

International Dispute Resolution Regimes And Hunter-Gatherer People

**An Article in Favour of the Particularisation of the Fundamental
Human Rights of Post-Foraging Societies**

**Kelly Mark Foote
June 16 2003**

**Originally presented to Professor Maureen Mahoney
December 2002
University of Victoria, Faculty of Law**

Abstract

State sovereignty is a right of the powerful, not of the weak.

-Lloyd Axworthy

With the end of the Cold War, nation-States have come under increasing pressure to share the world stage with a growing number of non-State actors. Indigenous groups around the world are now demanding recognition as legal persons at international law as a means of realising the Fundamental Human Rights that other world citizens have taken for granted as inalienable and irreducible. Such Native movements have been referred to as “post-tribalism” or “ethnic revivalism” as they are concerned not with attaining full-citizenship of the nation-States that encapsulate them, but rather, with the recognition of their traditional identities as valid and sufficient interpretations of citizenship.¹ For hunter-gatherer societies in particular, the current mechanisms employed by the international community are inadequate to suit their needs. Representing the smallest nationalities on Earth, they are so different from other modern forms of social ordering that new dispute resolution processes must be found.

Introduction

Equality is not in regarding different things similarly; equality is in regarding different things differently.

-Tom Robbins, Still Life with Woodpecker

The purpose of this paper is to lay the groundwork for new ways of thinking about approaches to Indigenous rights and the place of Hunter-Gatherer people within those rights. The attempt here is not to find an alternative solution, but to open a new space for dispute resolution theory that may lead to changes in how modern Hunter-Gatherer groups reconcile their claimed rights with those of the larger societies that surround them. Before any meaningful discussion on the particularisation of Hunter-Gatherer rights can begin, it is important to try and answer a few basic questions. First, are there fundamental differences between Hunter-Gatherer groups and wider Indigenous populations that create real differences in their respective conceptions of identity and of rights? Second,

¹ H. Reynolds, *Aboriginal Sovereignty: Three Nations, One Australia?* (St. Leonards: Allen & Unwin, 1996) at 168.

does the inclusion of Hunter-Gatherer rights within those of Aboriginal people as a whole, effectively dilute the rights of the former in current international regimes? Finally, is there a justifiable need to particularise Hunter-Gatherers rights from Indigenous rights?

By looking at the way three post-foraging² societies view the world and at what options are open to them in defending their rights to existence, it will be possible to formulate answers to these questions. Even as they share many similar attributes specific to Hunter-Gatherers, the !Kung³ of the Kalahari, the Mbuti⁴ of the Ituri Forest, and the Tucano of the Comisaria del Vauspés represent three vastly different ideals of community and of perceptions of the world.

The General State of Things

Our problems cannot be solved by the same level of thinking that created them.
-Albert Einstein

Numerous multilateral conventions, treaties, and municipal legislation have been generated with the expressed intent of empowering Aboriginal Peoples within the world state-system. In his work with Native people of Chiapas, Mexico, Harvey has found that the old struggles against the outward manifestations of State ethnocentrism such as colonialism, class structure, and racism have exposed deeper problems embedded in meaning, discourse, interpretation, and the semiotics of self-identification.⁵ New debates address the fundamental forces affecting ethnopolitics today, which very likely may cause a redrawing of today's accepted political map.⁶ Nevertheless, fears of political upheaval cannot morally justify the exclusion of cultural relativist thought from any level of the international system.

International agreements and declarations alone do not accurately reflect contemporary developments within identity politics discourse; nor do they bring about any true reconstructive or transformative changes that are needed in the relationship between the world's peoples if the Fundamental Rights of *all* are to be fully realised. The implementation of new pluralistic mechanisms is

² I will use the terms Hunter-Gatherers, foragers, and post-foragers interchangeably to describe the same society type. "Post-foragers" refers to groups whose economies in the past were based on hunting and gathering but have recently been brought into the State-system on some level. They are included here because it is my opinion that cultural and cognitive realities last beyond changes in economic practices. Therefore, while some groups, like the Ainu of Japan, no longer practise traditional subsistence strategies, culturally they remain Hunter-Gatherers. For use of this term, see D. Trigger, "Hunter-Gatherer Peoples and Nation States," in R. Daly and R. Lee, eds., *The Cambridge Encyclopaedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) 473 at 477.

³ The people who call themselves the !Kung are commonly referred to as the San or Bushmen by outsiders. The "!" before the name indicates a clicking phoneme made by creating suction between the end of the tongue and the mid-front area of the palate, then forcefully pulling the tongue downwards.

⁴ The Ituri belong to what we would commonly call a Pygmy people.

⁵ N. Harvey, *Rebellion in Chiapas: Rural reforms. Camposino Radicalism, and the Limits to Salinsimo* (San Diego: Center for U.S.-Mexican Studies, 1999) at 13.

⁶ Walker Conner in Reynolds, *supra* note 1 at 168.

dependent on the continuing particularisation of rights so that they meet the requirements of groups and subgroups on the ground. The alternative is to allow those grand and bombastic ideals proclaimed at multinational summits and in the preambles of treaties to remain rhetoric. In other words, general *principles* such as of the Right to Life and Freedom of Expression, are necessarily described as “universal” at the treaty level, but the actual implementation of those principles as *rights* must be tailored according to the regional and cultural landscapes of the people they will affect.

The 1957 International Labour Organisation’s *Convention 106*⁷ was the first multilateral agreement to articulate the need to distinguish the rights of Indigenous people from those of the majority population of the States in which they live. Since then the body of international human rights law addressing the concerns of specific groups of humans has grown.⁸ People are generally becoming increasingly aware of the need to accommodate cultural diversity in a world where the human population continues to rapidly increase and people are forced to live in closer proximity with one another. However, for the world’s most fragile cultures, this change in thinking may be too slow. It may well be time to further specify and define the rights of Hunter-Gatherer Peoples according to the specific needs, expectations, and responsibilities determined by their worldview, not according to our⁹ own academic research.

Who are Hunter-Gatherer People?

Many are [the st]ar[s of heaven wh]ose names no man knows. By the same token, no man knows mankind.

-The Words of Ahiqar, *Aramaic Proverb*, Late 5th c B.C.

Do Hunter-Gatherers constitute a particular type of Indigenous society that is fundamentally different from other Aboriginal groups? This question can be simplified by asking, who are Hunter-Gatherer People? This societal classification has been used by anthropologists and scientists who have identified certain human communities as significantly different from all others. These enumerated differences have justified students of human history using these societies as prehistoric analogues.¹⁰ Even within academic circles the definition of “Hunter-Gatherer” has changed over time in response to shifts in

⁷ *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 328 UNTS 247 (adopted 26 June 1957, entered into force 2 June 1959 [hereinafter *ILO 107*]).

⁸ Examples include: *Convention on the Elimination of All Forms of Discrimination against Women*, G.A. Res. 34/180, 34 UN GAOR, Supp. (No. 46), UN Doc. A/34/46, (1979) at 193 (adopted 18 Dec. 1979, entered into force 3 Sept. 1981); *Convention on the Rights of the Child*, G.A. Res. 44/25, 44 UN GAOR, Supp. (No. 49), UN Doc. A/44/49, at 166 (adopted 20 Nov. 1989, entered into force 2 Sept. 1990); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158, reprinted in 30 ILM 1517 (1991) (adopted 18 Dec. 1990, not in force).

⁹ “Our” refers to the cultures of State societies, as opposed to the cultures of non-State societies of Hunter-Gatherer.

¹⁰ M. Shott, “On Recent Trends in the Anthropology on Foragers: Kalahari Revisionism and its Archaeological Implications” (1992) 27 *Man* 843 at 843.

cultural thinking, ethnographic data, and the responses by Hunter-Gatherers themselves to the challenges imposed by modernity. Hunter-Gatherers have alternatively been described as noble savages, prehistoric holdovers, and as the ultimate survivors.¹¹ The 1966 Conference “Man the Hunter” laid the foundations for the present descriptions we use.¹² Generally, defining attributes of foragers are thought to include low population density, minimum food storing, egalitarian political structure, non-territoriality, and flexible group size with the band¹³ as the main social unit.¹⁴ An economic definition describes Hunter-Gatherers as non-agriculturalist and non-domesticators; that is to say, foragers.¹⁵

None of the definitions above satisfactorily describes the complex intersections of social, ethnic, and political considerations. So far, the definitions would exclude people from Hunter-Gatherer communities whose parents practised foraging, but who have become agriculturists themselves; or persons who have left to serve in the military of the encapsulating nation-State; or who work as domestic servants, trackers, game wardens, or miners. Economic realities and social structure continually inform and support one another. Any description of a human way of life, therefore, must include aspects of both elements.¹⁶ Many have argued that as a cultural type, Hunter-Gatherers are all but extinct and that any “reflexive selectivity” of past traditions as a means of self-identification today is not “authentic” culture.¹⁷ In fact, this has been a basis for arguing against modern Aboriginal Treaty Rights in Canada and elsewhere for some time. However, citizens of the Minority World¹⁸ democracies enjoy the privilege of picking and choosing the elements they will appropriate or discard in describing their personal and group heritage everyday. Non-Aboriginal Canadians may find it difficult to view the selling fish to tourists in Northern Ontario as a legitimate expression of traditional Cree culture; but would the same apprehension be applied to the use of the internet by the majority culture? The same right to self-identification should be extended to members of Indigenous

¹¹ R. Kelly, “Hunter-Gatherers and Anthropology” in *The Foraging Spectrum: Diversity in Hunter-Gatherer Lifeways* (Washington, D.C.: Smithsonian Institution Press, 1995) 1 at 13.

¹² *Ibid.* at 14.

¹³ The band is an association of families comprised of 25 to 60 people. Bands are knit together by strong social ties. They were the dominant form of social organization from human beginnings to the advent of agriculture. Brian M. Fagan, *People of the Earth: An Introduction to World Prehistory*, 9th ed. (New York: Longman, 1998) at 17.

¹⁴ *Ibid.* at 15.

¹⁵ *Ibid.* at 2; M. Jochim, “Hunting and Gathering Societies” in D. Levinson and M. Ember, eds. *Encyclopaedia of Cultural Anthropology* (New York: Henry Holt, 1996) 624 at 624.

¹⁶ Kelly, *supra* note 8 at 2.

¹⁷ N. Sharp, *No Ordinary Judgement: Murray Islanders’ Land Case*, (Canberra: Aboriginal Studies Press, 1996) at 8.

¹⁸ The author prefers the terms “Minority” and “Majority” worlds in describing the traditional ideas of industrialised/non-developed, Northern/Southern, etc. These terms more accurately reflect the division of the world between the wealthiest and the poorest States. It also allows for the recognition that some wealthy States lie in the “East”, such as Japan and Australia; that members of the majority also live in the Minority World; and that the industrialisation is occurring everywhere.

and Hunter-Gatherer societies as well. In many countries, like Aotearoa,¹⁹ Australia, Canada, Mexico, and the United States, Native people have been allowed to freely identify as Indigenous for processes of State. This concept has now been universally recognised in treaties.²⁰ This same logic can easily be extended to allow certain Indigenous groups to identify themselves “Hunter-Gatherers.”

Any working definition of “Hunter-Gatherer must be broad enough to allow for affiliations based on economic, cultural, political, social, historical, religious, ideological, and psychological reasoning, or any combination thereof. Today, there may not be many groups whose entire subsistence patterns revolve around foraging per se, but cultural and ideological sensibilities often outlive economic strategies and long continue to determine ethnic identity.²¹ Ethnoarchaeologist Lewis Binford has shown how the cognitive processes of contemporary Alaskan Nunamiut hunters, at least in the area of toolkit classification, more closely reflects pre-European contact subsistence patterns than modern day realities.²² Similarly, Bettinger and Baumhoff believe that economic strategies represent adaptive peaks and that the attending socio-cultural patterns usually lag behind economic changes for some time.²³

The most important cognitive difference between Hunters-Gatherer and non-forager worldviews, is the conception of territoriality and nationhood. Traditionally, hunting and gathering activities require small, autonomous, and highly mobile communal units spread over large territories.²⁴ These economic realities have produced societies with radically different conceptual relationships between land and people. Hunter-Gatherer bands have very little need for property, law, religion, or any of the traditional trappings of State and of complex tribal societies of pastoralists, agriculturalists, or industrialists.²⁵ The resulting difference in the perceptions of culture is quite vivid. Broadly speaking, State-centred people tend to map their culture onto the world through physical manifestations of their institutions, anchoring their group identity to actual territory and the objects they produce or collect. For Hunter-Gatherers, the basis of cultural identity springs from, and is recreated through the interpersonal relationships between group members. The resulting culture in a foraging

¹⁹ This is the indigenous Maori name for New Zealand, which now has official status alongside the European name.

²⁰ For example, Article 1(2) of *Convention Concerning Indigenous and Tribal Population in Independent Countries*, 28 ILM 1382 (1989) (entered into force 5 Sept. 1991) [hereinafter ILO 169] declares “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”

²¹ M. Jochim, “Hunting an Gathering Societies” in D. Levinson and M. Ember, eds., *Encyclopaedia of Cultural Anthropology* (New York: Henry Holt, 1996) 624 at 628.

²² L. Binford, “Forty-Seven Trips: A Case Study in the Character of Archaeological Formation Processes” in R. Wright, ed., *Stone Tools as Cultural Markers: Change, Evolution and Complexity* (New Jersey: Humanities Press, 1997) 24 at 31.

²³ R. Bettinger and M. Baumhoff, “The Numic Spread: Great Basin Cultures in Competition” (1992) 47 *American Antiquity* 487 at 489.

²⁴ A. Sanders, “The Bushmen of Botswana: From Desert Dwellers to World Citizens” (1989) 4 *Law and Anthropology: Internationales Jahrbuch für Rechtsanthropologie* 107 at 109-10.

²⁵ Trigger, *supra* note 2 at 473.

society is usually easily transportable, leaves little evidence of its existence, far less attached to a particular place, and changes little over time.

For the purposes of this article, it will serve to describe Hunter-Gatherers in the following way: first, any group of two or more persons that self-identify as such. Their choice can be based on cultural, legal, or economic conditions in current practice or drawn from memory. Second, they will most likely have no “formally elaborated political structures of a hierarchical kind” of their own creation.²⁶ Third, due to their small scale, egalitarianism, sharing practices, past classification as prehistoric analogues, and present minority status, such groups may see the need to differentiate between themselves as Hunter-Gatherers and other Aboriginal groups.²⁷ The !Kung, Mbuti, and Tucano provide three examples of different types of Hunter-Gatherer groups who fit this definition.

1) The !Kung of the Kalahari

The !Kung are recognised as the oldest living inhabitants of southern Africa and have often been used as a point of departure in the study of Paleolithic lifeways.²⁸ Their subsistence patterns, language, and physical appearance have distinguished them sufficiently in the minds of other indigenous groups “as well as in their own minds”.²⁹ Recent !Kung history is marked by repeated contacts with other African and European societies that have not respected the differences of the !Kung worldview. Khoi-Khoi pastoralists were the first to come into contact with the !Kung, calling them the *San* meaning “food gatherers”.³⁰ Bantu speaking tribes, as well as Dutch, British, and Afrikaaner migrants have used the !Kung as serf-labour, as slaves, or even as prey in sport hunting.³¹

Since independence, both Botswana and Namibia have pursued assimilationist policies towards !Kung people. Although very little successful assimilation has occurred, both countries maintain that !Kung interest can best be served through further integration efforts.³² The plurality of the *Constitution of Botswana*³³ recognises different tribal chiefs, their courts, laws, and systems of land tenure. As a non-“tribal” people, however, !Kung traditions do not qualify for State recognition.³⁴ The policies of both African republics treat the !Kung as “marginal people”.³⁵ Namibia’s *Constitution*³⁶ makes no reference to Indigenous

²⁶ *Ibid.*

²⁷ Jochim, *supra* note 15 at 628.

²⁸ P. Wiessner, “Risk, Reciprocity and Social Influences on !Kung San Economics” in E. Leacock and R. Lee, eds., *Politics and History in Band Societies* (Cambridge: Cambridge University Press, 1982) 61 at 62.

²⁹ Sanders, *supra* note 24 at 107.

³⁰ *Ibid.* Although the Khoi-Khoi pastoralists are also described as “indigenous,” they have usually treated the !Kung as competition and inferior.

³¹ *Ibid.* at 114.

³² Sanders, *supra* note 24 at 119.

³³ *Constitution of Botswana* in Botswana Independence Order of 1966, U.K. Statutory Instrument 19666. no. 1,171.

³⁴ Sanders, *supra* note 24 at 117.

³⁵ *Ibid.* at 108.

³⁶ *Constitution of Namibia* of 9 Feb. 1990 in *Government Gazette* 21 Mar. 1990.

people whatsoever. While South Africa's *Constitution*³⁷ does state that it is the responsibility of the Republic to protect and encourage the languages of Indigenous people, including the !Kung, it makes no other provisions to safeguard their cultural differences. What little is left of !Kung society in Southern Africa today is severely threatened. The !Kung can be considered living victims of modernity for they have experienced many of its ills, but have yet to receive any of its benefits. Forced sedentism has created an underclass of confused and despised squatters and beggars in countries where the majority population is already competing for limited resources.³⁸

Hxaro is the basis of traditional !Kung law, social, and risk reducing strategies and it permeates all aspects of life.³⁹ It is a mutually reciprocal, resource sharing system that reduces risk, creates inter-band ties, and maintains friendship bonds. *Hxaro* developed out of the needs dictated by the precariousness of harsh desert living. Yet even in newly created government settlements, the !Kung continue to practise and recreate the *hxaro* system by applying it to new realities and situations in innovative ways.⁴⁰ Modern !Kung demonstrate that although mobility and economic patterns may be changed, thinking patterns often remain the same.

The example of the !Kung illustrates the mutual exclusivity of vernacular Hunter-Gatherer and modern capitalist State-culture. Native folk culture seeks to preserve its small scale and uniqueness from the cultures that abut it; State or "official" culture is based on the smoothing out and the continual homogenisation of cultural differences within its sphere of influence, reproducing itself through processes of expansion. To date, the policies of the Botswanan government have ignored the ancient cultural markers of the !Kung, resulting in a passive form of ethnocide.⁴¹ National governments will often argue that traditional lifeways are no longer relevant once sedentism and a market economy have been introduced to a region. However, this view does not take into account the realities of the psychological definitions of a group's culture. The !Kung have been given the right to hold land just like anyone else, they have the right to vote, and they are considered equal citizens before the law in all the countries in which they live. However, real debate should not centre on what rights the !Kung have or have been granted, but on what rights they themselves want or recognise as important and inalienable.⁴²

2) The Mbuti of the Ituri Forest

The Mbuti are a net-hunting Pygmy people of the tropical Ituri rainforest of north and northeastern Congo-Kinshasa.⁴³ It has been speculated that the Mbuti are

³⁷ *Constitution of the Republic of South Africa Act 108 of Dec. 1996.*

³⁸ *Ibid.* at 108.

³⁹ Wiessner, *supra* note 28 at 61-2.

⁴⁰ *Ibid.* at 83.

⁴¹ Sanders, *supra* note 24 at 110.

⁴² R. Barsh "Individualism Versus Collectivism: The Concept of Collective Rights" (1988) 17 *SI-EUR-Reeks* 52 at 71.

⁴³ Formerly, the Republic of Zaïre.

the earliest living anatomically modern human inhabitants of Africa.⁴⁴ They live in bands of 20 to 100 persons and wander over a recognised territory collectively owned by the group. Men hunt wild game while the women fish and gather fruits, roots, and insects. The forest manages and shapes Mbuti society in the way the *hraxo* does for the !Kung. The forest is the core of their worldview. Their reverence for the forest extends beyond a source of materials and food. It is a place to find safety, a living deity from whom they ask favours of and honour with thanks, as well as a teacher of interpersonal relations.⁴⁵ The Mbuti's ancient relationship with the forest is also apparent in their physical evolution. While the forest may prove impenetrable to outsiders, the Mbuti's average height of 150cm allows them to slip easily through the dense growth.⁴⁶ The forest is the source of all that is good in Mbuti society.

Of the four groups of the region, only the Mbuti are true Pygmies as they have refrained from mixing genetically and culturally with surrounding populations, although trade with neighbouring Bantu villages is an important element of Mbuti subsistence.⁴⁷ Each Mbuti group has adopted the language of the main Bantu village it trades with. However, they have not adopted any aspects of outside political structures, remaining egalitarian and democratic, even lacking the Bantu age-grade system.⁴⁸ Although these two people are somewhat interdependent, Bantu villagers have assumed a position of authority over the Mbuti whom they see as inferior heathens.⁴⁹ Mbuti cultural practices have become increasingly difficult to maintain as large areas of the forest continue to be opened up for gold mining, as growing village populations have enticed some Mbuti to over-hunt to supply meat to villagers, and as the government forces many out of the forest.⁵⁰ Unlike the !Kung who can transfer their *hraxo* from place to place, once the Mbuti are removed from the forest, their social organising mechanism is lost.

3) The Tucano of the Comisaría del Vaupés

The Tucano are slash and burn horticulturalists of the Comisaría del Vaupés region of southeastern Colombia and northeastern Brazil. They live in longhouse communities of close-knit extended family units, which form the core of their society. Frequently, a single longhouse will serve an entire village of 20 to 100 people. This tendency to share such close quarters has partly shaped Tucano ideas of proprietary rights.

While dispersed villages along the river systems shift locations every two or three years over a far ranging area, jurisdiction over land is recognised rather

⁴⁴ *Ibid.*

⁴⁵ The M'Buti of Zaïre, online: Peoples of the World
<<http://www.qvctc.comment.edu/brian/saroviak/mbuti.html>> (date accessed: 1 October 2001).

⁴⁶ *Ibid.*

⁴⁷ Cultural Summary: M'Buti, online: HRAF: Human Area Relations File
<<http://www.gateway.uvic.ca/et/et.html>> (date accessed: 1 October 2001).

⁴⁸ *Ibid.*

⁴⁹ See note 45, *supra*.

⁵⁰ *Ibid.*

than ownership.⁵¹ Tucano language dialects play the same role in marking clan affiliation that totemism plays in other Hunter-Gatherer societies.⁵² A Tucano tribe will hold jurisdiction over a territory, a clan over an important feature as a section of a river or a hill, while ritual property is strictly the domain of particular descent lines.⁵³ Usufruct rights to resources are fully recognised but the concepts of “tribal lands,” “inalienable rights,” and “title” are meaningless in Tucano politics.⁵⁴ Jurisdiction of sites and territories are identified through the system of place naming.⁵⁵ Jurisdictional rights are expressed to, and against the rest of the world, through the complicated traditional name systems unique to each tribe and clan. If one does not know the historical relevance of a site’s name, one does not dare trespass.

The Tucano world is much wider than that which can be experienced through the senses alone. All daily experienced phenomena have an alternate aspect as well. For example, while to the Tucano the sky is still the “sky,” it also represents the underside of the level of the universe layered above this one. Tucano rituals attempt recreate alternate worlds of their ancestors where all aspects of time and space are transformed. The entire community participates in experiences where the longhouse becomes a synecdoche for the entire universe. These rituals play an important role in legitimising domestic Tucano political and social ordering processes.

Village of family disputes are mainly achieved through ridicule and shaming practices. Communal rituals serve to channel, manage, and diffuse tensions that naturally accrue due to living in such close quarters.⁵⁶ Without a spiritual leader or political representative speaking for all the Tucano people, managing conflict with encroaching Creole population has proven difficult. This has led to at least two Tucano organised military uprisings during the 1880s. After World War I, rubber camps in the region became the centres of Creole power where thousands of Indian labourers lost their lives.⁵⁷ Today, the gravest threat to Tucano culture is habitat destruction through the intense colonisation, logging, and mining of the Amazon forests.

Main Challenges Facing Hunter-Gatherers

Injustice anywhere is a threat to justice everywhere.
-Martin Luther King

1) Habitat Destruction

Habitat destruction is the most pressing and immediate threat to Hunter-Gatherer societies worldwide. Their extremely low population densities have

⁵¹ Cultural Summary: Tucano, online: HRAF: Human Area Relations File <<http://www.gateway.uvic.ca/et/et.html>> (date accessed: 1 October 2001).

⁵² *Ibid.* Totemism is especially important in Australian Hunter-Gatherer societies.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

made their traditional territories prime real estate in some of the most heavily populated countries. Indonesia uses West Papua (Irian) and Brazil the Amazon as a source of mineral extraction, farmlands, and internal colonisation. In fact, most modern Hunter-Gatherer groups occupy vast tracts of land in developing regions with State economies desperate for capital producing industries. Many foraging groups live in harsh environments that require a delicate balancing and interplay of resource management, population levels, seasonal movement, and social structuring. Outside disruptions can trigger consequences that ripple throughout the social matrix of a Hunter-Gatherer group, destroying the entire culture.

Of the three cultures outlined above, Tucano culture has suffered the most from foreign environmental interference. Mining projects have poisoned their river systems, causing illness while decimating their food game stocks as well. Habitat destruction is especially dangerous for foragers because, with very little material and reusable possessions, Hunter-Gatherer economies rely on their environments more intimately and than any other modern society. Reliance on the environment is not just for resources, also for a structuring mechanism of inter and intragroup dynamics.

2) Invisibility

Hunter-Gatherer invisibility in the eyes of surrounding State cultures is a direct consequence of the intimate level of interchange with their environments. Even today, Hunter-Gatherers are often thought of as part of the “natural” as opposed to the “human” world. For example, both the !Kung and Australian Aborigines were hunted for sport during the colonial periods of their respective regions. Until the 1960s, tradition living Aboriginal Australians were counted in wildlife tallies rather than in population censuses. This invisibility has made it even easier for the invading culture to dispossess Hunter-Gatherers of their traditional territories in two ways. First, individual guilt the new comers may feel is alleviated because they cannot see the direct effects of the harm they have caused. Second, invisibility has made it far easier for the legal regimes of newly developing States not to recognise Indigenous title.

3) Racism

Racism is the corollary attribute to invisibility. In all three cases described above, even once all Hunter-Gatherer cultural attributes have been removed, these individuals will continue to appear dramatically different from majority populations. The ancient heritage of the !Kung, Mbuti, and Tucano reflected in their physical appearance. This is the most obvious in the appearance of the Mbuti whose full adult height is about that of Bantu children. Assimilation, integration, and modernisation schemes have proven disastrous for the !Kung and Mbuti, in no small part to the racist attitudes of the other peoples. For Mbuti now living in villages, the chance of being treated on par with the Bantu when they apply for employment, voice their opinions, or study at school, must be very low.

4) Disenfranchisement

Invisibility and racism combine to effectively render Hunter-Gatherer people politically powerless within the States they find themselves. In poorer countries, they have few local advocates as they are seen as the larger society views them as “foreigners” joining the competition for already scarce resources. None of the constitutions of any of the States in which the groups described above makes any special provision for ensuring political enfranchisement of their Hunter-Gatherer nationals. Neither do any of these States expressly recognise traditional Hunter-Gatherer political organisation as a legitimate form of expression of civil society.

Although none of these States expressly bars foraging individuals from participating in public life, Hunter-Gatherers are currently left with two choices for political expression. First, they can struggle to keep their traditional institutions but forfeit any influence on the nation-State’s policies that affect them. Second, they can give up their traditional lifeways and join the majority’s culture where they stand little chance of affecting change with their small numbers. In either case, Hunter-Gatherers’ rights to their culture are undermined.

5) Assimilation

Processes that attempt to integrate non-State people into State systems have had devastating effects on Hunter-Gatherer people. Relocation, modernisation, religious conversion, enforced sedentism, agriculturism, pastoralism, and indentured servitude have all been employed by States to deal with domestic Hunter-Gatherer populations. History has repeatedly shown that enforced cultural indoctrination does not work because the adapting “minority which appears in an arena that is culturally foreign” is automatically put at an economic and social disadvantage that is recreated in perpetuity.⁵⁸ The fact that that assimilation has not worked in southern Africa is evident by the way the governments of both Namibia and Botswana officially refer to a “Bushman problem[s]”.⁵⁹

The greater and deeper the differences between two or more cultures attempting to merge, the less likely they are able to do so peacefully and successfully. When the difference is one based on the fundamental conceptions of how individuals fit into the natural world and what actually constitutes that world, assimilation may well be impossible. Even a cursory scan of world history illustrates that the damage done to a people as a result of being stripped of their vernacular forms of expression and communal identity is multigenerational.⁶⁰ As yet, history provides no examples of the effects of ethnocide in one generation being repaired in a later one.

Relevant International Regimes

⁵⁸ T. Svensson, “The Attainment of Limited Self-Determination Among the Saami in Recent Years” (1996) 8 *Law and Anthropology* 267 at 270.

⁵⁹ *Ibid.* “Bushman” is the term applied to the !Kung by the first European settlers of the region.

⁶⁰ A few examples include the Cree of North America, Guarani of Amazonia, the Aranda of Australia, and the Chechu of India.

*If the collective conscience of humanity...cannot find in the United Nations its greatest
tribune, there is a grave danger that it will look elsewhere for peace and justice.*
-Kofi Anan

The main avenue open to Indigenous Peoples seeking to assert their human rights is the United Nations System.⁶¹ The U.N. website has a number of documents to introduce Aboriginal people to the U.N. human rights and Indigenous rights mechanisms. Exactly how Hunter-Gatherers of rainforests or deserts are meant to access internet information is unclear. It is also important to note that none of the relevant treaties or resolutions discussed below, or any other the author is aware of, makes any mention to the specific needs and requirements of foragers.

1) Universal Declaration of Human Rights

Most successive Human Rights instruments are based on the United Nations' *Universal Declaration of Human Rights*.⁶² Although not binding per se, the *Declaration* has generally been accepted to have reached the level of customary international law. While it gives an overview of general and fundamental rights, it does not indicate how these rights are to be interpreted in particular States, regions, cultures, or situations.

For example, Article 25 (1) proclaims: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services."⁶³ However, there are no provisions that address what cultural standard is to be applied in assessing what is "adequate." Should a universal standard be applied as it is a "universal" declaration? Aboriginal people struggling for membership in Australian, Canadian, Mexican, and South African societies may very well demand the same standards of healthcare, shelter, and social services as enjoyed by others within their respective States. Hunter-Gatherers, however, do not require the same services as their State neighbours yet they are continually judged according to foreign standards of what constitutes adequate standards of living. This has resulted in continual justifications for placing them under the authority of State agencies that are charged with implementing strategies "in the best interest" of these groups.

The *Declaration's* preamble speaks of "a common standard of achievement for all *peoples* and all nations."⁶⁴ Similarly, the *U.N. Charter* opens with "We the *peoples* of the United Nations."⁶⁵ The choice of the word "peoples" instead of "people" is significant in applying a textual analysis of these treaties. "Peoples" usually refers to entire communal groups, nations, ethnicities or State populations. The United Nations was designed around the overriding principle of State sovereignty that has left little room for the meaningful

⁶¹ United Nations System [hereinafter U.N.].

⁶² *Universal Declaration of Human Rights*, GA Res. 217(III), U.N. G.O.A.R., 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948) [hereinafter the *Declaration*].

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 no. 7; emphasis added.

participation of sub-State actors. This is inconsistent not only with the organisation's supposedly democratic and pluriethnic principles, and with the wording of its own treaties, but also with the needs of the individuals in the greatest need of U.N. protection.

The *Declaration* is an excellent starting point when drafting human rights instruments, but only on the level of general principle. It can be used to declare the *principle* that a !Kung group has to an adequate standard of living. As it currently stands now, however, the *fundamental right* of the !Kung group to have this principle interpreted according to !Kung criterion is wholly dependent on its interpretation by non-!Kung arbitrators. For the !Kung to rely on U.N. staff to decide what standard of living they should enjoy is not very different from the assimilation policies of the Botswanan and Namibian government.

2) Draft Declaration on the Rights of Indigenous Peoples

The *Draft Declaration on the Rights of Indigenous Peoples*⁶⁶ was begun in 1985 by the U.N.'s Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations set to be adopted in 2004. Thousands of Indigenous representatives have contributed to the declaration that establishes collective rights to a degree unprecedented in international human rights law.⁶⁷

Rights outlined in the *Draft Declaration* are those usually taken for granted by the majority cultures of States. The 45 articles are divided into nine sections that cover the rights to: develop distinct culture, ownership of natural resources, protection against genocide, participation in the State, spiritual and linguistic identity, education, labour, economic rights, indigenous institutions. However, this instrument is that not legally binding but only has moral force. For Hunter-Gatherers, the main problem here is the same found with the *U.N. Declaration*: the possibility and likelihood that implementing States will interpret these rights in ways that do not reflect the desires of Hunter-Gatherers themselves.

3) Working Group on Indigenous Populations

The Working Group on Indigenous Populations⁶⁸ is the most accessible Charter-based U.N. body for Indigenous people. WGIP was created by the Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations with two main goals. First, its main area of focus is reviewing developments made in specific countries. This is meant to allow Indigenous people to draw international attention to issues of concern and to allow their governments an opportunity to respond. Second, it is charged with setting universal standards based upon the *Draft Declaration*.

⁶⁶ *Draft Declaration on the Rights Of Indigenous Peoples* (Citation could not be found) [hereinafter *Draft Declaration*].

⁶⁷ Leaflet No. 3: UN Charter-Based Bodies and Indigenous Peoples, online: Office of the High Commissioner on Human Rights <<http://www.unhchr.ch/html/racism/indileaflet3.doc>> (date accessed: 12 October 2002).

⁶⁸ Working Group on Indigenous Populations [hereinafter WGIP].

The assumption is that the threat of public shaming will cause States to improve their relations with their respective Indigenous populations. Like the provisions of the *Draft Declaration* it is meant to expand upon, the findings of the WGIP are not binding. In fact, a State party to a dispute is not required to present its case to the WGIP and it is unlikely many States would want to. Do to racism, invisibility, and a general public perception that Hunter-Gatherers are people of the past, it will be extremely difficult for foragers to get recognition as rightful claimants at international law.⁶⁹

4) Permanent Forum on Indigenous Issues

The U.N. Economic and Social Council established the Permanent Forum on Indigenous Issues as a response to the complaints of Aboriginal people of their limited access to the U.N. system. It is composed of 16 members, eight of whom are Indigenous experts. It is located at Geneva and its first meeting is to occur in 2002. It has a mandate to address Indigenous human rights issues.

The two main problems here are, first, the Forum does not hear complaints by individuals, only by groups. Second, the mandate of the Forum allows it to hear complaints on government actions, testimony from Indigenous groups and NGOs, and facilitates liaising between national representatives. Like many U.N. mechanisms, it operates on a level high above the people it purports to help. In other words, there is no method for actively dealing with Indigenous people on the ground. This is especially relevant to the cases of Hunter-Gatherers as they represent some of our most vulnerable groups of people who require immediate attention to their claims. For Hunter-Gatherer bands, time is of the greatest import as their environments are being destroyed and ethnocide can occur quickly with them. Third, it is an attempt to bring Indigenous people into the U.N. system. This effectively denies them their existence as Hunter-Gatherers by forcing them to participate in a non-traditional political institution in order to protect their traditional ways. Due to its hypocrisy, this is the most disturbing effect of the current methods of international dispute resolution mechanisms open to Hunter-Gatherers.

5) World Intellectual Property Organisation

The World Intellectual Property Organisation⁷⁰ may be of great import to foraging peoples because it recognises non-material culture as a proprietary right. WIPO enumerates dance, music, sacred sites, knowledge, and techniques in its cultural property list. This is extremely significant for Hunter-Gatherer cultures like the !Kung who barely possess any material culture but who have a rich heritage nonetheless.

Once again, there is a Westernisation of an Indigenous system. The underlying premise here is that to save Indigenous cultures, their attributes must

⁶⁹ For example, the !Kung of Botswana do not use the classifications of “Aboriginal” or “Indigenous”, but “tribal.” As the !Kung have no chieftain system, they are not recognised as tribal, and presumably, not as Indigenous as well.

⁷⁰ World Intellectual Property Organisation [hereinafter WIPO].

be defined within a Minority World paradigm, like “property”. This approach is just as neocolonialist as the preservation of Indigenous cultures by institutionalising them in museums or by commodification on the antiques or tourist markets.

6) International Labour Organisation Conventions

The two conventions of the International Labour Organisation⁷¹ have a mandate to develop labour standards to improve the working conditions of Indigenous people. The treaties demand respect for the cultures and institutions of Indigenous people. However, Article 2 gives national governments responsibility for developing acts to protect Indigenous rights. In addition, only 17 States have ratified *Convention 169*.⁷² Unfortunately for the !Kung and the Mbuti, Botswana, the Congo, Namibia, and South Africa have not signed on.

This cursory review of the U.N. mechanisms illuminates a sixth problem for Hunter-Gatherer people. Through the current system, in order to claim a violation of their Fundamental Human Rights and proceed to a form of dispute resolution, Hunter-Gatherers are required to sacrifice the enjoyment of some of the very rights they seek to protect. Either the community is forced to join the larger nation-State population, or individual advocates are forced to become versed in the institutions and systems of national States and the U.N. to claim legal rights in courts and tribunals. Either the entire group is forced to divorce itself from its traditions, or a few individuals must cut themselves off from their culture and community by taking on qualities of State society. In either case, this is unacceptable when we are speaking of rights that are recognised as fundamental, universal, and inalienable. The use of Minority World personnel and State-trained people in foraging societies continues neocolonialist theory that assumes the “North is and was the answer to the problem of development, while the South has and is the problem”.⁷³

Until these State-centric ideals are removed from the U.N. systems tailored for Indigenous people, Hunter-Gatherer people will never reach the arbitration stage of any of these mechanisms even if they are able to find standing at international law or found to have a valid claim to a rights infringement.

Yes

There is a third world in every first world, and vice versa.
-Trinh T. Minh-Ha

Thus far, the first two of our original questions have been answered in the affirmative. Hunter-Gatherers do have fundamentally different conceptions of group identity than do other Indigenous groups, and the treatment of Hunter-Gatherer Fundamental Rights are indeed diluted by assuming adequate

⁷¹ See notes 7 and 20, *supra*.

⁷² Both Brazil and Colombia are signatories.

⁷³ W. Graf, “Democratization for the Third World: Critique of a Hegemonic Project” in *Crosscurrents: International relations in the Post-Cold War Era*, 2nd ed. (Toronto: ITP Nelson, 1996) 542 at 554.

representation under the general rubric of Indigenous rights. Therefore, the rights of Hunter-Gatherer Peoples should be addressed and articulated separately from those of Indigenous populations as a whole.

Today, if Indigenous people truly constitute a "Fourth World," then Hunter-Gatherer people surely make up a *Fifth World*.⁷⁴ As it stands now, in any area where foraging people have to compete with larger local Indigenous populations for scarce resources, Hunter-Gatherers will most certainly always lose out. Self-determination, as it is defined today, emphasises autonomy tied to land rights that are unrepresentative of the self-sufficient, egalitarian, small scale, and band-driven societies of Hunter-Gatherer peoples.⁷⁵ While most Indigenous groups are fighting for the right to fully participate in national and global communities, Hunter-Gatherer rights must include the right to choose to remain physically and culturally isolated from those larger political spheres. People like the !Kung, Mbuti, and Tucano have civil societies based on reciprocity without the need of law enforcement, security forces, or bureaucracy.⁷⁶ These people most likely lack the psychological orientations that pressure other societies to create and rely on those systems as well.

Prescriptions

The moral claims of today are often the legal rights of tomorrow.

-H. Lauterpacht, International Law and Human Rights

Even as they celebrate small judicial and constitutional victories, Hunter-Gatherer people across the world must learn to accommodate the ways of the nation-States in which they are encapsulated.⁷⁷ All current avenues open to foraging societies to achieve their fundamental and inalienable human rights are *statist* in nature. Procedural requirements mean the native claimant must surrender personal qualities he or she is fighting to protect on the communal level. Future discourse will require a massive paradigm shift to allow particular groups to outline not only their own conception of human rights, self-determination, and autonomy, but also the way in which those rights are described, discussed, and resolved.

The target of affirmative action should not be on the level of participation by individuals in State institutions, but on the intellectual process of solving Indigenous rights disputes by the United Nations, international institutions, and governments. Legal instruments such as those outlined above are for the benefit of the culture creating them not for those they proclaim to protect. While they are valid and necessary methods by which State societies entrench and convey the desired importance of human rights for current and future populations, these same instruments hinder others from achieving the same goals. The institutions of the !Kung, Mbuti, and Tucano are recreated each day through their interpersonal relations, ceremonies, and interaction with their environments. For

⁷⁴ R. Hitchcock, 1999 in R. Daly and R. Lee, eds., *The Cambridge Encyclopaedia of Hunters and Gatherers* (Cambridge: Cambridge University Press, 1999) at 480.

⁷⁵ Barsh, *supra* note 42 at 70.

⁷⁶ Sharp, *supra* note 17 at 9.

⁷⁷ Trigger, *supra* note 2 at 478.

non-State people who do not encode their values by written treaty, commissions, or through formalised legal systems, how can the U.N. tribunals advance their needs?

The opening line of the preamble of the *Universal Declaration of Human Rights* states that: “recognition of the inherent dignity and of the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”⁷⁸ The challenge to the international community should be: how do we create mechanisms for resolving disputes that place just as much emphasis on process as on outcomes. If full respect and recognition for *all* human cultures is the road to peace and freedom, then true justice on the international stage will only be achieved when the civic institutions of the !Kung, Mbuti, and Tucano are reflected in the dispute resolution processes of international institutions like the U.N. All foraging groups must have the right to access the legal systems of the States in which they live for the purpose of lessening the influence of those very systems on their lives if they so choose. Hunter-Gatherer people should have the added option of realising these same objectives through their own traditional legal systems.

It must be remembered that as much as these cultures resemble Paleolithic societies, these are *modern* people and our contemporary fellow world citizens. Interaction with the surrounding world will definitely be necessary for their survival and Hunter-Gatherer rights instruments should assure that this interaction only occurs according to the needs and wishes of the less powerful in this relationship. Our commitment to human rights and the esteem we claim to hold them must be judged by how far we extend those rights, to whom, and to how many corners of the Earth. If these rights are truly universal, inalienable, and innate, then they will apply to all people, no matter how secluded, no matter how small in number, and no matter how different they are from us. Procedural and logistical difficulties cannot be cited as excuses against such drastic reform if fundamental human rights are to be entrenched in international culture as paramount.

Conclusion

Ancient thought is not dead: it lies dormant in the sources and within our own minds, and when we study the former the later begins to move within us.

-Barry Kemp, Ancient Egypt

Hunter-Gatherer reliance on foraging and their cultural antiquity have distinguished them from State societies and from other Indigenous groups. Hunter-Gatherers suffer from human rights threats because of their fundamental and particular aspects of their lifeways and worldviews. Current mechanisms for resolving issues of human rights in general, and Indigenous rights in particular are insufficient when applied to the world’s oldest living cultures.

International institutions that have taken it upon themselves to protect Hunter-Gatherer rights should approach their self-appointed duty in two ways simultaneously. First, the international community should ensure that foraging groups never need realise they have universal rights that are in need of

⁷⁸ See note 62, *supra*.

protecting. This requires a positive obligation on behalf of all foreign States and persons to protect Hunter-Gatherers and their territories from unwanted violations. Second, international institutions must create spaces within existing resolution systems for the expression of all human traditions, including those of Hunter-Gatherers. Such a pluralistic approach to international human rights regimes would increase the cultural diversity of world culture and knowledge in ways that cannot possibly be calculated.

The fact that Hunter-Gatherer people are still among us, despite their systematic persecution over the last 10 000 years, attests to their intrepid survival skills. These “small communities or nations are the most successful unit of human organisation” our species has yet to form.⁷⁹ We should realise by now that diversity is the underlying key to biological, cultural, creative, scholastic, and economic success. Weaving in dispute resolution mechanisms of Hunter-Gatherer societies into the international system can offer the rest of the world new options in settling some of the longstanding feuds that appear irresolvable. Perhaps several millennia of interpersonal and intersocietal conflict resolution may mean that our grandest institutions have more to learn from Hunter-Gatherers than they have to offer.

⁷⁹ Reynolds, *supra* note 1 at 166.