



Indigenous Peoples' Self-Determination and the Right to Security¹

**Assistant Professor L. June McCue
UBC Faculty of Law
November 26-28, 2004**

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 inroads into addressing the human rights of Indigenous Peoples at the international level, much

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 – globalization¹² 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 s

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 annex¹⁶ 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.

a. The adoption of the 1994 UN Subcommission text of the Draft Declaration on the Rights of Indigenous peoples²⁸

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 territories³¹;
- ...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 person³²;
- ...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 measures³³;
- ...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 return³⁴;
- ...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 circumstances³⁵;
- 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 concerned³⁶; and

- Indigenous Peoples divided by international

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

- 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

- Implementing international standards

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.ipperwashington.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 Neskonalith 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 Innu 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 were 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].

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/natsnor>> In

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 Sheffield, “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); Assembp2JPn78eTJ 0 TD0.0002 Tc-0.000r Wvview[(AsPro of00r Wc Vew[(N98] 4 6 (8rvices,)Tj-21.635 -1

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.*