

# The Recognition of Sacred Natural Sites of Arctic Indigenous Peoples as a Part of Their Right to Cultural Integrity

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Sacred Natural Sites (SNS) are an important means for the expressions and transmission of culture, and a manifestation of spiritual values of nature, which have contributed to the conservation of species and habitats. However, many SNS are increasingly under threat, and their contribution to conservation is still not sufficiently recognized by states and conservation agencies, laws and policies. With a growing recognition of the mutual dependency between biodiversity and sociocultural systems in the Arctic, indigenous communities, conservationists, law-and policy-makers are endeavoring to re-establish bio-cultural diversity as a constructive pathway for conservation law, policy and practice. The integration of indigenous rights into conservation, through rights-based approaches is an emerging and challenging area. This new rights-based approach to conservation acknowledges that conservation and human rights must be pursued in mutually supportive ways that contribute to the common goal of environmental sustainability and human well-being. Much remains to be done to better understand the benefits, practical implications and limitations of such rights-based approaches. This paper discusses the role of international law as well as sui generis processes from the sub-Arctic and Arctic regions that recognize and

uphold indigenous peoples' rights in conservation, and where action for the conservation of sacred natural sites is being taken by indigenous communities themselves using international law and policy instruments, or developing their own community instruments. These cases provide ways forward for duty-bearers and custodians to engage in constructive dialogue to seek together synergies to mutual responsibilities and benefits, and to build new spaces in law, policy and practice in the Arctic.

**Key-words:** Sacred Natural Sites; Indigenous Peoples; Arctic; cultural integrity; international human rights law, international environmental law

## 1. Introduction

This article studies the recognition and protection of sacred natural sites (SNS) of Indigenous Peoples (IPs) as a part of their cultural and environmental integrity by looking at the human rights law (right to cultural integrity) and relevant political instruments of international environmental law that recognize and have the potential, when effectively implemented, to offer a legal protection to SNS of IPs. Although this paper puts a special emphasis on Arctic IPs, global instruments that bind nearly all states are being studied with the background of case law outside the Arctic, due to their direct relevance.

SNS are natural areas of special spiritual significance; they “include natural areas recognized as sacred by indigenous peoples, as well as natural areas recognized by institutionalized religions or faiths as places for worship and remembrance”.<sup>1</sup> SNS are integral parts of ethnic identity and play a key role in traditional cultures and lifestyles. For example, the Maori in New Zealand see the mountains as frozen bodies of ancestors. They symbolize their ethnic identity. In tribal meetings, Maori identify themselves by first giving the name of their mountain tribe, their lake or stream and finally, their leader.<sup>2</sup> Cultural values are at the core of ethics and practices of local custodians of SNS. These custodians play a key role in the governance of their community, holding deep knowledge of spiritual practices, and biodiversity management according to customary laws.

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1. Oviedo G, Jeanrenaud S., “Protecting Sacred Natural Sites of Indigenous and Traditional Peoples” in Mallarach J, Papayannis T, (eds), *Protected Areas and Spirituality*. Proceedings of the First Workshop of the Delos Initiative, Montserrat, 23–26 November 2006. Gland, Switzerland: IUCN and Montserrat, Spain: Publicaciones de l’Abadia de Montserrat, 2007.
  2. Bernbaum E., “Les montagnes sacrés” in *Unasylva* 208 (53) 2002 pp. 54–55.

SNS are being increasingly recognized as natural reservoirs harboring high levels of bio-cultural diversity.<sup>3</sup> They protect a variety of habitats, and guard traditional practices and knowledge related to biodiversity conservation<sup>4</sup>. They help to uncover the processes by which beliefs and cultural practices (songs, stories) create inextricable interlinkages between societies and nature.

Despite the increasing recognition of SNS's role in the conservation of bio-cultural diversity, and the transmission of culture and identity, legal protection of SNS and related policies are still often insufficient or absent. In the Arctic, it becomes increasingly difficult for custodians to protect these ancient sites, due to outside impacts, such as economic developments (tourism, mining, forestry)<sup>5</sup> and infrastructural development (roads, dams).<sup>6,7</sup> Other SNS are comprised within official State protected areas, and IPs have lost rights on them. Moreover, current policies and management practices are often not aligned with traditional management structures based on customary laws.<sup>8</sup>

At international level, SNS have been receiving increasing legal attention, and, as will be discussed in this article, can be protected through international instruments. Yet, effective and culturally appropriate implementation is often still lacking.

With a growing recognition of the mutual dependency between biodiversity and socio-cultural systems in the Arctic, the integration of human rights and indigenous rights into conservation, through rights-based approaches is an emerging area.<sup>9</sup> This new rights-based approach to conservation, supported by the conclusions of this article, acknowledges that biodiversity conservation and human rights

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3. Maffi L, Woodley E, *Biocultural Diversity Conservation: A Global Sourcebook*, Earthscan, London, 2010.
  4. Dudley N, Higgins-Zogib L, Mansourian S., "The Links between Protected Areas, Faiths, and Sacred Natural Sites" in *Conservation Biology* (23) 2009 pp. 568–577.
  5. Norokorpi Y, Ojanlatva E., "Ukonsaari Island. Lapland, Finland" in Mallarach JM, Papayannis T (Eds) 2007 cited above, pp. 165–173
  6. Klubnikin K, Annett C, Cherkasova M, Shishin M, Fotieva I., "The Sacred and the Scientific: Traditional Ecological Knowledge in Siberian River Conservation" in *Ecological Applications* (10) 2000 pp. 1296–1306.
  7. Hamdallah Z.,. Foreword. *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, Secretariat of the Convention on Biological Diversity 2004 p. 1.
  8. Ross ML., *First Nations Sacred Sites in Canada's Courts*, UBC Press, Vancouver 2005.
  9. IUCN-CEESP, *Policy Matters 17: Exploring the Right to Diversity in Conservation Law, Policy, and Practice*, 2010.

must be pursued in mutually supportive ways that contribute to the common goal of environmental sustainability and human well-being. Much remains to be done to better understand the benefits, practical implications and limitations of such rights-based approaches. Hence, the objective of our study is to explore the theme of rights and cultural integrity by analyzing traditional as well as new instruments, initiatives, and mechanisms. To meet this objective we first describe international human rights mechanisms, added with case studies. Secondly, we examine and analyze the response to the recognition of SNS in international environmental policy (soft-law) instruments. Then, we document *sui generis* processes from the sub-Arctic and Arctic regions, where action for the conservation of SNS is being taken by indigenous communities themselves using international legal and policy instruments, and community protocols. These cases provide ways forward for duty-bearers and rights-holders to engage in constructive dialogue to understand and seek together innovative synergies to mutual responsibilities and benefits, and to build new spaces in law, policy and practice in the Arctic.

## 2. International Legal Recognition of the Sacred Natural Sites of Indigenous Peoples

### 2.1. The Recognition of SNS as an inherent part of the Cultural Integrity of Indigenous Peoples in Human Rights Law

SNS of IPs have been recognized and mainly studied as a part of their religious rights, particularly in Americas.<sup>10</sup> What has so far not been widely addressed in legal research is the intimate inclusiveness of SNS within the right to cultural integrity of IPs, although this inherent link has been established in human rights law as well as in the legal protection of biodiversity. Vella, Khanty writer, expresses how SNS play a crucial role both in religion and in social-cultural relations and identity:

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10. Herz R., “Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights” in *Virginia Law Review* (691) 1993 p. 79; Yablon M. “Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land” in *The Yale Law Journal* (113) 2004 pp. 1623–1662; Clinton RN., “The Right of Indigenous Peoples As Collective Group Rights” in *Arizona Law Review* 32 (4) 1990 p. 739; Kuppe R., “Religious Freedom Law and the Protection of the Sacred Sites”, in Kirsch TG., Turner B., *Permutations of Order, Religion and Law as Contested Sovereignties*, Ashgate Publishing, Surrey (UK) and Burlington (USA) 2009 pp. 49–66; Kuppe, R... *Indianische Sacred Sites und das Recht auf Religionsfreiheit in den Vereinigten Staaten von Amerika, Habilitationsschrift an der Rechtswissenschaftlichen Fakultät der Universität Wien* 2003.

“...apart from the ritual itself, there is another reason for visiting sacred sites, which is the opportunity to feel one is part of the present community, of this human space. The entire family or clan gathers together, and we can see what it is we share, how many of us are left, and what kind of changes have come about since the last time we met.”<sup>11</sup>

Free access of IPs to their SNS, and participation in the decision-making related to their sacred places, is crucial. Recent international developments concerning the right to cultural integrity are highly valuable to examine the protection of SNS as a part of the cultural rights protection in international law. The right of IPs to a distinct culture, as recognized by international conventions, and as interpreted by the human rights monitoring bodies, includes their right to effective participation in relevant decision-making, and the free, prior and informed consent (FPIC). Besides, the protection of cultural integrity has expanded to the recognition of the collective rights of IPs, including their right to (at least internal) self-determination.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted in 2007<sup>12</sup>, explicitly recognizes sacred places of IPs as an integral part of their culture. Article 11 declares that IPs have the right to practice and revitalize their cultural traditions and customs, which includes the right to protect and develop past, present and future manifestations of their cultures (e.g., ceremonies). States must provide redress through effective mechanism, with respect to their cultural, religious and spiritual property taken without their FPIC or in violation of their laws, traditions and customs. Article 12 endorses IPs’ right to practice, develop and teach their spiritual and religious traditions and the right to maintain, protect and have access in privacy to their religious and cultural sites.

Regarding the spiritual relationship to the lands, UNDRIP Article 25 affirms the right of IPs to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard”. As defined by the International Law Association, this provision applies to lands, territories and resources that IPs owned, occupied and/or used historically, even if it is no longer the case today. Furthermore, it speaks of the right to maintain and strengthen their spiritual relationship with those lands.<sup>13</sup>

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11. Vella Y., *The Conservation Value of Sacred Sites of Indigenous Peoples in the Arctic: A Case Study in Northern Russia*. CAFF Technical Report No. 11: 1, 2004.
  12. A/61/L.67.
  13. International Law Association, *The Hague Conference (2010), Rights of Indigenous Peoples*, at 22

The ILO Convention on Indigenous and Tribal Peoples No. 169<sup>14</sup> does not explicitly recognize sacred sites, but requires the recognition and protection of social, cultural, religious and spiritual values and practices<sup>15</sup> and cultural and spiritual relationship of IPs to their lands and territories.<sup>16</sup> Both the UNDRIP and ILO Convention emphasize the effective participation of IPs in decision-making concerning issues that are important to them, such as SNS. The UNDRIP takes a stronger position with this respect: it endorses both a right to self-determination<sup>17</sup> as well as a right to FPIC<sup>18</sup>, which is essential in the protection of SNS from outside interference (e.g., economic projects on traditional lands).

The right of IPs to cultural integrity is widely recognized in general human rights instruments.<sup>19</sup> Human rights monitoring bodies have strongly promoted the special status for IPs in relation to their culture. The UN Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the Elimination of Racial Discrimination (CERD) and the Inter-

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14. International Labour Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, adopted 27 June 1989, entered into force 5 September 1991, 28 ILM 1382.

15. *Id* at art. 5.

16. *Id* at art. 13.

17. *Id* at art. 3.

18. *Id* at arts. 10, 19, and 32.

19. International Covenant on Civil and Political Rights (CCPR, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, A/6316 (1966), adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3, International Convention on the Elimination of All Forms of Racial Discrimination, adopted 7 March 1966, entered into force 4 January 1969, 660 UNTS 195, United Nations Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 UNGAOR Supp. (No. 49) at 167, A/44/49 (1989), adopted 20 November 1989, entered into force 2 September 1990, 1577 UNTS 3.

American Human Rights Commission and Court have all endorsed the concept of FPIC of IPs in relation to the control over their traditional territories.<sup>20</sup>

The protection of SNS relates to the larger context of the worldview of many IPs where the land itself including all living species are regarded as inherently sacred. Helander describes how in Saami traditional worldview nature is seen as having a spirit, and, consequently, is respected and worshiped.<sup>21</sup> Former UN Special Rapporteur Martínez Cobo highlights the importance of spirituality in IPs' relationship to land.<sup>22</sup> As described by Wiessner, one of the basic claims of IPs in international law has been the respect or restoration of traditional lands, as a means to their physical, cultural and spiritual survival, and the right of IPs to practice their traditions and celebrate their culture and spirituality.<sup>23</sup> Also the Inter-American Court of Human Rights has stressed that the close ties of IPs with the land must be recognized and understood as the basis for their cultures, spiritual life, integrity, and their economic survival.<sup>24</sup>

Many IPs have argued their rights based on the right of property, yet a number of IPs have objected to terms such as property, ownership, and possession – also in associated verbal forms – because they do not adequately explain what many perceive as a personal affiliation with an ancestor, relative or deity. IPs have also found problematic terms such as “lands, territories and resources”, which unemotionally express what many IPs understand as Mother Earth. Such terms must be interpreted broadly, consistently with their own understanding of “the whole of the symbolic

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20. HRC, Concluding observations on El Salvador, 18 November 2010, CCPR/C/SLV/CO/6 Para 18; CESCR, General Comment No. 21 Right of everyone to take part in cultural life (art. 15, 1(a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21 (Dec. 21, 2009), paras 36, 37; CESCR, Concluding observations on Colombia, E/C.12/1/Add.74E/C.12/1/Add.74, paras 12, 33.; General Recommendation 23: Indigenous Peoples, Committee for the Elimination of Racial Discrimination, A/52/18, annex V; CERD/C/51/Misc.13/Rev.4 (1997), paras 4, 5; CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Ecuador, CERD/C/ECU/CO/19, para 16; *Maya indigenous community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, IACHR, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), para 194; *Saramaka People v. Suriname*, IACHPR, Judgment of November 28, 2007, Series C, No 172, Para 131.
  21. Helander E., “Global Change – Climate Change Observations Among the Sámi” in Mustonen T, Helander E. (eds.), *Snowscapes, Dreamscapes – A Snowchange Community Book on Community Voices of Change*, Tampere ammattikorkeakoulu, Tampere 2004 pp. 302–309.
  22. José Martínez Cobo. Study of the problem of discrimination against indigenous populations. E/CN.4/SUB.2/1986/7/ADD.4. Paras. 196–197.
  23. Wiessner S., “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis”, *Harvard Human Rights Journal* (12) 1999 pp. 57–128, and 98.
  24. *Mayagna (Sumo) AwasTingni Community v. Nicaragua*, Ser. C No. 79, judgment of 31 August 2001, Para 149.

space in which a particular indigenous culture has developed, including not only the land but also the ‘sacred landscape’ that corresponds to their world view”.<sup>25</sup>

A challenging issue in SNS protection is the fact that many sites are not publicly known by others than the community itself, and thus preserving the sacredness of these places means to keep them secret. Hence, a crucial feature when talking about the legal protection of SNS is to respect the community’s decision concerning the publicity of these sites where they are not officially known<sup>26</sup>. However, many of these sites are publicly known as archeological sites, and indigenous communities have started to protect them against outside interference (e.g., mining, tourism). We argue that the formal recognition of SNS could add weight to the struggle against outside interferences in IPs’ traditional lands. Thus, the protection of SNS acts as an intermediate between IPs’ cultural rights and nature conservation.<sup>27</sup>

25. Regino Montes A, Torres Cisneros G., “The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, State and Societies” in Charters C, Stavenhagen R (eds.), *Making the Declaration Work: The Declaration on the Rights of Indigenous Peoples*, IWGIA, Copenhagen 2009 p. 161.

26. Byrne D & Nugent M., *Mapping attachment: a spatial approach to Aboriginal post-contact heritage*, Department of Environment and Conservation (NSW), Australia 2004.

27. In the field of international environmental law, of relevance here is also the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention, 1972), as it represents an international instrument that recognizes sites of cultural and natural heritage, and that protects sites with both tangible and intangible heritage. Over the last decades this Convention has evolved; the World Heritage Committee has revised the selection criteria so that they are more inclusive and appreciative of living culture and traditions by taking into account the interlinkages between culture and nature, and has thus amended the Operational Guidelines for the Implementation of the World Heritage Convention to allow for the inscription of outstanding “cultural landscapes” categories as ‘combined works of nature and man’ on the basis of their continuing economic, cultural or spiritual value to IPs. Rössler M., “World Heritage Cultural Landscapes: A UNESCO Flagship Programme 1992–2006” in *Landscape Research* 31 (4) 2006 pp. 333–353; Rössler M., “Managing World Heritage Cultural Landscapes and Sacred Sites” in UNESCO *Linking Universal and Local Values: Managing a Sustainable Future for World Heritage*, Proceedings of a conference organized by the Netherlands National Commission for UNESCO 22 – 24 May 2004, World Heritage papers 13, UNESCO World Heritage Centre 2004 pp. 45–49. AHC, “Indigenous Cultural Landscapes and World Heritage Listing (Draft)”, Australian Heritage Commission, Victoria 1995. The interlinking of the natural and cultural values of SNS has resulted in their insertion on the UNESCO World Heritage List as ‘mixed properties’. In the new operational guidelines for the implementation of the convention 2012, it is taken into account, when estimating the authenticity of the cultural heritage, “spirit and feeling” of the place that are important indicators of character and sense of place, for example, in communities maintaining tradition and cultural continuity. WHC 12/02, July 2012, Paras 82 and 83 at <http://whc.unesco.org/archive/opguide12-en.doc>.

It can also be argued that the legal recognition of SNS of IPs has an implication of “greening” existing international human rights in the way that international monitoring bodies have to deal with environmental values and the rights of indigenous peoples hand in hand.<sup>28</sup> Although a universal recognition of an explicit human right to environment is not fully endorsed, there is an extensive jurisprudence in human rights monitoring bodies where traditional human rights such as a right to home and privacy, a right to property, a right to life and health and a right to culture have been applied in a context, where a human right violation has been occurred due to particular environmental circumstances. Particularly in Inter-American Human Rights system, most of these “environmental” human rights cases have been brought by IPs.<sup>29</sup> Significantly, European Court of Human Rights (ECHR) has in two recent cases, *Bâcilă v. Romania*<sup>30</sup> and *Di Sarno and others v. Italia*<sup>31</sup>, directly referred to a human right to a healthy and protected environment. Although there is not a single definition of environmental human rights or “environmental rights”, this concept has been largely used over the last decades to indicate that human rights can be applied in an environmental context.<sup>32</sup> Taylor discusses the establishment of an environmental human right that expresses the special spiritual, cultural, and social relationship between IPs and nature.<sup>33</sup> Such an environmental human right could contribute to sustainable environment, raise awareness of the interconnectedness between the biosphere and humanity’s activities, as noted by Taylor. Consequently, environmental protection might be ap-

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28. See, generally, Heinämäki L., “The Right to Be a Part of Nature: Greening Human Rights via Strengthening Indigenous Peoples” in *The Yearbook of Polar Law* IV 2012 pp. 415–474.
29. *Yanomami Indians v. Brazil*, Case 7615, IACHR, OEA/Ser.L/V/II.66 doc. 10, *Maya Indigenous Communities of the Toledo District Belize*, Oct. 12, 2004, Report No. 40/04 Case 12.053, *Yakye Axa indigenous community of the Enxet-Lengua people v. Paraguay*, Case 12.313, Report No 2/02, IACHR., Doc. 5 rev. 1 at 387 (2002), *Sawhoyamaya Indigenous Community of the Enxet People v. Paraguay*, Case 0322/2001, Report No. 12/03, IACHR, OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 378 (2003), *Moiwana Community v. Suriname*, IACHR (15 June 2005), *Xákmok Kásek Indigenous Community v. Paraguay*, IACHPR (24 August 2010).
30. ECHR, no. 19234/04 (2010).
31. ECHR, no. 30765/08 (2012)
32. Anton DK, Shelton DL., *Environmental Protection and Human Rights*. University of Cambridge 2011; Shelton DL. “Environmental Rights” in Alston P. (ed.) *Peoples’ Rights*, Oxford University Press, 2001 pp. 189–258; Thorne M., “Establishing Environment as a Human Right”, *Denver Journal of International Law and Policy* (19) 1991 pp. 301–342; Tomasevski K., “Environmental Rights” in Eide A, Krause C, Rosas A (eds.), *Economic, Social and Cultural Rights, A Textbook*, Martinus Nijhoff Publishers, Dordrecht (NL) 1995 pp. 257–269; Boyle A, Anderson M, (eds.), *Human Rights Approaches to Environmental Protection*, Clarendon Press, Oxford 1996.
33. Taylor P., “From Environmental to Ecological Human Rights: A New Dynamic in International Law?”, *Georgetown International Environmental Law Review* (10) 1998 pp. 309–397.

proached from a holistic perspective, which affirms a new environmental ethic. An environmental human right may encourage the development of this new ethic.<sup>34</sup>

IPs' traditional nature-based way of life makes them a special interest group in relation to environmental human rights. Metcalf calls that "cultural protection for IPs involves providing environmental guarantees that allow them to maintain the harmonious relationship with the earth that is central to their cultural survival."<sup>35</sup> Cultural and environmental integrity of IPs, thus, go hand in hand. The recognition of SNS of IPs does not only strengthen the cultural viability, but promotes a new environmental consciousness that endorses cultural and spiritual values, which can be seen as key components in a new environmental ethic.

## 2.2. The Recognition of SNS as a part of the Cultural Integrity of Indigenous Peoples by the UN Human Rights Committee

One of the major instruments that recognize minority members' right to enjoy their culture is the International Covenant on Civil and Political Rights (CCPR).<sup>36</sup> Article 27 of the CCPR may be regarded as a basic norm in protecting IPs' right to cultural integrity. Article 27 applies to minorities and recognizes an individual right to enjoy one's culture in a community with other members of the cultural collective.<sup>37</sup> Thus, even though protection is afforded to minority groups' individual

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34. Taylor P., *An Ecological Approach to International Law: Responding to Challenges of Climate-Change*, Routledge, 1998, p. 216.
35. Metcalf C., "Indigenous Rights and the Environment: Evolving International Law" *Ottawa Law Review* (35) 2005 pp. 103–140, and 107.
36. International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 52, A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 *United Nations Treaty Series* 171. Status of ratification: 161 (6 May 2008); Optional Protocol to the CCPR, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16), at 59, A/6316 (1966), adopted 16 December 1966, entered into force 23 March 1976, 999 *United Nations Treaty Series* 302.
37. Article 27 states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." See also Heinämäki L., "The Protection of the Environmental Integrity of Indigenous Peoples in Human Rights Law" *Finnish Yearbook of International Law* XVII 2006 pp. 1–46.

members, the substance of minority rights entails a collective dimension,<sup>38</sup> which has a particular importance for IPs. The HRC, the monitoring body of the CCPR<sup>39</sup>, has interpreted this article as including the “rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.”<sup>40</sup> The Committee recognizes that IPs’ subsistence and social activities are an integral part of their culture. Interference with such activities may be detrimental to their cultural integrity and survival.<sup>41</sup> The Committee has acknowledged that IP’s right to culture under Article 27 may apply to a way of life that is closely connected to a territory and its resources. The Committee clarified that the right comprises traditional activities (e.g., hunting). Furthermore, it stated that the enjoyment of such rights may require protective legal measures and methods for ensuring the *effective* participation of minority communities’ members in decisions that affect them.<sup>42</sup>

The Committee made an implicit reference to the SNS of IPs by stating that the protection of such rights is directed at ensuring the survival and continued development of the cultural, religious, and social identity of the minorities concerned, which also enriches the fabric of society as a whole.<sup>43</sup>

General Comments of the HRC are adopted by a consensus of the Committee members and may be regarded as creating an authoritative source of interpretation of the Covenant.<sup>44</sup> Even though they are not binding in a strictly legal sense, they may be considered as “quasi-authoritative” sources in the interpretation of the articles of the CCPR. Thus it may be argued that if culturally and spiritually

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38. Hanski R, Scheinin M., *Leading Cases of the Human Rights Committee*, Institute for Human Rights, Turku/Åbo, Finland 2003 p. 375; In: *Sandra Lovelace v. Canada* (Communication No. 24/1977, CCPR/C/OP/1 (1985)), Para 15: “In the opinion of the Committee the right of Sandra Lovelace to access to her native culture and language, ‘in community with the other members’ of her group, has in fact been, and continues to be, interfered with, because there is no place outside the Tobique Reserve where such a community exists.”

39. The HRC was established under CCPR Article 28, and is composed of 18 independent human rights experts elected by the Parties to the CCPR (CCPR, Arts 28–34). The members of the Committee do not represent the States that nominated them (CCPR, Art. 28(3)).

40. *Lubicon Lake Band v. Canada*, Communication No. 167/1984, CCPR/C/38/D/167/1984.

41. *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988).

42. *Id* at 7.

43. *Id*.

44. Nowak M., “The International Covenant on Civil and Political Rights” in Hanski R, Suksi M (eds.) *An Introduction to the International Protection of Human Rights: A Textbook*, Institute for Human Rights, Turku/Åbo, Finland 2002 p. 94.

important activities are to be safeguarded, the land, resources, and SNS of IPs require protection against environmental interference.<sup>45</sup>

The Committee's jurisprudence recognizes the inter-linkage between the right to cultural integrity and protection from environmental interference in IPs' territories.<sup>46</sup> Article 27 of the CCPR has been central in the HRC's practice, and the Committee has increasingly interpreted the Article in an expansive manner.<sup>47</sup>

Under Article 27 of CCPR, the HRC has made an explicit reference to the protection of SNS of IPs and recognized them as a part of the right to culture. In its Concluding Observations on Australia (2000), the Committee expressed "its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under Article 27, are not always a major factor in determining land use."<sup>48</sup> The Committee further stated that the Australian law reform related to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, which recognizes sacred sites as being culturally and traditionally significant for Aboriginals, should give sufficient weight to IPs' values.<sup>49</sup>

Two individual communications brought to the HRC acknowledges SNS of IPs, although do not directly use the concept "sacred sites". In *Hopu and Bessert v. France*<sup>50</sup> that was brought by native Tahitians who complained about French authorities' decision to allow construction of a hotel complex on an ancestral pre-European Polynesian burial ground that was an important place in their "history, culture and life". This decision, the authors alleged, violated their right to respect

45. Leighton, MT., "From Concept to Design: Creating an International Environmental Ombuds-person, Legal and Normative References: Environmental Human Rights", A Project of the Earth Council, San José, Costa Rica, Project Director: The Nautilus Institute for Security and Sustainable Development, Berkley, California, 1998, 8.

46. *Lubicon Lake Band v. Canada*, Communication No. 167/1984, CCPR/C/38/D/167/1984; *I. Länsman et al. v. Finland*, Communication No. 511/1992, CCPR/C/52/D/511/1992 (1994); *J. Länsman et al. v. Finland*, Communication No. 671/1995, CCPR/C/58/D/671/1995; *A. Äärelä and J. Näkkäläjärvi v. Finland* (Communication No. 779/1997, CCPR/C/73/D/779/1997)

47. Kingsbury B., "Reconciling Five Competing Conceptual Structures of Indigenous People's Claims in International and Comparative Law", *New York University Journal of International Law and Politics* (31) 2001 pp. 204–205.

48. Para 510. *The Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

49. *Id.* Para 511; A "Sacred site" means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition, *Aboriginal Land Rights (Northern Territory) Act 1976*, Part VII, s.69.

50. *Hopu and Bessert v. France*, Communication No. 549/1993; CCPR/C/60/D/549/1993.

for family life and privacy, guaranteed by article 17(1) and 23(1) of ICCPR. The French government contended that no issue could arise with regard to their right to family and privacy, because they had not any kinship link with the remains discovered in the burial grounds.<sup>51</sup> But the Committee stated that the term “family” has to be interpreted broadly, “so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term “family” in a specific situation.”<sup>52</sup> The Committee stressed that the people concerned considered their relationship to their ancestors to play an important role in their family life and to represent an essential element of their identity.<sup>53</sup> Since French authorities had failed to demonstrate that their interference was reasonable and that the burial grounds’ significance for the complainants had been taken into account in the decision-making process, they were found to be in breach of Articles 17(1) and 23(1) of CCPR.<sup>54</sup>

The reason why this case was not dealt under Article 27 was due to France’s reservation on this minority provision. Otherwise, it seems clear that the protection of the burial ground falls under the scope of Article 27. A dissenting opinion of a committee member in *Hopu and Bessert v. France* stated:

“The reference by the Committee to the authors’ history, culture and life, is revealing, for it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.”<sup>55</sup>

Although this case itself does not pronounce the sacredness of this burial ground, it is generally known that burial grounds have spiritual, religious and cultural significance for native Tahitians as well as many other IPs. Johnston, for instance, describes how in Anishnaabeg culture, there is an ongoing relationship between the Dead and the Living; between ancestors and descendants. It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance. Failure to perform this duty harms not only the Dead but also the Living. The Dead need to be sheltered and fed, to be visited and feasted. These traditions continue to exhibit powerful

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51. *Id* at para 5.7.

52. *Id* at para 10.3.

53. *Id*.

54. *Id*.

55. *Hopu and Bessert v. France*, Dissenting opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville, Para 5

continuity.<sup>56</sup> Therefore, there is no doubt that the protection of the SNS of IPs may be addressed to the HRC as a significant part of IPs' cultural integrity.

Another individual communication brought to the Committee that partly touches upon the recognition of a SNS of the Saami people is *Länsman et al v. Finland*.<sup>57</sup> However, the sacredness of the area did not itself become an issue that the Committee considered as a part of its final decision, although it did acknowledge that Etelä-Riutusvaara Mountain is of spiritual significance.<sup>58</sup> In this complaint the Saami authors challenged that quarrying of stone took place is a sacred area, where in old times reindeer were slaughtered.<sup>59</sup> The basis of the claim was not the sacred area to Saami people as such; but the impact that quarrying caused to their reindeer herding territory, which would violate their rights under Article 27 of the Covenant, in particular their right to culture, which is based on reindeer husbandry.<sup>60</sup> The Committee noted that although the State is allowed to encourage development, the scope of its freedom to do so is to be assessed by reference to the obligations it has undertaken in Article 27, which requires that a member of a minority shall not be denied his right to enjoy his culture.<sup>61</sup> It noted that measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27.<sup>62</sup> The Committee viewed that the quarrying did not constitute a denial of the authors' right under Article 27, and noted that the authors were consulted and that reindeer herding did not has been adversely affected by quarrying.<sup>63</sup> However, future economic activities must, in order to comply with Article 27, be carried out in a way that guarantees reindeer husbandry. Approval of large scale mining in the area to companies holding exploitation permits may constitute a violation of the authors' rights under Article 27, in particular their right to enjoy their own culture.<sup>64</sup>

Perhaps because the authors did not reason the sacredness of Etelä-Riutusvaara Mountain as a basis of the actual claim, the Committee did not take a clear stand-

56. Johnston D, Respecting and Protecting the Sacred, Ministry of Attorney General, Canada, [http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/pdf/Johnston\\_Respecting-and-Protecting-the-Sacred.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf); Ipperwash Inquiry Community Meeting about Aboriginal Burial and other Sacred Sites, [http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/meetings/pdf/Burial\\_and\\_sacred\\_sites\\_Feb\\_26.pdf](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/meetings/pdf/Burial_and_sacred_sites_Feb_26.pdf).

57. *Länsman et al v. Finland*, Communication No. 511/1992, CCPR/C/52/D/511/1992 (1994).

58. *Id* at para 9.3.

59. *Id* at para 2.6.

60. *Id* at para 3.1.

61. *Id* at para 9.4.

62. *Id*.

63. *Id* at para 9.6.

64. *Id* at para 9.8.

point in this particular matter. Since the Committee clearly recognizes SNS as a part of IPs' cultural integrity, this argumentation could have brought an extra weight to this particular case. Especially due to recent developments, such as the UNDRIP that recognize sacred cultural places as a part of indigenous culture, it can convincingly be argued that SNS of IPs can be protected by the CCPR and HRC, when argued to have a strong cultural significance, and particularly, perhaps, when related to the sustainable use of the environment.

The recent endorsement of the right of IPs to a FPIC in the HRC could play a crucial role in SNS protection. In 2009, the Committee made a historical shift by recognizing that the mere consultation of the indigenous community in question may not always satisfy the requirement of Article 27.

*Poma Poma v. Peru*<sup>65</sup> concerned a dispute over the exploitation of water resources, which negatively impacted on the Aymara peoples' traditional subsistence activity— the raising of llamas and alpacas.<sup>66</sup> The Committee reiterated its earlier view according to which the admissibility of measures, which *substantially* compromise or interfere with culturally significant economic activities, depends on whether the community's members have had the opportunity to participate in the decision-making process and whether they will continue to benefit from their traditional economy.<sup>67</sup> For the first time, in considering the meaning of the requirement of "effective" participation, the Committee stated that mere consultation is insufficient. Instead, FPIC of the community's members is required. Additionally, according to the Committee, "the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."<sup>68</sup> In this case consultation lacked completely.<sup>69</sup> Consequently, the Committee concluded (added with the fact that the author, Ángela Poma, lost her traditional economic activity), that the State-driven activities violate the right of the author to enjoy her own culture together with other members of her group, in accordance with Article 27 of the Covenant.<sup>70</sup>

This case shows how the HRC is ready to expand the interpretation of Article 27, when the environmental interference on IPs' lands is severe, and when the State did not consult with IPs. It is not a coincidence that this decision was released

65. HRC, Communication No. 1457/2006, CCPR/C/95/D/1457/2006. 27 March 2009

66. Göcke K., "The Case of *Ángela Poma Poma v. Peru* before the Human Rights Committee" in Von Bogdandy A, Wolfrum R. (eds.) *Max Planck Yearbook of United Nations Law* (14) 2010 pp. 337–370.

67. *Id* at para 7.6.

68. *Id*.

69. *Id* at para 7.7.

70. *Id*.

shortly after the adoption of the UNDRIP, which endorses the concept of FPIC. Although the lack of a direct reference to the UNDRIP has been criticized,<sup>71</sup> it is evident that the Declaration has played a role in this fundamental shift. The concept of FPIC has been on the UN agenda for some years.<sup>72,73</sup>

The HRC began applying Article 1 of CCPR (the right of peoples to self-determination) on IPs in 1999.<sup>74</sup> According to the Committee, Article 1 cannot be used in individual communications because the Optional Protocol provides a procedure under which individuals may claim that their individual rights have been violated.<sup>75</sup> The right of self-determination of IPs has often been related to the protection of their lands and resource.<sup>76</sup>

The wider recognition of self-determination of IPs could play an important role in the protection of SNS, since, when implemented, true control could be given to the custodians of these places. FPIC can be seen as an expression of the right to self-determination of indigenous peoples.

### 2.3. SNS and the Inter-American Human Rights System

The Inter-American Commission on Human Rights (IACHR) has acknowledged the spiritual value of IPs' ancestral territories. Concerning SNS, the Commission recognized that IPs consider that certain places, phenomena or natural resources are sacred in accordance with their tradition, and require special protection. The Commission has held that IPs' territories and natural resources are a constitutive

71. Göcke K, 2010. *supra* note 66, pp. 353–357.

72. A/RES/59/174.

73. A 60/270, Sect. II.; ECOSOC, UNPFII, Seventh session, New York, 21 April – 2 May 2008, Item 5 of the provisional agenda, Human rights: dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other special rapporteurs, E/C.19/2008/2, Para 17.

74. Article 40 of the CCPR requires Parties to submit reports on measures taken to give effect to the rights defined therein. An initial report is to be submitted one year after the State ratifies the CCPR, and further reports are required periodically. Explicit references to either Article 1 or to the notion of self-determination have also been made, for instance, in the Committee's Concluding Observations on Norway, CCPR/C/79/Add.112 (1999); Australia, CCPR/CO/69/Aus (2000); Denmark, CCPR/CO/70/DNK (2000); Sweden, CCPR/CO/74/SWE (2002); Finland, CCPR/CO/82/FIN (2004); Canada, CCPR/C/CAN/CO/5 (2005); United States, CCPR/C/USA/CO/3 (2006); The CESCR has applied Article 1. See, for instance, CESCR Concluding Observations on the Russian Federation, E/C.12/1/Add.94, 2003, Paras 11,39.

75. *Lubicon Lake Band v. Canada*, *supra* note 124, Para. 32.1.

76. Havemann P, Whall H, 2002. *The Miner's Canary: Indigenous Peoples and Sustainable Development in the Commonwealth*. London: *Indigenous Rights in the Commonwealth Project*, University of London Institute of Commonwealth Studies.

element of their worldview and religiousness<sup>77</sup> as notions of family and religion are intimately connected to the places where ancestral burial grounds and kinship patterns have developed.<sup>78</sup> Similarly, the Inter-American Court of Human Rights (IACHPR) has proven that Inter-American human rights instruments protect the right of IPs to enjoy their spiritual relationship with the territory they have traditionally used and occupied.<sup>79</sup> According to the Court, States have an obligation to protect that territory, and the relationship between communities, their lands and resources, as a means to preserve their spiritual life.<sup>80</sup>

Consequently, as maintained by the IACHR, limitations on the right to indigenous property can affect the right to the exercise of one's own spirituality / beliefs, a right recognized by Article 12 of the American Convention, and Article III of the American Declaration. States are under the obligation to secure IPs' freedom to preserve their religion or spirituality, including the public expression of this right and access to SNS whether or not on public or private property.<sup>81</sup> The Commission further stated that ancestral cemeteries, places of religious meaning,

77. IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II.Doc. 54, 30 December 2009, para 1054.

78. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District Belize, October 12, 2004, para 155.

79. IACHPR, *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 28, 2007. Series C No. 172, Para 95. See also: Indigenous and tribal peoples' rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II, Doc. 56/09, 30 December 2009, pp. 67–68.

80. IACHPR, *Case of the YakyeAxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, pars. 131, 135, 137. IACHPR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, paras. 118, 121. IACHPR, *Case of the Plan de Sánchez Massacre v. Guatemala. Reparations and Costs*. Judgment of November 19, 2004. Series C No. 116, para. 85. IACHPR, *Case of the Mayagna (Sumo) Awastingni Community v. Nicaragua. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 79, para. 149. IACHR, Arguments before the Inter-American Court of Human Rights in the case of YakyeAxa v. Paraguay. Cited in: IACHPR, *Case of the YakyeAxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125, par. 120(j). IACHR, Arguments before the Inter-American Court of Human Rights in the case of Sawhoyamaxa v. Paraguay. Cited in: IACHPR, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, para. 113(a).

81. IACHR, Indigenous and tribal peoples' rights over their ancestral lands and natural resources, Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II, Doc. 56/09, 30 December 2009, at 62

and ceremonial or ritual sites linked to the occupation and use of physical territories<sup>82</sup> constitute an intrinsic part of the right to cultural identity.<sup>83</sup>

In the Inter-American Human Rights system, the protection of SNS of IPs can be directly related to their property rights protection. Both the Court and the Commission recognize the communal property of IPs. A failure to guarantee the right to communal property impairs the preservation of the ways of life of IPs.<sup>84</sup> Access and control over SNS can be seen as an inherent component of the communal property of IPs. According to the IACHR, if the State fails to secure the right to territorial property of IPs, they are deprived “not only of material possession of their territory but also of the basic foundation for the development of their culture, their spiritual life, their wholeness and their economic survival.”<sup>85</sup> Therefore, by virtue of Article 21 of the American Convention, the protection of the right to territorial property is a means to preserve the basis for the development of the culture, spiritual life, integrity and economic survival of IPs.<sup>86</sup>

In the case of *Awas Tingni Community v. Nicaragua*<sup>87</sup>, which concerned logging on indigenous territory, the sacredness of the land within the culture and identity was explicitly articulated by several testimonies in the IACHPR. According to one Awas Tingni Territorial Committee member, the territory is sacred, harbors hills of religious importance, and sacred places. Visiting those places is done in silence as a sign of respect for the ancestors, and the spirit of the mountain is greeted.<sup>88</sup> The Awas Tingni prepared a map showing the location of SNS.<sup>89</sup> Stavenhagen in his expert opinion on the Awas Tingni case, highlighted: “All anthropological, ethnographic studies, all documentation which the IPs themselves have presented

82. IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District, October 12, 2004, Para. 155.

83. IACHR, *Democracy and Human Rights in Venezuela*. Doc. OEA/Ser.L/V/II. Doc. 54, 30 December 2009, Para. 1054.

84. IACHR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, Paras 73-75.

85. IACHR, Arguments before the Inter-American Court of Human Rights in the case of *YakyeAxa v. Paraguay*. Cited in: IACHPR, *Case of the YakyeAxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, Para. 120(j).

86. IACHR, Arguments before the Inter-American Court of Human Rights in the case of *Sawhoyamaya v. Paraguay*. Cited in: IACHPR, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, Para. 113(a).

87. *The Mayagna (Sumo) AwasTingni Community v. Nicaragua*, Judgment of August 31, 2001, IACHR (Ser. C) No. 79 (2001).

88. Testimony of Charly Webster Mclean Cornelio, Secretary of the AwasTingni Territorial Committee.

89. Testimony of Theodore Macdonald Jr., anthropologist.

in recent years, demonstrate that the relationship between IPs and the land is an essential tie which provides and maintains the cultural identity of those peoples. One must understand that the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked.”<sup>90</sup> According to Stavenhagen, under customary law, the land is seen as a spiritual place, insofar as it is linked to human beings (e.g., sacred places). This human-territory relationship is not, however, written down, but, instead, lived on a daily basis.<sup>91</sup>

The IACHPR recognized the community property right, by founding the State of Nicaragua to be in a violation of the right of property under Article 21, and considered that the State must create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities. Importantly, the Court recognized the spiritual value of the territory and sites for the community by ruling measures had to be adopted in accordance with the “customary law, values, customs and mores of the community.”<sup>92</sup> Until the final delimitation of the community’s lands, Nicaragua must abstain from acts which might affect the value or use of the property located in the region where the Awas Tingni live.<sup>93</sup> Although this case was based on the protection of the property rights, SNS played an important role in the testimonial part. The Inter-American Human Rights system recognizes SNS as an inherent and crucial part of the culture of indigenous peoples, relating to both to the right to culture and communal property. The American Human Rights Convention<sup>94</sup> and the Declaration<sup>95</sup> apply in two Arctic states: Canada and the United States.

In the recent *Saramaka v. Suriname* case<sup>96</sup>, the Inter-American Court utilized both, the UNDRIP, as well as common Article 1 of CCPR and CESCR (the right to self-determination) as guidelines in adopting the concept of FPIC, as well as in interpreting the right to property in light of the right to self-determination of peoples. Regarding logging and mining on Saramaka community lands, the Court made a special reference to Article 32 of the UNDRIP, which requires states’ consultation with IPs in obtaining their FPIC regarding projects affecting their ter-

90. Expert opinion of Rodolfo Stavenhagen, anthropologist.

91. *Id.*

92. *Id.* at para 164.

93. *Id.*

94. The American Convention on Human Rights, adopted 22 November 1969, entered into force 18 July 1978, 114 UNTS 123.

95. The American Declaration of the Rights and Duties of Man, adopted 2 May 1948, OEA/Ser.L.VV/II.82 soc. 6 rev. 1, 1992.

96. *Saramaka People v. Suriname*, IACHPR, Judgment of November 28, 2007, Series C, No 172.

ritories and resources.<sup>97</sup> Furthermore, the Court stated that the right to property (Article 21) of the American Convention must be understood in light of rights recognized under common Article 1 of CCPR and CESC (self-determination). It must also be understood in light of Article 27 of the CCPR to the effect of calling for IPs to freely determine and enjoy their social, cultural, and economic development. This includes the right to enjoy the spiritual relationship with their territory.<sup>98</sup> Consequently, the Court adopts an integral approach in balancing the interests between the State for economic development and IPs' way of life. According to the Court, the Saramakas must be consulted in a culturally appropriate way and in accordance with their own traditions, during the early stages of a development project<sup>99</sup>, and State shall adopt necessary legislative, administrative measures to guarantee effective consultation<sup>100</sup>. The State must ensure that the Saramaka people are aware of risks (e.g., health risks), so that the proposed development is knowingly or voluntarily accepted.<sup>101</sup>

The related principles and rights of this case: self-determination, FPIC, the right to communal property and customary laws of IPs play an important role in the recognition and protection of SNS. Different to the UN human rights system is the endorsement of the customary norms of IPs which strengthens the control of the custodians of SNS concerning outside interference.

### 3. International Policy Instruments to guide the conservation of Sacred Natural Sites of Indigenous Peoples

Major conservation organizations and institutions (e.g., the International Union for Conservation of Nature and Natural Resources (IUCN), the World Wide Fund for Nature (WWF)) have issued resolutions and developed guidelines for culturally appropriate conservation of SNS of IPs. Thus, following the Recommendation V. 13 *Cultural and Spiritual Values of Protected Areas* adopted by the Vth IUCN World Parks Congress in 2003, sites of cultural value (e.g., burial sites, places referred to in legends) can be designated as "sacred areas" and are given special protection. The IUCN Resolution 4.038 *Recognition and Conservation of Sacred Natural Sites in Protected Areas* adopted by the 4<sup>th</sup> IUCN World Conservation Congress in 2008

97. *Id* at para. 131 of the Decision.

98. *Id* at para. 95.

99. *Id* at para. 134.

100. *Id* at para. 8 of the Operative Paragraphs.

101. *Id* at para. 133.

affirmed the need for culturally appropriate SNS conservation and management within and near protected areas. This Resolution further called for recognition, support and facilitation of the rights and knowledge of SNS custodians.<sup>102</sup> Though the IUCN resolutions are not legally binding, they do influence conservation policies and international treaty-related processes (e.g., CBD). A tool for this increased recognition is the *Guidelines for Protected Area Managers* to help conservationists recognize and culturally appropriately manage SNS inside protected areas.<sup>103</sup>

One example of putting in practice IUCN Recommendation V. 13 in an Arctic State, is the case of the Albanel-Témiscamie-Otish National Park Project in Canada, which has been proposed by the Government of the province of Québec in partnership with the Cree First Nation of Mistissini.<sup>104</sup> The Provisory Master Plan, which contains the park's interim zoning plan, constitutes the main tool for defining sites requiring special protection. This plan introduced an innovation, as it defined the protection of areas considered as sacred by the Mistissini Cree elders. This decision follows on IUCN Recommendation V. 13. After consultation with Mistissini elders, the Provisory Master Plan designates five places as sacred areas.<sup>105</sup> No non-Native person will be allowed to visit these places without prior authorization from park management and the Cree trapping families concerned.

Another case was the recent establishment of the Kuururjuaq National Park in the arctic tundra in Nunavik (Canada), which was created by the Government of Québec, in partnership with the Kativik Regional Government. An important cultural site for the Naskapi First Nation, the Caribou Heaven, is situated within the limits of the park. Based on legends passed down for generations, Naskapi Elders believe that the Caribou Heaven is a sacred place to which the souls of dead caribou go. Only the shamans visited the Caribou Heaven by using their supernatural powers of 'vision'. The Caribou Heaven legend served to guide the behavior of and provided ethical guidelines to the ancestors, who survived largely by hunting caribou. For them, the responsible behavior promoted by the legend, including using all parts of the caribou killed as a way of showing respect to the soul of the caribou, ensured that the caribou would return to the hunter, thus ensuring the survival

102. [http://intranet.iucn.org/webfiles/doc/IUCNPolicy/Resolutions/2008\\_WCC\\_4/English/RES/res\\_4\\_038\\_recognition\\_and\\_conservation\\_of\\_sacred\\_natural\\_sites\\_in\\_protected\\_areas\\_.pdf](http://intranet.iucn.org/webfiles/doc/IUCNPolicy/Resolutions/2008_WCC_4/English/RES/res_4_038_recognition_and_conservation_of_sacred_natural_sites_in_protected_areas_.pdf).

103. Wild R, McLeod C., *Sacred Natural Sites. Guidelines for Protected Area Managers*. Best Practice Protected Area Guidelines Series No.16. IUCN and UNESCO, Gland, Switzerland 2008.

104. [http://www.mddep.gouv.qc.ca/parcs/ato/con-ato\\_en.htm](http://www.mddep.gouv.qc.ca/parcs/ato/con-ato_en.htm).

105. Alain H, Gagnon J, et al., *Albanel-Témiscamie-Otish National Park Project. Provisory Master Plan*. Cree Nation of Mistissini, Ministère des Ressources naturelles et de la Faune and Société des établissements de plein air du Québec 2005 pp. 24 and 27.

of the Naskapi themselves. Today, the legend serves as a tool for the Naskapi to teach their children the importance of treating all of Nature with respect. During the park planning process, in 2007, the Naskapi Elders Advisory Council and the Council of the Naskapi Nation used the IUCN Recommendation V. 13 to require that the site known to them as the ‘Caribou Heaven’ be designated as a sacred area. They further recommended that a Naskapi Elder should be a member of the committee responsible for managing the park at all times.<sup>106</sup> In 2009, the site was successfully designated as a zone of extreme protection. Access to the site is restricted.

Translating international resolutions into national policy and laws is a long process. As the two cases from the Canadian North above show, as regards greater recognition of SNS and their custodians, using international policy instruments goes conjointly with advocacy campaigns at national level, resulting from local levels.

With the CBD’s 2010 Target 11, protected area agencies in countries of the Arctic region will increase the terrestrial protected areas from the current 12.1% to 17% of land area by 2020. It will be important to avoid top-down exclusionist conservation policies concerning SNS, but that fair hearing of community, according to the principle of FPIC are held with the concerned IPs, and that legal mechanisms are developed that endorse SNS custodians to continue their management practices shaped by customary law, and to ensure that incorporating their SNS into the future protected areas will be consistent with their human rights, including the right to self-determination.<sup>107</sup>

#### 4. Bridging the Gap between Customary, National and International Law and Policies: Community Protocols

Although, as described above, a number of international human rights legal frameworks supporting the interlinkages between IPs and SNS protection emerged, there is still a concern that international human rights and policy guidelines are implemented in inappropriate ways on local level. Moreover, site custodian communities are often confronted within incompatibilities between national laws and community governance of SNS.

A way for communities to respond to these challenges and to uphold their rights to protect and use their SNS according to their customary laws, is the elaboration

106. Mameamskum J, Herrmann TM, Füleki B., “The ‘Caribou Heaven’: Recognizing a Sacred Site and Integrating Naskapi Ecological Knowledge in the Management of the Proposed Kuururjuaq National Park (Nunavik, Canada)”, *Policy Matters* 17 2010 pp. 120–126.

107. Verschuuren B, Wild R., “Sacred Natural Sites; Sources of Biocultural Diversity” in *Langscapes* 3 2012 pp. 12–19.

and use of community instruments, such as Biocultural Community Protocols (BCPs).<sup>108</sup> According to Booker & Shrumm, BCPs: “are community instruments that articulate how customary laws, values, and systems of self-governance can be used to respond to the challenges and opportunities posed by external actors.”<sup>109</sup> They are developed in a consultative process where a community outlines their core customary ecological, cultural and spiritual values and laws relating to their resources, based on which they set out clear conditions to external parties such as governments for accessing to their resources. They are an essential tool for succeeding legal recognition of SNS. Community protocols (CPs) have been recognized by the Conference of the Parties of the CBD, and recommended to be integrated in national legislation dealing with the implementation Access and Benefit Sharing protocol.

BCPs can be a means to address conflicts facing communities and external entities over the same area, as shown by the case of the Muskuuchii mountain (‘Bear Mountain’), which is considered a sacred site by the Cree First Nation in the Eastern James Bay, Canada, because of the role it played as food provider in times of famine: “There was a time in life that my family ran out of food for us to eat... If it wasn’t for the abundance of food on Muskuuchii we probably wouldn’t be around at this very moment.” (Johnny Weistche, Elder).<sup>110</sup> The experiences and stories of the hunters on Muskuuchii, have created a deep respect for this site. The Cree developed rituals, rules and restrictions to have as little impact as possible on the mountain and its wildlife: e.g., avoid making noise; avoid shooting on calm days; speaking in whispers.<sup>111</sup> These rules represent an indigenous wildlife management plan for the area, which has proven effective.<sup>112</sup> Concerns raised among the Cree regarding the impacts that logging may be having on this sacred site:

“Muskuuchii is a sacred place for all of the Crees [...]. How can you hold something sacred and then allow it to be cut and scarred? Would those who wish to clearcut Muskuuchii also plan to run heavy logging machines inside a church? Would they cut down the steeple of that church, especially when people go there for religious

108. See <http://www.community-protocols.org/> and <http://naturaljustice.org/context/biocultural-community-protocols>

109. Booker S, Shrumm H., “Protecting the Sacred: the Role Community Protocols Play in the Protection of Sacred Natural Sites” in *Landscapes* 3 2012 pp. 34–39.

110. Grand Council of the Cree. Undated. *Muskuuchii: More than a mountain*. <http://www.gcc.ca/archive/article.php?id=161> (accessed on 24 December 2012).

111. *Id.*

112. Ettenger K., *Muskuuchii (Bear Mountain): Protecting a Traditional Iyiyuuch Wildlife Preserve and Sacred Site*. Report. Forestry Working Group of the Grand Council of the Crees Montréal. 2002.

practices? This is what they plan to do to Muskuuchii. They wish to ignore its special nature and plan to destroy it by clearcutting. (Bob Moar, tallyman)<sup>113</sup>

The Forestry Working Group of the Grand Council of the Crees – using methodologies such as group discussions, interviews, archives, participatory mapping – produced a BCP that detailed traditional land uses, Cree values and customary laws, current threats, and why, how and who should protect this sacred site. Since 2008, the Muskuuchii hills are in the process of being declared as biodiversity reserve. The Cree have special rights regarding hunting, fishing and trapping in the area.<sup>114</sup>

In British Columbia, Canada, a conflict between the Northgate Mining Corporation and the TseKeh Nay (comprising the Takla, Kwadacha and TsayKeh Dene First Nations), set a powerful precedent regarding regulation of mining projects over SNS. The major gold mine in TseKeh Nay country is Kemess South, operated by Northgate Minerals. In 2006 the TseKeh Nay agreed to recognize the right of the mine to continue its operations in exchange for consultation on future projects and CAN\$1 million per year for their communities throughout the life of the mine. However, Northgate was simultaneously submitting plans for a proposed ore Kemess North mine, which would have turned the six-kilometre-long Amazay Lake, held sacred by the TseKeh Nay, into a toxic waste dump.

The TseKeh Nay held a water ceremony at Amazay Lake to protest its destruction. Along with the neighboring Gitxsan Nation, they argued that they were not involved in the environmental impact assessment: they did not receive promised funds to allow them to study Northgate's proposal, no communities' hearings took place, archaeologists hired by Northgate Minerals failed to document the numerous traditional campsites around the lake.<sup>115</sup>

The communities developed their own community-led instrument to assert their rights to this SNS. In 2007, they provided the Kemess North Joint Review Panel with a report in which they detailed TseKeh Nay values, historic and current uses of the of the Amazay lake region, threats, the spiritual significance of this SNS, and they demanded its protection.<sup>116</sup> The federal-provincial review panel rejected Northgate Minerals' mine expansion proposal, as they felt that the conversion of

113. *Id.* p.20.

114. Gouvernement du Québec. "Proposed Muskuuchii hills biodiversity reserve (provisional name) – Conservation Plan" 2008 13 [http://www.mddep.gouv.qc.ca/biodiversite/reserves-bio/muskuchii/PSC\\_Muskuchii-en.pdf](http://www.mddep.gouv.qc.ca/biodiversite/reserves-bio/muskuchii/PSC_Muskuchii-en.pdf).

115. <http://www.sacredland.org/amazay-lake/> (accessed on 24 December 2012)

116. Littlefield L, Dorricott L, Cullon D, Place J, Tobin P – on behalf of the TseKeh Nay 2007: *TseKeh Nay Traditional and Contemporary Use and Occupation at Amazay (Duncan Lake): A Draft Report*. Draft Submission to the Kemess North Joint Review Panel. May, 2007. 157.

Amazay Lake into a tailings dump is “not in the public interest” and that “both the Gitksan and the TseKeh Nay have stated that water is sacred to them, and that the destruction of a natural lake goes against their values as aboriginal people.” This decision is of much relevance, as it places sacred land issues on equal footing with environmental concerns, which is a precedent in this Province.<sup>117</sup>

As both cases above show, community-led instruments, CPs have allowed IPs to make aware governments to their rights as SNS guardians, and to stop development activities on their SNS. They also show how communities in developing their own instruments, create a basis upon which to develop the future management of their resources in clearly stating their norms, values and customary laws that govern their SNS; and their rights to be involved in decision-making according to the principle of FPIC, and be part in the monitoring of projects that affect their sacred lands. This can help communities gain recognition for their territorial sovereignty, for their SNS and the *sui generis* laws based on which they govern these sites. While a number of IPs have declared that they view CP as a useful tool in managing their land and resources, others however, have stated that they don't. The effectiveness of CPs depends on respect for underlying rights; if the rights are not respected, neither will the CPs be. We would argue that CPs enable IPs to bridge the gap between customary, national, and international laws.

## 5. Conclusions

The right to cultural integrity of IPs is well established in human rights law, and can be regarded also as a part of international customary law. Yet, the translation of international law, conventions and resolutions into national policy and legislation takes a long time, and in many countries across the Arctic region national policies and legislation on sacred natural sites (SNS) have no or only a very limited degree of implementation. In this paper we presented several processes that recognize and uphold IPs' rights, and where action for the protection of SNS is being taken by indigenous communities themselves using international law and policy instruments, or developing their own community instruments. As the cases in this paper show, regarding greater recognition and support for SNS and their local custodians in the sub-Arctic and Arctic regions, lobbying international legal and policy venues such as HRC or IUCN has to be raised up conjointly with advocacy campaigns at the national level, often resulting from local levels. The cases also illustrate how

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117. Takla First Nation, TsayKeh Dene First Nation, and Kwadacha First Nation. “First Nations welcome ‘brave recommendation’ from panel reviewing Kemess Mine expansion.” News release, September 18, 2007.

community-led instruments that call for the recognition of SNS and support for management practices based on the indigenous customary laws can be a tool for custodians to determine local implementation of their rights, and an opportunity to bridge the gap between customary, national and international law and policies.

There are several key lessons that could encourage recognition of SNS of IPs in the Arctic:

- National policies and legislations of Arctic States may be further strengthened that formally recognize the existence of SNS in culturally appropriate and sensitive ways, which enhance their protection and respect and affirm the rights of their traditional caretakers to their autonomous control and management of their SNS (e.g., ensure that site custodians retain decision-making control over tourist activities within such sites);
- International Human Rights law explicitly or implicitly related to the protection of the sacred sites should be more effectively implemented, particularly taking into account the right of indigenous peoples to free, prior and informed consent;
- Enabling community leadership to express a vision for protection and use of their sacred sites;
- Ensuring sufficient time, patience, and trust to develop an equitable partnership between the indigenous custodians and external parties that respect indigenous spiritual, cultural tradition and practices and their sacred sites.

### **I. Признание сакральных природных мест коренных народов Арктики в качестве их права на культурную целостность**

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#### **Резюме**

Сакральные природные объекты (далее – СПО) являются важным средством для выражения и передачи культуры и проявления духовных ценностей природы, которые внесли свой вклад в сохранение видов и мест обитания. Однако многие СПО все чаще находятся под угрозой, и их вклад в сохранении окружающей среды до сих пор в должной мере не признан государствами и природоохранными учреждениями, законодательством и политиками. С ростом признания взаимозависимости между биоразнообразием и социокультурными системами в Арктике, общины коренных народов, природо-

охранные организации, правоохранительные органы и политики стремятся восстановить биокультурное разнообразие на конструктивном уровне, на пути сохранения прав, политики и практики. В данной статье обсуждается роль международного права, а также своеобразие процессов в субарктических и арктических регионах, которые признают и защищают права коренных народов в СПО. Также обсуждаются и предпринимаемые действия по сохранению СПО, которые в настоящее время приняты либо в самих коренных общинах, с использованием международного права и политических инструментов, либо собственных инструментов данного сообщества.

**Ключевые слова:** сакральные природные объекты; права коренных народов; Арктика; культурная целостность, международное право, права человека, международное право по защите окружающей среды