with Indigenous peoples as stakeholders and rights-holders in a manner that increases their choices and capabilities, rather than in one that leaves them dispossessed and further marginalized. This is a framework that also increases the possibility of greater trust to be established between Indigenous peoples and the private sector, creating the potential for science and ancestral knowledge to come together more effectively to increase sustainability and optimal management of the world's most fragile and complex ecosystems. This requires renewed efforts to ensure that Indigenous rights and normative standards on biodiversity be conceptualized as mutually reinforcing interests and that new practices be negotiated accordingly. It does not need to be a case of one being championed at the expense of the other.

Protecting Indigenous rights and biodiversity should be seen as mutually reinforcing interests with new frameworks to be negotiated accordingly.

Nevertheless, the extent to which UNDRIP or the principles upheld in the *Endorois* decision are incorporated into further developments associated with the CBD remains to be seen. In Africa, at the very least, the *Endorois* ruling constitutes a formal interpretation of the African Charter – a normative instrument that is binding upon all but one State of the continent.[45] As a landmark case, it therefore serves as a formal warning to all other State Parties to the CBD of their obligations under the Charter if similar fact patterns were to emerge under their respective jurisdictions. However, this warning must not be misconstrued as a threat. Instead, as highlighted above, it should be welcomed by States as a blueprint and an opportunity for the emergence of new frameworks that allow for mutually beneficial outcomes for both conservation and Indigenous peoples' rights.

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45 Morocco stands as the sole African country not to be party to the African Charter on Human and Peoples' Rights.

Implementing the UN Declaration on the Rights of Indigenous Peoples and International Human Rights Law through the Recognition of ICCAs

Stan Stevens

Abstract

Appropriate recognition and respect for Indigenous Peoples' Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs) are critical components of the International Union for Conservation of Nature's new protected area paradigm policies and contribute significantly to implementing the Convention on Biological Diversity's Articles 8(j) and 10(c) and Programme of Work on Protected Areas. ICCAs are also supported by and embody many internationally-affirmed human rights. As such, the appropriate and rights-based legal recognition of ICCAs should become an important means of 'best practice' implementation of the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights instruments, as well as an important remedy and redress for violations of human rights associated with the establishment and governance of protected areas in Indigenous peoples' territories. An analysis of Sherpa ICCAs in Sagarmatha (Chomolungma/Mount Everest) National Park and World Heritage Site illustrates the need for increased and appropriate recognition of ICCAs as a prerequisite to the realization of these rights.

In recent years, the discourse on protected areas has been revolutionized by greater appreciation for the conservation contributions of Indigenous peoples and local communities on their traditional territories and collective lands. Recognition of Indigenous Peoples' Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs) is central to the current protected area policies and best practice standards of both the International Union for Conservation of Nature (IUCN) and the United Nations (UN) Convention on Biological Diversity (CBD).[1] IUCN characterizes ICCAs as territories and areas that "are voluntarily conserved by indigenous peoples and local communities through customary law or other effective means."[2] Both the Members of IUCN and the Parties to the CBD have endorsed ICCAs as protected areas and urged states to give them legal and other recognition and support.[3] ICCAs embody diverse forms of conservation based on Indigenous peoples' and local communities' cultures, self-governance, and self-determination. They vary enormously in their age, size, goals, and institutional arrangements, ranging from the collective care and protection of sacred natural sites and species to the community governance of forest, grassland, and marine commons, and from small sacred groves to Indigenous peoples' conservation stewardship of entire territories (Indigenous Conservation Territories) through their customary knowledge, values, institutional arrangements, and practices. ICCAs can also be recently adopted institutional arrangements and practices that Indigenous peoples and local communities implement through their self-governance and authority for decision-making about the use, development, and conservation of their lands, waters, and natural resources.[4]

ICCAs are recognized and supported by many provisions of international human rights and environmental law and policy.

IUCN recognizes ICCAs as one of four protected area governance types (along with governance by states, private governance, and shared governance).[5] ICCAs are considered appropriate for administering the entire spectrum of protected areas (IUCN protected area management categories I-VI), including national parks and wilderness areas. An IUCN resolution adopted by the III[rd] World Conservation Congress in Bangkok, moreover, linked ICCAs to rights by calling for "supporting existing [I]CCAs, and facilitating new ones, through measures including support to the restitution of traditional and customary rights."[6] Recent discussions of ICCAs within IUCN's Commission on Environmental, Economic and Social Policy further acknowledge that "many have been subsumed within government protected areas without acknowledgment of their pre-existence as independently-governed ICCAs" and recommend that "ICCAs that have been incorporated into official protected area systems without the free, prior and informed consent of the concerned communities should be recognized as ICCAs and provided respect and support."[7]

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1 Borrini-Feyerabend, G., A. Kothari, and G. Oviedo, 2004. *Indigenous and Local Communities and Protected Areas, Towards Equity and Enhanced Conservation: Guidance on Policy and Practice for Co-managed Protected Areas and Community Conserved Areas*, Best Practice Protected Area Guidelines Series No. 11. World Commission on Protected Areas, IUCN, and Cardiff University: Gland, Switzerland; Borrini-Feyerabend, G., 2008. *Recognizing and supporting indigenous and community conservation: ideas and experiences from the grassroots*, IUCN/CEESP Briefing Note 9. Last accessed September 22, 2010, at: http://cmsdata.iucn.org/downloads/ceesp_briefing_note_9_iccas.pdf; Borrini-Feyerabend, G., 2010, *Strengthening what works – recognizing and supporting the conservation achievements of indigenous peoples and local communities*, IUCN/CEESP Briefing Note 10. Last accessed September 22, 2010, at: http://www.iccaforum.org/images/stories/pdf/briefing%20note%2010%20in%20english-%20resolution%20150%20dpi.pdf; Pathak, N., S. Bhatt, T. Balasinorwala, A. Kothari, and G. Borrini-Feyerabend, 2004. *Community conserved areas: a bold new frontier for conservation.* IUCN/CEESP Briefing Note 5. Last accessed May 10, 2010, at: www.iucn.org/themes/ceesp/Wkg_grp/TILCEPA/CCA%20Briefing%20Note.pdf; Dudley, N. (ed.), 2008. *Guidelines for Applying Protected Area Management Categories*. IUCN: Gland, Switzerland; Kothari, A., 2006a. "Community conserved areas," pages 549-573 in Lockwood, M., G. L. Worboys, and A. Kothari (eds.), *Managing Protected Areas: a Global Guide*. Earthscan: London; Kothari, A., 2006b. "Community conserved areas: towards ecological and livelihood security". *Parks*, 16(1): 3-13; Kothari, A., 2008. "Protected areas and people: the future of the past". *Parks*, 17(2): 23-34.

2 IUCN, 2004a. "Community conserved areas", World Conservation Congress Resolution 3.049.

3 IUCN, 2004a; IUCN, 2004b. "Mobile peoples and conservation", World Conservation Congress Resolution 3.018; IUCN, 2008a. "Recognition of indigenous conservation territories", World Conservation Congress Resolution 4.050; IUCN, 2008b. "Recognition and conservation of sacred natural sites in protected areas", World Conservation Congress Resolution 4.038; IUCN, 2008c. "Supporting indigenous conservation territories and other indigenous peoples' and community conserved areas." World Conservation Congress Resolution 4.049; World Commission on Protected Areas (WCPA), (IUCN), 2003a. "The Durban accord", Vth World Parks Congress; WCPA, 2003b. "The Durban action plan", Vth World Parks Congress; WCPA, 2003c. "Community conserved areas", Vth World Parks Congress Recommendation V.26; WCPA, 2003d. "Cultural and spiritual values of protected areas", Vth World Parks Congress Recommendation V.13; WCPA, 2003e. "Indigenous peoples and protected areas", Vth World Parks Congress Recommendation V.24; WCPA, 2003f. "Mobile indigenous peoples and conservation", Vth World Parks Congress Recommendation V.27; WCPA, 2003g. "Recognising and supporting a diversity of governance types for protected areas", Vth World Parks Congress Recommendation V.17; 7th Conference of the Parties (COP7) to the Convention on Biological Diversity, 2004. Decision VII/28, Annex: *Programme of Work on Protected Areas*, Kuala Lumpur, Malaysia.

4 See Kothari, 2006b; Borrini-Feyerabend *et al.*, 2004; Borrini-Feyerabend, 2010; WCPA, 2003c; Pathak *et al.*, 2004; Phillips, A., 2003. "Turning ideas on their head: the new paradigm for protected areas". *George Wright Forum*, 20(2): 8-32.

5 Dudley, 2008.

6 See WCPA, 2003c, which noted the link between ICCAs and rights with reference to the then draft UNDRIP; IUCN, 2004a. On ICCAs and protected area governance types, see Pathak *et al.*, 2004; Borrini-Feyerabend, 2010; Dudley, 2008.

7 Borrini-Feyerabend, 2010, pages 3-4.

ICCAs are also supported by multiple provisions of the CBD and its Programme of Work on Protected Areas (PoWPA). ICCAs are an important means for the realization of the CBD's Article 8(j), which requires states to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity" and Article 10(c), which requires states to "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".[8] The PoWPA, which was adopted by the Parties to the CBD in 2004, specifically calls on state parties to "facilitate the legal recognition and effective management of indigenous and local community conserved areas" (Activity 2.1.3).[9] Support for recognition of ICCAs within the PoWPA is grounded in overall policy on protected area "governance, participation, equity, and benefit sharing", which emphasizes Indigenous peoples' participation in accordance with recognition of their rights.[10]

Recognition of ICCAs by IUCN is grounded in a long history of affirmation of the rights of Indigenous peoples with regard to protected areas.[11] As early as 1975, IUCN advised states to "devise means by which indigenous people may bring their lands into conservation areas without relinquishing their ownership, use, or tenure rights."[12] In 1994, IUCN began recommending compliance with the principles of the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169)[13] and the then draft UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[14] Two years later, IUCN reaffirmed this position by recommending that its members (which include most of the world's states and major non-governmental conservation organizations) adopt policies based on principles such as "recognition of the rights of indigenous peoples with regard to their lands or territories and resources that fall within protected areas" and the rights of Indigenous peoples "to participate effectively in the management of the protected areas established on their lands and territories."[15]

IUCN's strong affirmation of Indigenous rights and the rights of local communities has made ICCAs a core component of IUCN's "new protected area paradigm." The new paradigm maintains, *inter alia*, that rights recognition and rights-based conservation must be integral to the establishment, governance, and management of all protected areas, with advocates

8 Convention on Biological Diversity, 1992. The PoWPA makes further reference to Article 8(j) in recommending "the establishment of protected areas that benefit indigenous and local communities, including by respecting, preserving, and maintaining their traditional knowledge in accordance with Article 8(j) and related provisions" (Activity 1.1.7). ICCAs also have now been identified by the CBD as key means of implementing Article 10(c). In 2009, the Executive Secretary of the CBD noted that customary use, *sui generis* systems of resource use regulation, Indigenous knowledge, customary law, local beliefs and cosmologies, and the effective participation by Indigenous peoples in the management of natural resources are closely linked (paragraphs 6, 7, 8, 9, 16, 31, and 32), recommended local control as an effective means of realizing this (paragraph 16(a)), called for "supporting Indigenous and local communities to exercise their customary practices and laws" and to "represent themselves through their own institutions (paragraph 14(b))," identified protected areas as a particular site of challenges to Indigenous peoples' natural resource management in accordance with their knowledge and customary practices (paragraphs 15 and 18), and recommended recognition of ICCAs (paragraph 13(b)). The Executive Secretary observed that "one mechanism for promoting and strengthening access to biological resources for the purposes of customary use … is to document and recognize the existence of ICCAs, and to support local communities in their stewardship of these areas" (paragraph 13(b)). CBD Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 2009. *Advice on How Article 10(c) can be Further Advanced and Implemented as a Priority: Note by the Executive Secretary*, Sixth meeting, Montreal, November 2-6, 2009, Item 7 of the provisional agenda, UNEP/CBD/WG8J/add.1 12 June 2009.

9 CBD PoWPA, Activity 2.1.3. Two other PoWPA-suggested activities also advocate recognition and promotion of ICCAs. Activity 2.1.2 recommends that states do so through "legal and/or policy, financial, and community mechanisms," while Activity 2.2.4 calls for promotion of an "enabling environment" for Indigenous peoples and local communities "to establish and manage protected areas, including community conserved … protected areas." COP9 Decision IX/18, paragraph 19 encourages "taking into account indigenous and local communities' own management systems and customary use" in protected area conservation and development activities and benefit sharing. The revised CBD Programme of Work on Inland Water Biological Diversity also provides support for ICCAs by calling on states in paragraph 9(c) "to support indigenous and local communities to re-establish, develop and implement traditional approaches and/or adaptive management approaches to conserve and sustain the use of the biological diversity of inland water ecosystems." COP7 CBD 2004, Decision VII/4, Biological diversity of inland water ecosystems, Annex: Programme of Work on Inland Water Biological Diversity, paragraph 9(c). Last accessed July 23, 2010, at: http://www.cbd.int/decision/cop/?id=7741.

10 PoWPA, Element 2. Also, Goal 2.2 is "to enhance and secure involvement of indigenous and local communities and relevant stakeholders" in protected area governance and management with a target of "full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities … in the management of existing, and the establishment and management of new, protected areas." Participation by Indigenous peoples is also highlighted in Activities 2.1.3 and 2.1.5.

11 On rights and conservation, see Alcorn, J. B., and A. G. Royo, 2007. "Conservation's engagement with human rights – 'traction', 'slippage', or avoidance?" *Policy Matters*, 15: 115-139; Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), 2009. *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation*. Center for International Forestry Research and IUCN: Bogor, Indonesia.

12 IUCN, 1975. "Protection of traditional ways of life", IUCN General Assembly Resolution 5, paragraph 3.

13 ILO 169, opened for signature June 27, 1989, 28 ILM 1382 (entered into force September 5, 1991).

14 IUCN, 1994a. "Indigenous people", IUCN General Assembly Resolution 19.22; IUCN, 1994b. "Indigenous people and the sustainable use of natural resources", IUCN General Assembly Resolution 19.21.

15 IUCN, 1996. "Indigenous peoples and protected areas", World Conservation Congress I, Resolutions 1.53.1a and 1c.

often highlighting ICCAs as a key example of a new paradigm approach.[16]

Similarly, the Parties to the CBD have endorsed core new paradigm policy and recommendations by highlighting governance issues and rights recognition in 2004 in Decision VII/28 of the 7th Conference of the Parties (COP) and in the associated PoWPA. Paragraph 22 of Decision VII/28 "[*r*]*ecalls* the obligations of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and *notes* that the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations."[17] After setting a 2008 target for implementation, PoWPA Activity 2.2.2 further emphasizes that Indigenous peoples should be involved "with respect for their rights … at all levels of protected areas planning, establishment, governance and management."[18] The Parties to the CBD reiterated these commitments at the 9th COP in Bonn, Germany, in 2008 and urged states to give special attention to implementation of PoWPA Element 2.[19] IUCN had urged that COP 9 do so, observing that implementation of Element 2 "is crucial and yet [is] among the least effectively advanced."[20] A 2010 report from the Executive Secretary of the CBD agreed that implementation of Element 2, Goals 2.1 and 2.2 "was limited and way behind in achieving the targets."[21] Greater attention to legal recognition of rights, implementation of Element 2, and appropriate recognition and support of ICCAs are also emphasized in the 2010 in-depth review of the PoWPA developed by the CBD's Subsidiary Body on Scientific, Technical and Technological Advice and the recommendations adopted by at its 14th meeting in Nairobi, Kenya in May 2010.[22]

The affirmation of the rights of Indigenous peoples and local communities is a core component of IUCN's new protected area paradigm.

These IUCN and CBD policies in part represent a response to Indigenous peoples' calls for their rights to be recognized and respected in protected areas. ICCAs are an important means of meeting the call, expressed in the Indigenous Peoples Declaration to the World Parks Congress in Durban, for protected areas to "recognize the cultural integrity of Indigenous Peoples and ensure the integration of traditional collective management systems as a basis for the management of protected areas."[23]

This article discusses how ICCAs, including those over which state-governed protected areas have been superimposed, are supported by an extensive set of human rights. Thus far, unsuccessful efforts to promote the legal or other appropriate recognition of Sherpa ICCAs in Sagarmatha (Chomolungma/Mount Everest) National Park and World Heritage Site illustrate the difficulties of honoring human rights in protected areas even in a country such as Nepal, which has avowed

16 The term "new protected area paradigm", which was introduced by Beresford and Phillips in 2000, was adopted in 2003 by IUCN's World Commission on Protected Areas in the Durban Accord reached at the Vth World Congress on Protected Areas in Durban, South Africa. It has since been used in a number of influential IUCN publications. ICCA recognition and an emphasis on the importance of affirmation of Indigenous and human rights in protected areas have been core features of representations of the new paradigm since 2003. See Beresford, M., and A. Phillips, 2000. "Protected landscapes: a conservation model for the 21st century". *George Wright Forum*, 17(1): 15-26; Phillips, 2003; WCPA 2003a; Borrini-Feyerabend *et al*., 2004; Kothari, 2006a, 2006b, and 2008; WCPA 2003a, b, and e; IUCN 1996, 2008a, and 2008e; Dudley, 2008; Indigenous Peoples *ad hoc* Working Group to the III World Conservation Congress, 2004. "Press release", November 19, 2004. Last accessed May 12, 2010, at: http://www.treatycouncil.org/PDFs/PressRelease11_22_2004.pdf.

17 COP7 CBD, Decision VII/28, paragraph 22.

18 PoWPA, Activity 2.2.2. The PoWPA does not clarify what is meant by the rights of Indigenous peoples, an omission which could be corrected in its 2010 review and revision by specific reference to UNDRIP. The COP9 Decision IX/18 on Protected Areas took a step in this direction in its preamble by "*Recognizing* the need to promote full and effective participation of indigenous and local communities in the implementation of the programme of work on protected areas at all levels; also *noting* the United Nations Declaration on the Rights of Indigenous Peoples."

19 COP9 Decision IX/18 Protected Areas, paragraph 4(c).

20 IUCN, 2008d. "Protected areas (Agenda item 4.7)" position paper for the Ninth meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 9), Bonn, Germany, May 19-30, 2008. Last accessed September 5, 2010, at: http://cmsdata.iucn.org/downloads/pas_cop9.pdf.

21 Executive Secretary to the CBD, 2010. "In-depth review of the implementation of the Programme of Work on Protected Areas, SBSTTA-14, UNEP/CBD/SBSTTA/14/5/Add.1, page 2. Last accessed September 5, 2010, at: http://www.cbd.int/cms/ui/forums/attachment.aspx?id=8.

22 CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) 2010a. "In-depth review of the implementation of the Programme of Work on Protected Areas, SBSTTA Fourteenth meeting, Nairobi, Kenya, May 10-21, 2010, agenda item 3.1.4. UNEP/CBD/SBSTTA/14/L.5, paragraphs 1(j), 7 (b), and 27 (a-e). Last accessed September 5, 2010, at: http://www.cbd.int/cms/ui/forums/attachment.aspx?id=85; CBD SBSTTA, 2010b. "Report of the fourteenth meeting of the Subsidiary Body on Scientific, Technical and Technological Advice," pages 57-65, paragraphs 1(j), 7 (b), and 27 (a-e). Last accessed September 5, 2010, at http://www.cbd.int/doc/?meeting=sbstta-14.

23 Indigenous Peoples Declaration to the World Parks Congress, 2003. Last accessed May 12, 2010, at: http://www.treatycouncil.org/section_211812142.htm. ICCAs also embody the proposal of the 2010 Indigenous Peoples' Declaration in Cochabamba, Bolivia, that "Natural Protected Areas are managed, administered and controlled directly by Indigenous Peoples, taking into account the demonstrated traditional experience and knowledge towards the sustainable management of biodiversity." See Indigenous Peoples' Declaration, 2010. Last accessed July 20, 2010, at: http://www.sydney.foe.org.au/news/indigenous-peoples-declaration-cochabamba-peoples-climate-confernece [sic].

strong support for the rights of Indigenous peoples by voting in favor of UNDRIP and becoming the first country in Asia to ratify ILO 169.[24] The recognition and support of ICCAs must be considered to be an important – indeed, necessary – means of upholding UNDRIP, ILO 169, and international human rights treaties through the implementation of current protected area policies of IUCN and the CBD and its PoWPA. The failure of states or conservation non-governmental organizations (NGOs) to recognize and respect ICCAs arguably constitutes a violation of multiple human rights and a failure to meet international protected area standards. In many countries, however, achieving appropriate and effective recognition of ICCAs involves challenging entrenched political, social, economic, and conservation relationships and interests.

The appropriate and effective recognition of ICCAs involves navigating complex political, social, economic, and conservation interests.

Indigenous Rights and ICCAs

The rights of Indigenous peoples are affirmed by UNDRIP, ILO 169, international human rights treaties, and interpretations of those treaties by bodies and experts mandated to monitor states' compliance with them. UNDRIP, unlike ILO 169, is not a legally binding treaty, yet it nonetheless has "normative weight that is grounded in the international human rights system."[25] James Anaya, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples (the UN Special Rapporteur), advises that for signatory states, "at all times and at all levels, Government actors should be cognizant of UNDRIP when addressing indigenous peoples' concerns, and further, should interpret ILO 169 in light of it."[26]

In addition to the rights identified in UNDRIP and ILO 169, Indigenous peoples are entitled to, without discrimination, all individual and collective human rights identified in international human rights instruments, including the right of peoples to self-determination. That these rights are held by Indigenous peoples has been affirmed through interpretation of UN treaties and other international law by UN Charter-based bodies such as the UN Human Rights Council, UN treaty bodies charged with monitoring the implementation of core human rights treaties, international and national human rights commissions, and international and national courts. For example, the UN Human Rights Council has devoted considerable attention to Indigenous peoples, including appointing UN Special Rapporteurs and establishing the Expert Mechanism on the Rights of Indigenous Peoples. In 1994, the UN Human Rights Committee (the predecessor of the UN Human Rights Council), referencing the cultural rights of members of minorities affirmed in Article 27 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), noted that this article applies to Indigenous peoples, including their right to a "way of life associated with the use of land resources."[27] The Committee charged with monitoring the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD) has noted that "the situation of indigenous peoples has always been a matter of close attention and concern" and that "the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention" (paragraph 1).[28] The CERD has called on states to "recognize and respect" Indigenous peoples' "distinct culture, history, language and way of life" (paragraph 4(a)), to "ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs" (paragraph 4(e)), "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories, and resources" (paragraph 5), and "where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories" (paragraph 5).[29]

Four broad sets of rights affirmed in UNDRIP and ILO 169 are particularly pertinent to recognition and respect for ICCAs: rights to self-determination and autonomy; rights to ownership, control, management, and use of land and natural

24 The world's highest mountain is called Chomolungma by the Sherpa and Tibetan peoples who live at its foot. For them, it is a sacred peak and the dwelling of the goddess Miyolangsangma. The Nepal government's official name for the mountain and for the national park ignores the Sherpa name and instead adopts a Nepalese name for it that was coined in the twentieth century and was first used by the government in the late 1950s. The People's Republic of China uses the Tibetan and Sherpa name, rendered in pinyin as Qomolangma.

25 Anaya, J. S., 2009. *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya. Addendum: Report on the situation of indigenous peoples in Nepal*, UN Human Rights Council, Twelfth session, Agenda item 3, A/HRC/12/34/Add.3, July 20, 2009, page 14, paragraph 49. Last accessed April 30, 2010, at: http://www2.ohchr.org/english/issues/indigenous/rapporteur/countryreports.htm.

26 Anaya, 2009.

27 United Nations Human Rights Committee (UNHRC), 1994. *General Comment Adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 23 (50th session) (Article 27)*, UN Doc. CCPR/C/21/Rev.1/Add/5 (1994), paragraph 7.

28 CERD, 1997. *General Recommendation 23: Indigenous Peoples*, A/52/18. As Anaya has pointed out, CERD "has paid special attention to indigenous peoples in its efforts to achieve compliance." Anaya, J. S., 2004. *Indigenous Peoples in International Law*. Oxford University Press: Oxford, page 130.

29 CERD, 1997, paragraphs 3.2, 4a, d, and e, and 5.

resources; rights to culture, including cultural integrity and participation in the cultural life of the community; and rights to self-governance and participation in decision-making. Recent interpretations of the UNDRIP by James Anaya, the current UN Special Rapporteur, and his earlier work on Indigenous rights illustrate how ICCAs are supported by such rights identified in UNDRIP and thus how legal recognition of ICCAs can be an important means of implementing it.

Rights to Self-Determination and Autonomy

ICCAs are a foundational aspect of self-determination for Indigenous peoples as expressions of their self-governance, decision-making, and autonomy and as means of maintaining their cultures, livelihoods, and identities. The right to self-determination is violated when Indigenous peoples are prevented from maintaining their ICCAs. This infringement of self-determination is common when state-declared protected areas have been superimposed on ICCAs, collective tenure and customary law have not been recognized, Indigenous peoples' lands have been nationalized or privatized, or states or NGOs have imposed new local institutions of governance and conservation on Indigenous peoples without their free, prior and informed consent. Rectifying such situations through recognition and respect for ICCAs can be a key remedy and means of realizing the right to self-determination.

Self-determination is a fundamental right of all peoples. The securing of this right is one reason that the global Indigenous peoples movement has so strongly maintained that Indigenous peoples are not minorities, ethnic groups, or people, but rather are peoples with the right of peoples to self-determination.[30] As affirmed in foundational human rights instruments such as the UN Charter, the ICESCR, and the International Covenant on Civil and Political Rights (ICCPR), the right of peoples to self-determination has rich political, economic, social, and cultural dimensions that affirm the rights of peoples to decision-making authority over their lives, territories, and futures. Self-determination also has an important "territorial aspect" of supporting Indigenous peoples' autonomy within the territories that they occupy or use. This encompasses not only current land use, but also "ancestral or traditional use that continues to have significance in the contemporary life of the community, including within cultural and religious domains."[31]

ICCAs are foundational expressions of Indigenous peoples' self-governance and self-determination.

Article 3 of UNDRIP declares that "Indigenous peoples have the right to self-determination. By virtue of that right they … freely pursue their economic, social and cultural development." Furthermore, Article 4 affirms that Indigenous peoples have the right to autonomy or self-government, which includes the rights to maintain and develop their own distinct decision-making, political, legal, economic, social, and cultural institutions (Articles 5, 18, and 20).[32] ICCAs are distinct institutions in all of these senses. As culturally appropriate institutional structures through which Indigenous peoples realize their autonomy over their lands and lives, ICCAs are the means through which Indigenous peoples exercise authority over how community members and associations interact with nature, use natural resources through collectively managed practices, maintain care and respect for sacred places, and exercise self-governance. ICCAs therefore exemplify the "autonomy over particular subjects of local or internal concern", which Anaya maintains should "extend to matters throughout their respective territories in ways commensurate with the exercise of their rights to political participation, cultural integrity, and social and economic development."[33]

Rights to Ownership, Control, Management, and Use of Land and Natural Resources

ICCAs are expressions and means of Indigenous peoples' ownership, control, and management of territory and natural resources. These rights over territory, land, and natural resources critically support ICCAs and distinguish ICCA-managed land and resources from land use under state-conferred, conditional access privileges.

Such rights are well-established in international law and attest to Indigenous peoples' rights to territorial ownership and possession (ILO 169, Article 14(1)), and their right to own, use, develop, and control their lands and territories (UNDRIP,

30 Nietschmann, B., 1994. "The fourth world: nations versus states", pages 225-242 in Demko, G., and W. B. Wood (eds.), *Reordering the World*. Westview Press: Boulder; Niezen, R., 2003. *The Origins of Indigenism: Human Rights and the Politics of Identity*. University of California Press: Berkeley.
31 Anaya, 2009, page 19, paragraph 69.
32 See also ILO 169, Articles 8 and 9.
33 Anaya, 2009, page 19, paragraph 69.

Article 26.2).[34] States are required to "give legal recognition and protection to these lands, territories and resources", which "shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned" (UNDRIP, Article 26.3). Affirmation of these rights thus requires recognition of pre-existing Indigenous traditional title to lands and waters that have been annexed by the state and nationalized, including lands and waters for which ownership or custodianship is held collectively.[35] Indigenous peoples also have the right to redress – including by restitution – for territory, land, and natural resources "confiscated, taken, occupied, used, or damaged without their free, prior and informed consent" (UNDRIP, Article 28), a provision which is relevant to many protected areas.[36] International and national law that attests to rights to property gives further support to ICCAs by affirming both collective and individual tenure rights. Recognition of Indigenous peoples' collective ownership and management of territory is necessary to avoid discrimination against their customary means of owning property, ensuring cultural integrity, and pursuing self-determination. Article 14(1) of ILO 169 recognizes Indigenous peoples' collective ownership of land and the importance of this for their culture and their spiritual relationship with their lands and territories, and affirms "a combination of possessory, use, and management rights."[37]

While some ICCAs function without legal state recognition, it is indeed critical to recognize Indigenous peoples' collective ownership and management of their territories.

Many ICCAs benefit from *de jure* ownership of communal lands, territories, and resources. Others are maintained without state legal recognition of Indigenous peoples' collective land tenure or territorial control. In such conditions, ICCAs may be weakened or at risk. Conversely, restoration of title to nationalized lands or affirmation of rights to use and manage lands and natural resources may strengthen or rejuvenate ICCAs that have been destroyed or weakened by loss of tenure or of legal authority for self-governance and land management. Indigenous peoples and proponents of rights-based conservation often maintain that recognition of tenure rights (both land and marine) can be critical for maintaining effective ICCAs.[38] Recognition of tenure rights alone, however, may not be sufficient to ensure full recognition and respect for ICCAs or full and effective realization of Indigenous peoples' rights.[39]

Rights to Culture: Community, Participation, and Cultural Integrity

Rights to culture are fundamentally linked to ICCAs. ICCAs are supported by the right to participate in community cultural practices, by the collective rights of communities to their cultural integrity, and by the rights of peoples to rejuvenate their culture, institutions, and practices. ICCAs are cultural expressions *par excellence*. The governance and management of lands, waters, natural resources, and cultural sites (including sacred places) through ICCAs constitutes a community cultural practice that is often strongly associated with their values, spirituality, heritage, and cultural identities.

Rights to cultural integrity are affirmed in multiple articles of UNDRIP (of which Articles 5, 8, 11, 12, 15, 25, 31, and 34 are particularly relevant to ICCAs).[40] Articles 15 and 11, which state that Indigenous peoples "have the right to the dignity and diversity of their cultures, traditions, histories and aspirations" and "the right to practice and revitalize their

34 See also ILO 169, Article 15; CERD, 1997, paragraph 5.

35 The continued validity of Indigenous title, despite subsequent state claims to ownership, has underlain comprehensive land claims settlements in Alaska, Canada, and Australia, as well as restitution of lands in South Africa, the U.S., Australia, and New Zealand. Pre-existing Indigenous title has also been upheld by the Inter-American Court of Human Rights in multiple decisions, including its 2001 decision that Nicaragua had violated an Indigenous people's right to customary land and natural resource tenure under the right to property, as affirmed by the American Convention on Human Rights, and a 2003 decision in the case of Mayan land rights in Belize. MacKay, F., 2007. "Indigenous peoples, protected areas and the right to restitution – the jurisprudence of the Inter-American Court of Human Rights". *Policy Matters*, 15: 209-222; Anaya, J. S., and C. Grossman, 2002. "The case of Awas Tingni v. Nicaragua: a new step in the international law of indigenous peoples". *Arizona Journal of International and Comparative Law*, 19(1): 1-15; Anaya, 2004; *2001 The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-American Court of Human Rights (Series C) No. 79 (Judgment on merits and reparations of August 31, 2001); *2003 Maya Indigenous Communities*, Case No. 12.053 (Belize) Inter-American Court on Human Rights Report No. 96/03.

36 IUCN's World Commission on Protected Areas called for such restitution of protected area land in its 2003 World Parks Congress Recommendation V.24.1(i) on Indigenous Peoples and Protected Areas, Recommendation V. 27.3(h) on Mobile Indigenous Peoples and Conservation, and in the Durban Action Plan's Key Target 10. See WCPA 2003b, e, and f.

37 Anaya, 2004, page 143. Also see CBD Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 2009, paragraph 13(a). Rights to collective property are also recognized in the Universal Declaration of Human Rights, Article 17. The European Convention on Human Rights (Protocol No. 1, Article 1) and the American Convention on Human Rights (Article 21) recognize property rights, which can be interpreted to include collective property rights.

38 Borrini-Feyerabend, 2010; Colchester, M., 2007. *Beyond Tenure, Rights-Based Approaches to Peoples and Forests: Some Lessons from the Forest Peoples Programme*. Rights and Resources Initiative: Washington, D. C.

39 Colchester, 2007.

40 Anaya, 2004, page 133.

cultural traditions and customs", recognize rights that are relevant to ICCA recognition and respect. Indigenous peoples' governance of sacred sites, moreover, is specifically recognized in Article 12 of UNDRIP, which affirms "the right to maintain, protect, and have access in privacy to their religious and cultural sites." These rights to the expression, enjoyment, and revitalization of culture and customs are also relevant to community governance of land and natural resources based on customary law and institutions.

ICCAs are cultural expressions of communities' values, spirituality, heritage, and identities.

The right to practice culture as part of a community is recognized in Article 27 of the ICCPR, which the UN Human Rights Committee has interpreted as affirming the rights of persons who belong to "ethnic, linguistic or religious minorities … in community with other members of their group, to enjoy their own culture, [and] to profess and practice their own religion."[41] Although Article 27 is a right conferred upon individuals, its realization requires recognition of collective practices of culture and depends upon the ability of the community to maintain its culture, language, and religion.[42]

Cultural rights under Article 27 of the ICCPR also extend to Indigenous peoples' economic and social activities. For example, in applying Article 27 in the case of *Ominayak, Chief of the Lubicon Lake Band v. Canada*, the UN Human Rights Committee found in 1990 that Canada had violated the rights of the Lubicon Lake Band of Cree Indians to economic and social activities that are important to their identity as a community and to their subsistence.[43] The UN Human Rights Committee subsequently reiterated that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."[44] The way of life associated with the use of natural resources arguably encompasses not only the specific practices through which resources are used, but also the community's cultural shaping of that use through ICCAs, which integrate knowledge, values, and norms through culturally-grounded institutional arrangements.[45] The strong bonds between ICCAs, natural resource use, and livelihood customs make ICCAs an important aspect of Indigenous peoples' collective culture, community solidarity, and identity.

Right to Self-Governance and Participation in Decision-Making

ICCAs are pre-eminent institutions of self-governance. They are critical to Indigenous peoples' governance of their livelihood practices, natural resource use, economic development, and conservation practices. Lack of recognition of ICCAs, including their forced replacement by standardized, state-designed local institutions and institutional arrangements, strongly interferes with Indigenous peoples' rights to self-governance and decision-making.

The violation of rights to self-governance and participation in decision-making also violates rights to culture, self-determination, and ownership of territories and resources.

Rights to self-governance and to participation in decisions made about lands, natural resources, and development are recognized in UNDRIP (Articles 18, 20, 34, and 35) and ILO 169 (Articles 7, 8, and 9). These are entwined with rights to self-determination and cultural rights because of the right to self-governance through freely-adopted institutions and arrangements, including customary ones. According to UNDRIP Articles 5, 18, 20.1, and 34, Indigenous peoples have the rights to maintain, strengthen, and develop their own distinct decision-making, political, legal, economic, social, and cultural systems and institutions and "to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and, in the cases where they exist, juridical systems or customs." The right of Indigenous peoples to participate in decision-making clearly refers not only to consultation, but also to participation within the context of the right to self-governance through their own decision-making institutions.

41 UNHRC, 1994, paragraph 1. The right to participate in cultural activities and the right of members of minority groups to participate in the cultural life of their community are also recognized in the Universal Declaration on Human Rights (Article 5.v.vi) and in the International Covenant on Economic, Social and Cultural Rights (Article 15).

42 UNHRC, 1994, paragraph 6.2.

43 *1990 Ominayak, Chief of the Lubicon Lake Band v. Canada*, Communication No. 267/1984, Report of the Human Rights Committee, UN GOAR, 45th Session, Supplement No. 40, Vol. 2, at 1, UN Doc. A/45/40, Annex 9 (A) (1990) (views adopted March 26, 1990).

44 UNHRC, 1994, paragraph 7.

45 This is now noted by the Executive Secretary of the CBD, in conjunction with CBD Article 10(c), who observed that "customary use should be recognized as a form of traditional, local management. As such, customary use and the effective participation of indigenous and local communities in the management of resources form two sides of the same coin." CBD Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, 2009, paragraph 16.

These rights cannot be affirmed while denying recognition and respect to Indigenous peoples' ICCAs or by legally recognizing only standardized, 'blue-print' institutions designed by state agencies or conservation NGOs as ICCAs. In this way, any violation of rights to self-governance and to participation in decision-making also violates rights to culture, rights to self-determination and autonomy, and rights to the ownership, control, and management of territories, lands and waters, and natural resources. Such deep and widespread violation of rights is a common experience of Indigenous peoples whose lands and waters have been declared state-owned and -governed protected areas and whose ICCAs have not been accorded any legal standing. Such peoples include many Indigenous peoples in Nepal, among them, the Sherpa people of the Mount Everest region.

Recognizing Sherpa ICCAs in Sagarmatha (Chomolungma/Mount Everest) National Park

Sherpa efforts to gain recognition and respect for their ICCAs within the Sagarmatha (Chomolungma/Mount Everest) National Park (SNP) and World Heritage Site, Nepal, highlight how underlying political, bureaucratic, economic, and social relationships can pose enormous challenges to ICCA recognition, even in states that are signatory to major international human rights and Indigenous rights treaties.[46] The Sherpa people are one of at least 59 Indigenous peoples in Nepal, where Indigenous peoples collectively constitute at least 37% of the total population.[47] For two centuries, Indigenous peoples have been severely politically, socially, and economically marginalized and discriminated against in Nepal by the dominant ethnic elite. They continue to be subjected to entrenched discriminatory attitudes, institutions, and practices that violate fundamental human rights, despite Nepal's 2007 ratification of ILO 169 – the first country in Asia to do so – and vote in the UN General Assembly in favor of UNDRIP.[48] Rights violations continue in Nepal, even though ILO 169 and other human rights treaties have exceptional legal weight under the terms of the Nepal Treaty Act of 1990, whereby "as a duly ratified treaty, ILO 169 prevails in the case of conflicting national legislation within the domestic sphere."[49] There is considerable concern about the lack of implementation of ILO 169 due to the failure of many realms of national law, policy, and practice to affirm its provisions. According to Indigenous rights advocates in Nepal, this reflects continued social and political domination of Indigenous peoples by the non-Indigenous ethnic elite, as well as ethnocentrism, racism, paternalism, corruption, and vested political and bureaucratic interests.[50] The UN Special Rapporteur's 2009 country report on Nepal notes specific charges by Indigenous peoples of rights violations in and around national parks due to the policies and practices of the Department of National Parks and Wildlife Conservation.[51]

Most of Nepal's national parks and other protected areas have been established in the customary territories of Indigenous peoples and without their consent. While Indigenous peoples and local communities continue to inhabit the mountain protected areas (with one exception), resident Indigenous peoples were evicted from the lowland protected areas.[52] Indigenous peoples' enclave settlements within national parks, including the Sherpa settlements in the SNP, are

46 Stevens, S., 2008a. "The Mount Everest region as an ICCA: Sherpa conservation stewardship of the Khumbu sacred valley, Sagarmatha (Chomolungma/Mount Everest) National Park and Buffer Zone". Last accessed April 30, 2010, at: http://cmsdata.iucn.org/downloads/mount_everest_nepal_report_icca_grassroots_discussions.pdf; Stevens, S., 2009. "Seeking respect for a Sherpa community conserved area: responsibility, recognition, and rights in the Mount Everest Region of Nepal," pages 203-232 in Campese, J., T. Sunderland, T. Greiber, and G. Oviedo (eds.), *Rights-Based Approaches: Exploring Issues and Opportunities for Conservation*. Center for International Forestry Research and IUCN: Bogor, Indonesia.

47 Indigenous peoples' organizations in Nepal charge that past censuses have significantly under-enumerated Indigenous peoples. A number of peoples who are not yet recognized as Indigenous, moreover, are seeking legal recognition.

48 Anaya, 2009; Stevens, 2009; Gurung, H., 2003. "Trident and Thunderbolt: Cultural Dynamics in Nepalese Politics, Social Science Baha, Lalitpur, Nepal". Last accessed May 12, 2010, at: http://www.himalassociation.org/baha/Trident-and-Thunderbolt.pdf; Lawotri, M., 2001. "Racial discrimination towards the indigenous peoples in Nepal: non-government report for the Third World Conference Against Racism (WCAR) – 2001". Last accessed May 10, 2010, at: http://members.fortunecity.com/dharantimes/ethnic5.htm; Battachan, K. (no date). "Indigenous Peoples and Minorities in Nepal". Last accessed May 12, 2010, at: http://www.nefin.org.np/articles/dr-krishna-b-bhattachan; Battachan, K., 2000. "Do [Only] Dominant Groups Have a Right to Live?" Last accessed May 12, 2010, at: http://www.nepjol.info/index.php/DSAJ/article/viewPDFInterstitial/275/269.

49 Anaya, 2009.

50 Such conditions in Nepal and other countries raise questions about whether rights-grounded recognition and promotion of ICCAs – or rights-based conservation more generally – can be meaningfully implemented, regardless of pertinent international obligations, constitutional provisions, and national law. Nepalese and other Indigenous leaders are skeptical that ICCAs can be appropriately and effectively recognized and supported in the absence of rights recognition and the development and implementation of new national law and revised protected area policies, regulations, and plans.

51 Anaya, 2009.

52 Stevens, S., 1993. *Claiming the High Ground: Sherpas, Subsistence, and Environmental Change in the Highest Himalaya*. University of California Press: Los Angeles and Berkeley; Stevens, S., 1997, "Consultation, co-management, and conflict in Sagarmatha (Mount Everest) National Park, Nepal", pages 63-97 in Stevens, S. (ed.), *Conservation Through Cultural Survival: Indigenous Peoples and Protected Areas*. Island Press: Washington, D. C.; Stevens, 2009;

considered to be part of national park buffer zones in which Indigenous peoples are permitted to continue some of their customary livelihood activities in their customary territories. Other customary practices are banned. Many peoples continue to maintain their customary ICCAs, including those that protect sacred places and species and those that maintain customary governance and management of the use of community forests, grazing lands, rivers, lakes, and other livelihood commons. They maintain these customary, culture-based ICCAs despite the nationalization of their collective lands, the lack of legal recognition of the authority of their ICCAs, and the imposition by the Nepal government of new, nationally-standardized institutions of local governance and natural resource management such as state-recognized community forests and buffer zone institutions.

Human rights recognition has not been a fundamental consideration in the establishment, governance, and management of Nepal's protected areas. Allegations of human rights violations by park officials and staff (including evictions, unlawful violence, and lack of due process) have been documented in several of the national parks and wildlife reserves and found to be credible by the UN Special Rapporteur.[53] Besides these rights violations, the suppression of ICCAs and denial of their legal recognition can also be considered to be in violation of multiple cultural, social, and political rights affirmed by the ICESCR, ICCPR, CERD, and ILO 169, all of which Nepal is signatory to, and UNDRIP, which Nepal voted in favor of adopting in the UN General Assembly.

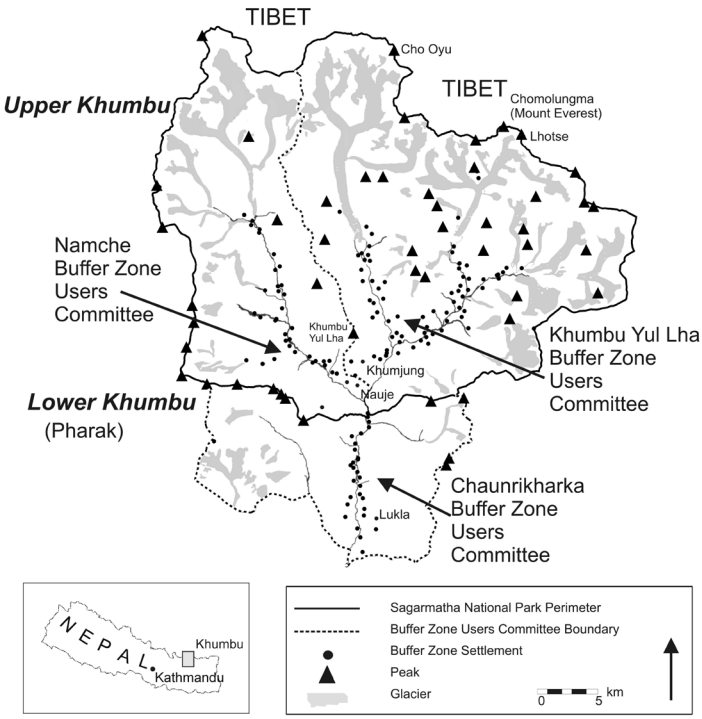

Figure 1. Upper Khumbu is administered as Sagarmatha National Park except for the many enclave settlements, which are part of the national park buffer zone. Not all settlements are shown. (The base map is adapted from ICIMOD MENRIS SNP/SNPBZ Land Cover Map.) © Piper Gaubatz

Nepal's Indigenous peoples and local communities maintain thousands, possibly tens of thousands, of ICCAs.[54] The most internationally-renowned of these are the Sherpa ICCAs of Khumbu, a customary Sherpa territory that encompasses the area that is now the SNP and SNP Buffer Zone.[55] Sherpas consider Khumbu to be one of a small number of sacred, hidden Himalayan valleys known as *beyuls* (hidden valleys) in the Sherpa and Tibetan languages. These places, which are believed to have been consecrated by Padmasambhava 1 200 years ago, are considered to be places of extraordinary sanctity by the Sherpa and other Tibetan Buddhists.[56] For generations, the Sherpa have expressed their responsibility to care for the Khumbu *beyul*, including responsibility for its conservation stewardship. As part of this commitment, the Sherpa seek to protect all life within the region, effectively making all of Khumbu a wildlife sanctuary ICCA. There are also many local and regional ICCAs maintained by individual villages and by groups of settlements, including protected

Battachan (no date); Battachan, 2000; Anaya, 2009.

53 Jana, S., 2007. "Voices from the margins: human rights crises around protected areas in Nepal". *Policy Matters*, 15: 87-99; Jana, S., 2008. *Protecting People in Protected Areas: Recapitulating Rights Campaign in Lowland Protected Areas of Nepal*. Community Development Organization: Kathmandu; Paudel, N. S., S. Ghimire, and H. R. Ojha, 2007. "Human rights: a guiding principle or an obstacle for conservation?" *Policy Matters*, 15: 299-310; Anaya, 2009.

54 Stevens, S., 2008b. "Nepal [ICCA relevant legislation]". Last accessed on Sept. 3, 2010, at: http://www.iccaforum.org/index.php?option=com_content&view=article&id=84&Itemid=100. There is not yet any enumeration in Nepal of sacred natural sites or of systems of community management of commons through customary institutions, though there are a vast number of both. Moreover, Nepal currently legally recognizes communities as having management or co-management authority (but not ownership) of 15 000 community forests. These are situated in Nepal's national forest and are overseen (and influenced) by the Ministry of Forests and Soil Conservation's Department of Forests.

55 The Sherpa live in many other customary territories in northeastern Nepal. Khumbu is considered to be the first Himalayan region that Sherpa ancestors settled after migrating from eastern Tibet (see Stevens, 1993). On the international renown of Sherpa ICCAs, see, for example, Borrini-Feyerabend, 2008; Borrini-Feyerabend, 2010; Stevens, 2009.

56 Padmasambhava, revered by the Sherpa and Tibetan peoples as *Guru Rinpoche* (precious teacher), was crucial in the adoption of Buddhism in the 8th century in the Himalaya and Tibet and was a founder of the Nyingma tradition that is followed by the Sherpa. Padmasambhava consecrated a number of sacred valleys in diverse parts of the Himalaya and Tibet and passed on directions for reaching them to his followers. Instructions for reaching Beyul Khumbu are found in 14th-century texts. According to Sherpa oral traditions, Guru Rinpoche visited Khumbu, converted local mountain spirits to Buddhism, and made it a *beyul* prior to his work in Tibet. See Stevens, 2008a.

sacred forests, mountains, and lakes, red panda habitat protection areas, a sanctuary which protects ground-nesting birds, rotational grazing management systems, community forests where tree felling for timber and deadwood gathering for fuel are restricted or banned, and a region-wide firewood collection management system that has reduced firewood use by 75% since 2002.[57] While some of these ICCAs have been created over the past 8 years, others have been maintained for generations and even centuries.[58]

Figure 2. Part of the eastern area of the Sherpa homeland and *beyul* of Khumbu (Sagarmatha National Park) in 2001. Mt. Everest, the Sherpa sacred mountain Chomolungma, is at the upper left. In the foreground is the village of Khumjung with its sacred temple forest, community forest, and community-managed grasslands, which are all Sherpa ICCAs. © Stan Stevens

Sherpa leaders consider these ICCAs to play a major role in conservation in the SNP. None, however, are legally recognized. They are not mentioned in the 2007-2012 SNP Management Plan, the SNP draft regulations developed by the Department of National Parks and Wildlife Conservation in 2007-2008, or other policies, plans, regulations, or written agreements related to the park.[59] Although some SNP wardens have informally respected or supported some ICCAs (and not others), these ICCAs' lack of legal status has made them vulnerable to neglect and interference by the SNP. The national park's wardens have often ignored them, supported only selected aspects of them, or authorized Sherpa use of their customary institutional arrangements only for enforcing national park regulations (not village regulations); they have also often been unaware that Khumbu is a *beyul* or that the Sherpa conserve sacred places, community forests, and rangeland areas.[60] Wardens have also undermined and overruled ICCAs by authorizing international conservation NGOs' introduction of new institutions and by authorizing the park's army detachment, police, and hotel developers to fell trees in strictly protected sacred forests and community forests. In one 2008 instance, the SNP warden reprimanded a Sherpa leader and ordered him to apologize for Sherpa efforts to halt logging by the park's army protection unit, which had violated community forest management regulations and procedures.[61]

Sherpa leaders are concerned about the weakening of their ICCAs' conservation effectiveness because of lack of respect for them by the SNP and conservation NGOs, natural resource use pressures associated with international tourism development, livelihood and lifestyle changes, and the assimilation of young Sherpas into national 'Nepalese' society.[62] They believe that without effective ICCAs, the Sherpa cannot maintain their responsibility to care for Khumbu as a *beyul*. They fear that sacred sites such as forests and lakes will be desecrated, community forests and rangelands will be misused, customary and new livelihood practices will be jeopardized by environmental degradation, and their distinctiveness as a people will be diminished by loss of local knowledge, spiritual beliefs and practices, and community institutions. The loss of ICCAs thus threatens not only conservation, but also identity, community cohesion, self-governance, culture, livelihoods, and development.

In an effort to increase awareness and support for their ICCAs, Sherpa leaders have taken several steps in recent years, including forming a new Sherpa NGO to support ICCAs and other aspects of Sherpa culture through community and youth education programmes and events, preparing to document and map their ICCAs to propose them as the basis for

57 Stevens, 2008a.

58 The firewood collection management system, bird sanctuary, and red panda habitat protection areas are new. The red panda habitat protection areas are ICCAs catalyzed by World Wildlife Fund Nepal initiatives; the others are Sherpa innovations. See Stevens, 2008a.

59 Ministry of Forests and Soil Conservation and Department of National Parks and Wildlife Conservation, 2007. *Sagarmatha National Park Management and Tourism Plan 2007-2012*. MFSC/DNPWC: Kathmandu, Nepal.

60 Stevens, S., and M. N. Sherpa, 1993. "Indigenous peoples and protected areas: new approaches to conservation in highland Nepal", pages 73-88 in Hamilton, L. S., D. P. Bauer, and H. F. Takeuchi (eds.), *Parks, Peaks, and People*. East-West Center: Honolulu; Stevens, 1993, 1997, and 2008.

61 Sherpa leaders did not apologize. Ultimately, the commander of the army unit admitted that his troops had made a mistake and Sherpa leaders complied with his request that they not make a further issue of the matter.

62 Sherpa society is not homogeneous. Although the Khumbu Sherpas strongly share many values, beliefs, and practices, there is significant differentiation in wealth, lifestyle aspirations, conservation commitment, and views on appropriate 'development'. As a result, there is notable regional variation in land use and resource management, including in the maintenance of customary ICCAs.

management zones within the SNP, and seeking national and international recognition and support.[63] Sherpa leaders also contributed strongly to the formation of the Nepal ICCA Network, established on June 6, 2010. The Sherpa are founding members of the network and a Sherpa leader was elected to be the first coordinator of the organization.

One Sherpa action, however, sparked a national controversy when it was misinterpreted by the SNP warden and the Director-General of the Department of National Parks and Wildlife Conservation and misrepresented in the national press. On May 25, 2008, after discussing Khumbu ICCAs, Sherpa leaders from nearly all of the enclave settlements within the SNP personally endorsed an informal statement affirming Sherpa commitment to their responsibility to care for and conserve Khumbu as a *beyul* and to maintain their ICCAs. They announced that they considered all of Khumbu to be an ICCA as well as a national park and national park buffer zone. They hoped that this would increase Nepalese national park officials' awareness and appreciation of their ICCAs, prompt them to take steps to acknowledge ICCAs, and improve coordination between them and SNP management. Instead, they were accused by the SNP warden of acting illegally, subjected to an investigation by the Director-General of the Department of National Parks and Wildlife Conservation, and threatened by the SNP warden with retribution against Sherpa community members unless they withdrew their 'declaration' and apologized. Under enormous pressure from the Department, Sherpa leaders 'withdrew' their informal ICCA self-declaration. They refused, however, to apologize. Instead, 18 leaders of regional Sherpa NGOs sent a letter to the Director-General of the Department informing him that if he persisted in misrepresenting their actions and questioning their patriotism in the national press, they would be compelled to mount a campaign of demonstrations and strikes to educate the public about the situation. Negative press coverage subsequently ceased and the controversy died out without further actions against Sherpa leaders, but also without any dialogue about changing SNP policies or practices. Sherpa leaders nonetheless continue to seek ICCA recognition. When the prime minister of Nepal visited Khumbu on December 4, 2009, a Sherpa leader presented him with a petition that included a request to recognize Sherpa ICCAs. So far, there has been no answer.

Figure 3. Pangboche village in Khumbu (Sagarmatha National Park Buffer Zone) and the Sherpa sacred lama's forest at Yarin (Sagarmatha National Park) in 2004. Sherpa oral traditions testify to strict protection of this forest from tree felling for four centuries. Sherpa protection of this ICCA continues today. © Stan Stevens

Figure 4. Sherpa leaders discussing their ICCAs in Khumjung village, Khumbu (Sagarmatha National Park Buffer Zone) in May, 2008. © Sonam Hishi Sherpa

The Sherpa experience with attempting to gain recognition and respect for their ICCAs highlights how far Nepal has yet to go in honouring human and Indigenous peoples' rights in its national parks. The problem is arguably not the government officials' lack of awareness of Nepal's international obligations to honor Indigenous rights or of IUCN and CBD policies supporting rights-based conservation and ICCAs.[64] Many other factors may play a role, including lack of appropriate training, administrative capacity, and financial resources, the unstable national political situation,

63 Sherpa leaders discussed their ICCAs and ICCA recognition issues at national and South Asia regional meetings on ICCAs and on protected area governance in 2008, 2009, and 2010. At these and other meetings, they have met with past and present co-chairs of TILCEPA, the IUCN inter-commission group concerned with Indigenous peoples, equity, and protected areas (TILCEPA was originally the Theme on Indigenous and Local Communities, Equity, and Protected Areas and now is the Theme/Strategic Direction on Governance, Communities, Equity, and Livelihood Rights in Relation to Protected Areas). They were also invited participants at IUCN's IVth World Conservation Congress in Barcelona in October, 2008, where they spoke at a TILCEPA-organized side-event on ICCAs.

64 Officials of the Department of National Parks and Wildlife Conservation and the Ministry of Forests and Soil Conservation (the former's parent ministry) have attended workshops, briefings, and dialogues on protected area policies that have included presentations on ICCAs and associated IUCN and CBD standards.

constraints associated with existing national law and regulations, bureaucratic inertia and vested interests in what was until recently an autocratic kingdom, and social, cultural, and political relationships between Nepal's ethnic political elite and Indigenous peoples, which some Indigenous peoples' leaders charge constitute continuing 'internal colonialism'. Indigenous peoples make specific complaints about the Department of National Parks and Wildlife Conservation, as does the 2009 Special Rapporteur's country report on Nepal.[65] Despite these contexts and constraints, the Department of National Parks and Wildlife Conservation and the Ministry of Forests and Soil Conservation could carry out significant reforms with regard to appropriate ICCA recognition if their officials chose to utilize their existing authority and resources.

ICCAs as Remedies and as Best Practice Implementation of UNDRIP and Human Rights Treaties

ICCAs embody cultural, social, economic, and political expressions that are protected by a remarkably broad set of individual and collective rights. Appropriate and effective ICCA recognition and support should thus be considered to be best practice for implementing UNDRIP, ILO 169, and other international human rights instruments. ICCA recognition and support also constitute a key means of implementing principles of good governance and rights recognition advocated by the CBD and IUCN in their protected area policies. Failure to recognize ICCAs constitutes failure to recognize many of the fundamental freedoms and human rights of Indigenous peoples. Inappropriate recognition of ICCAs – in essence, recognition without full accordance with Indigenous peoples' rights and without their full and effective participation in developing standards and procedures – similarly threatens Indigenous peoples' self-determination, identities, cultural integrity, social cohesion, livelihoods, self-governance, and ownership, control, and use of their territory, lands, and natural resources.[66]

Despite being party or signatory to all of the major international human rights instruments, Nepal has a long way to go before honouring these obligations in practice.

The implementation of international rights treaties, however, requires not only responding to allegations of rights violations, but also recommending remedies and promoting practices that honour rights and strengthen rights recognition. Rectifying injustices that have harmed or continue to threaten Indigenous peoples' cultures, livelihoods, and freedoms requires affirmative remedies in support of cultural integrity, self-governance, ownership and management of land and natural resources, and self-determination. ILO 169 requires governments to take such affirmative action to protect the rights of Indigenous peoples.[67] Accordingly, the UN Special Rapporteur has been directed by the UN Human Rights Council to "examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous peoples," to identify and promote best practice, and to "formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people."[68] Recognition of existing ICCAs and restoration or revitalization of suppressed ICCAs should be viewed as such a best practice and remedy that powerfully promotes the affirmation and restitution of Indigenous peoples' rights, including their control and management of their lands and territories in accordance with their

65 Sherpa leaders complain that these continuing conflicts over culture, conservation, and rights reflect many SNP wardens' and Department of National Parks and Wildlife Conservation officials' determination to maintain autocratic governance, ethnocentrism, paternalism, ignorance of Sherpa conservation contributions, disrespect for Sherpa culture and rights, bias towards scientific, techno-managerial 'expert' planning and decision-making, belief in exclusionary protected area models that emphasize strict nature protection, and the mistaken assumption that 'local people' are inevitably a threat to protected area goals.

66 The question of how ICCAs can be appropriately recognized and promoted has generated considerable discussion among Indigenous peoples and in international conservation circles. There is great concern that states will seek to establish criteria and procedures for ICCA recognition that will undermine Indigenous peoples' authority and culture, in effect destroying existing ICCAs and violating the rights of Indigenous peoples (see, for example, Borrini-Feyerabend, 2010). The CBD PoWPA calls for promotion through "legal and/or policy, financial and community mechanisms" (Activity 2.1.2) and calls for states "to establish policies and institutional mechanisms with full participation of indigenous and local communities" and "in a manner consistent with … the knowledge, innovations and practices of indigenous and local communities" (Activity 2.1.3). Besides legal recognition of ICCAs *per se* in national law or constitutional provisions, ICCAs can be appropriately recognized with the participation and consent of Indigenous peoples through other means such as their inclusion in protected area management plans, policies, and regulations and through inclusion in memoranda of understanding between state officials and Indigenous peoples. The recommendations adopted by SBSTTA14 in Nairobi in May, 2010, advise Parties to the CBD that appropriate recognition and support of ICCAs can include "formal acknowledgement, inclusion in listings or databases, legal recognition of community rights to land and/or resources, as appropriate, or incorporation of ICCAs into official protected area systems with the approval and involvement of indigenous and local communities". SBSTTA, 2010a and 2010b, paragraph 27(c). For further recommendations, see Borrini-Feyerabend, 2010.

67 Anaya, 2004, page 139.

68 Office of the United Nations High Commissioner for Human Rights (no date). "Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People" Last accessed May 6, 2010, at: http://www2.ohchr.org/english/issues/indigenous/rapporteur/mandate.htm.

cultural integrity, self-governance, and self-determination. ICCA recognition can particularly be a key remedy and means of redress for discrimination and rights violations caused by the superimposition of state protected areas over ICCAs and the latter's consequent neglect or suppression. In this respect, ICCA recognition could be endorsed and advocated by the UN Special Rapporteur and other international monitors as a best practice for protected areas established in the territories of Indigenous peoples, as well as an important remedy and redress in cases in which human rights have been violated by the marginalization or destruction of ICCAs as a result of protected area establishment, governance, and management.

The failure to recognize ICCAs constitutes the failure to recognize many of Indigenous peoples' fundamental rights and freedoms.

The strong entwinement of culture, rights, and conservation commitment in ICCAs should make upholding and strengthening them a major focus of future efforts by Indigenous peoples, international conservation organizations, human rights organizations, UN treaty monitoring bodies and experts, and national and international courts in order to strengthen recognition of human rights and promote rights-based conservation and development. The suppression of ICCAs or lack of recognition and support for them are issues of particular importance for action by the Special Rapporteur, in accordance with his statement to the VIIIth Session of the UN Permanent Forum on Indigenous Issues that he "may take action where the situation is representative of, or connected to, a broader pattern of human rights violations against indigenous peoples."[69] It may be appropriate for the Special Rapporteur to carry out a thematic study of the impacts of protected areas on Indigenous communities and, in coordination with the UN Permanent Forum on Indigenous Issues and the UN Human Rights Commission's Expert Mechanism on the Rights of Indigenous Peoples, to take note of the status of ICCAs as a key indicator of rights recognition or violation, as a key remedy and redress for injustices, and as a best practice for future implementation of UNDRIP and rights-based conservation.

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69 Anaya, J. S., 2008. "Statement by Professor James Anaya, Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples, Eight Session of the UN Permanent Forum on Indigenous Issues, May 20, 2008, New York," page 6. Last accessed April 30, 2010, at: http://www.un.org/esa/socdev/unpfii/documents/8Session_SR_Statement_UNPFII.doc.