

**REQUEST FOR EARLY WARNING MEASURES AND URGENT  
ACTION PROCEDURES**

**TO**

**The United Nations Committee On The Elimination Of Racial  
Discrimination**

**BY**

**Cultural Survival, On Behalf Of the Indigenous Peoples Of Hawai‘i**

**IN RELATION TO**

**The United States of America**

**PREPARED FOR**

**The 98<sup>th</sup> Session of the Committee on the Elimination of Racial  
Discrimination**

**Submitted 22 March 2019**

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## **Executive Summary**

This request is submitted by Cultural Survival on behalf of the Indigenous People of Hawai'i Island. The request details the discrimination that Native Hawaiians have faced due to the support from the State of Hawai'i and the United States of America for a major development project on Mauna Kea, the tallest mountain in the Pacific and a sacred place for Native Hawaiians.

This request highlights persistent violations of multiple provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. The State has continued to actively support development projects on Mauna Kea, despite plain evidence that doing so would degrade the religious and cultural practices of Native Hawaiians and deny them their rights to own and access their traditional lands and territories.

In late October 2018 the State of Hawai'i Supreme Court affirmed the Hawai'i Bureau of Land and Natural Resources' new permit for a Thirty Meter Telescope (TMT) on Mauna Kea. This affirmation of the TMT project allows construction to begin at any time. However, the project has never had the support of Native Hawaiians, who view continued construction on the mountain as a direct threat to their land rights as well as to their cultural and religious practices. Despite the lengthy approval process and multiple legal challenges, these concerns have never been addressed, nor does the government show any interest in addressing the concerns of Native Hawaiians. Under the contemporary international human rights framework, development without consent of a sacred place that historically was the territory of Indigenous persons is a human rights violation.

Native Hawaiians face the very real probability that construction of the telescope will begin in spring 2019, and therefore urgently request the Committee's immediate attention to the situation. The Committee's adoption of a decision under its Early Warning and Urgent Action Procedures is necessary to prevent further and irreparable harm to Indigenous Peoples' lands and practices.

### **Submitting Organization:**

Cultural Survival is an international Indigenous rights organization with a global Indigenous leadership and consultative status with ECOSOC since 2005. Cultural Survival is located in Cambridge, Massachusetts, and is registered as a 501(c)(3) non-profit organization in the United States. Cultural Survival monitors the protection of Indigenous Peoples' rights in countries throughout the world and publishes its findings in its magazine, the Cultural Survival Quarterly, and on its website: [www.cs.org](http://www.cs.org). Cultural Survival also produces and distributes quality radio programs that strengthen and sustain Indigenous languages, cultures, and civil participation.

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## **I. Introduction and Background**

The submitting organization respectfully requests the adoption of a decision under the early warning and urgent action procedures of the United Nations Committee on the Elimination of Racial Discrimination (“CERD” or “the Committee”) in relation to the alarming situation of indigenous peoples on Hawai‘i Island. This report is being submitted by Cultural Survival on behalf of the Petitioners and Plaintiff-Interveners in the TMT contested case hearings, as well as the Kanaka Maoli (indigenous people of Hawai‘i, or Native Hawaiians) of Hawai‘i Island.

Native Hawaiians believe Mauna Kea, also known as Maunakea or Mauna a Wākea (Mountain of the Sky Father), to be sacred because it is a piko (umbilical cord) connecting the Creator to the people of Hawai‘i. For Native Hawaiians, the summit of Mauna Kea is considered a wao akua, the realm of the gods. Mauna Kea is the home of gods, goddesses, and deities, including Poli‘ahu of the snow and ice, Lilinoe of the mist, Waiau of the sacred lake, and Mo‘oinanea, guardian of the waters on the summit. As the tallest mountain in the Pacific, it is the meeting place of Wākea (Sky Father), and Papahānaumoku, (Earth Mother), where heaven and earth meet. It is in this union that the islands of Hawai‘i were born.

Mauna Kea contains many ancient burial sites, sacred areas, and shrines, all of which are key to the religious practices of Native Hawaiians. The mountain is therefore similar to a temple, and is seen as a place for making prayers and giving sacred offerings. Because it is a place of spiritual connection with ancestors, history, and the heavens, Mauna Kea is a focal point of cultural significance for Native Hawaiians.

Traditionally, humans were only allowed to ascend to the top of Mauna Kea if they were highly specialized ritual practitioners or came to perform important rituals such as burials. This is no longer the case, as hundreds of tourists and scientists drive to the mountain’s summit every day. Despite development and interference from outsiders, Native Hawaiians continue to come to Mauna Kea for religious practices, and remain committed to the land and to preserving as much of their traditional practices as possible. The continuation of cultural and religious practices into contemporary times is a testament to the strength of the religious beliefs intrinsic to the Native Hawaiian people and their perseverance. However, these practices are once again under attack, as the State of Hawai‘i and several funding organizations are preparing for a massive new construction project on Mauna Kea.

The root of the current struggle is that Native Hawaiians no longer directly control their traditional lands. In 1893, the United States of America (“United States” or “U.S.”) helped stage the overthrow of the Kingdom of Hawai‘i, and annexed Hawai‘i as a territory in 1896. To strengthen its control of the territory, the United States government began enacting policies to force the assimilation of Native Hawaiians and suppress Native Hawaiian language and cultural practices. With the goal of subjugating the Native Hawaiian race in mind, the United States endeavored to appropriate Native Hawaiian land until said appropriation and unpermitted use became the norm. Until 1959, the United States controlled Hawai‘i as a territory and unilaterally

approved land sales to white settlers, as well as the construction of military bases, military training centers, housing, and resorts. While many of the assimilationist policies have slowly been reversed, there are still many lingering instances of implicit and explicit discrimination against Native Hawaiians, especially regarding cultural rights and land rights.

Since 1959, when the territory of Hawai‘i became the 50<sup>th</sup> State in the United States, the State of Hawai‘i has taken over control of land that was originally Indigenous land, and now holds it as trust land for the people of Hawai‘i. This includes the summit of Mauna Kea, which the State has leased out to the University of Hawai‘i and different scientific organizations for construction. Despite traditional lore about Mauna Kea, identified artifacts, the continuation of practice, and testimony from Native Hawaiians, the State has repeatedly refused to recognize Native Hawaiian beliefs and has largely dismissed the reality that Mauna Kea’s summit is of vital importance to Native Hawaiian cultural practice.

Construction of telescopes on Mauna Kea dates back to the 1960s, when Native Hawaiian’s cultural expression and language was nearly regulated out of existence in an effort to obliterate their race and facilitate Hawai‘i statehood. While the rights to cultural and religious expression have slowly been reinstated, this largely began after several telescopes had already been constructed on the mountain. Today, there are 22 telescopes and other large monitoring structures on the summit of Mauna Kea. For the past several decades though, Native Hawaiians and their allies have opposed the continued destruction and desecration on Mauna Kea; they seek the protection of sacred sites and the recognition of Native Hawaiians rights to practice and maintain cultural traditions and customs.

The United States is therefore responsible for discrimination against Native Hawaiians in multiple ways. The United States historically approved policies of discrimination against Native Hawaiians that have continued to the present. The United States is also responsible for monitoring the actions of its States, and so is responsible for the actions of the agencies and tribunals of the State of Hawai‘i. The United States government has also indirectly funded construction on Mauna Kea, including the proposed TMT project. Public universities, including the University of Hawai‘i and the University of California systems, receive significant federal funds and research support. These universities are two major supporters of the TMT. Native Hawaiians have been oppressed and discriminated against by these policies in a way that violates the rights CERD sets out to defend.

Because the United States and the State of Hawai‘i’s exhibits such reluctance to allow Native Hawaiians to assume their rights and protect the sacred summit of Mauna Kea, Native Hawaiians have no choice but to resort to international remedies. However, while the United States has signed many of the critical international rights treaties, it has refused to sign the optional protocols that would allow Native Hawaiians to bring individual complaints through the treaty body mechanisms. Native Hawaiians are therefore requesting that CERD issue an alert

under its early warning and urgent action procedures, and to recognize violations by the United States of the following Articles:

- CERD Articles 2(1)(a)-(d);
- CERD Article 2(2);
- CERD Article 5(a);
- CERD Articles 5(d)(vii)-(xii);
- CERD Article 5(e)(vi), and;
- CERD Article 6

These violations, egregious in both number and substance, necessitate attention due to the inability to receive equal treatment under domestic tribunals based on their racial status and the inability to seek other avenues of international recourse. The submitting organization is confident that the Committee can take the necessary measures to assist and encourage Native Hawaiians, and protect the physical, territorial and cultural integrity of the Indigenous Peoples of Hawai‘i Island.

## **II. Recent History of Rights Violations on Mauna Kea**

In 2009, the TMT International Observatory, LLC, announced that it had selected Mauna Kea as the site for a new telescope. The Thirty Meter Telescope (TMT) is part of a new generation of “extremely large telescopes” that are designed to see further and in greater detail than other terrestrial telescopes. As designed, the TMT would be the second largest telescope in the world, and would be housed in a five-acre compound.

In October 2010, developers for TMT applied to the Hawai‘i Board of Land and Natural Resources (BLNR), an executive agency of the State of Hawai‘i, for a permit to build in the summit conservation district of Mauna Kea. The BLNR voted to accept the application in February 2011, and issued a Conservation District Use Permit (CDUP, or “permit”) in April 2013. The application was accepted and the permit was granted without sufficient consultation with Native Hawaiians. Though the application was challenged by a group of Native Hawaiians (the “Mauna Kea Hui”), the BLNR reviewed its own decision, and determined that there had been no issues with the permitting process.

The Mauna Kea Hui then appealed the State agency action to the State of Hawai‘i judicial system. The judicial appeals court, the Hawai‘i Third Circuit Court of Appeals, affirmed the BLNR decision to grant the TMT permits in May 2014. These early agency and court decisions are representative of the discrimination that Native Hawaiians have faced throughout the process. Though the Mauna Kea Hui appealed this decision to the Hawai‘i Supreme Court (the high court of Hawai‘i), the TMT Corporation began to go forward with plans for groundbreaking and construction.

As the TMT Corporation began the early stages of construction preparation, Native Hawaiians and their supporters organized protests on the mountain. In October 2014, the TMT dedication and ground breaking ceremony was interrupted by protesters. And in the spring, earth movers and construction crews began to ascend the mountain but were blocked by protests. On 2 April 2015, hundreds of Mauna Kea protectors blocked roads accessing the proposed TMT site, and at least 31 peaceful demonstrators were arrested. On 24 June 2015, protesters again prevented construction crews from reaching the summit of Mauna Kea. Twelve were arrested. The sustained protests demonstrated that Native Hawaiians opposed construction and wanted to hold the BLNR accountable for ignoring cultural and religious practices and denying meaningful consultation.

The protests gained international attention. Fearing political backlash, the state ordered a temporary halt in construction until the Hawai'i Supreme Court issued its decision. Despite the halt in construction, on 14 September 2015 an ahu (religious altar) was bulldozed by a Mauna Kea Support Services Employee. No one was ever punished for the action, but it was widely seen as a deliberate attack against Native Hawaiians.

In response to the protests, in July 2015 the Office of Maunakea Management passed "emergency rules" restricting public access to Mauna Kea because of what it described as a risk to public safety. The restrictions included a ban on camping, a ban on access at night, and preventing media access during any enforcement action. The passage of these emergency rules is direct evidence of discriminatory behavior by a State agency. At least 15 people were arrested under these rules until they were overturned by the Third Circuit Court of Appeals in October 2015. However, the State and the University of Hawai'i are currently considering implementing similar rules as part of its new land management plan (see below).

On 2 December 2015, the highest court in Hawai'i, the Hawai'i Supreme Court, ruled that the 2011 permit from the Hawai'i Board of Land and Natural Resources was invalid. The high court stated: "BLNR put the cart before the horse when it approved the permit before the contested case hearing."<sup>1</sup> However, the Supreme Court only required that the BLNR hold a new contested case hearing before new permits could be issued. The opinion was therefore more concerned with due process than protecting the rights of Indigenous Hawaiians.

Despite legal objections from Native Hawaiian Petitioners, in June 2016 retired Judge Riki Amano was appointed by the BLNR as Hearing Officer for the second round of contested case hearings on the Conservation District Use Permit for the TMT. The Native Hawaiians alleged that Judge Amano would be biased in the proceedings because of her membership with the 'Imiloa Astronomy Center, which is operated under the University of Hawaii-Hilo. The University of Hawai'i and TMT International Observatory agreed and also requested that another Hearing Officer be appointed. However, the BLNR, again showing a lack of concern for the

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<sup>1</sup> *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 363 P.3d 224, 229 (2015).  
<https://www.leagle.com/decision/inhaco20151202205>

appropriate treatment of the Native Hawaiians, decided to keep Judge Amano on as Hearing Officer.

Over 44 days, from October 2016 to March 2017, the BLNR held contested case hearings on new permits for the TMT. Because of the number of parties involved, Native Hawaiian Petitioners and Plaintiff-Interveners and their supporters were limited to only 10 minutes of testimony, followed by cross-examination by the attorneys for the TMT project. The focus on cross-examination rather than the testimony of Native Hawaiians was borne out in the hearing conclusions. On 26 July 2017, Hearing Officer Amano issued her proposed findings of fact and conclusions of law, which almost entirely favored the TMT and discredited the testimony of Native Hawaiian participants.<sup>2</sup> Her proposed findings of fact focused largely on the responses from cross-examination, and found that the religious and cultural practices on Mauna Kea were not significant enough to stop construction from going forward. Amano found that there had been consultation with Native Hawaiians about the project throughout the permitting process, although this was supported by facts such as letters sent to Native Hawaiians that were not returned.

On 27 September, 2017, the BLNR, acting on Amano's report, approved by a vote of 5-2 a Conservation District Use Permit (CDUP) for the TMT. The Hearing Officer's proposed findings of fact and conclusions of law were adapted directly into the BLNR Findings of Fact, Conclusions of Law and Decision and Order, with no meaningful changes.<sup>3</sup> The Petitioners and Plaintiff-Interveners appealed this decision, bringing the case back again to the Hawai'i Supreme Court.

On 30 October 2018, the Hawai'i Supreme Court ruled in favor of the TMT.<sup>4</sup> Ruling against the Native Hawaiian Petitioners and Plaintiff-Interveners, the court held that the new round of contested case hearings provided sufficient due process for Native Hawaiians and that construction could therefore go ahead. The court also found that prior telescope development had already degraded the land enough so that it was no longer worthy of legally afforded protections. The court ignored that this degradation began during a time when Native Hawaiian language, culture, and religious practice was discouraged in order to encourage further development on the mountain. In addition, the tone of the holding was quite hostile to Native Hawaiians and their practices. The court's holding was very dismissive of the religious practices of Native Hawaiians, echoing Judge Amano's suggestions that the religious practices on the summit of

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<sup>2</sup> Amano, Riki, *Proposed Findings of Fact, Conclusions of Law and Decision and Order*, July 2017.

<https://www.oha.org/wp-content/uploads/OHA-IPLP-Report-FINAL-09-09-15.pdf>

<sup>3</sup> Board of Land and Natural Resources State of Hawai'i, *Findings of Fact, Conclusions of Law and Decision and Order*, September 2017. <https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf>

<sup>4</sup> *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve*, 431 P.3d 752 (2018). <https://www.scribd.com/document/392007050/Hawaii-Supreme-Court-Opinion-on-TMT>



Mauna Kea were simply tactics to delay construction. The court also denied a Motion for Reconsideration on 29 November 2018.<sup>5</sup>

Also in late 2018, the Office of Maunakea Management and University of Hawai‘i decided to revisit the management plan of Mauna Kea. The new Plan is plainly designed to limit protest on the mountain, but has the insidious side effect of greatly limiting all religious practices on the mountain. As members of the Native Hawaiian race are the only practitioners of the traditional Native Hawaiian religion, it is clear that this is a racially motivated attack. As of now, groups greater than ten are prevented from holding ceremonies, and permits are required before any kind of ceremony or gathering on Mauna Kea.<sup>6</sup> The plan also would require as much as 45 days advance notice in order to receive a permit, which ignores the reality of Native Hawaiian religious practice. The fine structure is also meant to discourage assembly, practice, or protest, because Native Hawaiians can face as much as \$60,000 USD in fines for four days of protest.

By focusing on the provision of basic due process rights rather than actually adjudicating the issues raised by construction on traditional land, the court was able to ignore the State of Hawai‘i’s denial of human rights to Native Hawaiians and the obligations of States under international human rights treaties like CERD.

### ***Native Hawaiians have Exhausted all Domestic Remedies***

Multiple cases and appeals have been brought since the project was announced in 2010, but the latest result was the Hawai‘i Supreme Court’s ruling in late 2018 in favor of the TMT project. This was the last State recourse for the Native Hawaiians. As it now stands, construction could potentially begin at any time.

While relief could still be sought through the United States Supreme Court, the process would be unduly prolonged and any result would not be effective. Because the Court will not issue an injunction before deciding whether to grant or deny certiorari, construction could begin while waiting to hear if the Court would even hear the case. Furthermore, cases before the United States Supreme Court can take an unduly burdensome amount of time to be resolved once certiorari is granted. It is not unreasonable to assume that it could take more than two years to get a decision from the Court, if one is given at all. This process would only serve to exhaust the emotional and financial resources of Native Hawaiian litigants, who would have to seek additional representation and travel back and forth between Hawai‘i and Washington, D.C.

In addition, the history of the United States Supreme Court shows a clear bias against Indigenous Peoples, and it is highly unlikely that the Court would rule in favor of Native

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<sup>5</sup> *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res.*, 143 Haw. 328 (2018).  
<https://kalahuihawaiipoliticalactioncommitteedotorg.files.wordpress.com/2018/11/order-granting-in-part-and-denying-in-part-motion-for-reconsideration1.pdf>

<sup>6</sup> Hawai‘i Administrative Rules, Chapter 20-26, [Proposed] *Public and Commercial Activities on Mauna Kea Lands*, §20-26-73. <http://www.hawaii.edu/offices/bor/adminrules/chapter26-proposed.pdf>.

Hawaiians. Historically, the United States judicial system has been hostile to claims brought by Indigenous Peoples that would require the United States make amends for the injustices it has committed, especially those involving the taking of Indigenous lands.

The rights of Native Hawaiians specifically have been even further limited by United State Supreme Court precedent; the Court has held that the limited protections granted to Indigenous Peoples living in the continental United States (Native Americans) do not apply to Native Hawaiians.<sup>7</sup> The current composition of the Court, with a solid majority of conservative justices who have repeatedly ruled against tribal governments and Indigenous Peoples, suggests that this trend will continue, denying Native Hawaiians the chance at achieving a just and racially unbiased result. The Native Hawaiians of Hawai‘i Island have therefore constructively exhausted all domestic avenues of recourse and have no choice but to seek the assistance of international human rights bodies.

Because the United States has failed to adopt many of the optional protocols of the United Nations human rights treaties, Native Hawaiians are tremendously limited in their ability to seek redress internationally. The failure of the United States to sign protocols that would give greater accountability through individual complaint mechanisms, along with the clear domestic bias against members of the Native Hawaiian race and the imminent threat of construction, means that CERD’s early warning/urgent action procedures are the only way to bring adequate attention to this issue.

### **III. The Construction of this Telescope would cause Irreparable Harm to the Indigenous People of Hawai‘i**

Indigenous culture, religion, and spirituality are integral to the Native Hawaiian race and identity. The summit of Mauna Kea is a sacred place in Native Hawaiian religion because it is the place connecting the Sky Father and Earth Mother, through which all of the energy and life on Earth came into being. It is also land that once belonged to Native Hawaiians but is now controlled by the State of Hawai‘i.

CERD Article 2 requires State Parties to go further than merely condemning racial discrimination - they are obligated to “undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.” Native Hawaiians have already made their case in the tribunals of the United States of America. Not only have those tribunals refused to acknowledge the centrality of Mauna Kea to the Native Hawaiian people, the United States has done nothing to stop the pervasive racial discrimination and dismissive attitude of the tribunals.

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<sup>7</sup> *Rice v. Cayetano*, 528 U.S. 495 (2000). <https://supreme.justia.com/cases/federal/us/528/495/case.pdf>.

By turning a blind eye to the erasure of Native Hawaiians perpetuated by its tribunals, the United States is in contravention of its duties under international human rights law, but even more significantly, its silence is causing irreparable harm to Native Hawaiians. Permitting the construction of this structure that will tower over Mauna Kea's summit will block Native Hawaiian access to their land, increase traffic and waste on the mountain, and will forever destroy a place of religious significance. Siding with construction of the TMT will only further restrict the ability of Native Hawaiians to practice their religion, celebrate their culture, or exist as Native Hawaiians when this identity is inherently entwined with Mauna Kea.

As TMT International Observatory prepares to begin construction in 2019, the United States has demonstrated that it is once again directly and indirectly discriminating against Native Hawaiians. Here, it has permitted the usage of Native Hawaiian traditional land without their free, prior and informed consent, and has limited their rights of assembly and religious practice on Mauna Kea. This jeopardizes the wellbeing of Native Hawaiians and is a direct and deliberate attack on a historically disadvantaged minority group. Injury to Mauna Kea is injury to Native Hawaiians themselves, and the submitting organization urgently requests that the Committee shed light on what is happening as the United States refuses to conform to its human rights obligations.

***The State has Repeatedly Failed to Prevent, and has Engaged in, Discrimination against Native Hawaiians***

Throughout the conflict over the latest telescope on Mauna Kea, the actions of the State of Hawai'i have been openly discriminatory against Native Hawaiians because they are an ethnic minority and because they have opposed construction that the State supports. And despite numerous lawsuits and protests, Native Hawaiians are in the difficult position that imminent construction may permanently destroy a sacred place.

Earlier actions by the State courts and State agencies demonstrated a complete lack of regard for equal treatment of Native Hawaiians. Not only were the initial TMT application and permits granted without any consultation with Native Hawaiians, but the BLNR, the agency that granted the permit, was tasked with conducting its own oversight and determined that no mistakes had been made. Its actions show an awareness that Native Hawaiians were likely to vigorously oppose TMT construction, so the State attempted to shut them out of the process as much as possible. Even once the Hawai'i Supreme Court ruled that additional hearings needed to be held, the hearings gave more time to the TMT attorneys than the Native Hawaiians. This pattern is clear and convincing evidence of ongoing discriminatory treatment of Native Hawaiians throughout the entire process, and Native Hawaiians have sustained continuous injury from the bias exhibited against them.

In addition, there is evidence of a frustrating, and completely incorrect, undercurrent that runs through the Hearing Officer's *Proposed Findings*, the BLNR *Findings*, and the Supreme Court decision. All indicated at some point a skepticism of the Native Hawaiian's stated

religious convictions of the personal and cultural significance of Mauna Kea. The Supreme Court, for example, denied Native Hawaiians the “full and equal enjoyment of human rights and fundamental freedoms,” in contravention of Article 2(2), by questioning what practices were appropriate on the mountain. It should not be for the courts to determine what is or is not appropriate for cultural practitioners – it is for the practitioners themselves to decide – and yet the tribunals have failed to give equal weight to the testimony of Native Hawaiians on how they would be impacted by further projects on Mauna Kea. It has been clear throughout the matter that Native Hawaiian culture and religion is something the State agency and State courts do not appreciate as sincere, and this lack of validation for an ethnic and religious minority is plainly discriminatory.

Another important example is the State’s treatment of traditional Native Hawaiian land. Mauna Kea is land held in public trust for the benefit of Native Hawaiians, but mismanagement by Hawai‘i has resulted in that trust obligation being all but destroyed. By doing so, the right of future Native Hawaiians writ large to inherent Mauna Kea as trust land is being violated - against the obligation that exists under CERD Article 5(d)(vi).

Nowhere is this more evident than in the October 2018 Hawai‘i Supreme Court ruling, which found that prior degradation of Mauna Kea effectively stripped it of any value as a spiritually significant site. The Court held that the prior existing telescopes negated all claims that a new telescope would jeopardize or limit the ability of Native Hawaiians to engage in cultural and religious practices. This dangerous precedent can potentially be used to argue for continued construction and development on any other traditional or sacred Hawaiian lands.

CERD Article 2(2) mandates that social and cultural considerations be looked at when the circumstances so warrant. While the Hawaiian courts allowed for testimony regarding this, they did not ultimately consider it, or follow through with the requirement that “special and concrete measures” be enacted to ensure protection of certain racial groups. Instead, the Hawai‘i Supreme Court created a new rule that effectively invalidates a core component of Native Hawaiian sociocultural heritage. The Court’s lone dissenting voice noted the danger of allowing the degradation principle to stand:

“The degradation principle ignores the unequivocal mandate contained in Hawai‘i Administrative Rules... Using the fact that the resource has already suffered a substantial adverse impact, the BLNR concludes that further land uses could not be the cause of substantial adverse impact. Under this new principle of natural resource law, one of the most sacred resources of the Hawaiian culture loses its protection because it has previously undergone substantial adverse impact from prior development of telescopes.”<sup>8</sup>

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<sup>8</sup> *In re Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Reserve*, 431 P.3d 752, 795 (2018). <https://www.scribd.com/document/392007050/Hawaii-Supreme-Court-Opinion-on-TMT>.

The degradation principle will allow future discrimination and oppression of Native Hawaiians by facilitating the taking of their traditional land for development. CERD Article 2(1)(d) vests the United States with the responsibility of policing racial discrimination by any groups or organizations, and this includes the Hawaiian courts. The United States therefore has a burden under CERD to correct this.

The State has been, throughout the entire process, attempting to do only the bare minimum in order to avoid accusations of racial discrimination against Native Hawaiians, but it has failed to meet even this low bar. Its recent actions and decisions have plainly discriminated against Native Hawaiian land rights and the Native Hawaiian religion. The State has actively worked to silence the voices of Native Hawaiians who are speaking up to protect their traditional lands, and has tried to undermine their religious freedom. Because of this discrimination, Native Hawaiians face the possibility of further destruction of Mauna Kea beginning in 2019.

### ***The Free, Prior and Informed Consent of Native Hawaiians was Never Granted***

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was passed in 2007 and is now supported by almost every State, including the United States and the other States financing the TMT. While UNDRIP is not a treaty, it is an authoritative synthesis of the contemporary view of Indigenous Rights in international law.<sup>9</sup> It therefore can be used to inform and supplement CERD's mission.

Along with describing the basic rights of Indigenous Peoples, UNDRIP sets forth basic responsibilities for States that are necessary to preserve and support Indigenous communities. Chief among these is the requirement of free, prior and informed consent (FPIC). This is because many Indigenous Peoples are still denied a say in issues that relate to their traditional lands, their culture, and their livelihoods. FPIC is extremely relevant to Mauna Kea because the free, prior and informed consent to construct on traditional Native Hawaiian land was never asked for and never granted. This includes the TMT project as well as all earlier construction.

Despite the Hawai'i Supreme Court's determination that Native Hawaiians were provided sufficient due process, neither actual consent nor meaningful consultation existed in the original permitting process, in the contested case hearings, or in the appeals that came after. The BLNR has argued, and the Hawai'i Supreme Court agreed, that 44 days of testimony split between witnesses, advocates for the TMT, the Petitioners, and the Plaintiff-Interveners, was sufficient consultation with the Indigenous People of Hawai'i. However, while UNDRIP does not specify how consent should occur, providing each person 10 minutes of testimony followed by cross examination by attorneys for TMT is not an effective method of engaging in meaningful consultation with Native Hawaiians.

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<sup>9</sup> S. James Anaya & Robert A. Williams, Jr., *Study on the International Law and Policy Relating to the Situation of the Native Hawaiian People*, p. 4; University of Arizona June 2015. <https://www.oha.org/wp-content/uploads/OHA-IPLP-Report-FINAL-09-09-15.pdf>

By finding that the arbitrary requirements of due process were met, the BLNR and Supreme Court argue that the State engaged in sufficient consultation with Native Hawaiians. The BLNR's *Findings of Fact* discuss the issue of consultation.<sup>10</sup> However, it focuses almost entirely on the cross-examination of certain witnesses, who "admitted," for example, getting letters from different bodies during the permitting process. This, the report says, is proof of "sufficient and significant" consultation, even if the particular party never responded to the letter. Under UNDRIP, this is clearly insufficient; a lack of dialogue is in no way meaningful consultation. The focus on the appearance of due process comes at the cost of actually discussing what consultation occurred and what the process looked like.<sup>11</sup>

The lack of meaningful consultation, and other issues like the potential conflicts of interest, show that both the executive branch and the court system of Hawai'i were not interested in securing the free, prior and informed consent of Native Hawaiians. The discussions of due process by the courts only show that due process is not a satisfactory substitute for FPIC. Here, the United States has failed to live up to the commitments it has made under UNDRIP by ignoring its responsibilities to seek free, prior and informed consent. The lack of FPIC has led to construction and land use policies that directly discriminate against Native Hawaiians because of their Indigenous status. This has created the risk of destroying one of the most culturally significant sites on the islands.

#### **IV. Telescope Construction and the Proposed Land Management Plan Would Impinge on the Rights of Peaceful Assembly, Association, and Land Access**

In anticipation of construction, the Office of Maunakea Management and the University of Hawai'i have proposed a new Land Management Plan ("the Plan") under the Hawai'i Administrative Rules that criminalizes protest and religious practice on Mauna Kea and is directly targeted at Native Hawaiians. Under the Plan, assembly on Mauna Kea without proper permits can be punishable by arrest and fines that could add up to tens of thousands of dollars. The Plan has been drafted solely out of a desire to restrict Native Hawaiian access to Mauna Kea due to fear that successful protests could once again halt groundbreaking. The Plan would also prevent Native Hawaiians from assembling on the mountain even in the course of spiritual, cultural, or religious practice that have nothing to do with TMT. It therefore plainly violates CERD Article 5(d)(ix) by impinging on the rights of peaceful assembly and association.

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<sup>10</sup> Board of Land and Natural Resources State of Hawai'i, *Findings of Fact, Conclusions of Law and Decision and Order*, para. 228-251, 438, September 2017. <https://dlnr.hawaii.gov/mk/files/2017/09/882-BLNR-FOFCOLDO.pdf>

<sup>11</sup> Elsewhere the BLNR *Findings of Fact* admits that several parties were not consulted; see *Id.* at para. 410-417, re: Pua Case.

Under the new Plan, Native Hawaiians can face up to \$60,000<sup>12</sup> in fines for repeated violations, not including the court costs and fees associated with such fines. Some of the proposed rules punishable by fine are as follows:<sup>13</sup>

- Not having their cell phone on airplane mode (\$50 - \$400 fine for first violation)
- Making offerings at the site of a destroyed ahu (\$50 - \$400 fine for first violation)
- Failure to obtain an advance group permit (Up to \$2500 fine for first violation)
- Interference with government function (Up to \$2500 fine for first violation)
- Public safety violation for chanting on an access road (Up to \$2500 fine for first violation)

These are merely examples of some of the fines, which can be incurred multiple times and stacked on each other, and are targeted at limiting the assembly of Native Hawaiians. A typical Native Hawaiian protester protesting for four days could be looking at anywhere from \$20,000 to \$62,800 in fines. These fines are directly designed to target Native Hawaiians, who are a historically disadvantaged economic group, and extract large fees that they State knows that they cannot pay, in order to prevent protest.

Not only does this Plan unfairly target Native Hawaiians and their right to peaceful protest and assembly, the Plan ignores the reality of Native Hawaiian practice and targets all religious activities on the mountain. For example, Native Hawaiians are obligated to provide offerings even at places where an ahu was destroyed; ahus are the mark of a sacred site, not the sacredness itself. Native Hawaiians also often conduct ritual worship in groups, and ceremonies can be spontaneous based on need. Sometimes elders may be unable to attend ceremony because of physical limitations but may wish to listen in via cell phone. And perhaps most egregiously, forcing someone to wait anywhere from 15 to 45 days to receive a permit in order to properly pray or conduct ritual on behalf of a sick loved one is not only cruel, but a plain violation of CERD.<sup>14</sup>

The new Plan is further evidence that the State of Hawai'i's legal system and agencies are working in concert to restrict the rights of Native Hawaiians. The Plan is targeted at Native Hawaiians because they are Native Hawaiian, and because the State believes that anything a Native Hawaiian does, even legitimate religious rituals, must be tied in some way to protesting construction that the State supports. Not only does the Plan improperly limit the right to protest and deliberately tax the resources of a historically disadvantaged group, the plan greatly limits the right to conduct non-political religious practice. These are violations of CERD Article 5(d)(ix), and the United States has done nothing to prevent this or force compliance with CERD Article 5(a).

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<sup>12</sup> All numbers provided are in USD.

<sup>13</sup> Hawai'i Administrative Rules, Chapter 20-26, [Proposed] "Public and Commercial Activities on Mauna Kea Lands." § 20-26-73. Available at <http://www.hawaii.edu/offices/bor/adminrules/chapter26-proposed.pdf>.

<sup>14</sup> *Id.* at §§ 20-26-62b; 20-26-65.



***This is Representative of a Pattern of Criminalizing Religious Assembly and Nonviolent Protest by Indigenous Peoples***

The State of Hawai‘i’s extreme response to concerted opposition to construction on Indigenous land is very concerning, but unfortunately is not unusual. For example, in response to the protests against the Dakota Access Pipeline on the Standing Rock Sioux Reservation, the State of South Dakota is working to criminalize the actions of human rights defenders and water protectors in anticipation of similar protests surrounding the Keystone XL pipeline. The legislature of South Dakota recently passed a new bill that greatly limits protest and free speech rights. The American Civil Liberties Union has opposed the bill, stating “the bill’s language is extremely broad... [i]t attempts to blur the line between constitutionally-protected speech and unlawful actions and would catch many innocent protestors in its wide net.”<sup>15</sup> The American Civil Liberties Union has also stated that it has reason to believe that the federal government is coordinating anti-protest action and has been consulting with the State of South Dakota in drafting and passing these laws.<sup>16</sup>

U.N. Special Rapporteur on the Rights of Indigenous Peoples Victoria Tauli-Corpuz has also recently commented on the renewed effort to silence human rights defenders. In her 2018 address to the U.N. General Assembly 73rd session, she noted the worrying escalation of violence, criminalization, harassment, and threats against Indigenous Peoples defending and exercising their rights – especially in the face of industries like agribusiness, infrastructure, and other industries whose success depends on seizing the land.<sup>17</sup>

She has repeatedly noted that Indigenous objection to large-scale projects at the detriment to their rights, livelihoods, and environment are being targeted for murder, forcible eviction, and harassment in the form of criminal charges that are grossly inflated or fictitious.<sup>18</sup> Her report, coupled with what is known about South Dakota’s push to criminalize human rights defenders and the Hawaiian attempt to do the same, creates a concrete basis for the allegation that Indigenous People living within the United States are being targeted due to the very nature of their Indigenous status. Their practices, their culture, and their determination to exercise their rights are being curbed by the United States because it is putting corporate profits before human rights.

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<sup>15</sup> American Civil Liberties Union, *Senate Bill 189 Passes, ACLU Of South Dakota Weighing Options, March 2019*. <https://www.aclusd.org/en/press-releases/senate-bill-189-passes-aclu-south-dakota-weighing-options>.

<sup>16</sup> American Civil Liberties Union, *The Government Is Hiding Its Plans for Anti-Pipeline Protests*, <https://www.aclu.org/blog/free-speech/rights-protesters/government-hiding-its-plans-anti-pipeline-protests>.

<sup>17</sup> *Statement of Ms. Victoria Tauli-Corpuz Special Rapporteur on the rights of indigenous peoples to the General Assembly 73rd Session, October 2018*.

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23723&LangID=E>.

<sup>18</sup> *Id.*



So egregious were the human rights abuses in Ms. Tauli-Corpuz's report that CERD issued a statement in 2018 addressing the actions of the Philippines.<sup>19</sup> CERD expressed concerns that the criminalization of human rights defenders amounted to intimidation and harassment, and created a dangerous atmosphere for their advocacy work. This kind of statement is precisely what Native Hawaiians need in order to bring attention to the racial discrimination they are facing. Native Hawaiians are being targeted by laws that are criminalizing their basic rights. Criminalizing failing to set a phone to airplane mode, because the State fears that it could be used to coordinate a protest, is a clear attack on Native Hawaiians who will be leading the charge against TMT. The United States is neglecting its duties under CERD, and it is urgent that action be taken to offer Native Hawaiians protection from the cultural and racial discrimination they are facing.

It is evident the United States, on both a federal and State level, is engaging in the curtailing of Indigenous rights and human rights more broadly at the expense of Indigenous Peoples. To stay silent on the issue of the Thirty Meter Telescope and the anti-Native Hawaiian sentiment expressed throughout the process is to enable the United States in its renewed attempt at racial suppression and cultural obliteration.

The clear racial and cultural bias against Native Hawaiians is going unaddressed at the expense of their fundamental rights under CERD and UNDRIP, not to mention at the expense of dignity and financial security. All of these factors work together to discriminate against and limit the rights of Native Hawaiians and operate in contravention of CERD Articles 5(d)(vii)-(e). The United States is failing to live up to its responsibilities and has instead remained silent while Native Hawaiians are stripped of their rights, and it is therefore imperative for the Committee to take action.

**V. The United States has Violated CERD through Wanton Disregard for Its Obligations**

The United States of America bears the responsibility under CERD Article 6 of monitoring the activities of its tribunals and local governments to “assure to everyone within their jurisdiction effective protection and remedies.” The Hawai‘i Supreme Court decision in October 2018 showed an unquestionable bias against Native Hawaiians, and set such a dangerous precedent regarding Native Hawaiian culture that non-parties to the litigation took the time to chastise the Court for its language. As a body under the control of the United States federal government, the State of Hawai‘i has a responsibility to act in line with the international human rights commitments that the United States government has made, and conversely the United States has a responsibility to make sure that its States are following its commitments.

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<sup>19</sup> Committee on the Elimination of Racial Discrimination, *Re: CERD/EWAUP/MJA/Philippines/2018*, August 2018. [https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/PHL/INT\\_CERD\\_ALE\\_PHL\\_8761\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/PHL/INT_CERD_ALE_PHL_8761_E.pdf)

Between 1893, when the United States helped overthrow the Kingdom of Hawai‘i, and 1959, when Hawai‘i became the 50<sup>th</sup> state, the United States controlled the islands as a territory. During this period, policies of forced assimilation and statutes limiting the exercise of Native Hawaiian culture and language proliferated. While these laws have largely been set aside, the courts and government agencies continue to exhibit anti-Native Hawaiian bias, in contravention of CERD Article 6’s requirement that State Parties prevent “any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention.”

Furthermore, the United States has provided indirect funding for many of the construction projects on the mountain, including TMT. Public universities, like the University of California and University of Hawai‘i systems, receive significant government funding and research support, which in turn has been used to support construction on Mauna Kea. The United States is therefore violating CERD Article 2(2)(a), which calls for the prevention of discrimination through public institutions, national and local. The United States has therefore engaged in direct discrimination and a complete abandonment of its duties, at the expense of all members of the Native Hawaiian race.

The United States government is also unlikely to take any direct action. Because legal precedent is integral to tribunals of the United States, racially-tinged Supreme Court opinions from the early 19<sup>th</sup> century still carry significant legal weight. The Supreme Court, for example, held in 1823 that “Conquest gives a title which the courts of the conqueror cannot deny,” and this is still applicable law under the common law system.<sup>20</sup> Though the Hawai‘i Supreme Court decision plainly violates the Article 6 guarantee that individuals may seek “from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination,” because the decision came from Hawai‘i’s highest court it precludes an affordable, reasonable, or timely recourse. It would take legislation from the United States Congress, or a correction by the Supreme Court of the United States, to undo the establishment of this principle, and these avenues request traveling, lobbying, further litigation – if the Supreme Court would even agree to hear the case – and other actions that require significant resources. Because the legal system of the United States places the burden of seeking justice on the oppressed, the legal system perpetuates a burden on the historically disadvantaged, and jeopardizes the wellbeing of Native Hawaiians.

The United States, in its decision to deliberately allow the erosion of Native Hawaiian cultural sites, is in direct violation of its obligations under CERD and other international human rights treaties, and is clearly motivated by a bias against Native Hawaiians based on their racial heritage. It has also resulted in the flashpoint that is Mauna Kea and the Thirty Meter Telescope, and every passing minute is another opportunity for construction to begin and for Native Hawaiians to have something central and sacred to their culture attacked and desecrated.

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<sup>20</sup> *Johnson v. M'Intosh*, 21 U.S. 543 (1823). <https://supreme.justia.com/cases/federal/us/21/543/>.

Therefore, it is imperative that CERD issue guidance under its early warning urgent action procedures to assist Native Hawaiians in keeping their cultural, religion, and race alive.

## **VI. Conclusion and Requests**

In light of ongoing discrimination against Native Hawaiians on multiple fronts and the threat of imminent construction, the submitting organization humbly requests that the Committee considers the situation on Hawai‘i Island under its early warning and urgent action procedures in order to avoid further irreparable harm to Native Hawaiians. In particular, the submitting organization requests that the Committee adopt a decision:

- 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.
- Stating concern regarding the discriminatory treatment of Native Hawaiians religious rights, assembly rights, and land rights on Hawai‘i Island.
- Recommending that the United States and its State of Hawai‘i, consistent with the commitments that it has made under CERD and UNDRIP, recognize the denial of rights to Indigenous Hawaiians as a human rights issue and begin to take action to rectify the above described human rights abuses.
- 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 further construction from occurring on Mauna Kea.
  - Adopting a land management plan that allows for unlimited access for cultural practitioners as required by CERD Article 5(d)(ix).
  - 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.
- Requesting that the other States and international organizations sponsoring or supporting TMT also withdraw their support.
- Recommending that the UN Special Rapporteur on Indigenous Peoples 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.