
Culture as an Activity and Human Right: An Important Advance for Indigenous Peoples and International Law

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Historically, culture has been treated as an object in international documents. One consequence of this is that cultural rights in international law have been understood as rights of access and consumption. Recently, an alternative conception of culture, and of what cultural rights protect, has emerged from international documents treating indigenous peoples. Within these documents culture is treated as an activity rather than a good. This activity is ascribed to peoples as well as persons, and protecting the capacity of both peoples and persons to engage in culture is taken to be as basic a component of human dignity as are freedom of movement, freedom of speech, and freedom from torture.

It is not an accident that this treatment of culture has emerged from international documents treating indigenous peoples, for indigenous peoples' cultural rights can be fully understood only against the background of their basic rights to self-determination. However, the value of this treatment of culture extends beyond the human rights of indigenous peoples. Treating culture as an activity establishes an understanding of what cultural rights protect that clarifies the relationship between cultural rights and other mechanisms for protecting minorities and frames the role of cultural communities in the realization of human dignity as an important physical and political issue, not just a psychological one. This article offers an account of what is wrong with violating cultural rights that clearly and straightforwardly links violations of a group's cultural

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rights to violations of its rights to persist and to flourish. For these reasons, the norms regarding cultural rights that are emerging from international documents treating indigenous peoples are a much-needed step forward for peoples' rights more generally. **KEYWORDS:** sovereignty, indigenous cultural rights, international politics, human rights

Traditionally, culture has been treated as an object in international documents. As a consequence, cultural rights in international human rights law have been conceived of as rights of access and consumption. This conception of cultural rights sets them up to appear less fundamental to human dignity than political, civil, and economic rights. However, much of the empirical evidence on human rights abuses suggests that the abuse of minorities' cultural rights and the abuse of other of their human rights are linked in ways that makes it artificial to treat abuses of culture as less fundamental.

Recently, an alternative conception of culture has emerged from international documents treating indigenous peoples. Within these documents culture is treated as an activity rather than a good. This activity is ascribed to peoples as well as persons; and protecting the capacity of both peoples and persons to engage in culture is taken to be as basic a component of human dignity as are freedom of movement, freedom of speech, and freedom from torture. This activity conception of culture represents an important advance for the international legal framework within which human rights to culture are protected because it promotes a better understanding of what cultural rights protect.¹

It is not an accident that this treatment of culture has emerged from international documents treating indigenous peoples, for indigenous peoples' cultural rights can be fully understood only against the background of their basic rights to self-determination. However, the value of this treatment of culture extends beyond the human rights of indigenous peoples. Treating culture as an activity establishes an understanding of what cultural rights protect that clarifies the relationship between cultural rights and other mechanisms for protecting minorities and frames the role of cultural communities in the realization of human dignity as an important physical and political issue, not just a psychological one. This reveals a greater degree of coherence among international norms regarding the protection and preservation of minority cultures than is often recognized and defuses many of the standard worries about competition between human rights of peoples and human rights of individuals. In addition, it offers an account of what is wrong with violating cultural rights such that violations of a group's cultural rights are clearly

and straightforwardly linked to violations of its rights to persist and to flourish. For these reasons, the norms regarding cultural rights that are emerging from international documents treating indigenous peoples are a much-needed step forward for peoples' rights more generally.

The Human Right to Culture

There is a long history among international human rights instruments and within the United Nations system of treating cultural integrity and access to cultural heritage as a constituent element of human dignity in its own right and not merely instrumentally necessary.² Cultural rights are widely acknowledged to be human rights, and the right to participate in culture appears as a matter of course in human rights declarations, treaties, and interpretive documents. For example, the Universal Declaration of Human Rights states: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."³ And the Vienna Declaration reminds states that "persons belonging to minorities have the right to enjoy their own culture, to profess and practice their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination."⁴ In its General Comment 13: The Right to Education, the Committee on Economic, Social, and Cultural Rights (CESCR, the monitoring body for the International Covenant on Economic, Social, and Cultural Rights, the ICESCR) notes that the covenant obliges states to provide education that is not only relevant and of good quality in its form and content but also culturally appropriate.⁵ The Convention on the Rights of the Child states that a child belonging to an ethnic, religious, linguistic, or indigenous minority "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language."⁶ The Organization of American States (OAS) Protocol of San Salvador on economic, social, and cultural rights commits the states who are party to it to recognize the right of everyone "to take part in the cultural and artistic life of the community," including minority communities.⁷ And article 5 of the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live includes the right of aliens to retain their own language, culture, and tradition alongside the rights to life, to protection against arbitrary interference with their privacy, to equality before the law, to freedom of conscience, and to found a family.⁸

To say that cultural rights are human rights is to say that depriving an individual of her culture wrongs her directly, over and above any wrong done by undermining other aspects of her dignity. As the Human Rights Committee (HRC, the treaty-monitoring body for the International Covenant on Civil and Political Rights [ICCPR]) notes in connection with article 27 of the ICCPR, cultural rights are “distinct from and additional to, all the other rights which, as individuals in common with everyone else, [the members of a group] are already entitled to enjoy under the Covenant”; “the protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned” and accordingly “these rights must be protected as such and should not be confused with other personal rights.”⁹ This statement implies not only that cultural rights do not depend on other rights for their justification, but that they may themselves ground rights to conditions, objects, or goods that are instrumentally necessary for a people’s culture.¹⁰

This treatment of cultural rights has proved to be an important resource for nonstate peoples.¹¹ In particular, the fact that cultural rights are basic and universal has proved valuable in blocking certain kinds of arguments by states’ representatives against the admissibility of complaints arising from denials of access to or control over ancestral land and resources. For example, in *Hopu and Bessert v. France* the HRC was able to accept the complainants’ argument that building a hotel on their ancestral burial grounds constituted a violation of their rights to privacy and to family in part because the fundamental importance of cultural interests establishes an obligation to use the complainants’ interpretation of who counts as a member of their family when determining whether a violation has occurred.¹² In *Lansmann v. Finland*, the HRC rejected the government’s argument that state officials may balance a culturally based claim to land or resources against national interests in economic development on the grounds that insofar as the interest in culture includes an interest in the persistence of the group’s way of life, a group’s cultural interest in being able to access or use territory or resources may not be sacrificed for the sake of economic development.¹³

Nonetheless, the conception of culture at work in many international documents is problematic in several respects. In particular, there is a tendency to treat culture as a type of good—as an object or a state of affairs, valuable for its potential to be consumed, experienced, or used. For example, the UNESCO Declaration of the Principles of International Cultural Cooperation states: “Each *culture* has a dignity and value which must be respected and preserved” (emphasis added), and it describes cultures as “part of the common heritage belonging to all mankind.”¹⁴ The UNIDROIT

Convention on Stolen or Illegally Exported Cultural Objects defines cultural objects as those “of importance for archaeology, prehistory, history, literature, art or science.”¹⁵ And the preamble to the European Charter for Regional or Minority Languages motivates and situates the cultural protections included in that document by noting that “the protection of the historical regional or minority languages of Europe, some of which are in danger of eventual extinction, contributes to the maintenance and development of Europe’s cultural wealth and traditions.”¹⁶

This conception of culture encourages an understanding of what cultural rights protect that emphasizes objects, behaviors, and psychological states. And so, the statements of cultural rights in many international documents have emphasized rights of access, preservation, and use. For example, in the European Framework Convention for the Protection of National Minorities, state parties are directed parties to “promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.”¹⁷ The ICCPR and the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities describe persons belonging to minorities as having the right “to enjoy their own culture, to profess and practice their own religion, or to use their own language.” And the Committee on the Elimination of Racial Discrimination (CERD) recommends that governments consider “vesting persons belonging to ethnic or linguistic groups . . . with the right to engage in activities that are particularly relevant to the preservation of the identity of such persons or groups.”¹⁸ The ICESCR recognizes the right of everyone “to take part in cultural life.” However, in its concluding observations regarding France’s progress toward compliance with the ICESCR in 2001, the CESCR’s recommended remedy for concerns about inequalities in the enjoyment of social and cultural rights by minorities is for the state party to “increase its efforts to preserve regional and minority cultures and languages, and that it undertake measures to improve education on, and education in, these languages.”¹⁹

This way of thinking about cultural rights places important limits on the extent to which nonstate groups can challenge state activities that threaten their continued ability to live as a people. For example, in the *Lansmann* complaint, the Human Rights Committee rejected the government’s claim that cultural interests and economic interests could be treated on a par, but it left uncontested the Finnish government’s framework for thinking about the kind of interest that Saami people have with respect to their culture.

Within that framework, what the Saami have an interest in is a specific set of behaviors, symbols, self-understandings, and relations to objects and to one another, "the Saami way of life." Thus, although reindeer and the territory through which they move are a source of claims, they are considered as objects upon which symbols are projected and behaviors are enacted, not as part of a jurisdiction or domain with respect to which Saami decision making must be authoritative, and not as an extension of the Saami themselves. The Saami's right to culture protects that which is empirically necessary to *the* self-understandings and actions entailed by *the* way of life that distinguishes them from other peoples. Consequently, actions or activities that harm reindeer and the territory through which they move are ruled out by the Saami's cultural rights only when and to the extent that the harm makes it impossible for Saami to symbolize and behave with respect to reindeer as prescribed by their way of life, understood as an identifiable set of behaviors, symbols, self-understandings, and relations to objects and people that is distinctive to them *as Saami*.

This view of what cultural rights protect sets a very high threshold for the impact that decision making must have on a group's way of life before it constitutes a human rights violation. For example, in *Nakkalajarri v. Finland*, another complaint involving the impact of logging, the HRC ruled that there was insufficient evidence to determine whether logging impacted the group's way of life enough to prevent the complainants from continuing to practice it.²⁰ And in *Mahuika et al. v. New Zealand*, the HRC found that engaging in broad consultation and attention to the sustainability of Māori fishing practices was sufficient for the government to discharge its responsibilities with respect to cultural rights in a controversial settlement regarding Māori fishing rights.²¹

The problem here, as Rosemary Coombe notes, is that culture is understood as a noun, not just grammatically but in its very essence. What cultural rights protect are "cultures": objects or bundles of properties "that can be recognized, enjoyed, possessed, maintained, disseminated and preserved."²² These objects or bundles of properties may be argued to merit protection either because they are of direct interest to individuals, or because accessing, consuming, exhibiting them, and so on are necessary conditions for something that is in the direct interest to individuals. What human rights are understood to protect are examples or tokens of a distinctive type of thing, "culture." These examples, "cultures," may be manifest either in individual human beings qua members of a specific group or in collections of objects, behaviors, rituals, and meanings that specific groups require or put to work in the course of maintaining their specificity.

Coombe remarks about these worrying features of how *culture* as a term is used in international legal instruments in the course of noting the ways in which that usage lags behind changes in the way the term has come to be understood by academic anthropologists. However, as Coombe continues, it is not obvious that the best response to this gap between how cultures are theorized academically and how they are described in international legal instruments is simply to substitute the former for the latter.²³ The purposes for which cultures are referred to in international documents are different from the purposes for which such references are made in theoretical debates. Because of this, we must be careful to focus on the problems that conceiving of culture as a good poses from the perspective of the purposes that international documents are intended to serve. From that perspective, the primary problem is that conceiving of culture as a good encourages adjudicators and policy-makers to think of cultures as static and external in origin both to individuals, who exhibit, wield, or consume cultures, and to those individuals' relations with one another, which manifest, express, reinforce, or undermine cultures. This frames questions about what cultural rights may and must protect in a way that emphasizes the potential for conflict between individual and collective right holders, and among interests within and across individuals.

For example, when culture is conceived of as a good, groups appear as producers of culture not in virtue of activities that reflect the distinctive relationships and persons that constitute them, but in virtue of mechanisms that ensure that a group's internal relations and persons carry "its" culture forward into the future. This sets up an inherent tension between individuals' interests in culture and their interests in self-expression and between the needs of cultural communities and those of the individuals that constitute them—a tension that limits both the kind and extent of moral claims that cultural rights may justify. When cultural rights are understood primarily as rights to access a good, "culture," those who make up cultural communities appear as little more than vessels within which culture is preserved and through which it is delivered, or, even worse, as material upon which communities express themselves.

The central issue here is how we are encouraged to think about what our human rights protect with respect to culture. From an individual perspective, when culture is conceived of as a good, what cultural rights appear to protect is access to or benefit from a specific kind of public good. As public goods, we may expect that cultures will be difficult to sustain, in part because of the contributions they require and in part because they are inevitably objects of divergent and incompatible plans. The necessity of a certain degree of

coercion and repression thus appears to be built into cultural rights because of the nature of the interest that is at stake. Further, the intensity and moral difficulty of cultural rights appear to increase in direct proportion to increases in the degree of psychological significance with which a culture is vested. The more central cultural membership is made to personal well-being, the more important it is for individuals to be able to sustain and access it, and so the greater the justification there seems to be for communities to enjoy wide powers for cultural preservation. However, the more important it is for individuals to access culture and put it to use in their personal psychology, the more problematic it becomes to allow communities to control the form and terms of cultural participation.²⁴

Culture in Documents Treating Indigenous Peoples' Rights

International human rights documents relating to indigenous peoples are intended to clarify what universal human rights imply with respect to indigenous peoples. Recently, an alternative conception of culture, and so an alternative understanding of what cultural rights protect, has emerged from these documents. International documents focusing on the human rights of indigenous peoples spell out what indigenous peoples' (universal) human rights imply for policies and decisions regarding land, resources, and institutions. For example, the United Nations Special Rapporteur Erica-Irene Daes described her 1996 supplementary report on the protection of indigenous peoples' cultural heritage as explaining "how these universally recognized principles of human rights [regarding protection of one's cultural heritage] should best be interpreted and applied in particular contexts, such as the context of indigenous peoples."²⁵ The International Labour Organization has similarly stated in its comment on the wording of the Draft United Nations Declaration on the Rights of Indigenous Peoples that "the rights of indigenous peoples do not 'derive from their political, economic and social structures . . .' etc.—these rights are inherent in all human beings."²⁶ In these accounts, the necessity for documents elucidating the rights of indigenous peoples specifically is presented as arising because of a persistent inability or unwillingness of state actors to recognize that certain of their activities violate indigenous peoples' rights, and not, or at least not necessarily, because of something special about indigenous peoples as such.

Within the conception that is emerging from these international documents treating indigenous peoples' rights, what cultural

rights protect is not a good that individuals have an interest in accessing or consuming but an activity that individuals and peoples must be permitted to pursue. Cultural rights are rights to do cultural sorts of things: express and develop language, a worldview, a history, an identity, as peoples and as individuals. In short, cultural rights protect the interests peoples have in culture as a verb: in a way of living. Exercising this right means that there will be objects, languages, behaviors, and institutions that reflect peoples' various "culturings." And so, to deprive people of objects, languages, and institutions is to limit or prevent their ability to continue engaging in culture. It is not possible to respect the interests of peoples to engage in such activities without allowing what is produced by this activity to be distinctive to and reflective of the individuals and relations of which the group is constituted, and this is why pressure to assimilate and other activities that erode a group's capacity to maintain a distinct way of life are ruled out by cultural rights. Consequently, peoples must be allowed to live in accordance with their own decisions and values not because the distinctiveness of a group's life is in itself valuable, but because it is not possible to respect cultural rights without respecting the distinctive forms of living that peoples will develop when their rights are exercised.

This understanding of cultural rights differs in several ways from that promoted in earlier international documents. First, the interests that cultural rights protect are presented as interests in undertaking and seeing through certain types of activity, rather than interests in accessing, using, or consuming certain types of goods. Second, both individuals and communities are presented as primary subjects of cultural rights, so that the cultural rights of communities are not, or not only, derivative of the rights of the individuals who constitute them. Third, although particular objects, activities, or states of affairs may be entailed or implied by cultural rights as described in these documents, the primary focus of the protection is not on specific rituals, symbols, or objects but rather on the capacity to express, develop, and direct: to engage in culture, and to do so on a people's own terms.

These differences are in part a reflection of awareness in cases involving indigenous peoples that have found that their cultural rights can be fully understood only against the background of a fundamental and persistent denial of indigenous peoples' basic rights to self-determination.²⁷ For example, in *Lovelace v. Canada*, a case in which a woman who had been excluded from official membership in her band, or community, after marrying a non-band member, the HRC found that Canada had violated the woman's cultural rights not because the membership rule violated her human

rights, but because Canada had violated her right in concert with other band members to determine for themselves the conditions of membership.²⁸ The membership rule violated her rights because it had been imposed upon her by Canada for its own purposes, not the purposes of the group. In contrast, in *Kitok v. Sweden*, the HRC ruled that membership restrictions did *not* violate the complainant's right to culture by excluding him because such restrictions could be justified as a measure whose primary purpose was to serve the Saami (the indigenous community).²⁹

In both the *Lovelace* and the *Kitok* cases, protecting the group's cultural interests was taken to imply a prohibition on state interference with certain forms of internal decision making (such as decisions about who counts as a member). This interpretation of cultural rights as including respect for autonomous decision making with respect to membership was in part a reflection of the fact that because of the peculiarities of the HRC's interpretation of the scope of ICCPR optional protocol (the provision that makes it possible for the committee to hear complaints from individuals), indigenous peoples have often been constrained to pursue complaints under article 27 (the right of minorities to preserve their cultures) that they would otherwise pursue under article 1 (the right of all peoples to self-determination).³⁰ The overall impact of this constraint on complaints based directly in denials of self-determination has been to encourage a connection of cultural rights with rights of self-determination. This in turn has led to a more sophisticated conception of the role of land, resources, and relationships with others in human dignity.

For example, in its General Comment 23 on article 27, the HRC notes "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."³¹ This expanded understanding of what cultural rights protect can also be seen in what many state parties now understand to be required of them by article 27, as evidenced by their phrasing and the information included in their periodic reports. For example, Argentina's report in 1999 cited restitution of land and legal recognition of indigenous organizational structures and governments as proposed courses of action as evidence of compliance with its treaty obligations. Chile's report in 1998 included information about recognition of indigenous communities. And Canada's report in 1997 included the information that the government conducted consultations with national aboriginal groups before ratifying the Convention on the Rights of the Child.³² A more sophisticated understanding of culture can also be seen in the committee's comments on the reports of state parties to the committee, as in 1999 when the HRC remarked with respect to Chile

on the necessity of respecting indigenous peoples' rights under article 27 to protection from the impact of hydroelectric development and to have a say in decisions affecting their way of life, and with respect to Cambodia, where the committee found that the state's report had given insufficient information about measures taken to secure indigenous peoples rights under article 27 to protection of their agricultural activities.³³

Following the ICCPR, the Inter-American Commission on Human Rights (IACHR) now takes it as part of its settled interpretive framework for indigenous human rights "that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples" and that such control and use includes not just its capacity to sustain life but also its function as "the geographic space necessary for the cultural and social reproduction of the group."³⁴ Consequently, the IACHR includes policies such as "the introduction of infrastructure (roads, dams, etc.) that destroys and threatens the physical and cultural integrity of the indigenous areas" as rights-violating in virtue of its assault on indigenous peoples' capacity to sustain the communal life necessary to cultural activity.³⁵ This recognition of the fundamental importance of land to cultural integrity is most clearly stated by the Inter-American Court of Human Rights (the inter-American court) in its *Awas Tingni* decision: "The close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element that they must fully enjoy."³⁶

This connection between cultural integrity and self-determination in documents treating indigenous peoples has also had the effect of emphasizing the communal nature of cultural rights, and in particular in developing an interpretive framework in which communities are primary subjects of cultural rights. For example, one set of rights laid out in the draft UN Declaration on the Rights of Indigenous Peoples are rights to support and effect a people's own way of interacting, both with one another and with those outside the community.³⁷ In that document, articles 15, 29, and 32-34 focus on control over the development and maintenance of institutions, rules of membership, and the terms on which a community interacts with other communities; on the institutional underpinnings of cultural life; and in particular on the link between institutions of governance and cultural expression and development. Article 15

lists a right of a people to establish and control their own institutions and system of education. Article 29 sets out a right to full ownership, control, and protection of cultural and intellectual property. Article 32 states that indigenous peoples have the collective right to determine their citizenship in accordance with their customs and traditions. Article 33 names a right to promote, develop, and maintain a people's institutional structures and distinctive juridical customs, traditions, procedures, and practices. And article 34 states that indigenous peoples have a collective right to determine the responsibilities of individuals to their communities. The underlying theme of these articles is that states, groups, and persons violate human rights when they compel indigenous peoples and the persons that constitute them to abandon a way of life or to restrict the development of their way of life to terms or pathways of someone else's choosing. Indigenous peoples have the right *in groups* to determine *as a group* what their collective life means and what future course it will take. As the Proposed American Declaration on the Rights of Indigenous Peoples states, respect for cultural integrity includes recognition and respect for "indigenous forms of social, economic and political organization, [and] institutions" as well as for indigenous beliefs, values, clothing and languages.³⁸

In this interpretation, cultural rights are the collective corollary to individual rights of free expression. Cultural rights are the rights of collectives and those who constitute them to express themselves as collectives. This makes cultural rights not only rights *of groups*, but rights *to an activity* rather than a good. Material conditions, such as secure access to sites, artifacts, technologies, media, plants, animals, and minerals are explicitly linked to ensuring that peoples can *act* and *live* as they (and not someone else) have chosen. For example, in both the draft Declaration and the inter-American documents described above, rights against forcible removal are linked to rights to maintain and strengthen relationships to specific territories and waters, and to use these in accordance with a people's own customs, laws, and priorities. Similarly, the ability to determine the form and significance of relationships to other people, both within the community and outside of it, is presented as part of what it is to develop and live a collective life that a people may call their own. Part of developing and living a way of life is developing and living a set of relationships to objects and to other people. These relationships are both material and conceptual: They are both a set of connections in the material world and a set of symbolic and conceptual connections between persons.

So what cultural rights protect is not in the first instance rights to particular rituals, internal relationships, or institutions. Rather,

cultural rights protect rituals, relationships, and institutions *that express, embody, and reflect the peoples that live and produce them*. In the context of a particular community, this may establish claims to the protection or promotion of specific institutions. However, such claims regarding specific objects or political arrangements will be a consequence of interpreting the implications of cultural rights in a specific set of circumstances and not something built into these rights' conceptual specification. Specific features of an indigenous people and that people's specific circumstances may mean that states must refrain from policies or undertake action with respect to that people that is not forbidden or required with respect to others. Such differences do not arise because the rights of indigenous peoples are different in form or content from those of other peoples, but because the circumstances and constitution of many indigenous peoples are such that their rights have distinctive implications.³⁹

Thus although recent documents treating indigenous peoples' human rights reiterate the point made in other international documents that a right to culture without security of means to realize and instantiate that culture is an empty protection, such documents frame this point in a way that makes what is significant about specific objects, materials, and relationships their role in enabling cultural activity rather than their distinctively "cultural" nature. Rights to physical objects, material conditions, and distinctive patterns of familial or political relationships are included in cultural rights not because these are the constitutive elements of indigenous cultures, but rather because access to and control over them is necessary for indigenous peoples to *be cultural* on terms of their own choosing. Objects, material conditions, and relationships are protected as a matter of cultural rights because the right to determine the shape and meaning of collective life is empty without the ability to instantiate and live that life in the world.

Understood in this way, the interest that cultural rights protect is in itself very narrow: an interest in being cultural. However, this narrowness is compatible with a people's being able to claim a very broad range of goods, performances, states of affairs, or reparations as a matter of right derivatively, in virtue of their necessity to engage in culture in a specific instance, especially when human rights to culture are taken in combination with arguments for a human right of peoples to self-determination.⁴⁰ Culture, the activity, is protected directly as a basic component of human dignity; objects, behaviors, and states of affairs are protected derivatively, in virtue of the fact that international human rights establish not only negative duties to refrain from interfering with people when they are pursuing an interest, but also positive duties to provide people with what

they need to ensure that pursuit is successful.⁴¹ The fact that claims regarding objects and so forth are established derivatively does not in any way diminish their normative force—the fact that they command compliance from those to whom they are addressed, even if those addressed would prefer to act differently.

The Universality of Indigenous Peoples Rights to Culture

The specific circumstances that have dictated the need for documents spelling out indigenous peoples' cultural rights, and in particular the centrality of indigenous peoples' rights to self-determination to adequately addressing their claims, explains why an activity conception of cultural rights has emerged from thinking about indigenous peoples' rights. However, the value of an activity conception is not limited to indigenous peoples. In this, the movement to clarify and spell out the implications of human rights for the rights of indigenous peoples marks an important step forward for the protection of cultural rights more generally.

The understanding of cultural rights that has emerged from international documents treating indigenous peoples' rights presents the interest cultural rights protect as an interest in being able to *do* something, to engage in a kind of activity, rather than an interest in being able to access, consume, or enjoy a kind of thing. In this understanding, cultural rights are essential to human dignity not because they secure individuals in their ability to obtain goods or achieve a specific state of affairs, but because culture is what people do when they are living their lives within a people. This way of describing what persons have at stake in cultural rights is reminiscent of Dan Sperber's description of culture as participation in a shared process or activity.⁴² Some may also see a resonance with Pierre Bourdieu's description of culture as a practice.⁴³ In my own view, describing culture as a process or activity is preferable in this context to describing it as a practice, because the language of activity more clearly communicates the idea that what a cultural right protects is the ability of persons and peoples to produce cultures, and to produce them in a way that allows them to describe those cultures as their own.⁴⁴

This consideration is not decisive, however. What matters is not so much the terminology that we use to describe the conception of culture that is at work in the documents treating indigenous peoples' rights, but that the conception of culture that emerges from

those documents encourages a better understanding of what cultural rights protect.

Understanding cultural rights as protecting the ability to do something is important because it defuses a number of common worries about cultural rights, in particular worries about the relationship between cultural rights of individuals and those of communities. When cultural rights are conceived of as rights to a kind of good, the interests that individuals have at stake appear as interests in reliable access to, consumption of, or use of "culture" as a resource. Arguing that cultural interests are sufficiently important in a particular context to hold other people to be bound by duties thus involves articulating what it is about this resource or good, "culture," that makes it so important to individual well-being. Such arguments might be constructed in terms of the importance of culture for other, more important, aspects of well-being: the inherent value of having culture, the inherent disvalue of not having it, or the inequality inherent in a government's providing culture for some people but not others.⁴⁵ Such arguments require a clear definition of what it is for something to be culture, or at the very least an explicit set of circumstances in the world to which one can point and say definitively, "Yes, the government provided (or no, the government failed to provide) culture for you, because *x*, *y*, and *z* were (or were not) present."

One obvious problem that arises in the context of attempts to justify duties with respect to culture conceived of in this way is that cultures do not seem to have the kind of stability, persistence of identity across time, or distinctness from other social factors that we need if we are to make a persuasive case for the kinds of empirical links between a culture's persistence and individual members' consuming or achieving the good, capacity, or internal state that is supposed to be at stake.⁴⁶

Another problem is that one important component of cultures, and so one important thing to which individuals require access if they are to be ensured secure enjoyment of the right, is the set of past, present, and future members of the cultural community. If what the right to culture protects is access to a good or achievement of a state of being or of the world, then ensuring cultural rights seems to imply that we may have to secure rights to access and use other people: When culture is conceived of as a good, securing one person's interests in accessing and consuming it seems to require not just constraints on other people, but guaranteed access to them. In many cases, such a requirement would be obviously defeated by other human rights considerations; and so at the very least, the protections

that we may claim under the auspices of cultural rights seem, as a matter of principle, to be much more limited in their effectiveness than those we may claim under the auspices of other rights.

Because of this, many normative theorists have been reluctant to accord culture as a group right the same kind of basic importance as other human rights.⁴⁷ Instead, many have argued that the cultural health of the group is important only derivatively, in virtue of its role in securing other rights, and ought not be placed in the same league with interests such as physical integrity. This reluctance is mirrored in a tendency within diplomacy and international relations, noted most recently in the United Nations secretary general's report to the newly constituted Human Rights Council, to tolerate levels of violations for groups' cultural rights that would be clearly perceived as intolerable were they practiced with respect to other rights.⁴⁸ In many real-world cases, however, minority cultural groups are subject to abuses that are perpetrated for the express purpose of preventing their persistence as a distinct group. The analysis given above, because it places group rights on a par with other rights, is able to describe not just the abuses themselves as primary, or basic, wrongs, but also the project that motivates them.⁴⁹ In contrast, unwillingness to treat group rights on a par with other rights places us in the position of having to describe the project that motivates these abuses—eradicating the group as such—as wrong only derivatively, in virtue of the means employed in pursuit of it. Some theorists explicitly acknowledge this implication and seem comfortable with it.⁵⁰ However most theorists recognize that there is something perverse in holding that the only thing wrong with a goal such as “ensuring that the Roma as a people with a distinct way of life no longer exist within this territory two generations from now” is the means we would have to adopt in order to successfully realize it.

The problem is that the relationship between the groupness of cultural rights and the interests at stake appears contingent and instrumental when culture is conceived of as a good: Cultural rights imply group rights because groups are best place to secure the cultures that individuals need.⁵¹ Consequently, it becomes difficult to articulate what precisely is wrong with eradicating cultures apart from the violence that is usually deployed against individuals in the course of doing so. However, as an activity rather than a good, culture is obviously something in which we have an interest *in groups*, and not only individually. That is, it becomes obvious that culture is an important interest for us qua members of the group separately from our interest in culture as a particular individual. Moreover, many of the cultural activities in which we engage are

communal efforts to shape the physical and social world that defines us and connects us to one another. And so, it is difficult to see how governments and institutions could respect our interests in culture without respecting our capacities to access and make decisions about these parts of the world. In the same way that the ability to determine whether, with whom, and on what terms we build families is of key importance to human dignity, so too is the ability to determine whether, with whom, and on what terms we build a way of life.

In this, the shift to an activity conception emphasizes the connection between peoples' rights and individuals' rights, and the unity of cultural and other human rights. This is not to suggest that there may not be conflicts or inconsistencies of interest across and within individuals and groups. But it does suggest that such conflicts or inconsistencies are not any more likely to arise in virtue of some right holders being peoples or some rights being cultural. More to the point, the emphasis on connection between peoples' rights and individuals' rights, and between cultural rights and other human rights, forces us to acknowledge that assaults on a way of life are not just assaults on ideas, they are assaults on persons, and in particular they are assaults on persons' ability to live.

* * *

The historical tendency in international documents has been to think of cultural rights as analogous to rights such as the right to food, the right to health, and the right to personal property. However, the cultural rights that have emerged from documents treating indigenous peoples' rights are more closely analogous to rights such as the right to free expression, the right to marry, and the right to participate in political institutions. These latter are rights to engage in a type of activity that is thought to be especially important for persons be able to do. Expressing yourself, marrying, and participating politically all have a certain instrumental value in contributing to well-being and persistence. Yet we are also thought to have a basic interest in being able to engage in these activities *apart* from any contribution they may make to securing important goods.

Thinking about the experiences of indigenous peoples and their specific human rights with respect to land, resources, and self-determination helps to clarify the problems inherent in thinking about cultural rights as rights to a kind of good. For example, a crucial dimension of the wrongs that have been perpetrated against indigenous peoples has been the attempt to deny them the ability to be who they are, as peoples. Claudia Card has noted the centrality of this type of attack on a community's continued life as a distinguishing

feature of the evil in genocide.⁵² And so the shift to thinking about culture as something communities do and not just something they have or bequeath may be an important aspect of explaining why and how cultural genocide is intolerable and an evil in a way that is distinct from the other evils present in the human-rights abuses to which indigenous peoples are subject.

Insofar as conceiving of culture as a good is problematic, however, it is not problematic only with respect to the cultural rights of indigenous peoples. To have little or no say, individually or collectively, about the content of our shared lives is to lack an unacceptably large degree of say over the direction and possibilities of our lives in precisely the way that human rights are supposed to guard against. Because of this, at least some of the problems that the shift to an activity conception addresses in the context of indigenous peoples' cultural rights ought to be understood as general problems for human rights to culture. In this respect, the conception of cultural rights that has emerged from international documents treating the rights of indigenous peoples—cultural rights as rights of communities and those who constitute them to an activity of basic importance to their dignity, in virtue of which they gain rights with respect to the material world they have constructed for themselves—marks an important step forward for our thinking about peoples' rights more generally.

Notes

1. This article focuses on conceptions of culture in international documents. The argument is that recently a conception of culture has emerged from international documents treating indigenous peoples' rights that differs from the conception of culture that dominates in other documents, and that this difference has important implications for the way cultural rights are understood as a set of international protections. In making this argument I am interested in how culture is conceived of in international documents. I am not arguing either that indigenous peoples themselves have developed and are advancing the conception of culture noted or that the distinctiveness and value of this conception of culture depends on its being an indigenous conception. This is not to say that there is no connection between the conception of culture's being different from that found in other international documents and its having been articulated in the context of cases and declarations addressing indigenous peoples. Below, I argue that the distinctiveness of the conception of culture can in part be explained by the fact that indigenous peoples' cultural rights must be interpreted against the background of their rights to self-determination.

2. On the difference between rights that protect basic constituents of dignity and rights that protect interests and activities because of their contribution to basic constituents, see James W. Nickel, *Making Sense of Human Rights*, 2d ed. (New York: Blackwell, 2007); Cindy Holder, "Self-determination

as a Basic Human Right," in A. Eisenberg and J. Spinner-Halev, eds., *Minorities Within Minorities* (Cambridge University Press: 2005), pp. 297–300.

3. UN General Assembly, Universal Declaration of Human Rights, GA res. 217A (III), UN doc. A/810 at 71 (1948); article 27 at 1.

4. World Conference on Human Rights, Vienna Declaration and Programme of Action, June 25, 1993, Vienna, UN doc. A/CONF.157/24 (part 1) at 20, (1993) at 19. Other important documents in the historical development of the international human right to culture include International Covenant on Economic, Social, and Cultural Rights, adopted and opened for signature, ratification, and accession by General Assembly res. 2200A (XXI) of Dec. 16, 1966, entry into force Jan. 3, 1976, article 15; UNESCO General Conference (1976), Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It, Nov. 26, 1976, Nairobi, Kenya; UNESCO Intergovernmental Conference on Cultural Policies in Latin America and the Caribbean, Declaration of Bogota, Jan. 20, 1978; and UN Human Rights Committee (HRC), General Comment 23: The Rights of Minorities (article 27), 08/04/94, UN doc. HR1/GEN/1/Rev.1, at 38 (1994).

5. Committee on Economic, Social, and Cultural Rights, General Comment 13: The Right to Education (article 13), 08/12/1999, UN doc. E/C.12/1999/10 (1999) at 6 (c).

6. Convention on the Rights of the Child, General Assembly res. 44/25 of Nov. 20, 1989, at article 30.

7. Organization of American States, San Salvador Protocol to the American Declaration on Human Rights in the Area of Economic, Social, and Cultural Rights at article 14.1(a).

8. United Nations, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted by General Assembly res. 40/144 of Dec. 13, 1985, article 5.

9. UNHRC, note 4, at 1, 9.

10. For a general discussion of the significance of treating the human right to culture as a basic rather than derivative, see Cindy Holder, "Culture as a Basic Human Right," in Avigail Eisenberg, ed., *Diversity and Equality* (Vancouver: University of British Columbia Press, 2006), pp. 78–96.

11. On this, see Natan Lerner, *Group Rights and Discrimination in International Law* (Dordrecht, NL: Martin Nijhoff, 1991); S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford University Press, 2004), pp. 131–141.

12. UN Human Rights Committee, *Hopu and Bessert v. France*, ICCPR, Communication no. 549/1993: France 29/12/97, UN doc. CCPR/C/60/D/549/1993/Rev.1.

13. UN Human Rights Committee, *Lansmann v. Finland* and *Lansmann et al. v. Finland*, communication no. 671/1995, UN doc. CCPR/C/58/D/671/1995. The complainants in this case (a group of Saami reindeer breeders) argued that the Finnish government violated their article 27 rights by granting logging concessions in areas that reindeer normally use for winter grazing. The decision ultimately went against the complainants because the committee found that the evidence did not permit them to conclude that the logging concessions constituted a pressing threat to the reindeer migration.

14. UNESCO, Declaration of the Principles of International Cultural Cooperation, article 1.

15. UNIDROIT, Convention on Stolen or Illegally Exported Cultural Objects, article 2.

16. European Charter for Regional or Minority Languages, preamble.

17. European Framework Convention for the Protection of National Minorities, article 5.

18. United Nations, International Covenant on Civil and Political Rights, article 27; United Nations General Assembly, Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities, GA res. 47/135 of Dec. 18, 1992, article 2 at 1 (emphasis added); CERD General Recommendation XXI on the right to self-determination (1996), UN doc. A/51/18, articles 2 and 5 (emphasis added).

19. International Covenant on Economic, Social, and Cultural Rights, article 15; United Nations, Concluding Observations of the Committee on Economic, Social, and Cultural Rights, FRANCE, 30/11/2001. UN doc. E/C.12/1/Add.72, Concluding Observations/Comments, para. 26.

20. UN Human Rights Committee, *Anni Aarela and Jouri Nakkalajarri v. Finland*, ICCPR communication no. 779/1997: Finland, 07/11/2001.

21. UN Human Rights Committee *Apirana Mahuika et al. v. New Zealand*, ICCPR communication no. 547/1993: New Zealand, 15/11/2000.

22. Rosemary Coombe, "Culture: Anthropology's Old Vice or International Law's New Virtue?" *ASIL Proceedings* 93 (1999): 261.

23. *Ibid.*

24. For a detailed discussion of how interpreting culture as a good contributes to undermining the plausibility of its being a basic human right, see Holder, note 10.

25. Commission on Human Rights, Supplementary Report of the Special Rapporteur, Mrs. Erica-Irene Daes, Submitted Pursuant to Sub-Commission Resolution 1995/40 and Commission on Human Rights Resolution 1996/63, UN doc. E/CN.4/Sub.2/1996/22 at 16.

26. Note by the International Labour Office, UN doc. E/CN.4/1995/119 at 17.

27. For a detailed discussion of the primacy of indigenous peoples' rights to self-determination in the interpretation of their other human rights, see S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford: Oxford University Press, 2004).

28. UNHRC, *Lovelace v. Canada*, ICCPR communication no. R/24, UN doc. A/43/40, annex 7(G). For a detailed discussion of the restrictions that rights of cultural integrity have been interpreted as placing on state actions with respect to indigenous groups, see Anaya, note 27, pp. 131-141.

29. UNHRC, *Kitok v. Sweden*, ICCPR communication no. 197/1985, UN doc. A/43/40, annex 7(G).

30. See, for example, *B. Omniyak and members of the Lubicon Lake Band v. Canada*, communication no. 167/1984. Anaya discusses this interpretive constraint in detail in Anaya, note 27, pp. 253-255.

31. UNHRC, note 4, General Comment no. 23 (General Comments) at 7.

32. Third periodic reports of state parties due in 1997, UN doc. CCPR/C/ARG/98/3 Argentina 07/05/99 at 287; fourth periodic reports of state parties due in 1994, UN doc. CCPR/C/95/Add.11 Chile 03/12/98 at 268; fourth periodic reports of state parties due in 1995, UN doc. CCPR/C/103/Add. 5 Canada 15/10/97 at 288.

33. Report of the HRC: 21/10/99, UN doc. A/54/40, vol. 1 (sessional/annual report).

34. Inter-American Commission of Human Rights, Mary and Carrie Dann, case 11.140 (United States), IACHR report no. 75/02 (merits decision of Dec. 27, 2002) at 128.

35. IACHR, Report on the Situation of Human Rights in Brazil (1996), chap. 6 at 41.

36. Inter-American Court of Human Rights, the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Aug. 31, 2001, judgment. Ser. C no. 79 at 149.

37. Draft United Nations Declaration on the Rights of Indigenous Peoples, UN doc. E/CN.4/Sub.2/1194/56, articles 15, 29, 33–34. For a detailed discussion of the draft declaration in connection with self-determination, see Holder, note 2.

38. Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights, Feb. 26, 1997, at article VII at 1, 3.

39. For a detailed discussion of the generation of particular claims out of universal rights, see Anaya, note 27, and Holder, note 2.

40. On this, see Anaya, note 27, and Holder, note 2.

41. See Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy*, 2d ed. (Princeton: Princeton University Press, 1996); Nickel, note 2; Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, June 14–25, 1993, UN doc. A/CONF.157/24 (part 1) at 20 (1993), I.5, I.18, I.19, and I.33; Maastricht Guidelines on Violations of Economic, Social, and Cultural Rights, unanimously adopted by participants of the conference celebrating the tenth anniversary of the Limburg Principles, organized by the International Commission of Jurists (Geneva), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio), and the Centre for Human Rights of the Faculty of Law of Maastricht University at Maastricht, the Netherlands, January 22–26, 1997 at II. 6, 7.

42. Dan Sperber, *Explaining Culture* (Oxford, UK: Blackwell, 1996), esp. chaps. 1–3.

43. Pierre Bourdieu, *Distinction: A Social Critique of Judgement and Taste*, trans. Richard Nice (London: Routledge, 1984), esp. chaps. 1–2; and idem, *Language and Symbolic Power*, trans. G. Raymond and M. Adamson (Cambridge: Harvard University Press, 1991), esp. chap. 1.

44. Another reason for preferring to describe culture as an activity rather than a practice is that not all interpretations of what it means to say that culture is a practice imply the shift in understanding of what cultural rights protect that I have identified in the documents treating indigenous peoples' rights. For example, if what we mean by *culture is a practice* is that culture consists in the development, inculcation, and deployment of a distinctive habitus or orientation to action, there will be no barrier to using the phrase to capture the shift in conception of both culture and what cultural rights protect that I have described. However, if what we mean by *culture as a practice* is that culture consists in the habitus or orientation to action that distinguishes groups from one another, then even though the understanding of what cultures are may be different from conceptions of culture that treat it as a good, the understanding of what cultural rights protect will be the same. For overviews of Bourdieu's own position on habitus, culture, and symbolic power, see Craig Calhoun, "A Different Post-Structuralism," *Contemporary Sociology* 25, no. 3 (1996): 302–305; and Toril

Moi, "Appropriating Bourdieu: Feminist Theory and Pierre Bourdieu's Sociology of Culture," *New Literary History* 22, no. 4 (Autumn 1991): 1017–1049.

45. For an argument that culture is an enabling condition, see Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993). For an argument that culture is inherently valuable, see Avishai Margalit and Joseph Raz, "National Self-Determination," *Journal of Philosophy* 87, no. 9 (1990): 439–461. For an argument that failure to have culture is inherently disvaluable, see Frances Svensson, "Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes," *Political Studies* 27, no. 3 (1979): 421–439. For an argument in terms of equality, see Will Kymlicka, *Liberalism, Community and Culture* (Oxford, UK: Clarendon Press, 1989), pp. 185–200 (the "two ships" example).

46. For a concise criticism of the essentialism about culture involved in claims about cultures having certain kinds of effects, see Cindy Holder, "Are Patriarchal Cultures Really a Problem? Rethinking Objections from Cultural Viciousness," *Journal of Contemporary Legal Issues* 12, no. 2 (2002): 727–757; Uma Narayan, "Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism," *Hypatia* 13, no. 2 (Spring 1998): 86–106.

47. See, for example, Susan Okin, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999), pp. 7–25; Jacob Levy, *Multiculturalism of Fear* (Oxford, UK: Oxford University Press, 2000).

48. UN Human Rights Council, Report of the Secretary-General: Question of the Realization in All Countries of Economic, Social, and Cultural Rights, UN doc. A/HRC/4/62, Feb. 13, 2007.

49. On this, see T. R. Gurr, *Peoples versus States: Minorities at Risk in the New Century* (Washington, DC: US Institute of Peace Press, 2000); Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996).

50. For examples of unapologetic views, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Harvard University Press, 2001), and Jeremy Waldron, "What Is Cosmopolitanism?" *Journal of Political Philosophy* 8, no. 2 (2000): 234.

51. This is in effect Peter Jones's argument for limiting group human rights to collective rights and resisting the recognition of human rights that are corporate. See Peter Jones, "Human Rights, Group Rights, and Peoples' Rights," *Human Rights Quarterly* 21, no. 1 (1999): 80–107.

52. Claudia Card, "Genocide and Social Death," *Hypatia* 18, no. 1 (Winter 2003): 63–79.

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