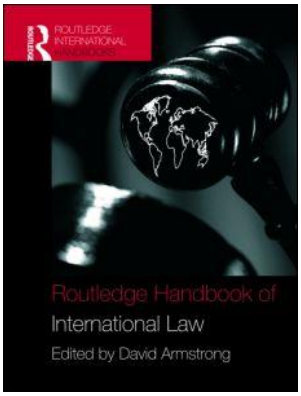

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Indigenous Rights Claims in International Law

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Indigenous rights claims in international law: self-determination, culture, and development

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This chapter examines the emergence and application of the human right to culture as the primary legal and political strategy for making rights claims on behalf of indigenous peoples. It discusses the different ways in which advocates invoke the right to culture, presenting a typology ranging from claims that make a relatively small claim on the state in terms of resource sharing and development (culture as heritage) to those that pose significant challenges to the neo-liberal state (culture as land and culture as development). I consider the successes and dark sides of each of these uses of the right to culture and caution indigenous rights advocates against the temptation to embrace "strategic essentialism."

For the past 20 years, tribal representatives, indigenous rights activists, lawyers, anthropologists, and even most states have largely coalesced around an understanding that the right to culture provides an effective means to protect the rights of indigenous peoples. This chapter traces how that coalescence occurred by studying how the human right to culture replaced the right to self-determination as the primary legal and political strategy for indigenous rights advocates. In doing so, it raises the question whether the human right to culture is robust enough to achieve the types of economic and political goals that its advocates often seek. Imbedded in that question is another, about the similarities and differences between right to culture and self-determination claims made by indigenous advocates.

The right to culture has not totally replaced calls for self-determination in indigenous advocacy, but it has provided the dominant discursive and legal vehicle for making political and economic (as well as cultural) rights claims on behalf of indigenous peoples. When advocates invoke the right to culture, however, they do so in multiple ways. I devote much of this chapter to examining and delineating those different uses of culture, presenting a typology ranging from those claims that make a relatively small claim on the state in terms of resource sharing and development to those that pose significant challenges to the neo-liberal state. Nearly all of these claims rely to a certain extent on overly stereotyped and essentialized ideas of indigenous culture.

Through an exploration of potential costs and benefits of each of these uses of culture, I aim to urge advocates away from the acceptance and deployment of essentialized notions of culture. I argue that "strategic essentialism," the intentional use of essentialized versions of indigenous cultures to claim

indigenous rights under a right-to-culture framework, often has the effect of restricting rather than broadening indigenous economic, political, and territorial autonomy.[1] I therefore call for a consideration of constructivism in legal and political advocacy alongside a more explicit statement of or at least debate over the types of economic and political claim to autonomy that advocates aim to achieve.

Indigenous advocacy based on assimilation and self-determination

When, in the 1970s, indigenous groups began to organize around a pan-indigenist ideology, they had three primary legal tools available to them for consideration: (1) the 1957 International Labor Convention (No. 107); (2) the right to self-determination, with or without a right to state sovereignty; (3) human rights. While ILO Convention (No. 107) was the only international legal document specifically focusing on indigenous peoples, it was rejected as a tool for indigenous liberation because of its integrationist and assimilationist aims. Self-determination arguments were dominant for some time but, as they gradually moved away from an insistence on statehood, the claims began to be articulated in human rights terms, even as a human right to self-determination. The human rights rubric that seems to have achieved the most traction, however, has been the human right to culture.

That said, self-determination continues to be advocated and was at the heart of many debates over the recently adopted United Nations General Assembly Resolution on the Declaration on the Rights of Indigenous Peoples. Thus, before turning to the uses of culture in the next section, I briefly consider here these first two options and the reasons they seem to have been rejected as strong tools for indigenous rights advocacy.

International Labor Convention (No. 107)

In the 1950s, the ILO became concerned with the failure of indigenous peoples to integrate into the national population. Failure of such integration was seen to have social and economic effects, on indigenous populations as well as on the nation states they inhabited. In 1957, the ILO drafted Convention (No. 107), which, according to Douglas Sanders, saw "indigenous populations as 'less advanced' than other sectors of national society. They were seen as archaic lumps in the body politic, in need of modernization and integration" (Sanders 1983: 19).[2]

Although most of the Convention was aimed at measures to integrate indigenous populations, it did not call for complete assimilation. In fact, an often overlooked provision is Article 4, which calls for "due account" to be "taken of the cultural and religious values and of the forms of social control existing among these populations" and "the danger involved in disrupting the values and institutions of the said populations" (International Labor Organization No. 107 1957: Art. 4(a), 4(b)). Moreover, it recognized indigenous peoples' right to collective lands they had traditionally occupied (International Labor Organization No. 107 1957: Art. 11). That said, a new economic order was clearly imagined, and eventually – it was thought – indigenous peoples would not require attention to their cultures or traditions. Neither would they need special protections provided by the Convention (International Labor Organization No. 107 1959: Art. 3). The idea was to "mitigat[e] the difficulties experienced by these populations in adjusting themselves to new conditions of life and work" (International Labor Organization No. 107 1959: Art. 4(c)). Similarly, land rights were subject to the "interest of national economic development or . . . the health of the said populations" (International Labor Organization No. 107 1959: Art. 12).

In the 1970s pan-indigenous movement advocates largely rejected the Convention. These advocates were explicitly anti-assimilationist and sought consciously to reclaim and preserve cultural practices seen by settlers and missionaries as "backward." From their perspective, ILO Convention (No. 107) represented a perpetuation of the civilizing mission because of its support for conventional models of industrialized economic development and its explicit attempt to assimilate indigenous people(s) into those models. In the context of Latin America, the Convention was considered to be a reflection of *indigenismo*, an ideology that dictated many Latin American state policies toward indigenous peoples in the first half of the twentieth century. Peter Wade explains *indigenismo* in the context of Mexico and Peru: "From the 1920s, the indian became a prime symbol of national identity . . . both countries created government departments for indigenous affairs, while Peru recognised the 'indigenous community' as a legal entity and Mexico created academic institutions dedicated to the study of indigenous peoples . . . [T]he central notion was that indians need special recognition and that special values attached to them" (Wade 1997: 32).

The ILO revisited its approach, and produced a new Convention on indigenous peoples in 1989, ILO Convention (No. 169). As discussed in the next section, that Convention largely approaches indigenous rights from a cultural rights perspective.

Self-determination

Self-determination as state sovereignty

Somewhat surprisingly from today's vantage point, in the 1970s, the right to self-determination – including the right to secession or state sovereignty – seemed a viable alternative for indigenous peoples. Coming on the heels of a large wave of decolonization, many indigenous advocates saw the possibility for a similar future for indigenous peoples. Particularly in former British colonies, self-determination – meaning a right to secession and statehood – was the prevailing paradigm for much indigenous advocacy throughout the 1970s and continued to struggle for dominance into the late 1980s. Advocates for this state-end model sometimes argued that indigenous groups constituted independent states under the Montivedeo Convention of 1933 or "peoples" under Chapter XI of the UN Charter. Such recognition would have entitled them to exclusive dominance over territory and (at least to the extent decolonized states were getting it) control over their natural resources. This argument met with strong resistance by states with indigenous populations and, as early as the meeting of the first United Nations Working Group on Indigenous Populations, was a major point of contention. It continues to animate debates about the meaning and appropriateness of defining indigenous rights in self-determination terms.

Until September 2007, when the United Nations General Assembly passed the Declaration on the Rights of Indigenous Peoples, there were no internationally accepted documents or instruments that applied the language of self-determination to indigenous peoples. Indeed, although the ILO reconsidered its integrationist approach toward indigenous peoples in the 1980s, states refused to agree to a Convention that included the term "self-determination." Neither that term nor "autonomy" appears in ILO Convention (No. 169) (International Labor Organization No. 169 1989: 8(2)). In contrast, Article 3 of the newly adopted Declaration on the Rights of Indigenous Peoples repeats the language of common Article 1 of the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights, stating: "Indigenous peoples have the right of self-determination. By virtue

of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Declaration on the Rights of Indigenous Peoples 2007: Art. 3). The earlier Conventions had declared this right one that belonged to "all peoples" (ICCPR 1966: Art. 1; ICESR 1966: Art. 1); by replacing the word "all" with "indigenous," the Declaration placed indigenous peoples among those entitled to self-determination. Debate over the potential meaning of self-determination in that context was central to the failure of states to agree on a text for the Declaration for over two decades, and to the final opposition to the Declaration by the four states that voted against it – United States, Canada, Australia and New Zealand. These states, and many others along the way, have expressed concern that the term might be read to grant the right of statehood.

Article 3 has been in every version of the Declaration over the years, but its qualifying and limiting language has been the subject of much controversy. In 2005 the chair of the Working Group on Indigenous Populations suggested a list of compromises on the Draft Declaration to push its adoption through the new Human Rights Council. Many of the compromises limited the meaning of self-determination. This new draft of the Declaration was presented to the Human Rights Council, adopted by the Council in June 2006, and sent to the General Assembly.

Ultimately the compromises were not sufficient for the General Assembly. In late November 2006 the Third Committee voted in favor of a non-action resolution on the Declaration, deferring consideration of the Declaration for a later date. The non-action resolution was formally proposed by Namibia, on behalf of the Group of African States, in part on the ground that "the vast majority of the peoples of Africa are indigenous to the African Continent," and that self-determination "only applies to nations trying to free themselves from the yoke of colonialism" (Cherrington 2006; Lutz 2007a). The concerns expressed by the African states were echoed in the statements of others who opposed the Declaration. The New Zealand representative, for example, issued a statement on behalf of Australia, New Zealand, and the United States expressing concern that "[s]elf-determination . . . could be misrepresented as conferring a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity, and the stability of existing UN member states" (Banks 2006).

Yet another compromise ensued to respond to these concerns. Article 46 of the resolution that finally passed added language specifically indicating that the Declaration should not be "construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States." Although this compromise language gave a number of activists pause, most ultimately supported it. At the same time, it was not sufficient to convince all countries concerned about sovereignty issues to vote in favor. In its official observations on the Declaration, the United States explained that, despite limitations to Article 3 expressed in the Declaration: "We find [the] approach [of reproducing common Article 1 in Article 3] on a topic that involves the foundation of international relations and stability (i.e. the political unity and territorial integrity of nation-states) to be ill advised and likely to result in confusion and disputes" (Hagen 2007).

Self-determination as autonomy within a state

As the preceding discussion indicates, to the extent that indigenous peoples are considered to possess the right to self-determination, the term has taken on a new hue from that which initially animated indigenous rights advocacy. The consensus today, even among most advocates, is that self-determination does

not include a right to statehood. Rather, self-determination is generally invoked to make claims for various forms of autonomy within (and sometimes across) already defined state boundaries. The Indigenous Peoples of Africa Coordinating Committee, for example, attempted to assuage the African Union's recent opposition to the Declaration on the Rights of Indigenous Peoples by making it clear that it had no intention of reading self-determination broadly. The Committee stated emphatically "that no single African indigenous community claims statehood." (Indigenous Peoples of Africa Coordinating Committee 2006).

The deployment of this softer form of self-determination in the indigenous context is not new. The Martinez Cobo Report, commissioned by the UN in 1971 and eventually fully published in 1984, for example states that "self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future" (Martinez Cobo 1984: para. 2). Yet the Report distances itself from the strong self-determination claim through its definition of the term. For the Report, self-determination "constitutes the exercise of free choice by indigenous peoples who must, to a large extent, create the specific context of this principle, which [does] not necessarily include the right to secede. This right may in fact be expressed in various forms of autonomy within the State" (Martinez Cobo 1984: para. 581).

In Latin America, indigenous groups have rarely made strong demands for self-determination. Even at the beginning of panindigenous movements in Latin America in the 1970s, indigenous groups and coalitions tended to make claims for territorial autonomy for indigenous peoples in those states in which indigenous peoples constituted a minority, and for control over existing state structures where they made up a majority of the population.[3] Perhaps for this reason, no Latin American states voted against the Declaration, and only Colombia abstained. There seems to be little threat in Latin America that indigenous groups will deploy self-determination in a way that would challenge "territorial integrity."

The Martinez Cobo Report, in its call for self-determination, concluded that human rights standards were inadequate for the protection of indigenous peoples (Martinez Cobo 1984: para. 580). Over the ensuing years, nevertheless, many of those who supported this version of self-determination that was divorced from secession began to advocate for legal recognition under human rights models. These models included the human right to self-determination, but much of the energy went toward a human right to culture.

Indigenous advocacy's turn to the human right to culture

Although the human right to culture might today seem an obvious and accepted mechanism for the protection of indigenous rights, it was not an obvious choice for indigenous rights advocates. If human rights are "a product of modern, post-Enlightenment, liberal secular humanism . . . elevat[ing] the individual to the point that the group is forgotten" (Zion 1992: 211), they would seem not only to conflict with, but to threaten indigenous culture. Or put another way, to the extent that human rights are inseparable from the civilizing mission of colonial days or the liberalizing mission of neocolonialism, they would appear to offer little (but a site of resistance) to those whose aim is to reject assimilation.

For these reasons, indigenous rights advocates were skeptical of human rights legal and political discourse from the beginning. In 1947, for example, the American Anthropological Association warned the United Nations against adopting a Universal Declaration on Human Rights that would fail to take into account the extent to which cultures varied in their values and norms (American Anthropological Association 1947: 539). Such a

failure, the association suggested, would simply perpetuate the "white man's burden" assumed under missionary practices and colonialism (American Anthropological Association 1947: 540). In this view, human rights was a modernizing move that would strip indigenous groups of their culture by imposing apparently universal values on their ways of life.

As human rights law developed, little attention was paid to indigenous rights. In fact, rights were seen to be individual as well as universal, primarily conferred upon individuals vis à vis the state. Although indigenous rights were not on the table either explicitly or implicitly, significant consideration was given early on to the issue of whether to include minority rights in human rights treaties. Advocates for ethnic minorities, particularly those within European states in the post-war period, sought to claim a right to culture during the drafting of the Universal Declaration of Human Rights (Morsink 1999: 301). Specific protection of collective cultural rights for minorities was rejected, however, for language saying that "everyone" has a right to culture (Universal Declaration of Human Rights 1948: Article 27).

In 1966, when the United Nations adopted the International Covenant on Civil and Political Rights (ICCPR), it adopted language on cultural rights that was more specific than that in the Universal Declaration. Article 27 of the Covenant reads: "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." Although this language was considered a victory by those concerned with the rights of ethnic minorities, indigenous rights advocates did not treat the language as applicable to their needs until the 1980s.

In the 1980s, indigenous advocates began to see the value of the right-to-culture model. They mediated the tension they had earlier experienced between human rights and culture by calling for a human right *to* culture. For some, this move was precipitated by decisions by the Human Rights Committee, the body that considers claims brought under the Optional Protocol of the ICCPR. Advocates brought a number of indigenous rights claims to the Committee under Article 1's self-determination provision. The Committee denied admissibility under this provision, stating that self-determination could not provide the basis for a claim, given that the Optional Protocol only allows for individual claims. In one case, however, it decided *sua sponte*, to consider the claim under Article 27's protection of the right to culture (Scheinin 2000a: 179–94).[4] Advocates also began to use various protections of the right to culture embodied in the ILO Convention (No. 169).

Today, the human right to culture strategy is the most often used terrain on which individuals (on behalf of or sometimes even against the group) bring their legal claims. Importantly, indigenous rights advocates have not generally considered the use of the right to culture as a compromise. Instead, they have conceived of the right and its potential for protection rather broadly. James Anaya, for example, even while advocating for a shift from a sovereignty to a human rights focus in the early 1990s, did so in part because he believed that Article 27 of the ICCPR, the Convention against Genocide, and the UNESCO Declaration on Cultural Cooperation all evinced an "emergent human right of cultural survival and flourishment" (Anaya 1990: 841). James Zion, who saw human rights as a western enlightenment construct, also encouraged the support for indigenous rights through "the liberal construction to the concept of 'the right to culture' " (Zion 1992: 209). Even in Chiapas, Mexico, where indigenous communities have declared their autonomy, they often defend against threats to that autonomy at least in part by using ILO Convention (No. 169) pro-

visions protecting indigenous peoples' right to the possession of their traditional lands, which is one part of the right to culture for that document.

But what does the right to culture mean for indigenous groups, their advocates and the UN? Unlike with the right to self-determination, there have been few overt debates about what constitutes the right to culture. In the next section, I briefly unpack what is meant by culture.

Indigenous advocacy and the meaning of the right to culture

In this section, I identify and trace three different understandings of culture in indigenous rights advocacy: culture as intangible heritage (like a museum piece or scarce natural resource to be preserved), culture as materially grounded in land (requiring communal and inalienable land rights to protect indigenous culture), and culture as development (specifically ethnodevelopment). While the first understanding of culture does little to question the neo-liberal state, the last two approaches, at least in principle, pose greater challenges to it. Their support for communal over individual property arrangements and their interrogation of modern forms of development would seem, at least at one level, to be in direct opposition to neo-liberalism.

I would argue that, despite their radical potential, strategies based on these understandings of culture have either failed in their resistance or have been co-opted by states and international institutions. The latter is especially true with regard to ethnodevelopment – a concept that is now supported and promoted by today's World Bank (van Nieuwkoop and Uquillas 2000). This co-optation, I would argue, is in part a consequence of strategic essentialism. Indigenous movements have unwittingly set themselves up for certain expectations about their "nature" and their conduct. In doing so, they have often both raised the bar for who counts as indigenous and have limited the autonomy of those who do count.

Thus, each of these understandings of culture has its dark sides and unintended consequences with which I encourage advocates to grapple. The first, culture as heritage, threatens to alienate indigenous people(s) from their heritage; the second, culture as grounded in land, makes land inalienable; and the third, culture as development, combines with the second to limit the forms of development available to indigenous peoples.

Culture as heritage

Perhaps the most commonly invoked and understood meaning of culture in indigenous rights advocacy is that culture is comprised of practices, knowledge, and ways of seeing the world (cosmovision) of those societies that predated the settlers. In this usage, culture is something to be preserved, much like a museum piece or a scarce natural resource.

Culture as heritage is largely intangible, and, in one version, is much like intellectual property. It constitutes those things that were at some point thought to be produced by indigenous peoples. It is the conception of culture that is most consistent with the neo-liberal state, unlikely to require power-sharing arrangements or significant resources from the state. Importantly, it is the things, and not the peoples, that are the primary object of protection. One example of this version of culture as heritage is the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, which protects "oral traditions and expressions, including language as a vehicle of the intangible cultural heritage," "performing arts," "social practices, rituals, and festive events," "knowledge and practices concerning nature and the universe," and "traditional craftsmanship" (Convention for the Safeguarding of Intangible Cultural Heritage 2003a: Article 2(2)). It says nothing about ownership.

To the extent that they have argued for the protection of indigenous heritage – includ-

ing both material and intangible items that reflect their understanding of indigenous culture – indigenous rights activists have had relative success. At least in principle, heritage is something that states and their non-indigenous citizens often seem to want to protect. As Ronald Niezen explains:

> The moral persuasiveness of indigenous peoples' claims to recognition derives not just from local grievances, but ultimately from a near-universal perception of cultural loss and nostalgia as well . . . It draws upon those who may have nothing to do with indigenous communities or international agencies, but who nevertheless feel strong stirrings of sympathy for those who represent a lost time of unhurried simplicity.
>
> (Niezen 2005: 593)

Although what Niezen refers to as a "near-universal perception of cultural loss and nostalgia" has led to a variety of international, regional and local protections, it has its dark sides as well. At times, the cultural heritage becomes revered over and disembodied from the peoples. The cultural heritage and the values it is seen to hold become the objects of protection. And what is considered the cultural heritage of a state's or region's initial inhabitants might be treated as the property and identity of the state in a contemporary form of the ideology of *indigenismo* found in many Latin American states in the early decades of the twentieth century. As Peter Wade explains of *indigenismo*: "Very often, it was a question of exotic and romantic symbolism, based more on the glorification of the pre-Columbian indian ancestry of the nation than on respect for contemporary indian populations" (Wade 1997: 32).

That heritage can be alienated from the groups from which it is seen to emanate provides the basis for another perhaps unintended consequence of this understanding of culture. It permits states and even international institutions to pick and choose the parts of the heritage they believe is worth protecting, and even to suppress those of which they do not approve. UNESCO's protection of cultural heritage, for example, only extends to those practices that are "compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development" (Convention for the Safeguarding of Intangible Cultural Heritage 2003a: Article 1(1)).

In the context of Australia, Elizabeth Povinelli has called this type of limitation "an invisible asterisk, a proviso, [which] hovers above every enunciation of indigenous customary law: '(provided [they] are not so repugnant)' " (Povinella 2002: 12).

Finally, heritage makes the least demand on states of the various understandings of culture we explore. It asks states to be "tolerant," but it also makes it so that states can both appropriate and easily accommodate "heritage" without acknowledging or attending to underlying economic, social and political inequalities.

Culture as grounded in land

In contrast to the heritage idea, where knowledge is alienated for all to use, this understanding of culture often considers possession or use of a particular land or territory as the very basis of indigenous cultural identity. Taking seriously the material implications of a cosmovision centered on land, this conception belies the distinction between intellectual and real property by seeing indigenous peoples as key to the protection of those lands. Hence, indigenous peoples must be permitted to stay on, perhaps even control, if not own, their traditional territories because the land (and the peoples) both hold and carry forth the heritage. It is also used to argue for indigenous control of territory in order to protect the land in accordance with the environmentally friendly cosmovision indigenous peoples are thought to have. This argument is based on an assumption that real Indians will use the land in traditional and sustainable ways, and are therefore its proper guardians.

This idea is often reinforced by the claims of indigenous peoples themselves. Citing statements by indigenous people, James Anaya claims that there is the wide acceptance of "indigenous peoples' articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional nexus with the earth and its fruits" (Anaya 1996: 104). If the cosmovision sounds too essentialist or monolithic or alienated from the everyday life of many indigenous peoples, it is a deliberate, but not inauthentic, strategy.

The strategy has led to some successful land claims. But there are potential downsides to it, which reflect more generally some of the difficulties with the ways in which strategic essentialism is often deployed. Basing indigenous rights on a human right to culture as land effectively prohibits indigenous peoples from ever choosing to alienate the property they own communally. Alienation is a complicated issue, and it is not clear that indigenous peoples want a right to alienate property. Were they to attempt to argue for such a right, however, they would find themselves in a serious bind. The moment they were to articulate a desire for the right, they would be seen as potentially exercising it, which would go against their perceived cosmovision (communal property and environmental stewardship) and thereby devalue their claim. That is, they are largely dependent on capitalist states for recognition of their right to culture, which these states view as genuine only if the culture includes a pre-capitalist/communal use-based understanding of land. If they were to aim to participate in the market with regard to land, they would be seen as going against their assumed culture and beliefs, potentially losing their claim to indigeneity.

Similarly, particularly without a strong understanding of self-determination, indigenous peoples are not always given much flexibility with regard to the use of their own land. Because of their "special relationship" to the land, they are meant to be its protectors and guardians. In some instances, states have prohibited indigenous groups from using land in a manner that goes against their claimed attachment to it, limiting the groups' possibilities for development. The UN Report on Indigenous Peoples and their Relationship to Land, for example, lists Canada's refusal to allow indigenous groups to use land they consider hunting ground in any way that would destroy or decrease its value for hunting as an example of discriminatory treatment with regard to land title. Despite its seeming criticism of the practice, the Report does not include in its recommendations a suggested change to the practice.

There are even more potentially serious political consequences, at least for some groups, to the pursuit of a political and legal strategy based on such a special relationship to the land. When groups do not behave towards the land in this idealized manner, they might not be considered real Indians. The focus on occupation and use of land often leads to successful claims for those groups who have maintained and can prove their existence on their ancestral lands for centuries. But it misses the experience of many groups that consider themselves indigenous and are considered by others to be indigenous because of the language they speak, the traditions they practice, the ways and groupings in which they live, their internal administrative functioning or their local control, but who nevertheless live on land to which they have no proven ancestral ties. Such groups are often on land to which they were forcibly relocated or that they occupied as a result of dislocation from another territory. In such instances, these groups do not necessarily have the knowledge or means to subsist in ways that might be considered traditional. Although Martin Scheinin refers to such groups as "pathological," in fact they are quite common (Scheinin 2000b: 171–72).

In Chiapas, for example, the Mexican government has been threatening to dislocate or "relocate" groups of indigenous people living in the Montes Azules Integral Biosphere Reserve in the heart of the jungle which, likely not coincidentally, is also the home of the

Zapatista army. The allegation that indigenous peoples have been using "slash and burn" farming techniques has been tied into an argument about those indigenous peoples not being entitled to live on the land because they are not native to it.

This focus on culture as land often displaces a focus on the reason that indigenous peoples are in need of land and resources. It could be said that the ILO's attempt through Convention (No. 107) to integrate indigenous people and make them a productive part of economic modernization at least recognized the extent to which they had long been deprived of economic resources. If the current anti-assimilationist/pro-culture arguments recognize how neo-liberal land reform policies have in many instances destroyed communal forms of ownership and weakened the ability of indigenous peoples to control their own natural resources and maximize the productivity of the land, they respond in a limited way, both in terms of the parts of the bundle of rights that are recognized and in terms of the groups and locations where such rights are grounded.

Culture as development

Culture and development have long been linked. Western expansion – whether through Christian proselytizing, increasing of trade routes, or industrialization – was seen as a way to civilize or modernize indigenous peoples. Even when world opinion would seem to have moved away from at least an explicit goal of either conquest or forced acculturation of indigenous peoples, integration was considered to lead to progress. ILO Convention (No. 107), for example, states that part of its intent is to "assure the protection of the populations concerned . . . and the improvement of their living and working conditions" (International Labor Organization No. 107 (1959): Preamble). Some argued that it was based on an understanding that development would lead to assimilation, and eventually to greater prosperity (Kastrup 1997: 120).

By the 1970s anthropologists and indigenous rights advocates began to take a critical view of even the seemingly benevolent forms of development and of capitalism in general. Capitalism began to be viewed by some of its critics as a form of "cultural genocide" (Burger 1987: 105). Economic exploitation and cultural extermination, therefore, were inextricably connected. A critique of development projects from the 1980s elaborates at least one way of viewing the connection:

> The impact of such developments on indigenous peoples, however, is not merely economic. The displacement and environmental degradation brought about by mining, deforestation, dam building or unsuitable large-scale farming, may cause hardship; but more importantly, they also sever the vital link between indigenous peoples and their environment. When indigenous peoples are separated from their land, the social and cultural cohesion of their communities is eroded.
>
> (Burger 1987: 105)

Even if indigenous peoples were not always separated from their land, capitalism required that they have a different relationship to it. Often transforming them into laborers, it alienated them from the work as well as the land. The UN Report on the Relationship to Land explains: "National economic development schemes not only dispossess indigenous peoples of their lands, but also convert indigenous peoples into cheap labourers for industry, because the exploitation of the lands and environmental degradation have deprived them of their livelihood" (para. 64).

Indigenous peoples had available to them two potential strategies in the 1970s to combat the economic threat to their culture: they could ally with the third world and its class-conscious postcolonial struggles, or they could assert their own indigenous cultural identity. Just as many advocates chose the right to culture over self-determination in the late 1980s and early 1990s, many ultimately

chose cultural identity over class consciousness. For movements in the English-speaking world (particularly Canada and the United States), a "fourth world" identity provided a means to ensure that the struggles of indigenous peoples were not subsumed or ignored by Third World politics. In Latin America, many indigenous and African-descendant struggles had their roots in peasant movements, and thus the tension between impulses to organize around cultural and class identity continued for a significant time. Different movements mediated the tension in different ways, but ultimately cultural identity prevailed.

As they began to consider what would replace western development, many advocates called for ethnodevelopment, or development based on the traditional culture of indigenous groups. Many argued for taking advantage of culture, resources, and sustainable attitudes towards the earth to permit indigenous groups to develop in culturally sensitive ways. They hoped that, without western-style industrialized development, indigenous groups would be able to return to a traditional and sustainable livelihood through, for example, engaging in sustainable forms of agriculture, hunting whales, herding reindeer, and fishing from natural habitats. These attempts overlapped with many of the arguments based on indigenous relationship to land, and share some of the same potential benefits and dark sides.

Ethnodevelopment has met with mixed success. On one hand, it has appealed to environmentalists and even to international financial institutions such as the World Bank. It has provided a rubric for considering and promoting sustainable means of development, often based on what are considered to be an indigenous understanding of and relationship to land and the environment. On the other hand, indigenous peoples have not been granted control over development to the extent that they have generally advocated. Rather, their development decisions are often subject either to government decision-making processes or to perceived ideas about how they can and should live their lives.

With regard to government decision making, questions about the extent to which indigenous peoples should be consulted in development decisions on or affecting indigenous lands has been at the heart of disagreements over the interpretation of ILO Convention (No. 169) and the drafting of the Declaration. In both instances, indigenous peoples are meant to be consulted with regard to development decisions affecting the areas they occupy and use, but the provisions stop short of granting them autonomy over those decisions.

ILO Convention No. 169 gives indigenous peoples "the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use" (International Labor Organization 1989: Art. 7). Yet, national and regional entities continue to be able to make decisions that affect indigenous lands, so long as they allow indigenous peoples to "participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly" (International Labor Organization 1989: Art. 7). Much debate has ensued over the requirements of this "prior consultation." Indigenous groups often claim that, even when governments technically comply with the requirement to consult with them, the consultations in fact have little effect on government decision making.

The Declaration would seem to grant indigenous peoples less autonomy than ILO Convention (No. 169) in this regard. Article 20 offers a broad statement about indigenous peoples' right to development, recognizing their right "to engage freely in all their traditional *and other* economic activities" (Declaration on the Rights of Indigenous Peoples 2007: Art. 21) Yet, while earlier drafts of the Declaration granted indigenous

peoples the "right to determine and develop priorities and strategies for exercising their right to development," one of the compromises made to push the Declaration through the Human Rights Council changed the wording to give them the right "*to be actively involved in* developing and determining" (Declaration on the Rights of Indigenous Peoples 2007: Art. 23; United Nations Commission on Human Rights 2005). That wording is in the final Declaration that passed the General Assembly, and arguably falls short of the participation required in ILO Convention (No. 169).

Indigenous peoples' autonomy is often limited in another way, which would seem to be more explicitly tied to the success of ethnodevelopment as a strategy. That is, their own development is often only protected to the extent that it is done in ecologically sustainable ways. In ILO Convention (No. 169), for example, governments commit to "take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit" (International Labor Organization No. 169 1989: Art. 7(4)). This and similar provisions might sometimes put the brakes on forms of unsustainable development by non-indigenous peoples on indigenous land, but it also limits the types of development in which indigenous peoples can engage. Indeed, the assumption that real Indians treat their land in sustainable ways sometimes comes back to haunt them and limit their possibilities for economic growth or is used to define certain groups as non-Indian.

As with culture as land, then, culture as development often depends on and requires an ongoing link between economic activity and traditional means of livelihood. Ethnodevelopment seems most appropriate as a strategy for those groups that have a nice fit between how they in fact make their livelihood and their traditional ways of life. But it is more difficult to make the required link when groups have been displaced from their traditional lands or no longer have the population or ability to sustain themselves economically through traditional means.

Conclusion

Although the dark sides I have discussed in this chapter lead me to be skeptical of many aspects of contemporary models for the protection of indigenous rights, I also recognize the extent to which these models have been seen as aspirational and powerful. In perhaps its most radical form, the right to culture makes heritage, land and economic development inseparable; the three constitute a rights package that promises to challenge dominant distribution of wealth and resources. The stakes to claiming indigenous identity are thus increased. Some claim indigeneity to get the rights package, while others attach the package to some other form of minority cultural alterity. For those who have not experienced the protection of even some of the most basic rights included in the package, the model is particularly promising. Especially for those minority groups who do not desire to pursue strong claims to self-determination, the right to culture model is attractive for its promises for respect for difference, collective title, and economic resources for development.

Based on the apparent attraction of this rights package, many advocates express an understandable objection to or skepticism of advocacy work that deconstructs "culture" or questions particular uses of strategic essentialism. Some believe that exposing the incongruencies or conflicts in narratives of cultural unity is risky, perhaps opening it up to use by those who hope to deny claims to the cultural rights package. At some level, this concern is persuasive. But given the ways in which the right to culture claims, if taken seriously, threaten to limit the groups that might qualify for protection, overstate the cultural cohesion that other groups maintain, and limit indigenous economic, political and territorial autonomy, I would argue for a willingness to

"risk" exposure. Indeed, I would argue for advocates to bring constructivism to their advocacy in a way that would expose not only the fragile nature of the culture claims, but the background distributional inequality that both underlies and structures the claims.

Without denying the power of cultural identity and the extent to which ideas about culture organize our understandings about and presentations of ourselves and others, I suggest we consider how assertions of cultural (and other) identity claims often function as a defense mechanism to protect against real vast material and political inequalities. As with most defense mechanisms, identity assertions work at some level to stave off or at least diminish the impact of daily threats, but they accept as ongoing and unchangeable the threats against which they are initially created.

Studying defense mechanisms can be useful because defense mechanisms often provide gateways for understanding underlying pathologies. In exploring the multiple deployments of culture, I attempt better to understand the threats to which they are responding. Imbedded in assertions of culture are multiple understandings about indigenous peoples and their traditions, but also about their relationship to and ongoing service to states, civil society and even the future of mankind. They are more complex and at times even more radical than they might originally appear. To the extent, however, that they function to *protect* the group, rather than transform the underlying power structures *against* which they are protecting the group, I suggest that they might be short sighted and even counterproductive. Perhaps more importantly, they appear unsustainable. To the extent that the dominant societies in which indigenous peoples or their territories reside have expressed an acknowledgment of a right to indigenous culture, including "special" protections for that culture, few indigenous groups can live up to the cultural purity and ideal that the state and its non-indigenous citizens have come to expect in the bargain.

Far from playing into the hands of those who might aim to deny indigenous rights, my hope is that this constructivist approach to culture would not conclude that indigenous groups that do not meet the expectations of cultural performance, territory or ancestry that have come to be expected by many settler societies are inauthentic. Rather, it would demonstrate the impossibility of that performance, and aim to create more, not less, autonomy within and among groups by rejecting the assumption that they should only be empowered to the extent that they are carriers of a culture worth preserving for the good of humankind.

Notes

1 The term "strategic essentialism" was coined by Gayatri Spivak in 1984. Although generated in the context of post-colonial feminist theory, it has been employed in various disciplines and taken on a number of meanings. Spivak has since distanced herself from the term. For the interview in which the idea of strategic essentialism was introduced by Spivak see Grosz and Spivak (1985: 10–12. For one of the first discussions in which Spivak publicly abandons the term, see Danius, Jonsson, and Spivak) 1993: 34–5.
2 For an analysis of ILO Convention (No. 107) that argues that the Convention saw indigenous peoples as "ignoble primitives," as opposed to the more modern understanding of Indians as "noble primitives," see Tennant 1994.
3 For a collection of manifestos from the late 1970s and early 1980s from various indigenous organizations throughout Latin America, see Bonfil Batalla 1981.
4 Scheinin's analysis is based on *Ominayak vs. Canada* (1984), *Kitok vs. Sweeden* (1988), and *Mikmaq vs. Canada* (No. 1) (1989). In each of these cases, the Art. 1 claims were considered inadmissible because the Committee found that the Optional Protocol under which complaints are brought only recognizes individual rights and, further, that individuals cannot be victims of a collective right to self-determination (Scheinin 2000a: 179–80).