Comments from The Union of BC Indian Chiefs, Feminist Alliance for International Action and Dr. Pamela Palmater on: *General Recommendation No. 39 on the rights of indigenous women and girls*

Submission to:
The Committee on the Elimination of Discrimination Against Women

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Background:

The Union of BC Indian Chiefs (UBCIC) is a First Nations political advocacy organization founded in 1969 which has a mandate of advancing and protecting Indigenous Title and Rights. Feminist Alliance for International Action (FAFIA) is an alliance of women's organizations that work to advance women's equality in Canada by working for the full implementation of the international human rights treaties and

agreements that Canada has ratified. Dr. Pamela Palmater is a Mi'kmaw citizen and member of the Eel River Bar First Nation in northern New Brunswick and has been a practicing lawyer for 23 years. She is currently a Professor and the Chair in Indigenous Governance at Ryerson University. And has been recognized with many awards and honours for her social justice advocacy on behalf of First Nations and her work related to murdered and missing Indigenous women.

Key Comments:

UBCIC, FAFIA and Dr. Palmater submit these comments on the *UN General Recommendation No. 39 on the rights of indigenous women and girls* in recognition of the meaningful work being done to end violence against Indigenous women, girls, Two-Spirit, and LGBTQQIA+ people[1].

For centuries, Canada and the Crown have used systematic tools to extinguish Indigenous societies and cultures, including violent policies of land dispossession, forced assimilation, and genocide. In particular, sex discrimination and violence against women and girls have been and are used as tools by State and non-State actors to disconnect Indigenous women and girls from their lands, cultures, and communities. As a result, Indigenous women and girls have been systematically robbed of the right to participate in the processes of self-determination, in decision-making within their traditional governance structures, and in the community where they practice their culture, care for their children, manage the land and waters, and sustain themselves with traditional food and medicine systems. These colonial practices were designed to sever Indigenous women and their descendants from their cultures and communities, reduce the size of the Indigenous population to whom the Crown/State owes a fiduciary duty and who are deemed by the Crown to have inherent Aboriginal rights, and to cement socioeconomic barriers.

We agree with the Objectives outlined in the draft; however, we recommend:

- Stronger and more explicit language overall that establishes the unequivocable relationship between colonial violence and ongoing socioeconomic marginalization of Indigenous women and girls today.
- A stronger linkage between the role of colonial policies and ongoing systemic inequities and discrimination against Indigenous women and girls.
- Assurance of actionable implementation strategies.

II. Objectives and Scope

- **Comments on Section (II), Paragraph 6:** We recommend that this paragraph expand its statement on "self-identification as a guiding principle" and reference how States must recognize community membership and self-identification and *remove colonial determinants* of Indigenous identity.
- In Canada Indigenous people are governed under the *Indian Act*, which dictates identity through policies of blood quantum which determine who is defined as Status or Non-Status Indian. This

[1] Please note that this submission and any abbreviated reference to Indigenous women and girls is inclusive of Two-Spirit and LGBTQQIA+ people who experience disproportionate rates of gender-based violence.

colonial method of identification has detrimental consequences on individual and community identity, holistic well-being, and funding provided to First Nations which is based on the number of status members.

- Indigenous women and their descendants continue to face barriers to fulsome self-identification and access to their Title and Rights. 'Pretendians', people who claim to be Indigenous but do not in fact have Indigenous ancestry, and use their claim of Indigeneity to take up positions of authority and privilege in institutions or communities, are prevalent. This grotesque form of cultural appropriation can create an unsafe environment for those rightfully entitled to their Indigeneity, but who are disconnected from their cultures and communities, to self-identify out of fear of ostracization or backlash. Many communities trying to establish self-determination will not accept self-identification as sufficient to become a member of the community as they tend to model Canada's status identification system, which has fiduciary obligations attached to it. Self-identification is no help to women and their descendants who have been legally defined out of the pool of recognized Indigenous persons because of sex discrimination; it will not establish their entitlement to State-provided benefits that flow to Indigenous peoples, or to Aboriginal or treaty rights.
- **Comments on Section (II), Paragraph 11:** This paragraph needs to emphasize that a key cause of Indigenous women and girls being denied the right to self-determination is State and Crown laws and policies which have banished women and their descendants from their lands and communities through colonial, patriarchal and discriminatory definitions of Indigenous identity, which favour men and their descendants over women and their descendants. The denial of self-determination to Indigenous women is therefore inextricably linked to sexist policies of forced assimilation. We recommend that this point be strengthened and linked with paragraph 14.
- **Comments on Section (II), Paragraph 14:** Paragraph 14 should indicate that forced assimilation policies and genocidal policies deprive Indigenous women and their descendants from enjoying the right of self-determination as full participants in their communities and are a root cause of contemporary acts of violence and discrimination.

III. Legal Framework

- **Comments on Section (III), Paragraph 17:** This paragraph must specify the right of Indigenous women and girls to effective participation in political and public life at large, but also must acknowledge their inherent right to participate safely and fulsomely within their Indigenous communities and Nations.

IV. General obligations of States parties in relation to the rights of indigenous women and girls: Articles 1 and 2 of CEDAW

A. Equality and Non-Discrimination with a focus on Indigenous Women and Intersecting Forms of discrimination

- **Comments on Section IV(A), paragraph 19-28:** This section focuses on intersecting forms of discrimination, but fails to immediately foreground, in paragraph 20 and 21, how the ongoing

practices and impacts of colonialism are linked to *both* the individual and collective dimensions of discrimination.

- A clause can be included before these paragraphs to highlight how individual and collective experiences of racism, marginalization, and gender-based violence are a result of and continue to be shaped by historical colonial efforts from States to extinguish Indigenous cultures and assimilate Indigenous societies. It needs to be emphasized how discrimination and violence is used as a tool by State and non-State actors to destabilize Indigenous women and girls' integral position in society and forcibly disconnect them from their lands, cultures, and communities, which not only harms women individually, but weakens their communities by robbing them of women's vital leadership and knowledge.
- **Paragraph 22** briefly mentions that discrimination against Indigenous women and girls is perpetuated by the "legacy of colonization," but stronger, explicit language needs to be used to state how colonialism is ongoing – that within States, historical/neo-colonial laws and practices continue to feed into the different forms of discrimination Indigenous women and girls are experiencing.
- **Paragraph 22** and other paragraphs in Section IV(A) need to explicitly reference the impacts of discriminatory policing against Indigenous women, girls and Two-Spirit people and its entanglements with colonialism (i.e., explicitly reference impacts and motivations of violent, biased policing and how police were historically agents of colonialism, supporting State efforts to eliminate and suppress Indigenous peoples).
- **Paragraph 23** states that many nationality laws still discriminate against Indigenous women in relation to the transmission of their nationality to their children when they marry non-Indigenous person. This statement needs to be expanded to include an explanation that many States lack laws that define and recognize Indigeneity, thereby further challenging Indigenous claims to nationality and birthright.

B. Access to justice and plural legal systems

- **Comments on Section (IV) B:** This section needs to be stronger in its declarations to demonstrate the realities of sexism, discrimination, and violence experienced by Indigenous women within colonial justice systems and to demonstrate the pathway from colonialism to criminalization.
- The criminal justice system has historically been used to control, abuse and traumatize Indigenous women and girls. In Canada, the Royal Canadian Mounted Police (RCMP) were used as colonial agents to uphold genocidal colonial policies including forcibly removing First Nations children from their families and taking them to Residential school institutions to undergo forced assimilation practices. Police have also traditionally been deployed through the child welfare system to remove children from Indigenous families. In addition, police violence against Indigenous women has been documented repeatedly with little effect. This long history of racism continues to manifest as victim-blaming, stereotyping, and a lack of will by authorities to believe Indigenous women or take swift action to prevent violence against them or to investigate it when it occurs. Survivors of sexual violence and the families of Missing and

Murdered Indigenous Women and Girls and Two-Spirit+ (MMIWG2S+) are often forced to take on the search and pursuit of justice for their missing loved one in the face of apathy from the authorities. With an increase in gender-based violence throughout the pandemic, British Columbia has seen a number of recent cases of women reporting threats and safety concerns to police which go unheeded, only to be murdered weeks later.

- **Comments on Section (IV), B, Paragraph 35:** Paragraph 35 should strengthen the linkage between colonialism and current judicial structures. The justice system is created by the State and is a mechanism with which to uphold colonial laws, Western values, and attitudes. These systems are not rooted in Indigenous law, governance, or culture and thus function as biased towards Indigenous ways of knowing.
- **Comments on Section (IV), B, Paragraph 37:** In Canada, there is no 'tendency' towards Indigenous women's overrepresentation in prisons. "Indigenous women make up 4% of the Canadian population, yet account for roughly 40% of the federal prison population" (National Inquiry into MMIWG, 635), and this number increases every year. We recommend that this section more clearly define the overrepresentation of Indigenous women and girls in prison as a manifestation of discrimination and bias, demonstrate a deeper understanding of the context which leads Indigenous women to be incarcerated, and importantly expand on Indigenous women's victimization by the justice system which has been well-documented across the Americas.
- The Canadian prison system functions as an extension of colonial institutions and often as the 'last stop' for Indigenous women who have moved through foster care, youth detention, provincial institutions, to federal institutions (National Inquiry into MMIWG, 635). The concern is not only with Indigenous women's lack of access to justice, but with how they are treated with discrimination, sexism, and violence by a genocidal justice system that has been used for centuries as the principal structure to uphold colonial law which sought to extinguish Indigenous women's existence, and today creates and maintains violence against them. Indigenous women face over-policing and under-protection, bias in prosecution and judging when Indigenous women are the victims or accused, and over-incarceration and over-classification of female Indigenous prisoners.
- **Comments on Section (IV), B, Paragraph 39,** These recommendations are weak and insufficient. They focus mainly on issues of access to justice, not on the inherently discriminatory character of colonial justice systems which do not deliver effective remedies or justice to Indigenous women, whether they are victims or accused.
- **Paragraph 39, recommendation (h):** Recommendation (h) provides an important framework for understanding Indigenous women's experiences with the Justice system but fails to highlight how the criminal justice system functions as a colonial mechanism which continues to systematically target and harm Indigenous women; this recommendation should also require States to take comprehensive, transformative measures to ensure that Indigenous women and girls can receive equal protection of the law and equal benefit of the law.
- *Interactions within the Justice System:* Canada's justice system is a colonial one that is prejudiced against Indigenous women. It is important that these recommendations

acknowledge the experience of women that lead to disproportionate rates of incarceration. Socioeconomic inequities, intergenerational trauma, gender-based violence, racism and discrimination stemming from colonial policies create conditions of precarity and vulnerability for Indigenous women. From within these conditions of hyper-precarity, crimes often occur out of fear, for protection, or for survival and should be understood through a trauma-informed lens. Indigenous women who commit crimes are highly likely to have been the victim of a crime (Department of Justice). Women who do seek justice through institutional channels have no access to culturally-appropriate justice and widely report facing re-traumatization.

- *Violence by the Justice System:* Indigenous women face discrimination from within the justice system, but have also been actively victimized by it, leading to a cycle of violence, fear, mistrust, and insecurity. Indigenous women and children in Canada face violence, sexual violence, and inhumane isolation while in custody. A recent report from the Office of the Ombudsperson in British Columbia, Canada described the use of prolonged solitary confinement of youth which disproportionately impacted Indigenous youth, among them almost exclusively Indigenous and racialized girls.

V. State party obligations in relation to specific dimensions of the rights of indigenous women and girls

A. Prevention of and protection from gender-based violence against indigenous women and girls

- **Comments on Recommendation V. A, 47:** This recommendation can be strengthened to reflect the imminent need for States to fully adopt and implement all measures, laws, and policies including the *UN Declaration* and gender-based violence specific legislation to protect Indigenous women and girls. As a result of the National Inquiry's Calls for Justice, Canada has begun implementing a National Action Plan to End Gender Based Violence and provide a framework for governments to follow across the country. The National Action Plan's stated priorities include public education, training for frontline workers, victim and family services, Indigenous-led prevention, housing and infrastructure, annual livable income, and a task force to investigate unsolved MMIWG2S cases. However, Canada has been slow to demonstrate action or a plan for implementation of these priorities. We therefore feel it is imperative that this recommendation reflects the urgent need to end gender-based violence globally and instructs States to immediately develop policy, legislation, and put these measures into practice.

B. Right to effective participation in political and public life

- **Comments on Section V(B), paragraphs 48-52:** We recommend that any reference to "political and public life" throughout the entirety of the section be amended to "political, public, *and community life*" to capture how discrimination also bars Indigenous women and girls from participating within their Nations, communities, and families.
- **Paragraph 49** states "Indigenous women and girls face multiple and intersecting barriers to effective, meaningful, and real participation" and identifies several of these barriers; the list of barriers should also include an acknowledgement of *the laws* that bar women and girls from effective participation in their Nations/communities, and public and political life, as well as

explain how these laws effect their individual wellbeing and the collective wellbeing of their Nation/community.

- **Paragraph 52**, recommendation (g) calls for the creation of spaces for Indigenous women and girl to participate "as decision-makers in peacebuilding efforts and transitional justice processes"; this sentence needs to be expanded to "as decision-makers in peacebuilding efforts, transitional justice processes, *and processes related to self-government, land claims, and treaty rights*."

D. Right to education

- **Comments on Section V(D), paragraphs 55-56:** Paragraph 55 references barriers Indigenous women and girls face with regards to all levels of education; we recommend stronger language that links educational barriers to violent and genocidal practices; paragraph 55 should *explicitly address the historical impacts of colonialism upon education systems and how State or non-State institutions – such as Indian Residential Schools in Canada – used education to assimilate Indigenous women and girls and destroy cultural traditions, knowledge, and practices.*
- **Paragraph 56**, recommendation (a) necessitates the inclusion of a call for States to initiate and support independent investigations into anti-Indigenous racism in education system; this process can be modelled similar to the independent investigation and led by Dr. Mary Ellen Turpel-Lafond into racism in British Columbia's health care system. This investigation, which included consultations with nearly 9,000 people led to a report entitled In Plain Sight: Addressing Indigenous-specific Racism and Discrimination in BC Health Care which outlined findings and provided clear recommendations to improve equity in healthcare in collaboration with Indigenous peoples, and to remedy the lasting consequences of colonialism and improve accountability for Indigenous-specific racism.

F. Right to health

- **Comments on Section V(F), paragraphs 59-62:** Throughout this section, there is no mention of how discrimination in health systems impacts Indigenous women and girls in *rural and remote communities*.[2] The first sentence of paragraph 59 should be amended to include reference to how discrimination, inequity, and violence within health systems are especially prevalent and amplified in rural and remote communities due to accessibility issues (i.e. lack of accessible, culturally safe resources and supports) and higher rates of intolerance and racism that are typically linked to geopolitical areas outside of major cities.
- **Paragraph 60** should also reference how Indigenous women and girls face discrimination within disability designation processes, with their cultural, mental, and physical needs often being excluded and discounted in colonial systems that are designed to assess whether they can be officially designated as someone with a disability who is eligible for financial aid; (see UBCIC

[2] CEDAW Committee, General Recommendation 34 on rural women, paras. 30-31.

Resolution 2021-17 for a overview of the colonial framework of disability designation in B.C., and its impacts on Indigenous peoples)

- **Paragraph 62**, recommendation (e) calls for "gender-responsive and culturally responsive capacity building to health professionals treating indigenous women and girls…"; this recommendation should be expanded to include capacity building that is specifically geared towards *rural and remote Indigenous communities*, and include reference to how the disproportionate rates of sexual violence and accessibility issues in these communities necessitates capacity building around culturally appropriate victim services, trauma care, and healing programs, *including specialized forensic nurse practitioners or 'sexual assault nurse examiners (SANE)'* who are needed to provide sensitive, trauma-informed health care to survivors of violence (See UBCIC Resolution 2021-31 for further details on the impacts of inaccessible resources and supports for Indigenous survivors of assault and violence).

G: Right to equality in marriage and family relations

- **Comments on Section (V), G, Paragraph 64, recommendation (b):** We agree with recommendation 64. (b) on the basis that Indigenous women and their descendants in Canada are still living with the impacts of discriminatory sex-based colonial policies of forced assimilation in the *Indian Act* which robbed First Nations women of their Indian status if they married a non-status man and led to their social and economic marginalization and disconnect from their lands, cultures, and communities.
- Although amendments have been made to these clauses of the Indian Act through Bill S-3, newly entitled individuals face significant barriers from Canada to completing registration and enrollment. *Therefore, States must do everything in their power to develop, implement, and expedite processes aimed at restoring and honouring the Title and Rights to Indigenous women and their descendants.*

I. Rights to land, territories, and natural resources

- **Comments on Section V(I), paragraphs 69-71:** As this section focuses on Indigenous women and girls' rights and identity in relation to their lands, we recommend that Paragraph 69 include explicit reference to how doctrines of superiority (*terra nullius*, doctrine of discovery etc.) led to the discriminatory laws and practices that sought to delegitimize Indigenous Title and land-based connections, and continues to influence States' treatment of Indigenous Title and Rights
- Paragraph 70 should also contain stronger language regarding the colonial violence Indigenous women and girls face as land and environmental human rights defenders; it should also make stronger connections between Indigenous women and girls' involvement in land defense and climate action (*i.e., Indigenous women and girls have upheld a sacred responsibility to steward and protect their lands and waters since time immemorial and their efforts as land defenders to protect their territories from direct climate change impacts and emissions intensive projects are a climate mitigation strategy that continues to be delegitimized by industry and State interests*).