

**Update to Early Warning Urgent Action Submission Regarding Native Hawaiians and the
Thirty Meter Telescope**

*Respectfully Submitted to the Committee on the Elimination of Racial Discrimination this 14th of
July, 2019*

New Discriminatory Actions Against Native Hawaiians in Hawai'i, U.S.A

Mauna Kea, the tallest mountain in the Pacific, is a sacred place for Kanaka Maoli (Native Hawaiians) and has been the site of important religious ceremonies since time immemorial. Because of Mauna Kea's importance, for the past decade Native Hawaiians have been fighting to block the construction of the massive Thirty Meter Telescope (TMT) on the summit of Mauna Kea. Unfortunately, unless action is taken, the State is poised to attempt to go forward with the first phase of construction this month.

During the week of 20 June 2019, the State of Hawai'i purposefully destroyed a number of religious structures built by Native Hawaiians and announced that it had cleared the way for the TMT corporation to begin to build on the summit of Mauna Kea. It also announced that it would be closing the mountain to Native Hawaiians, and that any protestors would be arrested. On 10 July, it announced that it would be deploying military personnel to begin escorting construction equipment up the mountain starting 15 July. The current policies being pursued by the government of the United States of America and the State of Hawai'i are plainly discriminatory and targeted at Native Hawaiians, a distinct racial group, and will likely lead to conflict with Native Hawaiians asserting their right to engage in traditional cultural expression.

On 22 March, 2019, Cultural Survival submitted a report to this Committee's 98th Session under the Early Warning and Urgent Action Procedures on behalf of a group of Native Hawaiians. This report highlighted the imminent risk of construction on sacred Native Hawaiian land without the free, prior and informed consent of Native Hawaiians. The report further noted that the state government and state agencies of Hawai'i were engaging in discrimination against the Native Hawaiian religion, unfairly limiting the free speech and assembly rights of Native Hawaiians, and were purposefully attempting to prevent Native Hawaiians from accessing sacred spaces on Mauna Kea. This organization now writes to provide an update to the Committee on recent actions, emphasize the urgency of the situation, and request that the Committee on the Elimination of Racial Discrimination provide an immediate response to these acts of racism and discrimination.

Moving ahead with Construction

Mauna Kea is sacred for Native Hawaiians, and the land is held in trust by the State of Hawai'i on behalf of Native Hawaiians. However, the State has regularly neglected this trust

responsibility, and has allowed over a dozen structures to be built on the summit of Mauna Kea without the consent of Native Hawaiians. On 20 June, 2019, the Chief Executive of the State of Hawai'i, Governor David Ige, announced that the State of Hawai'i was issuing a "notice to proceed" with the construction of the TMT on Mauna Kea. This decision is based on a local state court decision, and ignores both international human rights law as well as recent United States federal court precedent.

On June 20, 2019, the United States Supreme Court ruled in *American Legion, et al. v. American Humanist Association, et al.*, that a cross erected in the State of Maryland could not be removed, as it "has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of a hostility toward religion that has no place in our Establishment Clause traditions." At the same time that the highest court of the United States announced this decision, state actors for the government of Hawai'i were working to facilitate the destruction of prominent community landmarks of great significance, in what was a clear act of discrimination against Native Hawaiians. The dichotomy between the Supreme Court decision and the actions of the State of Hawai'i demonstrates that the United States is only interested in preventing hostility towards religion when that religion is Christianity.

Furthermore, the United States is a signatory to a number of international human rights treaties and agreements, including the International Convention on the Elimination of all Racial Discrimination (ICERD) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Under these agreements, the United States is required to prevent discrimination against minority racial groups and seek the free, prior and informed consent of indigenous peoples before taking action that affects them. The ongoing protests and the extensive legal battles over the TMT demonstrate that the United States and the State of Hawai'i have neither sought nor received consent to construct a massive structure on sacred Native Hawaiian land. The United States also has an affirmative duty to ensure that the states within its borders act in accordance with the obligations contained in these treaties and agreements. Instead, the United States has allowed blatant acts of discrimination related to the TMT to go unpunished. We reiterate this request that the Committee remind the United States of its obligation to prevent discrimination against racial, cultural, and religious groups, including indigenous peoples.

Criminalization of Protest and Restrictions on Freedom of Assembly

The new restrictions on Mauna Kea have led to the criminalization of protest and undue limitations on the right of assembly and free speech. The government of Hawai'i, fearing peaceful assembly and protest, has moved to limit all access to Mauna Kea. The Governor's announcement that construction was given a "notice to proceed" also stated that no assembly or protest would be allowed anywhere near the proposed site for TMT. The State has begun to

block citizens from going higher than the main highway, which is several miles and thousands of feet lower than the mountain's summit. It is essentially cutting off all access to the entire mountain. Furthermore, the destruction of hales far from the construction site were plainly intended to silence Native Hawaiian opposition to construction and remove what the State feared could be used as a site for organizing protests.

There is also a legitimate concern that the State is prepared to use violence against those who choose to protest the State's actions. The American Civil Liberties Union has learned that the State has purchased sound cannons, and that there is a potential for them to be deployed against Native Hawaiian protestors. The State of Hawai'i has already demonstrated that it is willing to use force to prevent assembly, protest, or religious practice on Mauna Kea. The situation is evolving rapidly, but at the time of submission at least one protestor has already been arrested, and there is a likelihood of many more arrests in the coming weeks as construction equipment starts to move up the mountain.

The State's criminalization of protest and threats of violence against Native Hawaiians are not only illegal under United States law, but they are plainly in violation of human rights principles. We request that CERD remind the United States of its obligation to allow peaceful assembly for all peoples, that it may not interfere with the religious practices of racial or ethnic groups, and that it may not limit the rights of one race or ethnicity as compared to other groups.

Infringement on Religious Practices – Preventing Access to Sacred Sites, Destruction and Desecration of Sacred Sites

In anticipation of the Governor's announcement, employees of the State of Hawai'i traveled up Mauna Kea late on the evening of 19 July and the morning of 20 July to remove ahus (sacred shrines) from the area where the telescope will be built. They then went on to destroy two hales (religious structures and places of worship) built miles from the construction site. The State of Hawai'i claims that these structures did not have cultural and religious importance because they were built within the past decade. This view of Native Hawaiian religion and culture is extremely narrow and offensive; the State does not get to decide that a religion must be static, nor does it get to decide what elements of a religion are significant. Even the Office of Hawaiian Affairs, a government agency, has publicly noted the State's failures, stating: "The Office of Hawaiian Affairs is disappointed by . . . the dismantling of several symbolic structures on Mauna Kea today. These acts and the manner in which they were conducted, with little to no consultation with the Native Hawaiian community and OHA, exemplify the state and UH's longstanding and blatant disregard of Mauna Kea's significance to our beneficiaries, whose deep connection to the sacred mountain was embodied by the ahu and hale pili removed today."

In addition, the State is limiting religious practice and assembly by cutting off all access to Mauna Kea. Under the State's current policies, religious observers who are not participating in any form of protest or direct action can be prosecuted simply for conducting traditional religious ceremonies at sites on the Mauna. Governments may not criminalize minority groups or indigenous peoples visiting sacred sites, and doing so plainly violates the State's responsibilities under ICERD.

Native Hawaiian culture and religion are closely entwined; any act against Native Hawaiian cultural or religious practice is a racist act. By destroying Native Hawaiian religious structures, the State is demonstrating its hostility toward Native Hawaiian religion. Cutting off sacred areas from religious practitioners and destroying the ahus and hales on Mauna Kea are acts of violence targeted at Native Hawaiians that must be denounced. The State may not desecrate or destroy the religious sites of indigenous peoples. The United States must comply with the commitments that it has made under international human rights law, and must apologize and otherwise rectify the destruction of religious structures.

Updated Conclusion & Requests to CERD

In light of ongoing discrimination against Native Hawaiians as well as new and immediate threats, we humbly requests that the Committee reconsider the situation on Hawai'i Island under its early warning and urgent action procedures in order to avoid further irreparable harm to the Native Hawaiians who oppose this project. In particular, we requests that the Committee adopt a decision:

- Stating that the recent developments in construction on Mauna Kea are inconsistent with the commitments that the United States has made under ICERD and UNDRIP, and that the denial of rights to Native Hawaiians is a human rights issue.
- Requesting that the United States submit information to the Committee under the urgent action and early warning procedures relating to the situation on Hawai'i Island.
- Recommending the United States government and the government of the State of Hawai'i work to bring to a halt any activities that infringe on the rights of Indigenous Peoples, including:
 - Revoking the permit and sublease that has been granted to TMT, and preventing construction from beginning on Mauna Kea.
 - Allowing Native Hawaiian practitioners access to their sacred land for religious ceremony as required by ICERD Article 5(d)(ix).
 - Compensating the cultural practitioners whose structures were destroyed.
 - Forbidding the destruction of additional cultural and religious sites on Mauna Kea.

- Allowing Native Hawaiians to exercise their right to protest construction on sacred land.
- Honoring the government's trust land obligation.
- Engaging in meaningful consultation and consent under the free, prior and consent principles of UNDRIP before commencing projects on the ancestral lands of Native Hawaiians.
- Recommending that the other States and international organizations sponsoring or supporting TMT also withdraw their support.
- Requesting the UN Special Rapporteur on Indigenous Peoples to communicate with the United States government regarding this situation, and consider visiting Hawai'i Island and creating a report on the situation based on her findings.
- Stating that the Committee will continue to track this issue and report on it in the next Universal Periodic Review of the United States of America.