

Mandates of the Special Rapporteur in the field of cultural rights; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the rights of indigenous peoples

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur in the field of cultural rights; Special Rapporteur on freedom of religion or belief; and Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolutions 19/6, 22/20, and 24/9.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the alleged desecration of Mauna Kea, a sacred mountain located on the Big Island of Hawai'i, for the construction of the Thirty Meter Telescope (TMT).

According to the information received:

Mauna Kea is held in public trust by the State of Hawai'i and has been zoned as part of a Conservation District, where projects that "cause substantial adverse impact[s]" are prohibited. (Hawai'i Administrative Rules, Title 13 Chapter 5, Conservation District Rules, subchapter 4: procedures for permit, site plans approvals and management plans, c.4)

Apart from its value as a protected area for natural resources, the mountain is considered to be of high cultural and religious significance both for the Native peoples of Hawaii and for the entire Pacific. The summit is part of the Native Hawaiians traditional land divisions called the "wao akua", the realm of gods, and is considered the home of important female deities such as Poli'ahu (snow goddess) and Mo'oinanea (the protector of lake Waiau, the lake near the summit). Being the highest mountain in the area, it is considered particularly sacred and is a place of regular ceremonial trips for Native Hawaiians religious and cultural practitioners, who climb the mountain every month to convey offerings. In addition, most people of the island visit the mountain at least twice a year, around the summer and winter solstices, for cultural rituals. Many families have buried bones of beloved family members in various sites on the Mauna. Numerous

studies document the many traditions and historical accounts associated with the site and its importance. Native Hawaiians have opposed the construction of this large-scale astronomy development on the basis that it disrupts their cultural and religious practices on Mauna Kea for decades.

In 1968, the state Land Board issued a 65-year general lease to the University of Hawai'i to build an observatory on Mauna Kea. Despite the site being in a conservation area, in the first 20 years of their lease, the University of Hawai'i constructed a number of telescope complexes. However, an overall development plan was only prepared in 1985. This plan allowed up to thirteen telescopes by the year 2000. In 2000, the University of Hawai'i developed a new plan that included allowing for at least 40 new telescopes and support structures.

Two state audits in 1998 and 2005 found that the University of Hawai'i failed in its responsibility to protect the public lands and resources of Mauna Kea. By 1998, the Hawai'i State Auditor released a critical report documenting 30 years of mismanagement of Mauna Kea by the Land Board and University of Hawai'i. Legal action by Native Hawaiians against further construction on the mountain precipitated a court-ordered Environmental Impact Statement. Released in 2005, that Environmental Impact Statement concluded that the cumulative impact of decades of astronomy activity has caused "significant, substantial and adverse" harm on Mauna Kea. Under the University's management, the rare wēkiu bug has suffered habitat loss and incursions by invasive species, and many gallons of hydraulic fluid, mercury, and sewage have been spilled and "absorbed" into the highly porous ground, beneath which are flows to aquifers.

Despite these conclusions, the Thirty Meter International Observatory, a project developed by Goodfellow Bros, the University of Hawai'i, the Office of Mauna Kea Management, the University of Hawai'i at Hilo, and the Hawai'i State Department of Land and Natural Resources (DLNR), has been approved. The project includes the construction of an additional 18-story high industrial complex telescope, the Thirty Meter Telescope (TMT), on Mauna Kea. The complex would have a footprint of over five acres and excavations reaching 20 feet into the ground, on the Northern Plateau of Mauna Kea. In 2009, the State of Hawai'i Land Board approved University of Hawai'i's "Comprehensive Management Plan", a development plan which allows for an unlimited number of new telescopes and support structures.

Developers applied for a permit to build the TMT in the summit conservation district in 2010. The University of Hawai'i filed a Conservation District Use Application for the TMT project, which was granted in February 2010 by the DLNR. Many Native Hawaiians, environmentalists and supporters have legally challenged both the Conservation District Use Permit for the TMT and the renewal of UH's general lease of Mauna Kea (currently ending in 2033) due to University of Hawai'i's negligence in caring for this precious, cultural and conservation area. Despite three on-going legal cases - an appeal before the State

Intermediate Court of Appeals against the TMT Conservation District Use permit, an appeal against the TMT sublease and one against the renewal of the UH's general lease -, it is alleged that construction continues, further destroying the environment others want to protect and negatively impacting the cultural life of Native Hawaiians.

In October and November 2013, actions were taken by students of the University of Hawai'i to protest against the management plan of the University, in particular the painting of a community mural and a resolution from the Association of students of the University of Hawai'i, representing all undergraduate students.

In October 2014, at the TMT ground-breaking ceremony, dozens of Kanaka Maoli people came to the mountain to peacefully confront TMT supporters and investors about their participation in the desecration of Mauna Kea.

On 21 January 2015, the Mauna Kea *hui* - a collective of Native Hawaiians and environmentalists who have been striving to protect Mauna Kea for almost 20 years – and their supporters, delivered a letter to the Governor on the opening day of the legislature, asking for his help in protecting Mauna Kea.

On 2 April 2015, hundreds of activists and supporters wishing to protect Mauna Kea blocked the road to the proposed TMT site to the contractors' trucks that were moving construction equipment up the mountain. The DLNR's Division of Conservation and Resource Enforcement and county police officers arrested thirty-one people who were protesting peacefully, including elders. A few days later, Governor David Ige called for a one-week "timeout" on construction, and he later extended that moratorium to 20 April 2015. Public outcry triggered a demonstration and vigil on Mauna Kea by *ka po'e aloha 'āina*, those who have a great love for the land. Since then protestors consisting of Native Hawaiians, environmentalists and their supporters have camped at the site to maintain their peaceful protest and prevent the continued construction by blocking the road.

On 24 June 2015, construction trucks coming up the mountain to resume work were stopped by the hundreds of protectors, who formed lines that stretched across the road for miles. Twelve arrests were made, but ultimately the police were not able to disperse the large number of people who had gathered.

The actions of the University of Hawai'i and the Thirty Meter International Observatory (based in Pasadena, California) are considered to be harmful to the protected and sacred status of Mauna Kea, as well as to the relationship that Native Hawaiians have with the mountain Mauna Kea. Furthermore, the construction violates legal protections for Native Hawaiian traditional and customary rights, the State of Hawaii's public land trust, and Mauna Kea's fragile ecosystem and conservation areas.

While we do not wish to prejudge the accuracy of these allegations, concern is expressed as to how the decisions related to this construction project have been taken, particularly in relation to the involvement of affected indigenous people in decision-making and what alternatives have been considered to respect the human rights of those affected. Grave concern is also raised about the negative impacts this project will have on the fragile ecosystem and the rights to access and participate in cultural life, to access and enjoy cultural heritage, and to conduct one's own cultural and religious practices.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations. They include in particular articles 18 and 27 of the International Covenant on Civil and Political rights (ICCPR), and article 27 of the UDHR.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and any comments you may have on the above-mentioned allegations.
2. Please indicate whether your Government has undertaken an impact assessment on the rights of indigenous peoples of the decision to construct the Thirty Meter Telescope, in particular their rights to religion and belief, to take part in cultural life of their choice and to access and enjoy cultural heritage?
3. Please provide information on measures taken to ensure that meaningful prior consultations of the concerned indigenous peoples have been conducted and that the TMT project has received their informed consent.
4. Please provide information about all the steps that have been taken to consider alternative locations for the telescope that would not imply further destructions of the fragile environment and sacred character of the mountain.

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Farida Shaheed
Special Rapporteur in the field of cultural rights

Heiner Bielefeldt
Special Rapporteur on freedom of religion or belief

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your Excellency's Government attention to the Declaration on the Rights of Indigenous Peoples (2008), which has been endorsed by your Government, on December 16th, 2010. Recognizing the centrality of the traditional lands of indigenous peoples to their lives and cultures, article 12 of the Declaration affirms that "Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites..."

In connection with these rights, we would like to reiterate the observations made by the Human Rights Committee, which monitors compliance with the Covenant on Civil and Political Rights to which your Government is party since June 1992, and the Committee on the elimination of racial discrimination, which monitors the Convention on the Elimination of all Forms of Racial Discrimination which has been ratified by the USA in October 1994.

In its 28 March 2014 concluding observations to the periodic report presented by your Excellency's Government, the Human Rights Committee, referring to article 27 of the ICCPR expressed its concerns "about the insufficient measures being taken to protect the sacred areas of indigenous peoples against desecration, contamination and destruction as a result of urbanization, extractive industries, industrial development, tourism and toxic contamination. It is also concerned about [...] the insufficiency of consultation with indigenous peoples on matters of interest to their communities" (CCPR/C/USA/CO/4, para 25).

In its 25 September 2014 concluding observations, the Committee on the Elimination of Racial Discrimination (CERD) recalled its General Observation 23 (1997) on indigenous people and called for the US to "Adopt concrete measures to effectively protect the sacred sites of indigenous peoples..." (CERD/C/USA/CO/7-9, para. 24 c).

We would also like to stress that, in accordance with article 27 of the UDHR and article 15 paragraph 1 (a) of the International Covenant on Economic, Social, and Cultural Rights, which USA has signed in October 1977, everyone has the right to take part in cultural life. As emphasized by the Special Rapporteur in the field of cultural rights, this includes for all the right of access to and enjoyment of cultural heritage as part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life, the right of members of minorities to enjoy their own culture, and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage. This entails, in particular, that States "should recognize and value the diversity of cultural heritages present in their territories and under their jurisdiction". They have the duty "to take measures not to destroy, damage or alter cultural heritage, at least not without the free, prior and informed consent of concerned communities. (A/HRC/17/38, paras. 78 and 80).

We would also like to recall Human Rights Council resolution 6/37, paragraph 9 (e) which urges States, "To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction."

In its 2009 General Comment 21 on the right to take part in cultural life (E/C.12/GC/21), the Committee on Economic, Social and Cultural Rights stressed that States parties should take measures to guarantee that the exercise of the right to take part in cultural life of indigenous peoples includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources (para. 36). Furthermore, States parties must also respect the rights of indigenous peoples to their culture and heritage and to maintain and strengthen their spiritual relationship with their ancestral lands and other natural resources traditionally owned, occupied or used by them, and indispensable to their cultural life (para. 49 d). States parties have a core minimum obligation to allow and encourage the participation of indigenous peoples in the design and implementation of laws and policies that affect them (para. 55 e).

Furthermore, we would like to appeal to your Excellency's Government to ensure the right to freedom of thought, conscience and religion in accordance with article 18 of the UDHR and of the International Covenant on Civil and Political rights (ICCPR) and article 5 d) (vii) of the ICERD. Article 6 (a) of **1981 Declaration of the General Assembly** provides that the right to freedom of thought, conscience, religion or belief includes the freedom "to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes". Places of worship include different types of buildings or properties that have more than a material signification for the religious community that is attached to it, such as cemeteries, monasteries or community headquarters. Land to indigenous people, as the touchstone of their identity, is thus a precondition for providing access to holy sites and burial grounds and hence for legitimate religious or spiritual activities.

Human Rights Council resolution 6/37 moreover urges States in 9 (e) "To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction;" and 9 (g): "To ensure, in particular, the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes [...]";