Indigenous Peoples' Self-Determination and the Right to Security[1]

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Subject: This briefing note provides an Indigenous Perspective on the Right to Security and Indigenous Peoples-Canadian State Security Relations. I have often believed that the reason why there is so much conflict in this world, is because over 300 million Indigenous voices do not factor into security decisions. While we have made in roads into addressing the human rights of Indigenous Peoples at the international level, much more work has to be done to have our visions of peace reflected in the power institutions of the United Nations, other international bodies, and states overall. Recently, there has been a call for refashioning UN institutions such as the UN Security Council, for the purposes of achieving collective security in the 21st century.[2] I believe the time is ripe to now see Indigenous Peoples as actors in these institutions. This briefing note is a first step towards this vision.

Background:
Like all peoples, Indigenous peoples have experiences with peace and conflict. Sacred teachings passed on from generation to generation speak of being secure in one's person and territory. Respect for life provided a base for harmony in this world. We have learned that efforts to maintain balance or security are strengthened through ceremonies and observance of strict laws of peace. Peaceful relations allowed us to survive, meet the needs of our peoples, share in the abundance of resources from our lands, skies and waters, and engage in foreign relations with our neighbours. Leaders safeguarded the security of the people and territory through laws, customs and traditions such as: respect for the interconnectedness of life, generosity of spirit, reciprocity and human/ecological integrity.

Laws of peace were violated when social conduct led to an imbalance in societal relations. Conflict was sure to arise if one were to interfere in another peoples' business. To restore balance amongst the people, sanctions were put in place to remedy acts of destruction to life or the environment. Peace laws were designed to deal with acts of trespass. Ignoring the sacred teachings of our ancestors meant imbalance, sickness, loneliness, grief or death would occur. Ignoring sacred teachings of living in balance as a people lead to depressed societies.

Restitution and compassion were key in achieving peace. To resolve conflict over lands, Indigenous peoples created governing structures to institutionalize peace. For example,

my peoples' *Bah'lats* was created to bring peace between our clans.[3] Indigenous peoples' "security" was not solely measured by power, population, or territorial base. Rather, security was measured by a willingness to sustain peace, protect territories, and ensure healthy development of peoples living in balance with nature. Indigenous peoples' right to security is shaped by these inherent worldviews.

When non-Indigenous peoples came to our shores, we extended our peace and security relations to them. Europeans needed our help to survive. We had mutual interests in trade and technology. Importantly, contact lead to opportunities for co-existence, peace and friendship on equal terms.[4] Treaties and compacts between Indigenous peoples and the newcomers (oral and written) set out action plans for periods of peace and conflict. Indigenous peoples' sovereignty and laws were exercised in diverse way such as alliances, neutrality and diplomacy, or fierce resistance.[5] These treaties were renewed with ceremonies.

These treaties were not honoured though in the period of European colonialism and imperialism. During this period (which continues today) treaties were breached as conduct such as war, settlement, proliferation of diseases, exploitation of resources and colonization lead to imbalanced relations. Sacred teachings were disrespected and replaced by conduct antithetical to Indigenous worldviews. As the balance of power shifted towards Europeans, security relations changed dramatically in favour of western domination.

What was the direct effect of imbalanced security relations between the settlers and Indigenous peoples? The dispossession of Indigenous peoples from their territories and the destruction of co-existence based on a nation to nation model. Use of force, colonial laws and policies facilitated this outcome. The application of the constitutional imperative, "peace, order, and good government (POGG)" which finds its early roots in the Royal Proclamation of 1763, prevented Indigenous peoples from exercising their right to security. This power was vested solely with Britain. In today's world, Canada continues to monopolize this POGG power.

These same imbalanced security relations impact of us today. Indigenous peoples live under inhumane conditions and are anything but secure. We face violence, racial discrimination, suppression of nationhood and the dispossession of lands. In 1995, Anishnabe Dudley George was shot dead for trying to demilitarize the lands of his people.[6] Indigenous peoples are routinely criminalized for asserting our rights on our lands.[7] Courts have ignored protests against low level flight testing that has harmed the health, animal habitat and safety of Innu people.[8] Anti-terrorism legislation has been used against an indigenous youth group.[9] Disproportionate numbers of indigenous peoples find themselves in jail. Indigenous men, women and children have no protection against the sex trade and are subjected to racial profiling by legal enforcement authorities (criminal or regulatory).[10] The multitude of personal insecurities pale in comparison to the environmental impacts that Canada's trade and military development has had on indigenous lands.[11] In a world striving for human integrity and ecological balance, the insecurity of Indigenous peoples is unacceptable.

Through the colonizing process, both Indigenous and non-Indigenous peoples face dehumanization. We are both insecure. And conflict dominates our relations. To reach peace, any security relations must address these root causes inherent in peoples – state conflicts. The line between terrorism and imperialism – colonization – globalization[12] is a thin one. But the powers that sustain such state conduct is a crime against the humanity of Indigenous peoples. Canada and the US will never be at peace unless we deal with the centuries of terrorism that has been directed at Indigenous peoples by states.

Choices are available to transform our security relations. Canadians could compel their governments to embrace Indigenous peoples' right to security as part of the right to self-determination. A choice for Indigenous peoples is to work collectively in the restoration and upholding of our laws of peace to share them with the world. Through making such choices, Indigenous and non-Indigenous peoples can work towards peace. We can measure security by our joint efforts to bring balance and harmony to all our relations.

In periods of peace or conflict, Indigenous peoples must be part of decision-making that impacts their lives and territories. Fortunately, the teachings of our ancestors have been transmitted to us through oral traditions. Those teachings are the foundation of our vision of security today and we are taking that vision to international and domestic forums.

Key Issues:

1. Understanding Indigenous Peoples' Right to Security and its connection to human rights at international levels

John Henriksen provides a comprehensive perspective on human security and states:

The human security of Indigenous Peoples encompasses elements such as physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects. A desirable situation with respect to human security exists when the people concerned and its individual members have adequate legal and political guarantees for the implementation of their fundamental rights and freedoms, including the right to self-determination. Moreover, one has to take into account the relative aspects of human security, in particular the subjective feeling of security. The right to self-determination includes all of these interdependent aspects, which can only be fully realized through the complete recognition and implementation of all of them.[13]

The security - human rights connection, supported by James Anaya, holds that: "state sovereignty and human right precepts such as self-determination must work in tandem to promote peace and stability."[14] Non-Indigenous peoples have also recognized this vital connection as demonstrated by Erica-Irene Daes' comment on the spirit and letter of the right to self-determination:

> "Indigenous Peoples must feel secure in their right to make choices for themselves – to live well and humanely in their own ways...Peoples who must fight continually for their subsistence and existence are never truly free to develop

> their distinctive cultures...The only real security for self-determination lies in improving social relationships between Indigenous Peoples and non-Indigenous peoples."[15]

A recent expression of the right to security for Indigenous peoples is set out in a comprehensive annex[16] that was sent to British Prime Minister Tony Blair this summer. The Grand Council of the Crees and other Indigenous representatives sent a message to the UK Prime Minister that human security is not just the absence of conflict. Rather, states must understand that there are indivisible links between conceptions of security, development, and human rights.[17] They observe that genuine democracies that promote and protect human rights secure social justice and good health for their peoples.[18] Further, by connecting human security with good health, cultural survival, human dignity and well being, peoples can have confidence about the future.[19]

These Indigenous peoples advocate for states to take a rights-based approach to human security.[20] They assert that human right norms provide the content to global security.[21] To Indigenous peoples, the politics of security is not just about weapons of mass destruction and intelligence. It is also about scrutinizing human rights policies as part of a strategy to strengthen human security and to prevent terrorism.[22]

The annex recognizes the Organization for Security and Cooperation in Europe's efforts to create regional security frameworks that include the protection of human rights on the same basis as political, military and economic priorities.[23] By taking this approach, no state can claim that they have political and economic security without addressing human rights.[24]

Finally, they propose that human security includes the recognition of Indigenous peoples' collective rights, as pre-existing and inherent, and not dependent on state recognition. The denial of Indigenous peoples' rights to land, territories, and natural resources perpetuates poverty and injustice. It forms the root causes of insecurity. The US and British security policies don't deal with human rights,[25] and neither do Canada's national security policies.[26] As Canada and the US re-adjust their relations (to secure economic power through security and trade arrangements), Indigenous peoples demand an action plan to address the roots of conflict embedded in these colonial relations so that we can all have confidence about the future, live well, respect human rights and plan our peaceful relations together.

Some of this work has already begun at the United Nations level. On August 9, 2004, the UN Sub-Commission on the Promotion and Protection of Human Rights signalled concern for the security of Indigenous peoples and adopted without a vote, a resolution for the Protection of Indigenous peoples in the time of conflict. This resolution reaffirmed the right of Indigenous peoples to live in safety and security. It called upon the UN Commissioner for Human Rights to ensure that mechanisms are in place to respond to emergencies and protect Indigenous peoples from genocide.[27]

a. The adoption of the 1994 UN Subcommission text of the Draft Declaration on the Rights of Indigenous peoples[28]

In 1994, the UN Subcommission on Prevention of Discrimination and Protection of Minorities, adopted without changes, the UN Working Group on Indigenous Populations Draft Declaration on the Rights of Indigenous peoples. ("UN Draft Declaration")[29] this UN Draft Declaration represents the minimum standards for the protection of Indigenous Peoples' human rights. Over the past 10 years, an intersessional working group comprised of states and Indigenous peoples have tried to elaborate on the UN Draft Declaration. This working group hopes to adopt it by the end of 2004. But Indigenous peoples have called for more time to reach consensus on language because states are attempting to gut the human rights standards set out in 1994 UN Draft Declaration.

Indigenous peoples have put pressure on commonwealth states such as Canada, Britain, Australia, New Zealand and the United States to adopt the heart of the UN Draft Declaration, which states that Indigenous peoples have the unqualified *"…right to self-determination. By virtue of that right they freely choose their political status and freely pursue their economic, social and cultural development."*[30]

The following summaries of paragraphs from the UN Draft Declaration capture Indigenous peoples' formulations of rights and standards regarding security:

- …The demilitarization of Indigenous lands and territories[31];
- …Collective right to live in freedom, peace and security as peoples with guarantees against Genocide or any other act of violence such as the removal of Indigenous children from their families and communities; they have individual rights to life, physical and mental integrity, liberty, and security of the person[32];
- …Collective and individual right to not be subjected to ethnocide and cultural genocide, depriving of integrity as distinct peoples, dispossession of their lands, territories, resources; any form of population transfer or assimilation or integration by other cultures or ways of life imposed upon them by legislative, administrative or other measures[33];
- …The right not being forcibly removed from their lands and territories and requirements for proposed relocation which include first obtaining the free and informed consent of Indigenous Peoples; agreements on just and fair compensation and options to return[34];
- …The right to special protection and security in periods of armed conflict where states shall observe international standards like those set out in the 4th Geneva Convention of 1949, and states shall not recruit Indigenous individuals against their will into the armed forces and for use against other Indigenous peoples, recruit Indigenous children into the armed forces, force Indigenous peoples to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes, and force Indigenous individuals to work for military purposes under any circumstances[35];
- The right to conservation, restoration and protection of the total environment and the productive capacities of their lands, territories and resources – military activities shall

not take place in the lands, territories of Indigenous peoples, unless otherwise freely agreed upon by the peoples concerned[36]; and

- Indigenous Peoples divided by international borders have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.[37]

These security rights can lead to the prevention and resolution of conflicts.[38] However, current state positions regarding these security rights raise key issues about the negative impact that state-only security measures could have on the human rights of Indigenous peoples.[39]

At the September 2004 meeting, the US requested any language relating to the demilitarization of Indigenous lands and territories be deleted.[40] A number of states argued that an Indigenous right to security was an individual human right, rather than a collective right to security for a people. Rather than "obtain" the free and informed consent of Indigenous Peoples, states proposed to "seek" that consent before taking any security measures that could impact them.[41] In reality, states prefer to keep a monopoly on security decision-making and see consultations as a reasonable method for legitimizing security decisions.

Most states preferred to have the terms relating to ethnocide and cultural genocide removed from the UN Draft Declaration.[42] Where there is any reference to Indigenous peoples' land and territories, states prefer the language of "traditional residence and economic activities".[43] States also want to remove "special" protection of Indigenous peoples in periods of armed conflict. This position, if accepted, dilutes the standards relating to the non-recruitment of Indigenous individuals and children except to those prescribed unilaterally by state law.[44] Finally, where the UN Draft Declaration speaks of a right to fair and just compensation for any state violations of indigenous rights, states prefer to not compensate directly, but provide opportunities for Indigenous peoples to seek effective measures to redress claimed violations.[45]

The most troubling state positions that could severely impact Indigenous peoples' rights to security include limits placed on the decision-making of Indigenous peoples. States are proposing that Indigenous rights must not be incompatible with national legislation.[46] State positions also hold that the status of any treaties would have domestic legal status.[47] This could prevent the international, collective exercise of "self-determination" by Indigenous peoples or prevent Indigenous peoples from accessing international law protections. Rather than ensuring Indigenous peoples develop priorities and strategies for stopping or mitigating adverse impacts to Indigenous lands, states want sole jurisdiction to limit Indigenous rights.[48] Further, some states would rather see Indigenous peoples securing their subsistence - rather than maintaining and strengthening Indigenous peoples' political, economic, social, cultural, and legal systems.[49]

Finally, states are refusing to accept standards that restore, protect, conserve the productive capacity of lands, territories and natural resources traditionally owned or occupied by Indigenous Peoples. In a security context, without this right, Indigenous

Peoples would have difficulty in protecting their lands from confiscation, appropriation, and expropriation for military use, disposal of hazardous waste and testing of weapons by states on Indigenous soil.[50]

The UN Draft Declaration was designed to set out the minimum standards for protection of Indigenous peoples' human rights. It also captured Indigenous peoples' free expression of their collective and personal rights. The UN Draft Declaration provides the foundation for Indigenous peoples' self-sufficiency. The state positions outlined above, discriminate against Indigenous peoples and contribute to world instability because they deny the indigenous peoples' right to self-determination. This is also a denial of Indigenous peoples' right to security. States must move beyond positions that do not recognize Indigenous peoples as dynamic members of the human family who can contribute to peace and security efforts.

There are battles to be fought internationally, but the deeper challenges to reach peace between Indigenous peoples and states like Canada and the US are at the domestic level.

b. The impact of Canadian national security and defence policies, laws and unilateral jurisdiction on the Indigenous right to security and self-determination

We aspire to have our collective rights to self-determination and security respected by states. Canada has interpreted the right of self-determination as "a right, which can continue to be enjoyed in a functioning democracy in which citizens participate in the political system and have the opportunity to have input in the political processes that affect them.[51] Canada sees our internal autonomy expressed through institutions of self-governance. Canada does not recognize our autonomy to include co-equal jurisdiction over foreign affairs, security or policing.[52] Modern land claims agreements define unilateral state powers over national defence and security in relation to our aboriginal and treaty rights.[53] Canadian courts also see our security rights as being incompatible with assumed Canadian sovereignty.[54] Since 1990, courts have also found that the "public safety" of Canadians to be a compelling and substantial legislative objective for infringing our aboriginal and treaty rights.[55] Under Canada's constitution, we remain subject to (or objects of) Canada's peace, order, and good governance power.

Canadian national security policy is silent on our rights to security and self-determination. We may participate in round tables, public consultative processes, think tanks, reviews, administrative boards or advisory groups concerning state security measures. But this does nothing to move Canada from a position of seeing our contributions to peace in recruitment terms. Canadian national security policy leaves little space for us to make strategic and operational decisions about security issues that impact us or our lands.

Since there is negligible Indigenous representation in key Canadian national security institutions, we have difficulty ensuring that Canada meets international laws, obligations and standards for peace and security. We also have limited capacity to ensure that legislative measures, such as the recent anti-terrorism legislation does not restrict the exercise of our rights. At the same time, Canada's national defence projects, if large in

scope, are often exempted from structured national environmental review processes.[56] This leaves us without opportunities to assess the purpose of these projects or how these projects impact our way of life. Canada's laws and policies on security clearly do not respect our rights to security.

A key challenge for Indigenous peoples is to encourage Canada to transform its monopoly on security relations and recognize the necessity of respecting Indigenous peoples' right to security and self-determination. Some Indigenous peoples have taken legal and political action against Canada regarding these adverse security impacts. For example, Indigenous peoples impacted by the development of large-scale military projects such as training ranges have been able to secure access rights for the exercise of their treaty rights as well as economic rehabilitation.[57] Some aboriginal veterans were compensated recently for past discriminatory treatment relating to the unequal distribution of pension and other veterans' benefits.[58] Where courts and governments continue to deny remedies at the domestic level to address Indigenous peoples security concerns, international avenues open up for Indigenous peoples to enforce our rights. We see this happening in the context of the exercise of Indigenous peoples border rights such as free/ safe passage and trade.[59] Canadian courts have found these border rights incompatible with the assertion of Canadian sovereignty.[60] This issue is now directly before the Inter-American Commission on Human Rights.[61] Sadly, the issue of demilitarization of Indigenous lands has proven that Canada's national security laws and policies can *fatally* impact the lives of both Indigenous peoples and Canadians.[62]

The peace and security relations we have with each other must be decolonised. These relations can be formalized through arrangements that meet constitutional scrutiny under an *amended* s. 35 of the *Constitution Act, 1982*, which recognizes the power right of self-determination for Indigenous peoples. Further, Indigenous-Canadian peace and security relations must respect international laws regarding Indigenous peoples.

Choices of Canadians and Indigenous peoples

While Canadians may have significant concerns about the impact of US foreign policy on sovereignty, economy, environment, human rights and security, they should also be concerned about fostering peace relations with Indigenous peoples. At the same time, Indigenous peoples have to exercise our responsibilities to ensure cultural survival and the protection of our territories. There are potential opportunities that we can take to become more peaceful. In the next 10 to 15 years, we can:

- Restore respectful security relations between Canada and Indigenous peoples;
- Build coalitions to put pressure on Canada and the US to respect Indigenous rights in the context of security;
- Recognise that Indigenous peoples have the right to security, self-determination and constitutional protection for their aboriginal and treaty rights;
- Pressure government representatives to address the impacts that Canadian national security laws and policies may have on Indigenous peoples and their rights;

- Embrace Indigenous worldviews on security;
- Understand the connection between security and human rights and committing to the resolution of the root causes of conflict; and
- Respect Indigenous peoples' choices to: ally with Canada on security matters, remain neutral through diplomacy, not participate at all and oppose such measures.
- See an independent place for Indigenous peoples to prevent conflict through the application of Indigenous peoples' worldviews on peace.

Potential Flash Points (10-15 years):

In the next decade, peace will depend on our efforts to address the root causes of global conflict. Scarce resources, environmental changes and population increase loom in our future. The ability to face our rapidly changing world will depend upon the actions we take today. It is hypocritical for Canada to demand no unilateral security and trade treatment from its neighbour and direct similar discriminatory treatment towards Indigenous peoples. This means we also have to resolve ownership of lands and jurisdiction conflicts. By establishing strong security relations, Canadians and Indigenous peoples can prepare for periods of peace and decrease conflict.

Our children will value the diversity of peoples if we can teach them that recognizing the rights of Indigenous peoples to security and self-determination will create peace. We must learn from the past to ensure that all peoples, including Indigenous peoples achieve:

- physical security;
- land, territory, and natural resource security; and
- the freedom to determine their political status and political, economic, social and cultural development.

If we do not take the time today to create just relations, potential flash points may challenge our efforts to obtain peace and co-existence. We will see more Dudley Georges shot, indigenous soldiering, indigenous assertions of rights being cast as terrorist activities, and the ultimate destruction of the planet's capacity to provide a healthy and sustaining world for us to live. A state that can uphold respect for the right to self-determination of all peoples will be seen as a state promoting global peace and security. A state that continues to treat Indigenous Peoples as "objects of its security" perpetuates discrimination against Indigenous Peoples and threatens their needs to cultural survival and overall development as productive actors in world affairs. *Hopefully our choices will lead to world peace.*

Recommendations:

Canada can ensure security relations with Indigenous peoples are respectful and honourable both within Canada and abroad by:

- Adopting the UN Draft Declaration on the Rights of Indigenous Peoples (Subcommission text) which recognizes the right to security and self-determination of Indigenous peoples;

- Implementing international standards regarding Indigenous peoples at the domestic level;
- Amending s. 35 of the Canadian constitution to include the international right to self-determination as an unqualified right for Indigenous peoples, which includes the right to security;
- Entering into Indigenous security frameworks and agreements with Indigenous peoples tailored to meet Indigenous Peoples' needs - the Cree Annex principles on security are relevant.
- Incorporating free prior and informed consent standards for potential security activities that may adversely impact the constitutional and international rights of Indigenous peoples. The level of consent obtained will reflect the degree of self-determination to be exercised by the Indigenous People affected. Where Canada assumes discretion in security implementation, corresponding fiduciary duties will arise to protect Indigenous peoples personhood and lands, territories and natural resources;
- A nation to nation coordination of security relations through the creation and resourcing of an Indigenous Security Secretariat.[63] This neutral security institution can provide a mechanism to ensure that international obligations, human rights and the right to Indigenous People's security and self-determination are honourably upheld. The Indigenous Security Institution is bilateral (nation to nation) and multilateral (state and peoples engagement in world affairs) in structure;
- To begin to operationalize the Indigenous peoples' right to security in times of peace and conflict, the Indigenous Peoples Security Secretariat can:
- Develop security ethics, policies and legislative reviews;
- Implement the numerous commissions, inquiries, reports that have called for a change in Canadian – Indigenous relations as they relate to peace and security;
- Assess the cumulative impacts of strategic and operational security decisions in relation to Indigenous peoples and their rights;
- Develop multilateral efforts to build capacity and deal with border issues;
- Coordinate security rights with treaty and aboriginal rights and ensure consistency with international laws and standards;
- Develop interpretation devices to reduce problems of communication;
- Develop a security conflict resolution tribunal with equal representation between Canada and Indigenous Peoples;
- Include the UN Institute for Training and Research Programme in Peacemaking and Preventative Diplomacy – to build capacity for conflict analysis and negotiation;[64]
- Provide a security institution where elders and aboriginal veterans play key security roles and monitor the treatment of Indigenous peoples engaged in security relations with Canada and abroad;
- Jointly advocate for Indigenous peoples' institutional role in a changing UN system working towards cooperation.

Endnotes

[1] The author would like to thank her legal researchers Kylie Walman and Harsha Walia for their suburb research contributions to this briefing note. This briefing note is being developed into an article for a forthcoming publication. Please do not quote without permission of the author.

[2] Report of the Secretary-General's High Level Panel on Threats, Challenge and Change, "A more secure world: our shared responsibility". (UN Doc. A/59/565) December 2, 2004.

[3] J. Fiske and B. Patrick, *Cis dideen kat (When The Plumes Rise): The Way of the Lake Babine Nation* (Vancouver, UBC Press, 2000).

[4] R. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law And Peace, 1600-1800* (New York, Oxford University Press, 1997). The main premise of Williams' book is found at p. 137: "Indians of the Encounter Era developed a number of innovative and fruitful approaches for meeting the difficult challenges of building relationships of trust between communities at a distance. Different peoples, according to American Indian visions of law and peace, nurtured trust between each other by sharing sufferings, clearing all barriers to communication, exchanging stories, forgiveness, and goodwill, and mutualizing their interests; they agreed to treat each other as relatives, "to the latest generation". These are just a few of the many acts of commitment we read about in the Encounter era treaty literature that shows us how American Indians went about the difficult process of society building on a rapidly changing multicultural frontier. Such acts speak with insight and imagination to the challenges of creating a society in which different, conflicting groups of peoples learn to trust each other enough to place their lives in each other's hands. According to American Indian visions of law and peace, they must first agree to link arms together."

[5] For an excellent study on the Georgian (Peace and Friendship treaties) and Victorian treaties with Indigenous Peoples across Canada see J. Y. Henderson eds., *Aboriginal Tenure in the Constitution of Canada* (Scarborough: Carswell, 2000) at 101-141. Henderson states, "[T]hree general models of prerogative treaties exist in British jurisdictions of North America: Georgian treaties in the North Atlantic territory; a number of Georgian and Victorian treaties in Upper Canada, Lower Canada and British Columbia; and Victorian treaties in the Western Indian country. All treaties were founded on a permanent nation-to-nation relationship based on trust and respect, and created a bilateral sovereignty in a shared territory. Thus, Aboriginal nations had a central role in forging a new society with a shared legal order. Differences in treaties illustrate the vigorous choices of Aboriginal nations. In treaty negotiations and stipulations, these radically different societies negotiated as political equals to create a new order. No culture or social narrative occupied a privileged or dominant position in the resulting treaty order that sought to structure power and relations justly."

[6] An inquiry to the killing of Dudley George was created by the Ontario government on November 12, 2003. Its mandate is to inquire and report on events surrounding the death of Dudley George and make recommendations that would avoid violence in similar circumstances. Online: < http: //www.ipperwashinquiry.ca/. See also P. Whitney Lackenbauer, "Combined Operation: The Appropriation of Stoney Point Reserve and the Creation of Camp Ipperwash" (Fall, 1999), on line:< http://www.jmss.org/1999/articles4..html>.

[7] Members of the Neskonlith people who have been asserting aboriginal title and rights to an area where there are plans to expand a ski resort have faced criminal charges, convictions and injunctions. See A. Manuel , "Aboriginal Rights on the Ground: Making Section 35 Meaningful" in A. Walkem and H. Bruce, eds., *Box of Treasures or Empty Box?: Twenty Years of Section 35* (Penticton: Theytus Books Ltd., 2003) at 316.

[8] Since the 1980's, the Inuu have been vigilant in challenging direct impacts of military training such as low level flight testing in their territories. See "Innu Launch Court Challenge to Military Plans for Supersonic Test Flights over Innu lands'. On line: <http:www.ienearth.org/military – impacts. html.>; <http://www.perc.ca/PEN/1994-07-08/s-innubomb.html>. Innu leader Peter Penashue has been charged for protesting against such flights.

[9] See Grand Chief Matthew Coon Coome's (AFN) statement to the Standing Committee on Justice and Human Rights (November 1, 2001). Kent Roach summarizes this statement in his book on Canada's response September 11, 2001: "Grand Chief Matthew Coon Come of the Assembly of First Nations argued that events such as the killing of Dudley George at Ipperwash "demonstrate the risk posed to First Nations by legislation that gives heightened powers to police, narrows the civil rights of those involved in legitimate dissent and protest activities and limits or suspends the civil rights of those perceived by the government to be involved in 'terrorist activities." He expressed concerns that the Aboriginal movement had already been labelled as terrorist in some quarters and would be vulnerable to such labelling under the new law. Invoking Oka, he was not reassured by the justice minister's statement "that native assertions of aboriginal and treaty rights are not intended to be captured by the broad definitions of terrorist activities in the bill…The actions of governments in the past lead us to fear that the strictest force of law is inevitably applied to First Nations protest and dissent, including we fear – the misapplication of the anti-terrorism legislation in the future." K. roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen's University Press, 2003) at 59-60. Coon Come's concerns would ring true 10 months later when the anti-terrorism legislation was used to authorize a raid to search for weapons at the home of two native activists who where members of the West Coast Warrior Society. See ICLMP, "In The Shadow of the Law: A Report by the International Civil Liberties Monitoring Group (ICLMG) in response to Justice Canada' s 1st Annual report on the application of the *Anti-Terrorism Act* (Bill C-36) (May 14, 2003) [on file with author and unpublished].

[10] See the recent report by Amnesty International, "Stolen Sisters – A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada" (October 4, 2004) on line: <http://www.amnesty.ca/stolensisters/index.php>. See also recommendations made in the September 24, 2004 Final Report of the Stonechild Inquiry which looked into the death of Neil Stonechild and the conduct of the investigation into his death. online: <http://www.stonechildinquiry.ca/finalreport/default.shtml>.

[11] In 1997, the Department of National Defence and Canadian Forces "managed more than 10,000 individual facilities at hundreds of locations, maintains a fleet of more than 30,000 vehicles, and administers over 20,000 km2 of land. An added consideration in our planning is that more than three-quarters of DND/CF's location are near communities made up largely of Aboriginal people." See DND, Environmentally Sustainable Defence Activities: A Sustainable Development Strategy for National Defence. December, 1997, on line:< http://www.dnd.ca/admie/dge/sds/downloads/doc_e.pdf>. A report on current impacts of military development is necessary given the national priority to increase security.

[12] Tony Hall argues that imperialism and colonialism are the forebears of globalization. See A. Hall, *The American Empire and the Fourth World*. (Montreal: McGill-Queens's University Press, 2003) at 22-23.

[13] J. Henriksen, "The Right to Self-Determination: Indigenous Peoples versus States in P. Aikio and M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Finland: Institute for Human Rights, 2000) at 131.

[14] J. Anaya, "Self-Determination as a Collective Human Right under Contemporary International Law" in P. Aikio and M. Scheinin, *ibid*. at 17; K. Myntti cites James Crawford who states that the "collective rights of peoples include the right to international peace and security" in K. Myntti, "The Right of Indigenous Peoples to Self-Determination and Effective Participation" in P. Aikio and M, Scheinin, *ibid.* at 89.

[15] Erica-Irene Daes, "The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections On The Making of the United Nations Draft Declaration" in P. Aikio and M. Scheinin, *ibid.* at 81-82.

[16] Grand Council of the Crees, et. al. "Towards A *U.N. Declaration on the Rights of Indigenous Peoples:* Injustices and Contradictions in the Positions of the United Kingdom." (September 10, 2004). [Cree Annex] This Annex can be accessed on line: <http:///www.gcc.ca/gcc/intrelations/AnnexTonyBlair.htm>.

[17] Cree Annex, *ibid*. at para. 203.

[18] Cree Annex, *ibid*. at para. 204.

[19] Cree Annex, *ibid.*

[20] Cree Annex, *ibid.* at para. 208

[21] Cree Annex, *ibid.*

[22] Cree Annex, *ibid.* at para. 211.

[23] Cree Annex, *ibid.* at para. 210.

[24] Cree Annex, *ibid.*

[25] Cree annex, *ibid.* at paras. 224-226.

[26] The April 2004 Canadian National Security Policy makes no mention of human rights nor Indigenous Peoples. See Canada, Privy Council Office, *Securing an Open Society: Canada's National Security Policy* (April 2004), on line: <http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf>

[27] E/CN.4/sub.2/Res/2004/11.

[28] While other instruments, conventions and declarations also support the indigenous right to security, this briefing note concentrates on the UN Draft Declaration on the Rights of Indigenous Peoples.

[29] *United Nations Declaration on the Rights of Indigenous Peoples* (Draft), in U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/RES/1994/45, 26 August, 1994, Annex, reprinted in (1995) 34 I.L.M. 541.

[30] UN Draft Declaration, Art.3.

[31] UN Draft Declaration, *ibid.* preambular para.10.

[32] UN Draft Declaration, *ibid.* Art 6.

[33] UN Draft Declaration, *ibid.* Art 7.

[34] UN Draft Declaration, *ibid.* Art 10.

[35] UN Draft Declaration, *ibid.* Art 11.

[36] UN Draft Declaration, *ibid.* Art 28.

[37] UN Draft Declaration, *ibid.* Art 35.

[38] Henriksen, *supra* note 13 at 141.

[39] K. Lebsock, American Indian Law Alliance Report on The United Nations Commission on Human Rights Intersessional Working Group on the Draft Declaration of the World's Indigenous Peoples Xth Session – September 2004 (November 9, 2004) on line: <http://www.ailanyc.org> This report sets out some of the state positions concerning paragraphs on security noted above. [AILA 2004 DDWGIP Report]

[40] AILA 2004 DDWGIP Report, *ibid.* at 39.

[41] See state proposals in E/CN.4/2004/Wg.15/CRP.4 (October 14, 2004) Working group established in accordance with Commission on Human Rights resolution 1995/32 – Chairperson's summary of proposals (Mr. Luis-Enrique Chavez)

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.*

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.*

[50] AILA 2004 DDWGIP Report at 38.

[51] Patrick Thornberry, "Self-Determination and Indigenous Peoples: Objections and Responses" in P. Aikio and M. Scheinin, *supra* note 13 at 51.

[52] Some Indigenous Peoples have advocated for better relations with law enforcement authorities to deal with the problem of drugs on reserve. Recently, the Assembly of First Nations created a public safety protocol with the RCMP to deal with community safety problems and establish secure communities. See AFN, Public Safety Cooperation Protocol Between the AFN and RCMP (November, 2004) on line: <http://www.afn.ca/public_safety_cooperation.htm>

[53] See Westbank First Nation Self-Government Agreement, para. 35, which states: "The operation of this Agreement shall not limit the authority of Canada or the Minister of National Defence to carry out activities related to national defence, security or public safety." This same provision exists in the Nisga'a Treaty at para. 17. Some First Nations and Inuit peoples have been able to negotiate consultation and reasonable notice standards, requirements for environmental reviews of projects relating to security, and hold federal or provincial governments liable for any damage to settlement lands. Under the Nunavut Agreement, where government seeks to infringe rights to land or cause damage to the land, the Inuit must be consulted and if agreement is not reached on the exercise of government access, then the matter gets referred to an arbitration board. There are no consent standards applicable to crown access to settlement lands for security or emergency reasons. In most agreements, no fees, charges, or rent may be imposed on crown access to settlement lands. In some agreements, aboriginal peoples have control over peace, public safety and order, but this control is subject to laws on national security and national interests. The federal government also maintains control over military development and the resources that can be used to make products from uranium or nuclear energy. Self-government Agreements, treaties and modern land claim agreements can be found on line: <http://www.ainc-inac.gc.ca/>.

[54] *Mitchell v. M.N.R.* [2001] 1 S.C.R. 911 [Mitchell cited to S.C.R.] at para. 153 where Binnie, J. states, "However, important as they may have been to the Mohawk identity as a people, it could not be said, in my view, that pre-contact warrior activities gave rise under successor regimes to a legal right under s. 35(1) to engage in military adventures on Canadian territory. Canadian sovereign authority has, one of its inherent characteristics, a monopoly on the lawful use of military force within its territory. I do not accept that the Mohawks could acquire under s. 35(1) a legal right to deploy a military force in what is now Canada, as and when they choose to do so, even if the warrior tradition was to be considered a defining feature of pre-contact Mohawk society. S. 35(1) should not be interpreted to throw on the Crown the burden of demonstrating subsequent extinguishments by "clear and plain" measures…a "right" to organize a private army, or a requirement to justify such a limitation after 1982 under the Sparrow standard. This example, remote as it is from the particular claim advanced in this case, usefully illustrates the principled limitation flowing from sovereign incompatibility in the s. 35 (1) analysis."

[55] A number of cases relating to aboriginal hunting rights at night show that provincial wildlife public safety regulations can justifiably infringe such rights. The B.C. case of *R. v. Morris*, [2004] B.C. J. No. 400 is now before the Supreme Court of Canada and deals with this issue in the treaty rights context.

[56] There has been some examples where smaller projects are reviewed by boards involving First Nations and go beyond environmental impacts and assess socio-economic impacts too. See *Yukon Environmental and Socio-economic Assessment Act*.

[57] See Canada, Indian Claims Commission, *Cold Lake and Canoe Lake (Primrose Lake Air Weapons Range*) Inquiries, ICCP, vol. 1 (Ottawa: Minister of Supply and Services, 1994). "Primrose Lake Air Weapons Range Report II (September 1995) which dealt with breaches of Treaty 6 and 10 rights and fiduciary duties owed to the beneficiaries of these treaties as a result of Canada not compensating and providing economic rehabilitation for the taking up of treaty 6 and 10 lands for a training (revenue generating) range. Regulations that prohibited treaty rights to hunt on this range were held to unjustifiably infringe these rights in the case of *R. v. Catarat*, [1998] 4 C.N.L.R. 115.

[58] See R. Scott Shefield, "A Search For Equity: A Study of the Treatment Accorded to First Nations Veterans and Dependents of the Second World War and the Korean Conflict" prepared for the National Roundtable on First Nations Veterans Issues, April, 2001), on line: <http://www.turtleisland.org/news/afnvets.pdf>; Standing Committee on National Defence and Veterans Affairs, 37th Parliament 2nd Session (9 April 2003); Assembly of First Nations, "First Nations Veterans, Review of Process, Recent and Major Accomplishments. Annual General Report" (July 2003), online: <http://www.afn.ca/Assembly_of_First_ Nations.htm>. On November 11, 2004, Canada announced that it would create a monument to commemorate aboriginal veterans and establish a communications program to assist aboriginal veterans in obtaining benefits.

[59] Canada does not recognize the 1794 Jay Treaty giving rise to a right to free passage or trade rights to Indigenous Peoples who have territories that have been divided by the Canadian-US border because Indigenous Peoples are not signatories to the treaty and the treaty has not been incorporated into domestic legislation. Rather, courts have viewed the treaty as evidence of the historical treatment of First Nations at that time. Indigenous Peoples will continue to seek international redress for this non-recognition. See *Mitchell supra* note 54. See also D. Evans, "Superimposed Nations: The Jay Treaty and Aboriginal Rights" (1995) 4 Dalhousie Journal of Legal Studies at 215-30; B. Slattery" Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar. Rev. 196; and B. Nickels, "Native American Free Passage Rights under the 1794 Jay Treaty: Survival under United States Statutory Law and Canadian Common Law" (2001) 24:2 Boston College International and Comparative Law Review at 313-34. For a practical guide to the US Jay Treaty implementation, please see: American Indian Law Alliance, "Border Crossing Rights Between The United States and Canada For Aboriginal People on line: http://www.ailanyc.org

[60] Mitchell *supra* note 54, where Mitchell brought a diverse range of goods across the Canada/US border and refused to pay customs duties. He claimed a cross-border trade right. The Supreme Court of Canada held that the right had not been established.

[61] The *Mitchell* case is now before the Inter-American Commission on Human Rights as a petition "alleging that the denial of his rights to bring goods, duty free across the United States/Canada border dividing the territory of his community, for the purposes of trade with other First Nations, is incompatible with the provisions of Article XIII of the *American Declaration of the Rights and Duties of Man*. For an excellent report on this

case, see P. Hutchins, "Against The Current – Aboriginal and Treaty Rights and Title in the "Commercial Mainstream" – *Mitchell versus MNR and the Petition of Grand Chief Michael Mitchell to the Inter-American Commission on Human Rights, 2003; R. versus Marshall, 2003 and Bernard versus the Queen, 2003*. (A paper presented for the 3rd Annual Law Forum, November 15-16, 2004, Toronto, Ontario)

62 See Ipperwash Inquiry *supra* note 6.

63 A similar recommendation was made at the Roundtable On Aboriginal Peoples' Participation in Canadian Foreign Policy (2001). In the final report at p. 3, participants recommended that the constitutional voice of Aboriginal Peoples on foreign policy formation *inform* the importance of Canada establishing both an Aboriginal Secretariat to help co-ordinate, encourage, and sustain aboriginal participation in Canadian foreign policy; and a certificate program to enhance aboriginal leadership.

64 *Ibid.*