

Mandates of the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

REFERENCE:
AL USA 27/2020

6 November 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the situation of human rights defenders; Special Rapporteur in the field of cultural rights; Special Rapporteur on the rights to freedom of peaceful assembly and of association; Special Rapporteur on the rights of indigenous peoples; and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 43/16, 37/12, 41/12, 42/20 and 34/35.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **alleged detention of indigenous and land rights defender Mr. Nicholas Tilsen in the context of a peaceful protest** at Mt. Rushmore, located within the Black Hills in the State of South Dakota, within the traditional territory recognized under the 1851 and 1868 Fort Laramie Treaties between the Great Sioux Nation and the United States.

Mr. Nicholas Tilsen, is an Oglala - Lakḥóta indigenous, land rights defender and president of the Native Indian Collective (NDN Collective). He is also an active member of the International Indian Treaty Council and the Black Hills Sioux Nation Council in South Dakota. Mr. Tilsen is a highly visible indigenous leader and defender with national and international recognition, and has worked for more than 18 years on the impacts of climate change in the enjoyment of indigenous peoples' rights and sustainable housing. In this respect, he has advocated for ethical investment and has taken strong positions in favor of the protection of lands belonging to indigenous peoples, as well as for the Black Lives Matter movement.

NDN Collective is an indigenous-led organization working for indigenous rights in both the United States and Mexico. It provides financial and advocacy support to indigenous peoples and COVID-19 relief for indigenous peoples during the pandemic.

The protests and subsequent arrests of land and indigenous rights defenders in Mt. Rushmore were communicated to your Excellency's Government on 5 August 2020, through communication No. USA 21/2020. In this communication, mandate holders also expressed concern at the disproportionate and differentiated impacts of COVID-19 on indigenous communities across the United States of America and the inadequacy of the measures taken to support tribes in their efforts to reduce the spread and address the harms caused by the pandemic. We regret not having received a reply to this date.

According to the information received:

On 3 July 2020, the President of the United States, Donald Trump, called for a mass gathering at Mt. Rushmore for the celebration of the United States Independence Day. The chosen location, Mt. Rushmore, is located on the traditional treaty recognized lands¹ of the Great Sioux Nation, who reportedly, were not consulted on the decision and did not provide consent as per the 1868 Fort Laramie Treaty (Article 16). Social distancing and mask-wearing were neither required nor enforced during the gathering, which was attended by 7,500 persons. Both indigenous leaders and community members had expressed their objection to the president's visit to their traditional territories and their concern about the potential and increased exposure to COVID-19 that might result from the mass gathering, both on their social media pages and in local and national news outlets.

The same day, members of several indigenous people's organizations, including indigenous human rights defender, Mr. Nicholas Tilsen, held a peaceful demonstration on the highway leading to the gathering, blocking access to the site and denouncing the lack of consultation, as well as COVID-19 related risks associated with the gathering. Reportedly, the South Dakota National Guard used excessive force when trying to disperse protestors by pushing them to the ground and by using pepper spray against them. In this context, 15 peaceful demonstrators, including Mr. Tilsen, were arrested and taken into custody.

On 6 July 2020, after 3 days in detention, Mr. Tilsen was released and charged with: 1) "second degree robbery" and 2) "grand theft", both stemming from the allegation that Mr. Tilsen took a shield from an officer during the protest, 3 and 4) "simple assault on a law enforcement officer/public officer", both stemming from the allegation that Mr. Tilsen physically attacked two officers 5) "obstruction" 6) "impeding highway" 7) "unlawful assembly" and 8) "disorderly conduct".

On 21 August 2020, a preliminary hearing took place at the Pennington County Courthouse in Rapid City. The judge determined that Mr. Tilsen would go to jury trial for the eight charges, which include three felonies ("second degree robbery"; "simple assault of a law enforcement officer" and "simple assault of a public officer") and five misdemeanors. All together, these could amount to up to 15 years in prison. Other protestors face up to one year in prison for misdemeanors. They are still waiting for their next hearing.

While we do not wish to judge the accuracy of these allegations, we would like to express our serious concern at the arrest and charges brought against the human rights defender Mr. Nicholas Tilsen in connection with the exercise of his individual and collective rights as an indigenous person, and in particular, his right to freedom of peaceful assembly. In particular, we are concerned that Mr. Tilsen appears to have been arrested, detained and charged in connection with his role in

¹ United Nations Study on treaties, agreements and other constructive arrangements between states and indigenous populations, E/CN.4/Sub.2/1999/20 (1999) at para. 276.

organising the demonstration of 3 July 2020, for denouncing the lack of consultation and consent to hold the political rally on treaty lands, and for warning against the possible negative impacts of the mass gathering on the health of indigenous peoples in the context of COVID-19. We wish to highlight our concern about the failure of the Government to adequately consult and obtain the indigenous communities' free, prior and informed consent on issues affecting their communities and lands. We are also concerned about the failure to take adequate steps to protect public health at this event in the face of the pandemic, with such a significant number of cases among indigenous peoples.

We are further concerned at the restrictions on freedom of peaceful assembly and the reported excessive use of force by local law enforcement agents against the defender and other protestors.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As 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 be grateful for your observations on the following matters:

1. Please provide any additional information or any comments you may have on the above-mentioned allegations.
2. Please provide more detail on the factual and legal basis of the arrest and criminal charges brought against Mr. Tilsen and other lands defenders.
3. Please provide information on the measures taken by the State to avoid the spread of COVID-19 during the gathering that took place in Mt. Rushmore.
4. Please provide information on what measures the State has taken to obtain the free, prior and informed consent of indigenous peoples regarding the organization of a major political event on their territories and regarding the health protocols planned for the event, which took place during the pandemic.
5. Please provide information on any measures taken by the State to initiate a dialogue with the Great Sioux Nation for the resolution of treaty violations and to prevent further violations.

We would appreciate receiving a response within 60 days. After this deadline, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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.

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

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Karima Bennoune
Special Rapporteur in the field of cultural rights

Clement Nyaletsossi Voule
Special Rapporteur on the rights to freedom of peaceful assembly and of association

José Francisco Cali Tzay
Special Rapporteur on the rights of indigenous peoples

E. Tendayi Achiume
Special Rapporteur on contemporary forms of racism, racial discrimination,
xenophobia and related intolerance

Annex

Reference to international human rights law

In relation to the above-mentioned facts and concerns, we would like to draw the attention of your Excellency's Government to its obligations under binding international human rights instruments. The International Covenant on Civil and Political Rights (hereinafter, "ICCPR"), ratified by the United States of America on 8 June 1992, provides in article 21 the right to freedom of assembly, and that no restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

We would like to recall the Joint compilation of practical recommendations for the proper management of assemblies of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/31/66), in which was stated that: "The use of force by law enforcement officials should be exceptional, and assemblies should ordinarily be managed with no resort to force. Any use of force must comply with the principles of necessity and proportionality. The necessity requirement restricts the kind and degree of force used to the minimum necessary in the circumstances (the least 5 harmful means available), which is a factual cause and effect assessment. Any force used should be targeted at individuals using violence or to avert an imminent threat. Regarding the policing of assemblies, the primary duty of law enforcement agencies is to facilitate peaceful assemblies and protect individuals from harm (A/HRC/31/66 para. 61).

Furthermore, the Human Rights Committee, in its General Comment number 37 (2020), establishes that an assembly that remains peaceful while nevertheless causing a high level of disruption, such as the extended blocking of traffic, may be dispersed, only if the disruption is "serious and sustained" (para. 85).

In addition, under article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by the United States of America in 1994, States parties have the obligation to condemn and eliminate racial discrimination in all its forms. To this end, States parties undertake to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions act in conformity with this obligation. According to article 5 (a) of ICERD, States parties should guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably the enjoyment of the right to equal treatment before the tribunals and all other organs administering justice. The Committee on the Elimination of Racial Discrimination in its General Recommendation number 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, provides that States parties should guarantee to all arrested persons, whatever the racial, national or ethnic group to which they belong, their right to not be arbitrarily arrested or detained.

We would also like to refer to article 5 (e) (iv) of the ICERD which establishes that States parties have the obligation to guarantee the right of everyone, without

distinction as to race, colour, or national or ethnic origin, to the right to public health, medical care, social security and social services. As a result, States are required to take effective and, where necessary, special measures to guarantee indigenous people's equal enjoyment of the right to health. Furthermore, since its General Recommendation number 23 (1997) on indigenous peoples, the Committee on the Elimination of Racial Discrimination has consistently called upon the United States to: "Guarantee, in law and in practice, the right of indigenous peoples to effective participation in public life and in decisions that affect them, based on their free, prior and informed consent".

We would like to refer your Excellency's government to the United Nations Declaration on the Rights of Indigenous Peoples (the UN Declaration), in particular, article 7, which states that indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person, and article 15, which requests States to take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society. The UN Declaration also provides for indigenous peoples' right to participate in decision-making in matters affecting their rights (article 18) and the right to control the lands territories that they possess by reason of traditional ownership (article 26.2). Indigenous peoples' right to autonomy also means they have the right to determine and develop priorities and strategies for exercising, inter alia, their right to health. (Article 23). Indigenous peoples have the right to the recognition, observance and enforcement of treaties concluded with States and to have States honour and respect such treaties (article 37). Finally, the UN Declaration provides indigenous peoples with the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringement of their individual and collective rights (article 40).

We would also like to refer your Excellency's Government to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders (1998). Firstly, we would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms. We would also like to bring to the attention of your Excellency's Government the following provisions of the UN Declaration on Human Rights Defenders:

- article 5 (a) which establishes that for the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: to meet or assemble peacefully;
- article 6 (b) and c) which provide for the right to freely publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms; and to study, discuss, form and hold opinions on

the observance, both in law and in practice, of all human rights and fundamental freedoms and to draw public attention to those matters;

- article 8, paragraph 1, which stipulates that everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.