even if the proposal has not

been actualized, certain gains have been made. The State's investigating committee states that "The right for a *Sameby* to accept supporting members for idealistic activities is, in this committee's opinion, a matter of course" (SOU 1975:99, p. 170). For this right to be secured in law, however, some change would be required in paragraph 31 of the Reindeer Act, and this has yet to be made.

The Kitok Hunger Strike.

In the spring of 1980, Ivan Kitok started a hunger strike on Sergei's Square in Stockholm. Kitok was once an active herding member of Sörkaitum *Sameby.* He left the *Sameby* when his herding enterprise began to fail and took employment with the State Power Board and later with the State Railways. For a number of years, he sought re-entry into his old, ancestral *Sameby* as a full-time herder, but he has continually been turned down by Sörkaitum *Sameby.*

In his hunger strike to gain the ear of the Swedish Parliament, Kitok condemned the Reindeer Act of 1971 for creating a "class society" ruled by big-herder "dictators" within the *Sameby,* who have gained power and now want to establish their own private herding kingdom. Kitok challenged the form of legislation which can rob a man of his culture and identity. While many other Saami have condemned the occupational-cultural split before him, Kitok's action suceeded in bringing these problems to national attention.

If Kitok had merely been eligible for herding rights through a grandparent, his case would never have drawn so much support from other non-herding Saami and even from herders. Kitok, however, had himself been raised in the area and had herded there before. He was forced to leave when his fortunes declined, and many considered that, under the circumstances, he should be welcomed back to his old *Sameby.* With the Kitok case, dammed-up feelings seemed to burst out and many pent-up quarrels started over legislation with a wide range. Kitok and his many supporters-especially small herders and non-herding Saami who felt themselves deprived of their rightful heritage-formed a vocal group, demanding that Kitok be admitted to the *Sameby* and that the State review the law, so as to protect the small herder and combat the formation of large, herding monopolies.

Despite all the publicity, the *Sameby* voted to deny Kitok entry. Naturally, there is much more to this story. All manner of personal animosities and generation-old family feuds might well lurk behind this situation. Kitok was excluded by the graduated vote of the *Sameby's* active herding members.

The Reindeer Act does provide some protective clauses to conterbalance big-herder voting predominance. One such point is the regulation that no one herder can himself represent more than one-fifth of the total assembled vote on any issue, according to paragraph 59, point 4. Another protective measure is the regulation that herders receive one vote per each newly started herd of 100 head. It was suggested in the 1960s that the rule should be one vote for each newly started herd of 200 head, but the authorities considered that this policy would favor the smaller herders too much. Nonetheless, while Kitok was defeated in the vote graduated by herd size, he claimed that he would have been victorious had the *Sameby* voted on the one-man, one-vote principle.

The investigation secretary of the Department of Agriculture, the former Saami sheriff Åke Wikman, declared that Kitok should appeal against the *Sameby's* verdict, for the *Sameby* had voted wrongly (and therefore had been voting wrongly for the past seven years). According to Wikman, "The entire debate over his (Kitok's) membership in Sörkaitum *Sameby* is founded on a wrong interpretation of the voting rules... when it is a question of voting about membership applications, the one-man, one-vote rule should apply" (Wikman, *Dagens Nyheter,* June 11, 1980). In this statement, Wikman groups the membership-question vote with the vote of *Sameby* officials under the one-man, one-vote rule as per paragraph 59, point 1 of the Reindeer Act. Thus, he wishes to distinguish matters of membership

and *Sameby* board positions from the other, largely economic issues for which the graduated vote was designed.

Yet paragraph 59, point 2 of the Reindeer Act does not really support Wikman's interpretation. Here it is stated simply that "in all other questions", i.e. other than the election of *Sameby* officials, the graduated vote of the active herding members only is to apply. Lars Pittsa, the headman för Sörkaitum, denies that the outcome of the vote would have been any different if the one-man, one-vote principle had applied. Most importantly, Pittsa makes it clear that in Sörkaitum, *where the rational reindeer population has nearly been reached, there is no sense in pretending that membership questions are not also highly important economic questions* (Pittsa, *Samefolket,* 1980, no. 5, p. 18).

Although Pittsa's position is well taken and is supported by the Reindeer Act, the larger question still remains: Why should Saami solidarity be dependent upon vacant grazing land? And if the grazing lands are full, why should some Saami be made to forfeit their ancient rights for the benefit of those remaining rather than let all share the difficulty? Of course, the grazing lands cannot support an unlimited Saami population, and very likely there will always be a need for some Saami to leave the field. Kitok's complaint is not that resources may be scarce and limit the number of actual herders. Rather it is over the mechanism by which the exercise of rights in controlled.

The Case for the Defence.

The plight of aspiring *Sameby* supporting members or of former but now barred members like Ivan Kitok may inspire sympathy, and yet in any resource/consumer relationship of reduced flexibility unpopular and seemingly insensitive regulatory decisions must be taken. Rules of differential access to scarce resources are not necessarily always the domain of a dominant majority population. Native minorities might well possess their own system of distribution, which, while possibly favoring a group slighted by the majority's system, still must make difficult decisions. The enormous ethical problems involved with the constitution of resource-use policy do not disappear because they are decided by a Native minority rather than by the majority or the Nation State.

Nevertheless, the rules of distribution policy and most importantly, the rules stipulating who defines these rules are established by tradition and law. The Swedish Crown has proclaimed the validity of certain Saami rights, and the modern Swedish state cannot simply ignore old rights or declare them void without due process of law. The Reindeer Act of 1928 did not provide for such process, and no compensation was given the eligible-to-herd Saami who were not admitted into the *Lappby.* Nor did the Reindeer Act of 1971 consider the issue of the curtailment of rights for the eligible-to-herd Saami who were not granted *Sameby* membership; the question was simply ignored.

Immemorial Ancestral Rights.

The rights of ancestral usage to land, immemorial rights *(urminnes hävd),* are recognized in Swedish civil law. If someone using the land can demonstrate blood ties with the original inhabitants or users of a specific land area, as far back as can be remembered, then this person has certain rights in the area. These rights are not dissolved through passivity, at least until a period of 50-60 years have passed. A family that continues to practice and assert its fishing rights in an area without a 50-60 year break can keep the legal claim to do so viable indefinitely. While the law states clearly by what means one obtains immemorial ancestral rights, the ways in which one can lose such rights are not specified. On this issue, lawyers must consult the interpretations established by legal precedent.

This civil right of the Saami to claim grazing, hunting and fishing rights in their homelands was ignored in the early Swedish

Lappby, reindeer grazing territories and social units under which the Saami herders were to be administered. Saami culture was basically equated with reindeer herding, and the Act of 1886 defined Saami rights as *herding rights.* Herders might have certain hunting and fishing rights on *Lappby* territory (to help them herd), but the rights of non-herding hunters and fishermen were not addressed at all. Cramér has suggested that the importation of German social darwinism and the desire for Sweden to open the north for ore transport by train routes across traditional Saami lands led to a belittling of Saami claims and the formulation of detrimental Saami policies which have continued largely unchallenged until the 1960s. The Act of 1886 was later superseded by the Act of 1898 and later still by the Reindeer Acts of 1928 (with which membership of the Saami herders in the *Lappbys* became compulsory) and 1971. At each successive step, the claims of the Saami have been increasingly distorted from being a recognized civil right to being a privilege granted to a chosen few (an increasingly reduced category) by a government dedicated to the "preservation of Saami culture", i.e. reindeer herding. Saami land rights are acknowledged for eligible-to-herd Saami, but these rights cannot be exercised unless one is a member of a compulsory union, the *Sameby.* Even Åke Holmbäck whose report (19-22) on the Saami legal situation supported the State's continued blindness to Saami claims of immemorial ancestral rights, says in passing that the Act of 1886, the Act of 1898 and the organization of the *Lappby* do not consider the rights of the non-herding Saami and that this latter group has civil rights to land and water (Holmbäck, 1922:72; cf. Prawitz & Cramér, 1970:56-70).

Altevatn and Skattefjäll Cases.

Cramér was the attorney for the Saami both in the Altevatn Case, 1963-68, which concerned the rights of Swedish Saami in Norway (Cramér did the research, and a Norwegian attorney pleaded the case.), and in the Skattefjäll Case, the biggest case ever before the Swedish Supreme Court 1966-1981, which sought to establish increased Saami claims over a large area in Härjedalen and Jämtland (southern parts of Swedish Saamiland). The Altevatn verdict was a major victory for the Saami. The rights of Swedish Saami to continue their immemorial utilization of areas in Norway were upheld. Although the verdict of the Supreme Court in 1981 on the Skattefjäll Case has generally been considered unfavorable for the Saami, camouflaged by technical jargon are points of decisive victory for them. Bertil Bengtsson, one of the Supreme Court judges, in a private letter to Cramer writes:

> The Saami have won the most important question of principle from a juridical perspective: it is possible to gain ownership of land in the manner the Saami have claimed, and no one in the future can suggest that nomads cannot acquire ownership rights. (Bengtsson, letter to Cramer. Jan. 30, 1981).

Moreover, in both the Altevatn and the Skattefjäll Cases, the court explains that it has determined these rights to be and to have been in effect even if illegally ignored in subsequent legislation. The court is not proclaiming new rights, but rather confirming or legitimizing anew old rights which have existed all the time. As a consequence, laws which have ignored the earlier immemorial rights of the Saami can be challenged and should be found unacceptable.

The Vapsten Case is one of the first legal conflicts in which non-herding Saami stand in a position to capitalize upon the concessions wrung from the Altevatn and the Skattefjäll Cases. The civil right of ancestral heritage, immemorial rights, cannot be violated by the Reindeer Act of 1971, and so Cramér argues, the herding, hunting and fishing rights of his clients, all of whom can easily demonstrate ancient ancestral use of the Vapsten territory, arc secured. The defendants cannot be forced to be members of a *Sameby* at the expense of losing any of these rights. It is the Act of 1971 which is at fault rather than the defendants.

Membership in the Lappby must now be

decided according to ancestral heritage, the foundation clarified by the Altevatn verdict 1968 and the Skattefjäll verdict 1981. Rights of ancestral heritage are not lost even if they are not exercised for a long time. Administrative regulations under the Reindeer Act of 1928 have not been formulated upon the proper foundation of Civil Rights, ancestral heritage. Nor has the Reindeer Act of 1971, for the law of 1971 was hypothetical and built upon temporary suppositions which were to be corrected when the verdict was reached in the ongoing trial of principles - which is now the case with the Skattefjäll verdict 1981. (Cramér letter to Lundvall, Dec. 6, 1983).
In a letter to the Court of Appeal dated Dec. 29, 1983, Cramér demands a legal test of the Reindeer Acts of 1928 and 1971 and even of other, earlier laws if necessary. As a basis for this legal test, Cramér refers to sections 1:2, 2:15, 2:18 and 11:14 in the current Swedish Constitution and/or paragraph 16 in the Constitution of 1809. It is here that ancestral rights are secured as a part of Swedish Civil law.

Enforced Relocation.
The resurrection of the principle of immemorial rights implies the end to the Swedish Native minority rights paradigm whereby resource access is limited only to the active herding Saami, union members. From the immemorial rights perspective, a Saami may start herding and hunting even as a non-union member. Civil rights cannot be predicated upon union membership. However, immemorial rights also involve principles of discriminatory resource distribution: it is those Saami with ancestral heritage *to a particular land area* who can exercise certain rights *within that area.* A Saami with ancestral rights in Vapsten has no ancestral rights in Karesuando and vice versa.

Another layer of complexity is added to the Vapsten Case with the introduction of the principle of immemorial rights when considering the fact that all of the current members of Vapsten *Sameby* were originally relocated (some forcibly) from the Karesuando region. Here was a double affront to Saami civil rights. Under no circumstances should Saami with immemorial rights in the Karesuando area have been forced to leave, just as the Saami with immemorial rights in the other districts to which the Karesuando families came should not have been forced to accept them. In both instances due process of law was ignored. Currently in Vapsten *Sameby* only Karesuando Saami - with herding traditions and a Saami dialect different from that of the indigenous Saami - are members. After 1975 the "newcomers" have tried to bar the entrance of those with immemorial rights.

> Such a right (that by ancestral heritage) cannot be lost through eventual passivity until after a very long time. Resumption, or in the first place retention, of these inherited rights to real estate property (which after the Skattefjäll verdict should not be considered the "Crown's" but rather surplus land or by some other property category) has in the meantime become more difficult or has been blocked, practically made impossible, through Sweden's... illegal relocation of foreign persons with a different culture, a different Saami language and another form of reindeer herding which could not be integrated with the southern Saami herding form. The result is equivalent to occupational prohibition for the indigenous Saami despite their rights of ancestral heritage. (Cramér letter to the Court of Appeal, Jan. 12, 1984).

It is vital to understand that relocation of northern (Karesuando) Saami to more southern herding districts, in keeping with secret negotiations between Sweden and Norway in 1912, directly and fundamentally affected the herding abilities of the indigenous Saami. Just as Lars Pittsa pointed out when justifying the exclusion of Ivan Kitok - *Sameby* membership is a highly economic consideration - so too was the relocation of Karesuando Saami to Vapsten (and elsewhere) of huge consequence to indigenous herding, hunting and fishing. The conflicts borne of the Swedish relocation policy for Saami starting in 1912

have been widely discussed (Cf. Beach, 1981, Elbo, 1952; Åhren, 1975). Not only did the great number of herders and reindeer to move south cause increased stress on the resources of the host areas, but there were political and cultural differences as well which caused antagonism between the new-come Saami and the indigenous Saami (Cf. Ren sund, 1968; Park, 1937; Manker, 1928; Hedbäck, 1928). Many indigenous herders were forced from the field through the competition and increased resource stress brought by the Karesuando herders. In effect, some indigenous Saami with civil rights to land far prior to the rights of *Sameby* members have with time even lost herding eligibility according to the Act of 1971 as the result of illegal relocation from the north. Thus Cramér might seek charges based on discrimination against a minority, in this case, the indigenous southern Saami together with the relocated Karesuando Saami.

> When considering the extent to which the ancestral rights of the three families were legally dissolved, one cannot neglect the background in Vapsten *Lappby/Sameby*. If the legal status of the three families was upset because of the relocation of foreign Saami with another language, herding form and cultural characteristics from districts about 600 miles to the north, thereby making it impossible for the (indigenous) Saami to retain their heritage, and if this procedure is seemingly supported by laws which rest on laws which are now by precedent unacceptable as judicial theory, then in my opinion the punishability (of the defendants' "crimes") disappears on the basis of legal test according to point 11:14 (of the current Swedish Constitution). (Cramér letter to the Court of Appeal, Jan. 24, 1984).

Events.

The Vapsten Case, case number B12/82, has been heard at the local (Tingsrätt) level in Lycksele where the three defendants were represented by Stig Renström, a member of the Swedish Bar Association assigned to the task. At the request of the defendants, advocate Tomas Cramér was also present at the court proceedings and officially obtained powers of attorney for them. At this time Renström counselled the judge that as Cramér was far more expert in legal issues involving Saami, he, Renström, would henceforth like to remove himself as lawyer for the defence in favor of Cramér. However, Renström remained public defender until after the court's verdict in Lycksele on June 8, 1983. Since the case was tried only within the context of the Act of 1971, the defendants were found guilty on all counts.

In a letter of appeal to the next higher court, the Court of Appeal, Renström stated that his arguments would be developed in discussion with Cramér. However, such discussion did not occur, and Renström's appeal states that he submits no further evidence to the court. Nor did Renström bother to confer with his clients before making this rather lame appeal, and once this appeal was made, Renström removed himself from the case, leaving those charged without public defender (State-financed defender).

The defendants have requested that the Court of Appeal name Tomas Cramér, the attorney of their choice, as their public defender, but this court refused to do so. When facing the Court of Appeal, the three defendants stood without public defence, in itself a situation worthy of referral to the International Court. This matter has been appealed to the Supreme Court and is still undecided. Cramér, therefore, faces the problem of obtaining payment for his services. His clients are too poor to afford an attorney. The State will not bear the costs of the defence for a simple criminal case. Only if the court recognized the case as an important test of legal principle will the expenses of the defence attorney be covered by the State regardless of the verdict. To date this issue is far from settled. Obviously, if the court agrees that the case is one of importance for the clarification of legal principles regarding Saami legislation - thus eliminating the shadow of sizeable financial risk for Cramér and his clients (if they lose their appeal they may well be called upon to bear expenses) - then the court

has as much as admitted that Cramér is correct in seeking a broad definition of the case's context going well beyond that constituted by the Act of 1971.

Exercising his power of attorney for his clients, Cramér has asked that the Court of Appeal accept testimony from two witnesses, Sigrid Stångberg (sister to one of the defendants) and Johannes Marainen. Sigrid Stångberg has a deep knowledge of family history in the Vapsten area and can demonstrate the rights to ancestral heritage of the defendants. Johannes Marainen is a researcher at Gothenberg University who has specialized in studies regarding the relocation of Karesuando reindeer herders during the first half of the 1900s (Marainen, 1984). As indicated by the background material, evidence on both of these topics is essential to the case for the defence. The Court of Appeal refused to admit these witnesses on the grounds that their testimony would not be pertinent to the issue. Cramér will not be able to appeal this decision until the Court of Appeal has reached a final verdict, and the entire case can be appealed to the Supreme Court.

In their defence at the Court of First Instance in Lycksele, all three defendants stated their firm belief that they were Vapsten *Sameby* members and had acted in accordance with the rights to herd and to hunt that this status gave them. Support for this interpretation can be found in Vapsten *Sameby's* own by-laws of 1975 when the old *Lappby* was transformed into the current *Sameby* under the Act of 1971. It is important to note that the crimes for which they were tried would not have been crimes if committed by *Sameby* members. Östergren shot moose in numbers, time and place legal only for Vapsten members, but he did not hunt in a fashion which would have been illegal for a Vapsten member - something a regular poacher would scarcely have considered.

As basis for their opinion that they are indeed Vapsten *Sameby* members or share in the rights reserved for members, the defendants hold that even the prosecution admits that they have reindeer herding rights (eligibility). What is lacking, according to the prosecution, is union *(Sameby)* membership required by the Reindeer Act. The defendants contest this point and claim, moreover, that even were they not *Sameby* members their immemorial ancestral rights confirmed by the Skattefjäll Case cannot be nullified. The defendants also refer to paragraph 11 and paragraph 12 of the Act of 1971. According to paragraph 11, *Sameby* members are:

1) Those with herding rights who participate in herding within the *Sameby's* grazing area,
2) Those with herding rights who have engaged in herding within the *Sameby's* grazing area and had this as a steady profession and who have not turned to another major form of income-earning,
3) Those with herding rights who are married to a member specified under (1) or (2) or are children of such a member living at home or who are widows or widowers or under-age children of such a deceased member (Act of 1971, i.e. SFS 1971:437).

According to paragraph 12, the *Sameby* can vote to accept as member one who is eligible to herd who does not fit into the framework of paragraph 11. If special reasons exist, the county administration can grant him membership even if the *Sameby* has refused.

Of the defendants, Östergren challenges Swedish Saami policy most directly, for he bases his *Sameby* membership on the claim of immemorial ancestral rights and has exercised these rights with regard to both herding and hunting. Östergren is a prominent member of *Landsförbundet Svenska Samer* (LSS), the National Union of Swedish Saami, an organization largely composed of non-herding Saami (so-called "small Saami") in contrast to the Swedish Saami Organization, SSR, composed mainly of herders (so-called "big Saami") whose activities reflect their interests. Obviously, the two organizations do not always see eye to eye. Israelsson (as well as Östergren in part) claims his *Sameby* membership by the fact that he practices herding on the *Sameby* territory

as per paragraph 11, point 1. Stångberg makes his claim according to paragraph 11, point 3, for he is still living at home with his elderly father who is a member according to point 2.

Although the defendants were found guilty on all counts by the court in Lycksele, punishment was largely waived, except that punishment which pertained to Östergren's hunting offense. The court maintained that since the defendants had been acting under the (false) belief that they were *Sameby* members, they should not be severely punished for their reindeer herding. After he had been herding reindeer for some time, Östergren applied for a hunting permit and was made aware by the authorities that he could in no way consider himself a *Sameby* member with a member's hunting rights. As this did not deter Östergren from hunting moose as if he were a member, the court sentenced him on this count to the full extent of the law: heavy fines and one month in prison.

Assuming that the defendants are not to be considered *Sameby* members, "outsiders", the court was correct in its interpretation of the Act of 1971; Östergren, Israelsson and Stångberg cannot claim *Sameby* membership on the basis of paragraph 11. It is not enough to be eligible and to start herding in a territory. Otherwise *Sameby* membership lists would swell to uncontrollable numbers. It is also necessary to be accepted by official vote of the *Sameby* in question in order to be a member if one is seeking entrance from "outside". Naturally, this implies an already existing core of members to make these decisions, and one might well wonder who granted the membership of the original *Lappby* members in 1886 and again in 1928 when membership was first made compulsory.

Supposedly, all those who were herding in an area which came to be defined as a *Lappby* in 1886 were to constitute its membership, but this simple formula veils many problems. The Swedish Crown had instituted a policy opposed to forms of livelihood based on a combination of herding and farming (Beach 1981:306-12; Ruong, SOU 1975:100, p. 424). Saami herders were to be "true nomads" and nothing else. A trend toward a more settled life, it was thought, would make them "soft", less efficient herders, and as a consequence their reindeer would wander uncontrolled into the fields of the Swedish farmers. Equally important, the Crown did not want its settled Swedish population to adopt nomadic traits, as many had. The Crown wanted a "civilized", settled farming community to defend the territory and promote commerce. To regulate the numerous transgressions of this principle of non-combination and to prevent and mediate the frequent quarrels between farmers and herders, the Crown instituted the so-called "Lapp Sheriff authority which was to remain in effect until the passage of the Act of 1971.

The Lapp Sheriff was an extremely powerful figure, often more powerful than his mandate would justify. The Sheriff was the guardian of the Crown's land with respect to herding, and he could easily divest a herder of his *Lappby* membership or relocate him. Under the ideal of the true nomad and the pressure of herder-farmer conflict, a Saami who hunted, fished, had a small permanent cottage as well as some reindeer was not considered a herder nor a *Lappby* member by the Sheriff. Often such Saami would come to be dropped from the membership lists, but more likely they never were listed as *Lappby* members. This principle is still evident today in the Act of 1971. Paragraph 11 quoted above, for example, specifies that a herder is a *Sameby* member if herding is his steady livelihood. As a member he should not go over to another form of major income earning. Immemorial ancestral rights have never been considered in deliberations of *Lappby/ Sameby* membership. The law makers were at fault in dealing with the right to herd reindeer as if it were a service-distribution right (Hoffmann 1983), a privilege bestowed by the State, rather than an immemorial right as confirmed in the Skattefjäll Case.

Should the courts maintain that *Sameby* membership lists are the only legal source

for membership determination, then it is obviously important for the defence to investigate how the families of the defendants, with a history of herding in the Vapsten area, came to fall outside of these lists (if any lists existed). Were the defendants' ancestors ever on the lists? And if they once were, when and why were they dropped? In the effort to attain some knowledge of these matters, Cramér wrote (Dec. 6, 1983) to Mr. Lundvall at the reindeer administration office in Umeå. The records supplied by Lundvall (the same administrator who started legal proceedings against the defendants) are vague, incomplete and inconclusive. It is difficult to discern at this point whether the clients' families came to be omitted from at list according the the letter of the existing law (now a contested law), or if they were by-passed in a manner even at odds with the (faulty) legal framework of the time. In either case, Cramer holds that the burden of proof that his clients are not *Sameby* members and the explanation as to why they are not lie with the authorities. It should not be a task for the accused to shoulder the burden of proof that they are *Sameby* members.

I should like to add the following points to Cramér's argument: the validity of the so-called membership lists can be questioned even if they were complete and clear. Especially in earlier times these lists were really reindeer-count lists. For various reasons, including taxation, it was necessary to count the reindeer in a *Sameby.* The reindeer were then listed by owner. In fact, even today for many *Samebys* there is no true membership list at all. The list of owners of the reindeer in a *Sameby* - the annual, *Sameby,* reindeer-count list - cannot be considered to be the same as a real membership list. With the coming of the Act of 1971, all herders who fulfilled the requirements of paragraph 11 were forced to become *Sameby* members. But even those herders who did not comply with paragraph ll's requirements simply continued as if they did. The issue was never pressed. According to Knut Gustavsson (once on the staff of the reindeer administration in Umeå), if a strict list were demanded according to paragraph 11 today in each *Sameby,* the already small population of reindeer herders of about 900 people would be reduced to about 700 (personal com., see - Beach 1981:390). If it is recognized that the *Sameby* lists are inaccurate by containing more "members" than paragraph 11 strictly would permit, then it is doubtful if such a list should be taken as gospel for establishing legal membership status. The *Sameby* has no right to exclude existing official members.

Officials have argued that the lists might err by crediting as members some that should not be members but not by omitting to list any that are or should be members. Nonetheless, the lists are suspect. Moreover, the fact that the lists may err in excess has direct bearing upon the possibility that they may err by omission. It is the *Sameby* members who vote to accept or reject the membership applications of eligible herders. If some of these voting members really should not be members, then their vote might unjustly block an applicant from membership. Their vote in herding matters might also be partially responsible for economically pressuring from the field someone who is already a herder and a member.

The prosecution at the Court of First Instance in Lycksele, Mr. Lars-Erik Sundberg, has also entered an appeal (July 22, 1983) to the Court of Appeal in reaction to the lower court's verdict. Of course Sundberg agrees with the Court of First Instance's establishment of guilt for the defendants, but he expresses his opposition to the waiving of the full punishment he believes such guilt demands. The court justifies its reduced sentence by the claim that the defendants (except for Östergren during his moose hunting) were operating with the good faith that they were indeed *Sameby* members. Sundberg contests this claim and cites evidence, particularly discussions with Mr. Lundvall at the reindeer office of the National Agricultural Board, that the defendants knew all along that they were not *Sameby* members, or at any

rate that they were not considered so by the authorities. Apparently Lundvall had given them repeated warnings. Sundberg maintains that it is absurd to believe that the defendants did not know that they were not on the *Sameby* list. They had been given the list. Another member of the prosecution, Mr. Fred Östling also appealed the lower court's verdict (June 27, 1983) on the same grounds. Östling calls for a longer prison term for Östergren, that he be made to compensate the value of the moose he poached and that Israelsson and Stångberg be made to pay fines for their illegal herding.

In what appears to be a rather blatant revenge tactic for the trouble that the defendants have caused Vapsten *Sameby* and the herding authorities, the County Administration at the request of the *Sameby* issued a notice on April 18, 1984 that certain reindeer ear marks (in all about 30 marks, among them those of the defendants) would be cancelled. According to law, herders must have individual reindeer ear marks registered with the reindeer administration. The pattern of cuts and notches in the ear which composes the mark must undergo an elaborate process of inspection and approval to ensure that it is not too much like another mark and cannot be altered to become another mark. Old marks can be inherited, bought and sold. Those who own reindeer but do not herd them themselves, so-called "contract-reindeer" owners (Beach 1981:110) must also have marks. A herder or contract-reindeer owner without a registered ear mark is effectively hamstrung. He cannot proclaim ownership over his reindeer. If he uses an illegal mark, it can be ignored, and the *Sameby* can take this reindeer.

The *Sameby* cannot simply request the cancellation of a mark owned by a member or by an accepted and practicing contract-reindeer owner whose reindeer are under the care of a *Sameby* member. However, many Saami who are not *Sameby* members and who have not been granted contract-reindeer ownership status by a *Sameby* still own registered marks. The possession of a mark, often one that has been in the family for generations, has a personal value extending far beyond the practicalities of herding. There are many non-herding Saami who own marks but no reindeer to bear these marks. For those who are eligible to herd (and who may seek *Sameby* membership) or who have children whom they hope may someday gain admission to the *Sameby,* the possession of an old, dormant mark in the family can be extremely valuable.

The law stipulates that marks which are not registered under a *Sameby* member should be cancelled (a contract-reindeer owner's mark is counted as belonging to the active *Sameby* member responsible for herding his reindeer). Yet, if there are no reindeer bearing such a mark, the *Sameby* generally docs not feel itself pressured to cancel it. In the case of the defendants, however, there are indeed reindeer marked by Östergren, Israelsson and Stångberg on Vapsten territory. Following the letter of the law, Vapsten *Sameby* can seek to cancel the registration of the marks belonging to these "illegal" herders as well as those "dormant" marks belonging to all other non-members in the *Sameby* area. It is most significant that the motion for cancellation occurred when it did. The defendants have used their marks for a number of years already, but it is only now when the court conflict intensifies that cancellation is sought.

Not only can this action be considered an attack on the defendants, but it must also be seen as a warning to others, especially the indigenous Saami who have lost their right to exercise their herding right. The *Sameby* has in effect announced to non-members in general that if they want to start a fuss, the *Sameby* can take action to hurt them. Numerous non-members who have been granted contract-reindeer rights and limited hunting and fishing rights in certain areas by their local *Samebys* read the message clearly. Any "small Saami" who is beholding to the *Sameby* for some special privilege had better not become too vociferous in demands to break the occupational rights paradigm and take power from the herders. Östergren believes that for this very reason many more Saami sympathize

with the position of LSS, the "small Saami" organization, than arc willing to support it openly and actively (personal com.).

Cramér has, of course, submitted a written objection to the Country Administration's design to cancel the marks of his clients and other indigenous Saami in the area. Cramér points out that the principles of herding rights are currently under court process in the Vapsten Case and that immemorial ancestral rights alone, even without possible *Sameby* membership based on the by-laws, may suffice to give the indigenous Saami herding rights for which the maintenance of their marks if perfectly justified.

There are many possibilities open to the defence in conducting the case. The numerous methods require careful planning by the defence and formulation of a priority of strategies. These strategy priorities must be adaptable to the context of the case which the court is willing to entertain. At the same time, the defence must plan a strategy to cause the court to entertain a context or definition of the case most favorable to the objectives of the defence. In the next section I shall present in order of priority the strategy for the defence once in the Supreme Court. In the section following upon that I shall give an account of the means by which the defence can try to influence the definition of the case before it has re-entered the courts. The strategy of the defence is long-sighted and charts a continued course through the Supreme Court of Sweden and the International Court at Strasbourg.

Strategy in Court.

Once the Vapsten Case is taken up in the Supreme Court, attorney for the defence Tomas Cramér (hopefully by this time declared "public defender" by the Supreme Court so that the State will cover litigation expenses) plans to develop his arguments if need be through five stages. These points and their priority of presentation to the court have been discussed in detail by Cramér with the author, for it is possible that he will be called upon by the defence to testify on the subject of *Sameby* voting procedures. The following are the levels of argumentation devised by Cramér to be utilized as necessary, depending upon the receptivity of the court.

1) The defendants possess land ownership (perhaps together with other Vapsten Saami with immemorial rights). As they have private ownership, they can hunt, herd and fish on their own land regardless of the Act of 1971.
2) Even if immemorial rights no longer secure herding rights (assuming these have been taken over by herding law), the defendants still possess hunting (and fishing) rights based on their ancestral heritage (Holmbäck, 1922:74). Here too, the defendants cannot be regulated by the Act of 1971.
3) The three clients have always been members of Vapsten *Sameby.* The *Sameby* cannot exclude them (Prop. 1971:51 p. 119), and it is up to the *Sameby* and the herding administration to explain why the *Sameby* does not consider them members and how they have left the *Sameby* in spite of its own by-laws. The opening act of these by-laws proclaims the continuity of the new *Sameby* with its historical antecedents and derives its rights from times long prior to 1886. That is, even the new Vapsten *Sameby* composed mainly of Karesuando Saami derives its rights from the indigenous Saami. In this case, the defendants come under the regulations of the Act of 1971, but even in the by-laws occasioned by this Act, the *Sameby* makes its own land ownership claims.
4) In legislating the Act of 1971, Parliament said (JoU 1971:37, p. 36) that it did not take any concrete stand in the issues then in court (the Skattefjäll Case 1966-81). Therefore, the Skattefjäll Case verdict overrides the Act of 1971. Because the Skattefjäll Case confirmed Saami immemorial rights, it is wrong for the Act of 1971 to make *Sameby* membership a precondition for the exercise of these rights.
5) If it is asserted that the defendants lost

their *Sameby* membership status, then it is possible to show that they were forced from the field by the Saami mat were illegally (against paragraph 16 of the Constitution of 1809) and forcibly relocated to the area from Karesuando. The defence can then invoke points 2:15, 2: 18 and 11:14 of the Swedish Constitution condemning the discriminatory treatment of an ethnic group. The government could never have carried out such a forcible relocation of Swedish farmers.

The general background to these five arguments has already been discussed. Other, specific points pertaining to argument 5 strengthen the case for the defence further. The Northern Saami families which were relocated to the Vapsten area never obtained the necessary permits for permanent residency there. Originally they were not supposed to stay. Apparently the reindeer herding division of the National Agriculture Board disregarded this requirement in favor of the Northern Saami. Moreover, during the transition from the *Lappby* to the *Sameby* occasioned by the Act of 1971, two separate groups sought to gain recognition as forming Vapsten *Sameby,* a group composed of Northern Saami and a group composed of indigenous, Southern Saami. Vapsten was the last *Lappby* to be re-organized into a *Sameby* in 1975, and the reindeer herding division again favored the Northern Saami. Vapsten became a *Sameby* of Northern Saami despite the by-laws and the lack of a membership list (see above).

The Wider Strategy.

In order to set the stage in court so that the arguments of the defence will be given greatest consideration, Cramér can employ a number of stratagems. First of all, he can pressure the prosecuting attorney to clarify his position regarding the immemorial rights of the defendants. If it can be demonstrated that the issue of immemorial rights has not been granted the attention deserved and required by law, then Cramér will be in a position to declare the trial biased. Similarly, Cramér can make the courts aware that their barring of his witnesses, Stångberg and Marainen, can be used by him to question the impartiality of the Court of Appeal's judges. In effect, the more persistent the prosecution and the Court are in defining the case solely in terms of the Act of 1971, the greater the risk they run of supplying the defence with ammunition for appeal.

In his letters to the courts, Cramér has explicitly mentioned his intention to follow this case through to the International Court in Strasbourg if need be. For example, he has quoted passages to the Court from the European Convention (which Sweden has signed), supporting the rights of his clients to have the public defender of their choice. Cramér hopes that awareness of the Strasbourg threat with the risk of serious embarrassment for Sweden will force the courts to broaden the definition of the case and, by entertaining his arguments, recognize it as an important case of principle.

Not only does Cramér wish to inform the Swedish courts of his determination to bring the Vapsten Case to Strasbourg if necessary, but he also seeks to establish contact with the International Court there well ahead of time. In order for a case to qualify for the court at Strasbourg, one must be able to demonstrate that the existing legal processes of the country of origin have been exhausted. It is important to confer with the judges in Strasbourg over the qualifications of the Vapsten Case so as to determine how best to formulate an eventual appeal. If, for instance, Cramér is not named public defender for his clients, there are already grounds on which to build a case in Strasbourg, although more might be gained by questioning other aspects of the Swedish legal procedure.

According to the regulations of the European Convention, no case is to be tried in Strasbourg contesting legislation formulated prior to 1950. This regulation would put the Act of 1928 with its clause of compulsory *Lappby* membership for herders out of range for appeal. However, it is Cramér's contention that as the Act of 1971 ignored

Saami immemorial rights even after these had been confirmed by the Altevatn verdict three years previously, and as the Skattefjäll Case was pending since 1966, a gross legal injustice was committed. The Act of 1971 maintained the compulsory membership of herders to the *Lappby/Sameby* begun by the Act of 1928. But, in accordance with article 6 of the European Convention, it was said in Parliament that the Act of 1971 had no intention to intervene in the Skattefjäll Case, where in 1981 immemorial rights were finally confirmed. Since only those eligible herding Saami who actually are *Sameby* members can exercise their special, Saami resource rights, what should be immemorial Saami rights are blocked by an enforced and highly selective enrollment. In short, just as the matter of definition of the case is of utmost importance to its final outcome in the Swedish courts, so is it of great concern for the International Court. As a result, Cramér must be aware of different legal contests as he argues for the defence in the Supreme Court; besides considering the Supreme Court trial itself, he must keep in the mind strategies which, even if useless at this level, may prove valuable for the record when appealing to the Strasbourg Court.

Summary.

It is evident that the verdict of the court (at whatever level) will be predicated upon the framework of the legal contest accepted by the court. Given a narrow definition of the confrontation, the verdict of the Supreme Court will probably not be in the least surprising. The interpretation of the lower courts will be upheld. Should Cramér succeed in establishing the Vapsten Case as one of principle, challenging the legality of the very framework upon which the lower courts based their verdicts, the case can be vaulted to a position of monumental significance for the Saami minority in Sweden.

If the first of the five points of argument is conceded by the Supreme Court, that Saami with immemorial rights in an area automatically and forever possess herding, hunting and fishing rights there *(at least* those rights secured by *Sameby* membership), then a precedent would be set with far-reaching repercussions of principle. Native minority rights in Sweden would be forced out of a narrow occupational model. The extent of the practical repercussions of a possible swelling of the category of specially privileged resource utilizers (through a reactivation of immemorial rights external to the *Sameby* and/or an increase in the *Sameby* membership lists) will be considered below, as this is a feature involved in all of the arguments of the defence. However, not so many Saami can claim a viable tradition of immemorial rights in their ancestral area. To lay a convincing foundation for immemorial rights in an area, a Saami would probably need still to be living in his ancestral area. If the exercise of immemorial rights on ancestral ground by a certain family is broken for a lengthy period, the courts might find these rights forfeit.

Recognition of immemorial ancestral rights would not necessarily demand the total invalidation of the Reindeer Act of 1971. Herding eligibility criteria according to paragraph 1 could still be used as long as it were also established that any Saami who can demonstrate immemorial rights in a specific area cannot be barred from exercising these rights. Should the law require that all herders (hunters and fishermen) be enrolled in a particular organization like the *Sameby,* then it must be clear that membership in such an organization can never be denied someone with proven immemorial rights in that specific area (regardless of any kind of voting system by the organization's members). Of course, a Saami with immemorial rights in one district cannot claim herding, hunting or fishing rights in another district on those grounds alone. Should he wish herding rights in an area to which he holds no immemorial rights, he would have to apply for membership to the *Sameby* of that district according to the current rules of the Act of 1971. Reindeer herders in Alaska, for instance, commonly must seek grazing permits from up to four distinct land owners in order to puzzle to-

gether a proper range (Beach, 1985).

Should the courts adopt a position in accordance with Cramér's second argument, all that has been said in connection with the first argument will apply accept on a more limited basis. Herding will be separated from hunting and fishing with regard to its legal and regulatory foundations. In mis case one could imagine non-herding Saami hunting and fishing on *Sameby* territory according to immemorial rights. As Saami hunting and fishing rights today are far less studied or clearly defined in law than are reindeer herding rights (see, for example, SOU 1975:99), one can suppose a situation where the hunting and fishing rights secured by immemorial rights differs from those hunting and fishing rights accompanying herding rights in the Act of 1971. In all probability, further legislative work would be required to specify the relation of these two different foundations for special hunting and fishing rights. The two need not necessarily have identical quotas and seasonal limitations.

The Supreme Court's concession of the third point of argument, that the clients are and have always been Vapsten members, would cause many other eligible, once-active herders to find a means to resume herding despite the rejection of their *Sameby* applications.

Acceptance by the court of the fourth argument could occur in conjunction with any of the other points. Whether or not all Saami with immemorial resource rights are to be *Sameby* members, the precondition of organizational membership for the exercise of these rights (to *any* such union) is unjustified and must be revoked. This issue is all the more immediate when eligibility even to apply for union membership becomes linked to a phase-out, occupational clause as it is in Sweden. The phase-out nature of paragraph 1 of the Act of 1971 must be removed pursuant to the Supreme Court's confirmation of immemorial rights. Immemorial rights may have their own phase-out quality (for example, extreme passivity), but no other phase-out clause should apply to resource utilization encompassed by immemorial rights, and no phase-out clause whatsoever can be based upon the precondition of organizational membership. Thus confirmation of immemorial rights must affect the process of *maintenance* of resource rights as well as the formulation of the criteria specifying who originally has these special resource rights.

Cramér's fifth argument, if accepted, could also have major repercussions, but not of such a permanent nature nor of such principle importance for the Swedish Native minority rights paradigm. Certainly many (Central and Southern) Saami whose applications for *Sameby* membership were rejected might gain the opportunity to acquire membership. They argue that they lost their membership (or their ancestors did) as a result of the illegal forced relocation of Northern Saami to their area. However, once these claims had been dealt with and possible compensation paid, the same principles of herding regulation and occupational herding rights would continue unchanged. The "phase-out" nature of the law would not be altered; only the degree to which Saami rights had been phased out would be temporarily thrown back. Certainly many of the same problems borne of Saami factionalism would erupt. It would only compound a terrible injustice if the Northern Saami and their descendants (born and at home in their current *Samebys)* were to be forcibly returned to the Karesuando district.

Many of those who might otherwise support the position of the "small Saami" on principle hesitate to do so for fear of stirring up even more injustice or setting what they see as a dangerous precedent for herding realities. The "reactivated" indigenous Saami might press into herding territories where there was little or no room for them and their reindeer. Maybe some Northern Saami would be forced from the field due to Southern Saami "reactivation". This is hardly probable. The situation in Vapsten *Sameby* cannot be considered representative. Antagonism between Northern Saami and indigenous Saami herders is usually nowhere near so great. Moreover, the number of

people affected by such a policy change is not as large as one might at first think.

I believe that despite an initial shock of repercussions, the old system would remain largely intact. Even if the indigenous Saami along the Big Lule River (where this issue is notoriously hot) were to be included in their regional *Samebys* or given only hunting and fishing rights, one would not necessarily see any permanent, long-term changes. After a chaotic flurry of new *Sameby* members, the practicalities of the herding life would assert its weeding process and reduce herders. Were an indigenous herder (once again) forced from the field and his *Sameby* membership, I can see no reason why he would be in a better position to return than he is today. At least he will have secured herding eligibility rights for his descendents for two generations according to paragraph 1 of the Act of 1971. Some "returning" indigenous Saami, like the defendants in the Vapsten Case, might survive as herders. They have never left their home region or a way of life close to that demanded of Nature there. More would fail. Many would not even try. Most likely the State would set a time limit defining a specific period during which the return of indigenous Saami to the *Sameby* would be tolerated. One can imagine all manner of administrative regulation to implement such a major decision. Hearing and due process must be observed, however. The reader is encouraged to speculate on the possible effects arising from the Court's acceptance of various combinations of Cramér's five points of argument.

The Skattefjäll Case, while giving no Saami victory over the specific land area in question, did however entail important concessions of principle. The Supreme Court confirmed that even the seasonal and nomadic utilization of land by the pre-colonized Saami is and was enough to establish immemorial rights and lay a claim for ownership-at least claims to rights of grazing one's reindeer, hunting and fishing: The implications of this seemingly simple concession are enormous. Viewed from the perspective of what this verdict might come to mean for the Saami legally, the close of the 15-year-long Skattefjäll Case can signal the beginning of a new era of Saami rights in Sweden.

Nonetheless, confirmation of a principle is not implementation. Recognition of a right in one court case does not automatically insert this recognition elsewhere and readjust existing legislation in its light. The Skattefjäll verdict remains an unplayed score. Cramér had hoped to take it to Strasbourg on hunting rights issues, but SSR, the organization he represented, voted not to do so. Instead, SSR sought to embark upon a policy of negotiation rather then confrontation with the State. The Vapsten Case is to a certain extent a logical continuation of the Skattefjäll contest. It is another step in the continuing legal dialogue between the Swedish State and its Native minority. State exploitation of Saamiland for industry is the big menace to the Saami (and, of course, others with conservation interests) which adds the sense of urgency for the resolution of these issues.

Defined in this way, the Vapsten Case could not help but proceed to the Supreme Court, and, as it began with criminal charges brought against private citizens (whose affiliations lie moreover with LSS, the "small Saami" organization (non-herders) rather than with SSR), it would undoubtedly continue to Strasbourg if unsatisfactorily resolved in Sweden for the defendants.

Once at the International Court, it is difficult to imagine that the Swedish State could emerge unembarrassed. World-wide media coverage and condemnation might bring the State to make some compromises. However, it must be noted that in Sweden the enigmatic "transformation rule" frees the Swedish government from necessary compliance with the European Convention's rules. International disapproval might produce some results, and a court ruling in favor of Cramér's clients at Strasbourg does demand compliance from Sweden.

Whereas the statutes of an international convention may be accepted as national law automatically by some signing member countries (the U.S. for example), Sweden con-

siders itself under no definite obligation to abide by any international code of agreement it signs unless these rules have been transformed into Swedish law. Of course, this makes it easier to sign noble charters, for the risk of uncomfortable consequences is minimized. Transformation is rarely carried out.

Obviously, if as a result of the Vapsten Case (or any other similar legal contest) Swedish Native minority policy were altered significantly, the Act of 1971 redesigned and a wide category of Saami people permitted to herd, hunt and fish on *Sameby* land, this in turn would demand that the State negotiate settlements with, and pay compensation to, a much larger Saami population upon expropriation of land. Just as obviously, the current group of practicing herders would feel severely threatened by the opening of "their" rangelands to a wider category of people. One can anticipate a furious and bitter struggle between the so-called "big Saami" and "small Saami" - similar to that displayed during the Kitok Hunger Strike or the proposal for *Sameby* supporting members-reflected in positions adopted by the different national Saami organisations. On the other hand, many "big Saami" might applaud, nonetheless, the resurrection of Saami *minority* rights over purely *occupational* rights. Especially those small herders in danger of being forced from the *Sameby* on economic grounds (those who must acquire another major from of income earning) might rejoice in the knowledge that their rights are forever secure in their area of immemorial ancestral rights. Furthermore, those Saami who are concerned for the survival of the Saami culture and Saami rights in general, beyond private considerations, might welcome a development which opposes the gradual "phasing out" of Saami rights under paragraph 1 of the current Reindeer Act. Immemorial ancestral rights will disappear only if knowledge of ancestry is lost, if families completely die out, or if there has been passivity in the exercise of these rights for a 50-60 year period.

While the recognition of immemorial ancestral rights and their implementation in herding law would be a great victory in principle for the Saami people as a whole, such changes would not throw the herding industry into turmoil. Gross revision of the practical regulations concerning resource utilization would not be demanded. The transition from one functioning system to another cannot be accomplished without some pain and injustice to individuals even if the new system is in principle an improvement and a rectification of other, earlier injustices. A common argument for maintenance of the status quo is that reindeer herding, the backbone of Saami culture for herding and non-herding Saami alike, is today in such a stressed and vulnerable position in Sweden that too much turmoil and strife could cripple it terribly and perhaps permanently. It might then be argued mat the goal of the "small Saami", to revamp the legal implications of the distinctions between practicing herders, eligible herders and non-eligible herding Saami and to secure ethnically based rights, was purely a selfish motive and that the repossession of immemorial herding, hunting and fishing rights by the "small Saami" was gained at the expense of the Saami culture, Yet in reality it is only in the Vapsten and Big Lule River regions that such repossession of immemorial rights is an issue of any notable practical impact. I believe the injustices evident in these regions demand rectification. A positive verdict for the Vapsten Case defendants presents the Saami people as well as the Swedish State with a challenge. It is a challenge which the Saami should share, a responsibility which goes hand in hand with the possession of special resource rights based on Native status.

In order for the Saami to have an effective voice in issues vital to them, it is essential that they overcome the factionalism supported by the Swedish Native rights paradigm. SSR, the organization currently dominated by herding Saami, is far too small and comprises far too limited a proportion of the Saami as a whole to lobby forcefully against State policy. Unless a way is found for the herders and the non-herding Saami to unify their efforts, the exploitation of the northern forests and waterways and the

erosion of Saami resource rights will proceed unhampered. While it is of greatest importance for the Saami to organize a powerful lobby, until a resolution of the recurring conflicts illustrated by the Vapsten Case is attained, there is little hope of progress. A unified Saami lobby will have trouble enough influencing State policy; a splintered Saami people will find the task practically impossible. LSS, the organization composed of "small Saami", has a potential membership far greater than that of SSR, but cooperation between the two is poor. In the face of the continual exploitation of Saamiland and the neglect of Saami rights, the need for a united stance becomes increasingly urgent. All the major Saami organizations realize that divided, the Saami will fall. Currently there is a strong movement toward the foundation of an all-encompassing Saami Parliament. The Vapsten Case, with all of its problems over the categorization of Saami and with the accompanying inflammation of factional relations, is, nonetheless, part of the unification process.

Permit me in closing to posit my personal view on this delicate issue. It should not be the domain of the State to legislate the most internal and intimate relationships between Saami. Of course the State does play a vital and justified role in framing the regulation of its resources within bounds, but neither the State nor the Saami (for the sake of factional peace-keeping) should seek State control of the internal system of distribution and resource utilization of the Saami as long as they abide by the external framework established by State law. Swedish State policy regarding Saami has followed a divide-and-conquer evolutionary path. One Saami group has been offered advantages at the expense of another, and it is understandable that the privileged group clings to the privileges granted and adopts the underlying paradigm. The Saami should not tolerate an all-too-refined, State-imposed division into categories with differential resource rights and voting powers. Such divisions have caused much of the factionalism which so drastically weakens the ability of the Saami to defend their rights, their culture and the land. Granted, the State must make some distinctions--the very distinction between Saami and non-Saami (Swede) whereby only Saami can be eligible to herd is one example--but after the necessary framework is set (defining the Native category's rights as a whole and protecting the environment), the Saami should be allowed to govern their own internal relations regarding their special rights.

Much of what has been discussed here has not happened and perhaps will not happen.[1)] Nonetheless, the issues are real and very much kept in mind by the defence, who is well aware of the stakes in the Vapsten Case. The points of debate and negotiation currently at hand concern how much of this overall context will be recognized in court, how much of it can be forced upon the court before the case reaches the next level and how much can be forced upon the court through argument once the trial is in session. In short, it is largely a matter of legal definition. To the casual, surface observer, the Vapsten Case involves the crimes of moose poaching and illegal herding ("unlawful interference"). Beneath looms a huge legal iceberg capable of sinking the Swedish State's Native minority rights paradigm.

1) From the perspective of the study of advocacy and anthropology, the development of a case as well as its final result is of interest. In time, I intend to report on the outcome of this case with reference to the strategies outlined here. There is surely much to be gained from a diachronic study.

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