Indigenous Peoples, Land Rights and the Justice System: Making Human Rights A Priority

Amnesty International's Submissions to Part II
of the Ipperwash Inquiry

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I. INTRODUCTION AND OVERVIEW

> On September 6, 1995, Dudley George, aged 38, became the first Indigenous person known to Amnesty International to be killed in the twentieth century by a police officer in a land rights dispute in Canada. He was killed at close range by a single bullet, shot from a sub-machine gun equipped with a nocturnal telescopic sight.[1]

The Need for this Inquiry

It took more than eight years for this landmark public inquiry into the killing of Dudley George to be established. Throughout that time, Dudley George's family, Indigenous peoples' organizations, numerous Canadian civil society groups, the UN Human Rights Committee, and Amnesty International repeatedly called on both the federal and Ontario provincial governments to establish such an inquiry.

Dudley George's death was tragic. But more than that, the police killing of Dudley George was symptomatic of a complex and inter-related set of serious human rights concerns faced by Indigenous peoples in Canada. These include their relationship with justice and policing systems, and shortcomings in the protection of land, resource and treaty rights. His death symbolized a deepening concern that government laws, policies and practices with respect to Indigenous peoples in Canada were out of step with international human rights standards, including the growing body of standards dealing specifically with the rights of Indigenous peoples.

What happened to Dudley George was, sadly, in keeping with the experience of other Indigenous men and women who had joined with him in Ipperwash Park, and countless other Indigenous people throughout Ontario and across Canada: protection of land rights delayed or denied; government and police responses that equate efforts to assert land and resource rights with criminal conduct; and encounters with a justice system that can be both blatantly and systemically racist. While others did not die from a police sniper's bullet, they nonetheless faced many of the same challenges undermining the protection of their basic human rights. A public inquiry was needed to examine these serious concerns, to consider what reforms were needed and also consider why recommendations made in earlier inquiries and commissions remain largely unimplemented.

Dudley George's killing and the response to his death also starkly demonstrated the difficulties arising from confusion and a lack of coordination between the federal and provincial governments with respect to the rights of Indigenous peoples. In this case, responsibility for resolution of the land rights dispute at the heart of the Ipperwash stand-off rested primarily with the federal government. Responsibility for the police operation that was launched in response lay with the provincial government. While these two levels of responsibility were inextricably and inescapably linked, there was a complete

[1] Amnesty International, *Canada: Why there must be a public inquiry into the police killing of Dudley George*, AI Index: AMR 20/002/2003, September 4, 2003 at 1.

failure of a coordinated effort from the two levels of government to advance a solution that would safeguard the fundamental rights at stake.

The disconnect between the two levels of government was dismally illustrated in their response to the 1999 recommendation from the United Nations Human Rights Committee to establish this public inquiry.[2] It is the federal government, on behalf of Canada, that has ratified the international treaty that the Committee was reviewing, the *International Covenant on Civil and Political Rights*. The Committee therefore addressed its recommendation to the federal government. But the federal government argued it was powerless to comply with the recommendation, because the concern was primarily about the actions of a provincial police force and thus not within federal jurisdiction. The federal government did not apparently consider its responsibility for the land rights dispute or its constitutional responsibility for Indigenous peoples to be relevant.

For its part the Ontario provincial government at the time argued that questions about compliance with UN level human rights treaties and recommendations were entirely the domain of the federal government. Lost, on both the federal and provincial governments, was the clear international legal standard that federalism is no defence to a failure to comply with international obligations: international law applies to and must be upheld by all parts of a federal state.[3] This disconnect has continued through the course of this inquiry. Amnesty International considers it regrettable that the federal government did not actively participate in any way in the inquiry, seemingly reinforcing its view that this was entirely a matter of provincial concern.

- **Amnesty International urges the Commissioner to press the federal and provincial governments to acknowledge that the federal/provincial constitutional division of powers must not be a barrier to the protection of human rights and to therefore develop a more coordinated approach to ensuring the protection of the rights of Indigenous peoples in Canada.**

The International Context

Sadly, the serious human rights issues that stand behind the killing of Dudley George are not uniquely Canadian. Around the world, Indigenous peoples live in extreme hardship and danger due to the failure of states to uphold their fundamental human rights. They are often among the most marginalized members of society. They are uprooted from their lands and communities as a consequence of discriminatory government policies, the impact of armed conflicts, and the actions of private economic interests. Cut off from resources and traditions vital to their welfare and survival, many Indigenous peoples are

[2] Human Rights Committee, Concluding Observations: Canada, UN Doc. CCPR/C/79/Add.105, 7 April 1999.

[3] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 50: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions."; *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980, art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

unable to fully enjoy such human rights as the right to food, the right to health, the right to housing, or cultural rights. Instead they face poverty, disease and violence – in some instances extinction as a people. Amnesty International reports have documented serious violations of the rights of Indigenous peoples the worldover.[4] There is sadly a global necessity for thoughtful recommendations that aim to:

- recognize and better safeguard the land, resource and treaty rights of Indigenous peoples;
- ensure that police, justice and government officials operate in a manner that recognizes and contributes to the protection of the rights of Indigenous peoples; and
- confront and eradicate the racism that fuels abuses of the rights of Indigenous peoples.

Canada's domestic laws and practices have long failed to properly protect the rights of Indigenous peoples and have in many instances been the direct cause of grave human rights abuses, such as the notorious residential schools policy. At the same time, Canada has at times played an important role on the world stage in efforts to strengthen the global protection of the rights of Indigenous peoples and must be pressed more actively to demonstrate international leadership.

Recommendations formulated by this Commission will prove important not only in Ontario but in fact will be carefully reviewed across Canada, in many other countries and may be taken up by UN level human rights experts as well.

- **Amnesty International urges the Commissioner to develop recommendations that are sensitive to the wider international context of grave human rights violations against Indigenous peoples, and to do so in a manner that recognizes and affirms international standards for the protection of their human rights.**

Human Rights are at Stake

The tragic killing of Dudley George was in itself a violation of human rights. It also occurred as a consequence and culmination of a series of institutional failures by public officials to adequately uphold their human rights obligations. As will be highlighted in this submission, this includes obligations to respect and protect the specific rights of Indigenous peoples in respect to lands, territories and resources and obligations to ensure safe and unbiased policing that respects and upholds the rights of all.

Resolution of disagreements regarding land and resource rights is slow, expensive and cumbersome. Meanwhile, efforts by Indigenous peoples to assert those rights by occupying or making use of lands or fishing or hunting in contravention of licensing

[4] Amnesty International, *The International Day of the World's Indigenous People: Dispossessed and in Danger – Time to make the rights of indigenous peoples a reality*, AI Index: POL 30/025/2005, August 9, 2005.

regulations are readily characterized as acts of common criminality. The demand from the public and the response from government, the police and the courts then become focused on responding to what has been described as crime rather than responding to the possibility that fundamental rights are in jeopardy or have already been violated.

Throughout this submission Amnesty International refers to and urges compliance with international human rights standards. The relevance of international law in interpreting the government's human rights obligations has been underlined repeatedly by the Supreme Court of Canada,[5] and confirmed by Canada's reports to international human rights bodies.[6] The government of Canada has itself stated before the United Nations Human Rights Committee that international human rights treaties, such as the *International Covenant on Civil and Political Rights* were instrumental to the development and ultimate adoption of the *Canadian Charter of Rights and Freedoms*, and form part of the context for interpreting *Charter* rights.[7]

- **Amnesty International calls on the Commissioner to outline the need for governments across Canada to develop and commit to a strong rights-based understanding of the nature of land and resource disputes. This commitment may need to be secured through legislative reform.**

- **Amnesty International further calls on the Commissioner to adopt recommendations that will lead to laws and practice that conform to Canada's binding international human rights obligations, including specific standards regarding the rights of Indigenous peoples.**

These submissions focus on two overarching themes which are at the heart of this inquiry and have been underscored in the three background papers prepared by the Commission to guide Part II of the inquiry:

- the land and resource rights of Indigenous peoples, and
- policing for the protection of human rights.

Amnesty International is not party to Part I of the inquiry. We have nonetheless followed the testimony from the Part I proceedings carefully. We have also benefited from reviewing the various policy papers that have been prepared for Part II of the inquiry. However, this submission does not purport to be a comprehensive treatment of all the issues examined by this inquiry. Our commentary is focused on those concerns which are, in our view, of broader importance to the protection of human rights in Canada and

[5] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 348-350; *Slaight Communications Inc. v. Davidson*, [1987] 1 S.C.R. 1038 at 1056-57; *R v. Zundel*, [1992] 2 S.C.R. 731; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 70-71.
[6] See, Heritage Canada, Human Rights Program "Core Documents forming part of the report of States Parties" at para. 117. Available: http://www.canadianheritage.gc.ca/progs/pdp-hrp/docs/core_e.cfm
[7] Canada's Fourth Report under the International Covenant on Civil and Political Rights, "Advance Notes for the Presentation to the United Nations Human Rights Committee" March 1999, Available: http://www.canadianheritage.gc.ca/progs/pdp-hrp/docs/iccpr/notes_e.cfm

internationally and where our organization's experience and expertise enabled us to develop specific analysis and recommendations.

II. LAND AND RESOURCE RIGHTS OF INDIGENOUS PEOPLES

The conflict at Ipperwash was at its heart a dispute over the land rights of the Indigenous peoples of Stoney Point. The other issues before this inquiry would not have arisen if there had been timely and just resolution of the longstanding land dispute. This section addresses the current and developing international standards for the protection of the land and resource rights of Indigenous peoples and highlights the need for fundamental reforms to ensure that these rights are appropriately upheld in Canada

Guiding Principles

In recent years, human rights experts within the United Nations system, including expert bodies responsible for monitoring compliance with UN human rights treaties and a number of Special Rapporteurs whose mandates have included protection of the rights of Indigenous peoples, have articulated a clear and consistent framework of state obligations to protect the human rights of Indigenous peoples in the context of their unique circumstances, needs and aspirations. This emerging framework of human rights standards is based on recognizing the cultural distinctiveness of Indigenous peoples, the history of discrimination and dispossession that they have endured and the central importance of Indigenous peoples' relationship to the land as a basis for the fulfillment of their basic rights.[8] Indigenous peoples have played a key role in the development of these standards by bringing their concerns to the United Nations. Because of the efforts of Indigenous peoples' organizations in Canada, there are already numerous instances where expert bodies have applied these standards to the specific experiences of Indigenous peoples in Canada. Amnesty International urges this Inquiry to consider these developments in international law as a source of principles and best practices for the future.

In interpreting the binding obligations of state parties to protect the right of minorities to practice their cultures – article 27 of the *International Covenant on Civil and Political Rights*[9] – the UN Human Rights Committee (HRC) has stressed that cultural rights of Indigenous peoples are closely associated with territory and use of resources.[10] In the Committee's interpretation, states have a positive obligation to take legal measures to protect the integrity of Indigenous culture by protecting Indigenous peoples' unique relationship to land. The committee has observed that:

> …culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Aboriginal peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The

[8] United Nations, Commission on Human Rights, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7 (1986), Vol. V, "Conclusions, Proposals and Recommendations".
[9] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 2(3), Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].
[10] Human Rights Committee (HRC), *General Comment No. 23: The rights of minorities (Art. 27)*, 50th Sess. UN Doc. CCPR/C/21/Rev.1/Add.5 at para. 3.2.

> enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[11]

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) has interpreted the binding obligations of states under the *International Convention on the Elimination of All Forms of Racial Discrimination*[12] as including a duty to:

> (a) Recognize and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
>
> (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
>
> (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
>
> (d) Ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> (e) Ensure that Indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.[13]

Specifically on the issue of lands, territories and resources, CERD has called on state parties to:

> recognize and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[14]

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[11] *Ibid*., at para. 7. See also, Communication No. 167/1984 (*Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*), views adopted on 26 March 1990, and Communication No. 197/1985 (*Kitok v. Sweden*), views adopted on 27 July 1988.

[12] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195; [1970] Can. T.S. No. 28 (entered into force internationally January 4, 1969; ratified by Canada October 14, 1970).

[13] CERD, *General Recommendation XXIII – on the rights of indigenous peoples*, 51st Sess., UN Doc. CERD/C/51/Misc.13/Rev.4, 18 August 1997 at para. 4.

[14] *Ibid*, at para. 5.

A recent report on the Situation of Human Rights and Fundamental Freedoms of Indigenous People by Former Chairperson-Rapporteur of the Working Group on Indigenous Populations, Erica-Irene A. Daes, calls on governments to protect the rights of Indigenous peoples in respect to lands, territories and resources by establishing, in consultation with Indigenous peoples, "impartial mechanisms, including international mechanisms, to oversee and facilitate fair and equitable resolutions of indigenous land and resource claims and the implementation of land agreements." [15] The report outlined a number of principles to guide the fair resolution of land and resource disputes including:[16]

> (b) All State and international actions and legal measures in regard to indigenous lands, territories and resources must meet the standard of fundamental fairness for all indigenous and non-indigenous parties, and all such actions must be characterized by justice in historical, political, legal, social and economic terms;
>
> (c) All State and international actions and legal and administrative measures in regard to indigenous lands, territories and resources must be non-discriminatory in their application and effect and must not subject indigenous peoples or individuals to any disadvantage or adverse consequence as compared to non-indigenous persons in the State;
>
> (d) All State and international actions and legal measures in regard to indigenous lands, territories and resources must assure that all indigenous peoples have lands, territories and resources sufficient to assure their well-being and equitable development as peoples;
>
> (e) All State and international actions and legal measures in regard to indigenous lands, territories and resources must recognize the right of self-determination of indigenous peoples and conform with the obligation to deal with the appropriate indigenous institutions of government and the obligation to respect the right of indigenous peoples to control and protect their own lands, territories and resources; and …
>
> (h) All State and international actions and legal measures in regard to indigenous lands, territories and resources must as a practical matter be fully accessible to indigenous peoples, and adequate technical and financial resources must be available to assure that such measures, decisions and processes can be used effectively by them.

While the recommendations of treaty bodies and special mechanisms are not in themselves binding on states, they should be considered authoritative interpretations of

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[15] UN, Commission on Human Rights, Special Rapporteur Erica-Irene A. Daes, *Final Working Paper on Indigenous People and their Relationship to Land*, UN Doc. E/CN.4/Sub.2/2001/21, 11 June 2001 at paras. 152-155.

[16] *Ibid*., at paras. 140-150.

state obligations. The inherent rights of First Nations, Inuit and Métis peoples, as recognized and affirmed in the *Constitution Act, 1982* and the *Canadian Charter of Rights and Freedom*, should be interpreted in light of these recommendations. As former Chief Justice Dickson observed, international human rights instruments were part of the context in which the *Charter* was drafted and adopted, and should be viewed as "a relevant and persuasive source" for *Charter* interpretation. Moreover, the Court has emphasized that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents."[17] The Supreme Court has equally underlined the importance of international human rights law in interpreting not only the substantive content of *Charter* rights but the importance that should be given to protection of those rights, stating "the fact that a value has the status of an international human right, either in customary international law or under a treaty . . . should generally be indicative of a high degree of importance attached to that objective."[18]

As the following section illustrates, current policy and practice in Canada is fundamentally at odds with the emerging international framework for the protection of Indigenous peoples' human rights in respect to lands, territories and resources.

Institutional gaps in the just resolution of land and treaty disputes

As is the case for Indigenous peoples around the world, First Nations, Métis and Inuit in Canada depend on secure access to land and natural resources to enjoy their basic human rights, including rights to health, livelihood, shelter, education, cultural identity and self-determination. Such access has historically taken many forms including exclusive use, shared use for specific purposes such as hunting and gathering, and right of passage to visit sacred sites.

However, historical and contemporary injustices have led to the dramatic erosion of the lands, territories and resources available to Indigenous peoples throughout much of Canada. The Royal Commission on Aboriginal Peoples (RCAP) estimated that since Confederation two-thirds of the land allocated to Indigenous peoples has been "whittled away" through appropriation, theft, environmental destruction and questionable sales. According to RCAP, the loss of control over lands and resources has been a central factor behind problems of poverty, ill-health and social stress now rampant in many Indigenous communities across Canada.[19]

RCAP urged immediate government action to ensure fair and timely resolution of the hundreds of outstanding disputes over Indigenous land and resources, warning that:

> Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities

[17] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at 348-350.
[18] *Slaight Communications Inc. v. Davidson*, [1987] 1 S.C.R. 1038 at 1056-57.
[19] Royal Commission on Aboriginal Peoples. Final Report of the Royal Commission on Aboriginal Peoples. 1996. CD-ROM version, record 7608.

> necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.[20]

RCAP made this urgent recommendation ten years ago. Unfortunately, the available options for Indigenous peoples to pursue restoration of their lands are inadequate and remain unfairly biased against the protection of Indigenous peoples' human rights.

- Unless otherwise established, lands in Canada are presumed to be under Crown title. Indigenous peoples must establish their "claims" before their rights will be protected.

- Despite its fiduciary responsibility to Indigenous peoples in Canada and its broader obligation to uphold the rights of all without discrimination, the federal government plays an adversarial role in the negotiation of treaties and the resolution of land and treaty disputes.

- In contrast to the resources marshaled by the federal government in its efforts to oppose or minimize the rights of Indigenous peoples in negotiations or claims resolutions, Indigenous peoples may have great difficulty in paying for adequate legal research or representation.

- The federal government has exclusive constitutional jurisdiction over “Indians and lands reserved for Indians” but most conflicts over land use arise within areas of provincial jurisdiction. There is a disturbing tendency for the federal government to refuse to engage in the resolution of such disputes and, as has been illustrated by testimony during this Inquiry, there is often little communication of relevant facts between federal and provincial governments.

- The process of treaty negotiation or claims resolution drags on for a great many years during which the rights of the concerned communities may be left unprotected. Resource extraction projects and other forms of development are often authorized against the wishes of the affected community even while title to the land remains in dispute. Protective measures to ensure that the rights of the community are not compromised are rarely granted.

- Even where Indigenous title is recognized, it is commonly assumed to be of lesser legal status than other forms of private land title and more easily overridden in the name of the “common good.”

[20] *Ibid*., Record number 8380.

- The rights of Indigenous peoples are recognized primarily in international law, the Charter and in the precedents established by the Supreme Court. Lower courts which are called upon by governments and private interests to order the eviction of Indigenous peoples' occupying or using disputed lands often do not have the legal expertise or the disposition to adequately consider the underlying issues of Aboriginal and inherent rights. As the Supreme Court has noted, the balance of convenience typically used by courts in awarding injunctions against Indigenous protests "tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to 'lose' outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns."[21] Furthermore, applications for injunctions to evict Indigenous peoples from disputed land are often held *ex parte*, which effectively excludes consideration of Indigenous peoples' rights altogether.

- Disobedience of a court injunction has been seen as flagrant defiance of the law, even when the substance of the rights at stake has been left unresolved in the process.[22] However, the failure of the courts to deal with the substance of the case before them in the injunction process undermines the administration of justice in the eyes of the Indigenous peoples concerned. Not surprisingly, Indigenous protesters are more likely to ignore the court order than to abide by the injunction, and hence are subject to be arrested and prosecuted on charges such as contempt of court, intimidation or mischief.

The combined effect of these systemic biases against the recognition and protection of Indigenous peoples' lands rights often leads to situations in which a) Indigenous communities, because they can no longer wait for or depend on the legal recognition of their rights, feel they have no other choice but to occupy land or harvest resources in defiance of the government or competing claims to these lands and resources; and b) as a consequence, Indigenous peoples' may find themselves in a conflict with police or other law enforcement officials that could have been avoided if their rights have been fairly and effectively addressed in the first place.

Recommendations for the just protection of land and resource rights

Land rights play a crucial role in the search for justice by Indigenous peoples. When laws and the courts fail to provide adequate and just protection for Indigenous peoples' land rights, the integrity of the administration of justice is compromised and the perception of bias is all the more difficult to dispute. This failure can have dire consequences. It is clear that if there had been an appropriate and effective means to resolve the underlying land dispute at Ipperwash in a fair and timely manner, the tragic events of September 5, 1995 would not have happened.

[21] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 at para. 14.
[22] *MacMillan Bloedel Ltd. v. Simpson,* 1992 CarswellBC 1517 (BCSC). See also, *MacMillan Bloedel v. Simpson,* [1996] 2 SCR 1048.

There is clear and convincing evidence that the lands at the heart of the Ipperwash dispute were held under treaty by the Indigenous community at Stoney Point as reserve lands prior to their appropriation by the Department of National Defence in 1942.[23] Governments have made past promises that the lands would be returned, but have never followed through. This disregard for the land rights of the people at Stoney Point must be remedied. Return of these lands would offer powerful redress as well to Dudley George's family, as his death came about due to his efforts to recover that land and assert the rights of his people

- **Amnesty International calls on the Commissioner to stress the importance of bringing about an immediate remedy to the people of Stoney Point by restoring their lands and territories.**

The emerging framework of Indigenous rights in international law underlines the need to protect the right of Indigenous peoples to secure access to lands and resources central to their cultural identities, as well as their sustenance and well-being. Given the large-scale dispossession that has already occurred in Canada and the large numbers of land disputes that remain unresolved, there is urgent need for impartial and expert mechanisms to protect the fundamental rights of Indigenous peoples through the fair and timely resolution of such disputes.

- **Amnesty International urges the Commissioner to call upon both levels of government to collaborate with Indigenous peoples in developing impartial and expert mechanisms to resolve land and treaty disputes in an integrated and streamlined manner taking full account of all rights protected in national and international law.**

In the absence of a determination of land title through a fair and impartial process, it is vital that great care be taken to ensure that human rights are protected in the handling of competing interests to disputed lands.

- **Amnesty International urges the Commissioner to call upon all levels of government to enact policies consistent with international human rights standards, which require that unless the affected peoples give their consent, activities that could jeopardize the rights of Indigenous peoples will not be permitted on disputed land until title is fairly resolved.[24]**

[23] Joan Holmes & Associates, "Ipperwash Commission of Inquiry: Historical Background," Expert Report to the Ipperwash Commission of Inquiry, June 2004 at 48-50. Available: http://www.ipperwashinquiry.ca/transcripts/pdf/Ipperwash_Historical_Report.pdf; See also, "Aazhoodena: The History of Stoney Point First Nation" Project of the Aazhoodena and George Family Group for the Ipperwash Inquiry, June 30, 2006. Available: http://www.ipperwashinquiry.ca/policy_part/projects/pdf/Aazhoodena_history.stoney.point.pdf

[24] CERD, *General Recommendation XXIII – on the rights of indigenous peoples*, *supra* note 13 at para. 5.

III. POLICING FOR THE PROTECTION OF HUMAN RIGHTS

This section focuses on measures necessary to ensure that law enforcement is consistent with and serves the fundamental purpose of protecting the human rights of all.

Guiding Principles

The United Nations *Code of Conduct for Law Enforcement Officials* emphasizes that law enforcement officials must at all times "respect and protect human dignity and maintain and uphold the human rights of all persons".[25] Consistent with this principle, Ontario's *Police Services Act* recognizes that one of the fundamental objectives in the delivery of police services is safeguarding the fundamental rights and freedoms recognized in the *Charter*, as well as the *Human Rights Code*.[26] As noted above, international human rights laws and standards are relevant to interpreting the protections provided in the *Charter* and the *Human Rights Code.*

More specific principles can be elaborated that are relevant to the subject of this inquiry.

- As part of their duty to respect the rights and dignity of all persons, police officers have a duty to respect the right to engage in peaceful, lawful protest. Those engaging in such protest should receive the full protection of the police and should not be subject to intimidation, harassment or arbitrary arrest.[27]

- The United Nations *Code of Conduct for Law Enforcement Officials*, as well as the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* state that force is to be used only in extreme circumstances where other measures are insufficient and only in proportion to the threat at hand.[28] These standards also make clear that the use of firearms and the intentional use of lethal force shall only be permitted when it is strictly unavoidable in order to protect human life.[29] Any order, whether direct or indirect, to use disproportionate force is inherently unlawful and officers must not obey such an order regardless of whether it came from a superior or other state official.[30]

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[25] *Code of Conduct for Law Enforcement Officials,* GA Res. 34/169, annex. 34 U.N. GAOR Supp. (No. 46) at 186, UN Doc. A/34/46 (1979), adopted by the U.N. General Assembly on December 17, 1979, art. 2 [*Code of Conduct*].
[26] *Police Services Act*, R.S.O. 1990, Chapter P.15, s. 1.2.
[27] *Code of Conduct, supra* note 25.
[28] *Ibid*., art. 3; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,* UN Doc. A/CONF.144/28/Rev.1 (1990), adopted in 1990 by the Eighth U.N. Congress on the Prevention of Crime and Offenders, welcomed by the UN General Assembly in GA Res. 45/166 – Human rights in the administration of justice, adopted by the 45th Session of the UN General Assembly on 18 December 1990, principles 4, 9 [*Basic Principles on Force and Firearms*].
[29] *Basic Principles on Force and Firearms, ibid.*, principle 9.
[30] *Ibid*., principles 8, 26.

- It is critical that the judgment exercised by police is not clouded by societal prejudices or perceived to be biased or discriminatory.[31] This is important because police officers must exercise individual judgment in vital decisions such as the use of force, and because the trust of the community is essential to effective functioning of all parts of the justice system.

- Effective functioning of the police depends on appropriate relationships between police and the structures and systems of civilian governance. Amnesty International submits that human rights standards must be central in delineating the appropriate boundaries of that relationship. It is entirely inappropriate and generally illegal for government in any way to interfere with police operations if that directly or indirectly encourages actions that violate international human rights standards. That would include, for instance, a direct order or indirect suggestion that lethal force should be used as anything other than the option of absolute last resort. At the same time, however, it is entirely appropriate and to some extent an obligation that governments assert leadership in pressing and demanding that police operations be conducted in full conformity with international human rights standards.

Policing and land protests

Participation in public protest involves the exercise of basic human rights including the right of free expression, the right of political participation and the right of peaceful assembly. While police have a duty to ensure that protests are carried out lawfully and do not lead to injury or destruction of property, it is also important that police recognize that they have an obligation to protect the right of individuals to protest and to ensure that protestors are safe from harassment and intimidation.

Additional issues come into play in the case of Indigenous land protests. Where land is in dispute there may be dramatically different interpretations of what is lawful. Indigenous communities that believe that their rights will eventually be recognized may honestly feel they are acting within the law when they occupy disputed lands or harvest resources. In fact, such a "colour of right" argument has sometimes been successfully applied to defend Indigenous activists against charges in these circumstances. However, if public officials, the police or courts have not given adequate consideration to the Indigenous rights issues, they are likely to assume that the protesters are behaving unlawfully.

Furthermore, there is a clear tendency on the part of both public officials and police to respond to Indigenous people engaged in peaceful land and resource protests not as people potentially acting within their legal rights and deserving the protection of police, but as potentially dangerous criminals endangering public safety. J. Rudin's paper, "Aboriginal Peoples and the Criminal Justice System" discusses the tendency of police "to intervene on the side of the government and to crush or quash the protest on the

[31] *Code of Conduct*, *supra* note 25, art. 2.

assumption that the claim of rights being advanced is wrong prior to any determination by the courts as to the ultimate validity of the claim itself."[32] In 2004, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people noted with concern numerous cases of criminalization of Indigenous social and political protests activities.[33] The Rapporteur noted that the enforcement actions and prosecution of Indigenous protestors have been carried "without due regard" for the social and cultural context of their protest.[34]

The criminalization of Indigenous protest is reflected in the inflammatory language used by public officials denouncing the so-called "criminal" actions of protestors; the large numbers of police that have been deployed in response; the use of tactics based on encircling and containing the protest; the high levels of surveillance to which protestors are subject; and, in the case of Ipperwash, the deployment of heavily armed officers generally used to respond to armed violence. The use of such tactics tends to escalate the confrontation and increase the likelihood that human rights will be violated through the excessive use of force.

There is a pressing need for a profound and fundamental conceptual shift within government, police and the courts to recognize that efforts by Indigenous peoples to assert land and resource rights, including through acts of trespass, should be first and foremost approached from a human rights perspective, rather than from a perspective of arresting and prosecuting "criminals." Some officials and some judges argue that such an approach risks putting Indigenous activists above and beyond the law. In fact, it is an approach that ensures that the entirety of "law" governs, including the obligation to protect the specific rights of Indigenous peoples.

None of this is to suggest that there is no role for conventional approaches to law enforcement in the midst of protests or disputes of this nature. Clearly, for instance, police must act when there is evidence of impending or actual violence or other threats to public order and safety, whoever the perpetrators or victims of that violence may be. But this should not overshadow the need to develop new responses in the majority of situations when no such threat exists.

In this context, new training requirements introduced in the OPP since the confrontation at Ipperwash are welcome to the extent that they are successful in sensitizing officers to the rights issues that underlie the protests they may be called upon to police. However, it is crucial that any program or training be independently evaluated to determine the extent to which it has successfully sensitized officers to these issues.

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[32] Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" A Background Paper Prepared for the Ipperwash Inquiry at 31-39. Available: http://www.ipperwashinquiry.ca/policy_part/research/pdf/Rudin.pdf

[33] UN, Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, 60th Sess., 26 January 2004, UN Doc. S-R, E/CN.4/2004/80 at paras. 45-52.

[34] *Ibid*., at para. 51.

Similarly, it is encouraging that the OPP Framework for Police Preparedness for Aboriginal Critical Incidents, which has also been put in place since the confrontation at Ipperwash, recognizes that there may be underlying rights issues and clearly states that "it is the role of the OPP and all of its employees to make every effort prior to a critical incident to understand the issues and to protect the rights of all involved parties throughout the cycle of conflict." [35] The Framework includes a number of significant structural reforms, including the establishment of an Aboriginal Relations Team and calling for the deployment of a Critical Incident Mediator in the event of a confrontation. It is not clear, however, how well the new direction signaled by this Framework has been institutionalized and acculturated within the OPP and its many structures and large force of officers. Indeed, as signaled by recent events at Caledonia, there is an urgent need for an independent evaluation of this framework and its implementation.

Safeguarding Against Use of Excessive Force

Any use of force by a police officer involves decisions made in a context of tense, often rapidly unfolding and sometimes confusing or frightening situations. The decision will also be informed by other contexts including the officer's own assumptions about the situation he or she faces, orders and any briefing given by superiors, and the implicit message sent by the numbers and functions of officers that have been deployed. Safeguarding against excessive use of force requires effective training of individual officers in the appropriate use of force, as well as broader systemic safeguards within the force and its governing institutions including protocols to ensure that the number and function of any officers deployed to police protests corresponds to an accurate assessment of the threat, if any, posed to public order and safety.

The OPP Framework for Police Preparedness for Aboriginal Critical Incidents calls for "strategies that minimize the use of force to the fullest extent possible" but relies principally on mediation to achieve this end. The framework does not adequately address the need to ensure that police response is proportionate to any threat to public safety or for tactics that minimize the risk of violent confrontation.

Amnesty International is also concerned with the cursory treatment given to use of force in the Ontario *Police Services Act.*[36] The Act requires that officers who may be required to use force must be trained in appropriate use of force and relevant issues of judgment and law. However the only statutory guidance on the use of force provided by the relevant regulation itself is the statement that, "A member of a police force shall not draw a handgun or discharge a firearm unless he or she believes, on reasonable grounds that to do so is necessary to protect against loss of life or serious bodily harm."[37] Amnesty International is concerned that neither the Act nor the Regulation explicitly state that the use of potentially lethal force is to be restricted to extreme circumstances, where less extreme measures are insufficient or where the use of lethal force is strictly unavoidable

[35] OPP Framework for Police Preparedness for Aboriginal Critical Incidents, Submitted to the Ipperwash Inquiry at 2.
[36] *Police Services Act*, R.R.O. 1990, Regulation 926; Amended to O. Reg. 361/95.
[37] *Ibid.*, s. 9.

to protect human life. As pointed out in the examination of Commissioner G. Boniface, the regulation also does not explicitly cover the readying of rifles and sub-machine weapons as were used by the OPP at Ipperwash. Nor does it address the deployment of snipers whose express purpose is to use lethal force.

Unbiased policing

Studies of the Canadian justice system have repeatedly pointed to the impact of racial prejudice on police treatment of Indigenous persons.[38] Fifteen years ago the Manitoba Justice Inquiry suggested that the over representation of Indigenous people in the justice system may partly stem from the predisposition of police to charge and detain Indigenous people in circumstances "when a white person in the same circumstances might not be arrested at all, or might not be held."[39] The Inquiry explained that many police have come to view Indigenous people not as a community deserving protection, but a community from which the rest of society must be protected.[40]

The present inquiry has testimony concerning racist remarks and behaviour by individual officers involved in the Ipperwash incident. As noted above, the very nature and scale of the police response to the occupation of Ipperwash Park is suggestive of an attitude of suspicion, mistrust and possibly even hostility toward Indigenous protest.

Testimony concerning the introduction of cultural sensitivity training is a welcome indication that the OPP recognizes the importance of addressing racial bias within its ranks. However, the inquiry also received evidence that such training will not necessarily solve the problem. Several of the research papers before the inquiry, as well as the testimony of Commissioner G. Boniface highlight the difficulty with attempting cross-cultural sensitivity training once racist attitudes and behaviours are already engrained. In particular, the inquiry research paper "Challenge, Choice & Change" highlights results of surveys from specific forces showing that biased attitudes among officers did not actually change but in fact worsened after undertaking cultural sensitivity training.[41] It is unclear from the submissions of the OPP to Part II of the inquiry, what independent evaluation of cultural bias within the force has occurred to measure the impact of the training that its officers have received.

Accountability and Oversight

[38] E.g., Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, Final Report, Regina, 2004 [Saskatchewan Justice Reform Commission]; Aboriginal Justice Implementation Commission, Report of the Aboriginal Justice Inquiry of Manitoba, November 1999 [Aboriginal Justice Inquiry of Manitoba].
[39] Aboriginal Justice Inquiry of Manitoba, *ibid.*
[40] Aboriginal Justice Implementation Commission, Final Report, Manitoba, June 29, 2001. Available: http://www.ajic.mb.ca/reports/final_toc.html
[41] Human Sector Resources, "Challenge Choice & Change: A Report on Evidence-Based Practice in the Provision of Policing Services to Aboriginal Peoples," Research Paper prepared for the Ipperwash Inquiry, Jan. 11, 2005 at 12-13.

One of the key issues examined in the course of this inquiry is the relationship between the government and the police. We have noted the dangerous tendency of public officials and police to conceive of Indigenous land and resource protests as a criminal threat to public order rather than as an expression of potentially legitimate concerns. Amnesty International is concerned that direct involvement of public officials in police decisions could exacerbate this dangerous tendency to use law enforcement to defer or avoid fair resolution of legitimate claims.

As a general rule, public officials should not direct law enforcement officials in carrying out enforcement actions against specific groups or individuals, either through explicit commands or implied suggestions. In no instance is it appropriate or acceptable for public officials to in any way become involved with police operations if that involvement directly or indirectly encourages actions that violate international human rights standards. That would include, for instance, a direct order or indirect suggestion that lethal force should be used as anything other than the option of absolute last resort.

At the same time, however, it is entirely appropriate and to some extent an obligation that government assert leadership in pressing and demanding that police operations be conducted in full conformity with international human rights standards. That is not inappropriate interference with police independence. Rather, it is responsible compliance with international law.

Such leadership is particularly critical in the case of police response to protests rooted in disputes about a rights issue as vitally important to Canadian society as Indigenous land rights. As Prof. G. Christie's research paper argues, Canadian law enforcement treatment of Indigenous protests is contrary to the government's constitutional obligations:

> …police independence must… be tempered, as the government ought to be *constantly* and *actively* involved in the task of establishing and implementing policing policy which can adequately uphold the honour of the Crown and which satisfactorily meets its fiduciary requirements...[42]

Another critical dimension of the appropriate role of government is setting up and ensuring the effective functioning of mechanisms to hold police accountable for their compliance with police standards in both domestic and international law. To the best of our knowledge, the OPP is unique among police forces in Canada in that the use of lethal force by its officers is subject to mandatory investigation by a civilian Special Investigations Unit. Amnesty International is concerned that, as revealed by the handling of complaints of abuse and ill-treatment during the Ipperwash confrontation, the civilian Special Investigative Unit of the OPP is constrained in its mandate and operations in such a way that has limited its effectiveness in dealing with non-lethal abuses. Nonetheless, the SIU is an indication of the feasibility of robust and impartial civilian oversight of police operations.

[42] Gordon Christie, "Police-Government Relations in the Context of State-Aboriginal Relations" Research Paper for Ipperwash Inquiry, July 2004 at 18.

Impartiality, both real and perceived, is a critical component of any effective accountability mechanism, as is the power to quickly and thoroughly investigate any and all allegations of abuses. Another critical component is transparency and accessibility to the concerned communities. This is particularly important in respect to Indigenous communities. Additionally, Amnesty International believes that a strengthened civilian police oversight mechanism should:

- clearly and explicitly refer to human rights standards, including the Ontario Human Rights Code, the Charter, and international human rights norms, as being central to its mandate;

- have diversity in its composition, including representation of Indigenous peoples;

- have requisite expertise in specific issues such as Indigenous land and resource rights, and the relationship between police and Indigenous peoples;

- be able to launch review on its own initiation, upon the receipt of an individual's complaint, or when requested to do so by a third party;

- have strong and clearly-defined powers established in law that are necessary to carry out its work, including unhindered access to information, the ability to issue subpoenas, compel the disclosure of documents and the power to order arrest in necessary circumstances;

- have the power to make recommendations as to discipline, prosecution and compensation; and

- engage in wide ranging public education, including outreach to Indigenous communities, in a manner that builds awareness and develops trust, such that individuals who may have complaints are confident in bringing them forward.

Recommendations with respect to policing

- **When legal uncertainty exists over the exercise of Aboriginal rights, government officials have an obligation to seek a peaceful and just resolution of the dispute through an appropriate legal or negotiation process in which the rights of Indigenous peoples can be given full consideration. Where disputes over rights have not yet been settled, police should be deployed only as absolutely necessary and for the sole purpose of protecting public order and safety.**

- **Police training should include scenario-based training on the appropriate tactics to uphold human rights in the policing of Indigenous land and resource protests.**

- **The government of Ontario should collaborate with Indigenous peoples to carry out an independent evaluation to determine the effectiveness of the OPP Framework for Police Preparedness for Aboriginal Critical Incidents as a means to minimize the risk of escalation and ensure respect for and protection of the rights of Indigenous protestors.**

- **Independent evaluations of current cultural sensitivity training should be carried out to determine their effectiveness in achieving substantive changes to the perceived and actual attitudes of officers. Affected communities should be directly involved in such an evaluation.**

- **Policies must be put in place to weed out officers whose biased attitudes interfere with the fulfillment of their duties and to screen for racial bias among new recruits before they enter the force.**

- **The principle that force is to be used only as a last resort measure should be directly incorporated into the regulations of the *Police Services Act.***

- **Amnesty International urges the Commissioner to highlight that government interaction with police must never directly or indirectly order, facilitate or encourage conduct that contravenes human rights standards. Government must actively require police to operate in full compliance with international human rights obligations.**

- **Measures should be taken to expand the civilian oversight of police in Ontario, including independent investigation of all allegations of police wrongdoing. Particular attention should be paid to ensuring that such oversight is well-known and accessible to Indigenous communities.**