Written Comments: Draft Study on the Right to Land Under the UN Declaration on the Rights of Indigenous Peoples

Submission to:
The Expert Mechanism on the Rights of Indigenous Peoples
Via: expertmechanism@ohchr.org

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About UBCIC:

The Union of British Columbia Indian Chiefs' (UBCIC) mandate is to pursue the implementation, exercise, and recognition of our inherent Title, Rights, and Treaty Rights, and to protect our Lands and Waters through the exercise of our laws and jurisdiction. The UBCIC strengthens Indigenous Nations' assertions of their Aboriginal Title, Rights, Treaty Rights and Right of Self Determination as Peoples, working collectively among Indigenous Nations in British Columbia (BC) as a cohesive advocacy body regionally, nationally, and internationally. UBCIC supports Indigenous Nations in their assertion of Sovereignty within their traditional territories and is engaged in ongoing advocacy related to the implementation of land rights and the protecting of Indigenous lands and territories from dispossession and resource extraction.

Introduction:

The following submission contains UBCIC's comments and suggestions related to the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) draft study on "Right to land under the United Nations Declaration on the Rights of Indigenous Peoples: a human rights focus." The draft study does not "focus on the procedural aspects of land rights," but rather on creating a understanding of land rights in relation to Articles 25-28 of the *UN Declaration on the Rights of indigenous Peoples* (the *UN Declaration*) that is premised on de-escalating human rights violations and ensuring that State implementation of land rights is free from discrimination and violence. A such, our submission will adopt a human rights perspective and concentrate on Canada's treatment of land rights and its implications for the fulfillment of other Indigenous rights.

Key Comments:

- The land is through which First Nations reclaim their identities, cultures, and sense of belonging. The reclamation and management of unceded land is an empowering assertion of self-determination and sovereignty.
- Land rights should be framed around the idea that the relationship to the land is a social determinant of Indigenous health. A strong, consistent system of supporting and enforcing Indigenous land rights is therefore crucial for closing socioeconomic gaps and supporting traditional knowledge transfer, food security, community relations, and capacity building.
- Land rights provide the critical foundations for advancing a full spectrum of Indigenous rights. It must be recognized that Indigenous people's rights flow from their relationships to the lands and waters; their stewardship over their lands and waters is an integral component of their identity and way of life, and any barriers to this stewardship consequently has a ripple effect on their self-determination, jurisdiction, and legal traditions.
- There have been several landmark cases in Canada that have paved the way forward for the fulfillment of Article 25-28 (i.e., *R v Guerin [1984]*, *R v Sparrow [1990]*, *Delgamuukw v British*

Columbia [1997], *Tsilhqot'in Nation v. British Columbia [2014],*). The Wet'suwet'en Memorandum of Understanding is a recent precedent-setting agreement between the BC, Canada and the Wet'suwet'en Nation that sets the path for negotiations on legal recognition of their Title to 22,000 square kilometres of traditional territory.

- Canadian courts have identified the limits of resolving rights and Title issues through litigation, including issues related to overlapping and shared territories. Solutions will need to consider alternative dispute resolution frameworks and rely on Indigenous legal orders and traditions to guide and create processes that support the integrity and importance of Indigenous land rights.

- British Columbia is the first jurisdiction in Canada to enact the *UN Declaration* into legislation. *The Declaration of the Rights of Indigenous Peoples Act* (DRIPA) will align provincial legislation with the *UN Declaration* and presents an opportunity to formally realize Articles 25-28 through meaningful policy and action. DRIPA sets an example to other States of how to begin building a strong foundation of Indigenous Title and Rights recognition and fulfillment.

- The COVID-19 pandemic that has exacerbated pre-existing inequities and injustices highlights the need for Canada and other States to implement a strong human rights framework to protect Indigenous land, environmental, cultural, and human rights defenders who continue to experience harassment, surveillance, and violence in their stewardship of their lands and their assertion of their Title and Rights

Comments:

A. Significance of land rights for Indigenous peoples and link between land rights and other rights

- For Indigenous peoples in Canada, land is more than a commodity that can be monetarily valued and bartered; it is a physical manifestation of their spirituality. Reclaiming dispossessed land is not only an act of reparation for historical grievances, but a formal assertion of Indigenous sovereignty and a means through which to strengthen identity, cultural traditions, and a sense of belonging
    - Researchers in Canada even classify a connection to the land as an "imperative determinant" of health for First Nations youth. In their study of Yellowknife Dene First Nation youth, they concluded that a symbiotic relationship between land and people, including Indigenous ownership and access to traditional land, greatly improves the health status of Indigenous communities and promotes collective, traditional ways of being[1]
    - A strong framework of Indigenous land rights opens the way for incorporating cultural and traditional skills, knowledge and practices into Indigenous health solutions

[1] https://bmcpublichealth.biomedcentral.com/track/pdf/10.1186%2Fs12889-018-6383-8

- There is a crucial need for Canada to formally acknowledge, protect and support the spiritual, customary, and cultural components of Indigenous relationships to their land through law and policy, as well to expand their narrow conception of Indigenous Title
    - Defining Indigenous Title using Canadian common law concepts, including the concept of private property, is too rigid and incompatible with Indigenous legal traditions, failing to reflect Indigenous understandings of Title that are rooted in their spiritual, cultural, and lived connections and experiences of the land
    - The acknowledgement of Title must reflect historical land use, traditions, and customary law of Indigenous peoples
- First Nations in Canada exercise collective and usufruct rights connected to natural resources (water, minerals, etc.), hunting and fishing. However, the fulfilment of these rights has been hindered and endangered by climate change, corporate resource extraction, and government policies and practices that do not prioritize the free, prior and informed consent (FPIC) of Indigenous Peoples
    - Some of Canada's "clean energy" solutions (Muskrat Falls, Site C, Coastal Gaslink and LNG Canada) and big energy projects (Trans Mountain Pipeline Expansion Project, Site C Dam) are also being developed without the minimum standard of FPIC with affected Indigenous nations.
    - Indigenous land defenders who are advocating for their Title and Rights to be respected and advanced face racialized police brutality, harassment, violence, discrimination, surveillance, and the forceful removal from their traditional lands and territories

B. *UN Declaration* Articles 25-28 in Canada:

- In Canada, Indigenous peoples maintain important a spiritual connection to the land that is fostered and strengthened through cultural and traditional practices such as harvesting, hunting, and environmental conservation. For example, First Nations in BC are trying to revitalize cultural burning practices (traditional burning practices that enhance the health of the land) in order to advance wildfire prevention, climate change adaptation, and integrate cultural values into land management
- Indigenous women and girls also have unique and sacred relationships that with the land that are acutely endangered by resource extraction; there is a connection between "man camps," labor camps established by fossil fuel extraction companies, and increased rates of sexual abuse, trafficking and domestic violence against women [2]
- Resource extraction and energy projects threaten Indigenous cultural and spiritual connections to the land
    - For example, most recently UBCIC called for a moratorium on fracking and disposal well operations in the Peace River region in British Columbia that endanger the Dunne-za (Beaver People) Title and Rights, as well as their reliance on the Peace River Valley as an important component of their cultural identity and livelihoods.

[2] https://blogs.scientificamerican.com/voices/the-darkest-side-of-fossil-fuel-extraction/

- Indigenous peoples have the right to own, use and develop the lands, territories and resources they traditionally owned, occupied, or acquired. Connected to this right is the right to refuse and oppose unsanctioned construction and development in their traditional lands and territories. However, in Canada this has been endangered by corporations who prioritize their operations over the FPIC and Title of affected First Nations
    - For example, Taseko Mines Ltd. has tried for almost 30 years to advance a massive open pit mine (New Prosperity Mine) at Teẑtan Biny (Fish Lake), despite the concerns and objections of the Tŝilhqot'in. Teẑtan Biny is a pristine and sacred area of great importance to the Tsilhqot'in who rely on this area for hunting, fishing, and trapping.
    - It wasn't until May 14, 2020 that the Supreme Court of Canada's denied Taseko Mines Limited's application to appeal the rejection of the New Prosperity Mine proposal by the Government of Canada in 2014.
    - Lengthy and costly legal battles such as places the onus and burden on First Nations in Canada to prove their inherent land rights
- Remedies for the violations of land rights and human rights in Canada is slow-going and beset by discrimination and violent policing
    - Indigenous land defenders face opposition from both the State and wider Canadian public that is driven by discrimination and racism, political and corporate agendas, and a systemic lack of respect for and recognition of their inherent Title and Rights. They face include attacks and threats, illegal surveillance, travel bans, blackmail, sexual harassment, discriminatory policing of Indigenous people opposing fossil fuels projects in their territory

C. State Recognition of Land Tenure Rights

- Due to historic and ongoing Crown infringement of inherent Indigenous Title and Rights, as well as improper recognition and implementation of the Articles 25-28 of the *UN Declaration*, there is uncertainty for Indigenous peoples and the Canadian government over the management, use and benefit from the land.
- In British Columbia, unresolved issues of shared territories and overlaps between Nations in the treaty process is one of the main barriers to concluding treaty agreements and allowing the equitable assertion of land rights; The BC Treaty Commission (BCTC) has yet to formalize and incorporate into the treaty process a process of resolving overlapping claims that is consent-based and reflective of Indigenous values and beliefs.
    - Compounding the absence of a clearly defined framework for addressing the issue of overlaps are the structural issues of defining and analyzing overlaps. They are currently done so within Western legal principles and binary notions of territory that discount the flexibility and complexity of how different Indigenous communities define their identity in relation to their territories— not just through geographical boundaries, but

through historic land use and occupancy, contemporary occupancy and land use, language, customs and traditions.[3]

- In addition, there is the overarching issue of the treaty process being inherently prejudicial to the Aboriginal rights of groups with overlapping claims, especially those not engaged in the BCTC process. The settlement of treaties in an area of overlap is also inherently prejudicial due to the fact "that once exclusive rights to the land are recognized for one group that land is no longer available to another as part of future treaty settlement."
- it is imperative and both to Indigenous and Crown benefit that flexible and creative dispute resolution mechanisms be discussed and shaped by and for Indigenous communities (including land tribunals, commissions, acts, bodies, etc) in order to avoid "divide and conquer" tactics and expunge any discrimination or uncertainty regarding the assertion and exercising of Indigenous land rights

- While the enforcement and adjudication of legal Title in Canada has been a beleaguered uphill battle, it has also produced landmark cases such as *R v Guerin [1984]*, *R v Sparrow [1990]*, *Delgamuukw v British Columbia [1997]*, *Tsilhqot'in Nation v. British Columbia [2014]*,
- Most recently, following months of rail blockades, solidarity protests, and disputes between the police, Wet'suwet'en Nation, land defenders, and the greater Canadian public that erupted over the development of the Coastal GasLink pipeline, on May 14, 2020, a MOU was signed and endorsed by Hereditary Wet'suwet'en Chiefs, BC and Canada.
  - Effective immediately upon signing the MOU, Canada and BC recognized that Wet'suwet'en Title and Rights are held by Wet'suwet'en houses under their system of governance and are held throughout the Yintah (traditional territory), and set out a process to negotiate an agreement on how to implement them.
  - The MOU comes 23 years after the Supreme Court of Canada ruled on the Delgamuukw-Gisday'wa case brought forward by Gitxsan and Wet'suwe'ten hereditary chiefs who were seeking recognition of jurisdiction over their respective territories. The Supreme Court concluded that their Aboriginal title had not been extinguished but failed to actually legally recognize the Nations' Title. Consequently, the current MOU begins the steps towards the legal recognition of Wet'suwet'en Title and governance that has been long overdue.
  - The MOU is a blueprint for a Title and Rights recognition agreement that aims to transfer jurisdiction over their territories back to a First Nation
- At the provincial level, the BC government recently passed the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) which sets out a process to align BC's laws with the UN *Declaration on the Rights of Indigenous Peoples* (UNDRIP).
  - This is a crucial step towards actualizing and enforcing Articles 25-28 of the UN Declaration, as well as any other provisions that intersect with land rights

[3] Turner, Christopher, and Gail Fondahl. ""Overlapping Claims" to Territory Confronting Treaty-making in British Columbia: Causes and Implications." Canadian Geographer / Le Géographe Canadien 59.4 (2015): 482