



Association of Canadian Universities  
for Research in Astronomy  
Association canadienne d'universités  
pour la recherche en astronomie

July 25, 2023

Dear ACURA Institutional Members,

On July 14, 2023, a petition was submitted to the UN Committee on the Elimination of Racial Discrimination (CERD) regarding the Government of Canada's involvement in the Thirty Meter Telescope. Please find a copy of the petition itself attached, and links to media stories here:

- [National Observer \(18 July 2023\)](#)
- [Globe and Mail \(18 July 2023\)](#)

In response to the petition, the Thirty Meter Telescope (TMT) and the National Research Council (NRC) released the following statements:

**Statement from Dr. Robert P. Kirshner, TMT Executive Director:** *"The voices of those who oppose TMT contribute to an important conversation about the future of TMT on Maunakea. Through discussions, the people of Hawai'i and the Native Hawaiian community will decide whether TMT goes forward on Maunakea. Since 2019, we have changed our approach to community engagement. Led by our Hilo-based team, we have held genuine and in-depth conversations with hundreds of people who protested against TMT. We have focused on respecting the culture, land and people; healing the divisions; and building long-lasting trust and relationships with the Hawai'i community, especially with the Native Hawaiian Community."*

**Statement from NRC:** *"The Government of Canada is committed to the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and as a member of the Thirty Meter Telescope International Observatory (TIO), aims to listen and learn from the people of Hawai'i, their communities, and to contribute to an open and constructive dialogue about the project."*

**Conversations in Hawai'i on Maunakea:** Maunakea belongs to the people of Hawai'i and is sacred to many Native Hawaiians and communities. Currently, the Hawai'i community is engaged in an important conversation about the future of astronomy, including TMT, on Maunakea. This conversation includes residents, community and grassroots organizations, Native Hawaiians at home and abroad, elected representatives, and the Maunakea Stewardship and Oversight Authority (MKSOA). ACURA's position is that we support those conversations and processes in Hawai'i, and will wait for the Hawaiian communities to decide for themselves. In the meantime, ACURA has witnessed that the new TMT Project Manager (Fengchuan Liu) and the new (2021) TMT Project Office in Hilo are committed to respectful engagement and building relationships with the Native Hawaiian community (see the Feb 2023 ACURA Board meeting Report from the Chair's visit to Hawai'i in Jan 2023). TMT has met with hundreds of Native Hawaiians on Hawai'i Island in the past two years, including many TMT protest leaders and land protectors, to listen, learn, and build long-term trust and relationships.

**ACURA's position on the TMT remains unchanged:** *"Unless the TMT project has consent from the Native Hawaiian community, Canada's astronomical community cannot support its construction on Maunakea. As excited as we are about the scientific potential and engineering excellence of the TMT, ACURA believes that astronomical discovery cannot come at the expense of human rights for the*

*people on whose lands we operate our telescopes*". This statement has been on our website in the TMT folder (and formerly on the home page) since it was initially reported at the Canadian Astronomical Society (CASCA) 2021 Annual General Meeting, and it was advisory to the Long Range Plan (LRP2020). ACURA believes that supporting the current conversations and processes in Hawai'i will also support steps towards a longer-lasting solution in Hawai'i, in compliance with our LRP2020 Recommendation #1, and Canada's commitments to Truth and Reconciliation (TRC 2017 and UNDRIP 2015). ACURA fundamentally believes that the decision on the TMT rests with the Hawaiian people.

If you have any further questions about issues regarding TMT or astronomy on Maunakea, please reach out to us.

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## Recommendation on Selecting the Locations of Astronomy Facilities and Infrastructure

We recommend that the Canadian astronomical community (e.g., ACURA, CASCA and NRC-HAA) work together with Indigenous representatives and other relevant communities to develop and adopt a comprehensive set of guiding principles for the locations of astronomy facilities and associated infrastructure<sup>27</sup> in which Canada participates. These principles should be centred on consent from the Indigenous Peoples and traditional title holders who would be affected by any astronomy project. In addition, when such consent does not exist, the principles should recognize that the use or threat of force is an unacceptable avenue for developing or accessing an astronomical site. The principles should also acknowledge that ongoing consent from Indigenous Peoples and continuing consultation with all relevant local communities are both essential throughout a project's lifetime. These principles should be developed as soon as possible, and then applied to *all* future Canadian participation in new or existing astronomical programs, projects and national and international facilities. Engagement and implementation should be consistent with the spirit of the Calls to Action of the Truth and Reconciliation Commission of Canada and of the United Nations Declaration on the Rights of Indigenous Peoples.

## Recommendation on Coordination of Funding Agencies

We recommend that the leadership of agencies which fund or otherwise support astronomical research (NRC, CSA, CFI, NSERC, NDRIO, CIFAR) coordinate efforts through regular meetings. Involving ACURA and/or LRPIC in such meetings could further improve coordination efforts.

## Recommendations on Theoretical Astrophysics

Theoretical astrophysics is an essential part of modern astrophysics. Canada has a long and successful history in theoretical astrophysics, and has built a critical mass of world-leading theorists who study phenomena across the Universe. Support for theory should come from a variety of sources, including as part of the operational scientific support provided by the Canadian Space Agency (CSA) and National Research Council of Canada (NRC), for Canada's space-based and ground-based astronomical facilities, respectively. The recommendations below are targeted

toward the Canadian Institute for Theoretical Astrophysics (CITA) at the University of Toronto and its accompanying national program. As CITA now moves into its fifth decade, the CITA footprint is envisioned to grow and decentralize, so that it can play a greater role in enhancing the national theoretical astrophysics profile on the world scene.

We recommend that CITA strengthen its national role by committing ~40% of its annual NSERC funding to postdoctoral fellowships based outside the University of Toronto. These positions should be fully funded by CITA, without any host contributions allowed or required, and with a limit on the number of National/Canada Fellows per institution, in analogy with the NASA Hubble Fellowship program. The University of Toronto should remain ineligible to host CITA National Fellowships or the first half of Canada Fellowships, as is presently the case.

We recommend that CITA offer salaries and research allowances for CITA Fellows, Canada Fellows, and CITA National Fellows at identical levels and durations. We further recommend that the remuneration should be competitive with commensurate national and international prize fellowships, with the goal of attracting and retaining the world's best early-career theorists.

We recommend that CITA seek an expansion of its postdoctoral program in its next funding proposal to NSERC. Additional funding should be used to prioritize the two recommendations above before increasing the overall number of fellowship positions supported.

We recommend that CITA increase its focus on training for students and postdoctoral fellows and on organizing theory-focused meetings, in coordination with the Perimeter Institute and the broader theory community.

We recommend that CITA and CASCA work together to recognize the role of theoretical astrophysics by establishing and awarding national prizes in this field.

## Recommendations on Digital Research Infrastructure

In the 21st century, answers to fundamental questions in astronomy and cosmology require not just traditional observations or calculations, but also enormous data sets and large-scale computational simulations. Many theoretical programs require enormous computing resources, both to perform simulations or calculations and then to store and analyze the output. Several of the future observational facilities and programs recommended in this chapter will produce petabyte-scale data products, which then need to be distributed electronically to the community and also archived in perpetuity. To maintain Canadian

<sup>27</sup> Astronomy projects not only require telescopes and observatories, but also need support facilities, headquarters, project offices, instrumentation laboratories, integration and test facilities, computing and processing centres, etc.

**Request for Early Warning Measures and Urgent Action Procedures**

**TO:**

**United Nations Committee on the Elimination of Racial Discrimination (CERD)**

**BY:**

**KAHEA: The Hawaiian-Environmental Alliance, Zibiing Lab, and the Transnational Law and Racial Justice Network (TLRJN)**

**IN RELATION TO:**

**The Government of Canada**

**PREPARED FOR:**

**The 110<sup>th</sup> Session of the United Nations CERD**

**Submitted:** 14 July 2023

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## 1. EXECUTIVE SUMMARY

This request is jointly submitted by the three petitioners (1) KAHEA: The Hawaiian-Environmental Alliance, (2) Ziibiing Lab: Global Indigenous Politics Research Collaboratory, and (3) the Transnational Law and Racial Justice Network (TLRJN). KAHEA is a community-based organization working to improve the quality of life for Hawai‘i’s people and future generations through the revitalization and protection of Hawai‘i’s unique natural and cultural resources. Ziibiing Lab is an Indigenous-led research collaboratory based at the University of Toronto focusing on Indigenous politics in unique global, international, and transnational perspectives. The TLRJN is a research, advocacy and networking consortium housed at the University of Windsor Faculty of Law which uses law to research, teach, and work with communities in pursuit of racial and social justice.

The petitioners respectfully request the adoption of a decision under the early warning and urgent action procedures (EWUAP) of the United Nations Committee on the Elimination of Racial Discrimination (CERD) in relation to the situation of the Indigenous people of Hawai‘i (Kanaka Maoli or Native Hawaiians). Specifically, the petitioners request relief from CERD with respect to actions of the Canadian government, Canadian astronomical bodies, and Canadian corporations involved in supporting the Thirty Meter Telescope (TMT)—a major development project on Mauna Kea, the tallest mountain in the world from below sea level to summit, and a sacred site of immense religious, spiritual, and cultural importance for Native Hawaiians.

The petitioners request that CERD, *inter alia*, urge Canada to provide additional information regarding Canadian involvement in the TMT project; urge the Canadian government, astronomical associations, and corporations to immediately cease funding and divest support from the TMT project on Mauna Kea to comply with their legal obligations; and urge Canada to seek technical advice from the Expert Mechanism on the Rights of Indigenous People in establishing, in consultation with Indigenous peoples, effective compliance mechanisms to respect, protect, and fulfill the obligation to obtain the free, prior and informed consent on all development, law, and policy affecting Indigenous peoples both domestically and transnationally.

The petitioners assert that by continuing to support and finance the TMT project on Mauna Kea in the face of Native Hawaiian non-consent, the Canadian government, astronomical bodies, and corporations are in persistent violations of multiple provisions of ICERD and UNDRIP. These include violations of Native Hawaiian rights to self-determination and the principle of ongoing free, prior, and informed consent; violations of collective land, spiritual, and cultural rights; and violations of civil and political rights.

Though construction of the TMT on Mauna Kea has been temporarily adjourned due to mass opposition, this construction may potentially restart at any time. CERD’s adoption of a decision under its Early Warning and Urgent Action Procedures is thus necessary to prevent further and irreparable harm to Native Hawaiians’ lands, practices, and sacred sites.

## 2. INTRODUCTION AND BACKGROUND

The petitioners respectfully request the adoption of a decision under the EWUAP procedures of the CERD in relation to the situation of the Indigenous peoples of Hawai‘i (Kanaka Maoli or Native Hawaiians). Specifically, the petitioners request relief from CERD with respect to actions of the Canadian government, Canadian astronomical bodies, and Canadian corporations involved in supporting the Thirty Meter Telescope—a multi-billion dollar international development project sited on Mauna Kea, the tallest mountain in the world from below sea level to summit, and a sacred site of immense religious, spiritual, and cultural importance for Native Hawaiians.

For context, in 2009, the TMT Observatory Corporation (later the TMT International Observatory or TIO) selected Mauna Kea, Hawai‘i, as the preferred site to build and operate the telescope. In 2014, the TIO incorporated as a non-profit LLC tasked with carrying out the construction and operation of the TMT project. The TIO is a massive international conglomerate of public and private research organizations, including the National Research Council Canada, with multi-billion dollar backing from major foundations and governments.<sup>1</sup>

The 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. If built, the TMT would be the second-largest telescope in the world. Since its proposed construction on Mauna Kea, the TMT project has sparked immense and continuous opposition, court cases, blockades, and demonstrations, particularly from Native Hawaiians.<sup>2</sup>

### A) Procedural history of the TMT project at CERD

This EWUAP request is related to the same TMT project and underlying factual matrix as set out in the 22 March 2019 EWUAP request submitted to CERD by Cultural Survival,<sup>3</sup> in respect

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<sup>1</sup> The members of the TIO are: the National Research Council Canada (NRC), the US Association of Universities for Research in Astronomy (AURA), the Department of Science and Technology India (DST), the National Astronomical Observatories of the Chinese Academy of Sciences (NAOC), the National Institutes of Nature Sciences (NINS) & National Astronomical Observatory of Japan (NAOJ), the California Institute of Technology (Caltech), and the University of California system (UC). The TMT project has also been provided \$200 million in funding from the Gordon and Betty Moore Foundation, which serves as a TIO “Observer”, and is in the midst of a grant process with the US National Science Foundation (NSF) for nearly \$1 billion in additional funding for the project.

<sup>2</sup> Bianca Isaki, Shelley Muneoka, and Kuulei Higashi Kanahale, “Kū Kia‘i Mauna: Historical and Ongoing Resistance to Industrial Astronomy Development on Mauna Kea, Hawai‘i” (15 November 2019), The National Academies of Sciences, Engineering, and Medicine Astro2020, online: [https://www.academia.edu/82088850/K%C5%AB\\_Kiai\\_Mauna\\_Historical\\_and\\_Ongoing\\_Resistance\\_to\\_Industrial\\_Astronomy\\_Development\\_on\\_Mauna\\_Kea\\_Hawaii](https://www.academia.edu/82088850/K%C5%AB_Kiai_Mauna_Historical_and_Ongoing_Resistance_to_Industrial_Astronomy_Development_on_Mauna_Kea_Hawaii); Cultural Survival, “Request for Early Warning Measures and Urgent Action Procedures to the United Nations Committee on the Elimination of Racial Discrimination” (22 March 2019), online: [https://www.culturalsurvival.org/sites/default/files/EWUA\\_Hawaii%27i\\_2019.pdf](https://www.culturalsurvival.org/sites/default/files/EWUA_Hawaii%27i_2019.pdf) at 3-7 [Cultural Survival CERD Submissions].

<sup>3</sup> *Ibid.*



to the international human rights obligations of the United States of America in the TMT project, and the subsequent 10 May 2019 letter issued by CERD to the United States.<sup>4</sup>

The March 2019 EWUAP request set out details regarding, *inter alia*: the history of US imperialism in Hawai‘i and systematic efforts to forcibly assimilate and obliterate Native Hawaiians as distinct peoples,<sup>5</sup> the recent history of rights violations on Mauna Kea,<sup>6</sup> the lack of free, prior, and informed consent of Native Hawaiians for the TMT project,<sup>7</sup> and the discriminatory infringements of Native Hawaiians’ rights to peaceful assembly, freedom of association, and religious, cultural and land rights due to TMT project-related state repression.<sup>8</sup> The petitioners respectfully refer CERD to review the 2019 EWUAP and the subsequent update letter submitted in July 2019 for further particulars on the background facts,<sup>9</sup> including the decade-long legal and administrative procedural history of the TMT project through US domestic courts and governmental bodies.

With respect to CERD, the March 2019 EWUAP request asserted that, through the TMT project, the US violated the following articles of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD):

- Arts 2(1)(a)-(d) [obligations to pursue policies of eliminating racial discrimination including amending, rescinding or nullifying laws and regulations that have the effect of creating or perpetuating racial discrimination];
- Art 2(2) [obligations to take special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them for equal enjoyment of human rights];
- Art 5(a) [non-discriminatory rights to equal treatment before tribunals and all other organs administering justice];
- Arts 5(d)(vii)-(ix) [non-discriminatory rights to freedom of thought, conscience and religion; opinion and expression; peaceful assembly and association];
- Art 5(e)(vi) [non-discriminatory right to equal participation in cultural activities]; and
- Art 6 [effective protection and remedies for violations of these rights].<sup>10</sup>

On 10 May 2019, CERD Chair Nouredine Amir issued an urgent action letter to the US, noting that existing telescopes on Mauna Kea “have not received the support of Native

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<sup>4</sup> UNCERD, 98<sup>th</sup> Sess, CERD/EWUAP/98<sup>th</sup> session/USA (Mauna Kea Mountain)/JP/ks (10 May 2019), online: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FALE%2FUSA%2F8932&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCERD%2FALE%2FUSA%2F8932&Lang=en) [CERD letter to US].

<sup>5</sup> Cultural Survival CERD Submissions, *supra* note 2 at 1-2.

<sup>6</sup> *Ibid* at 3-7.

<sup>7</sup> *Ibid* at 10-11.

<sup>8</sup> *Ibid* at 11-14.

<sup>9</sup> Cultural Survival, “Update to Early Warning Urgent Action Submission Regarding Native Hawaiians and the Thirty Meter Telescope” (July 2019), online:

<https://www.culturalsurvival.org/sites/default/files/Update%20to%20Early%20Warning%20Urgent%20Action%20Submission.pdf> [Cultural Survival CERD update].

<sup>10</sup> *Ibid* at 3.



Hawaiians who perceive these developments as a direct threat to their ancestral lands as well as their cultural and religious practices” and expressing concern around “the failure to seek free, prior and informed consent of indigenous peoples, regarding their ancestral lands and the Mauna Kea Mountain.”<sup>11</sup> CERD stated that the allegations, if verified, “would amount to the failure of ensuring that indigenous peoples can exercise their rights to practise and revitalize their cultural traditions and customs” and a “breach of the State party duty to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.”<sup>12</sup>

Pursuant to this, CERD requested that the US provide information on steps taken to (1) ensure the right to free, prior, and informed consent on or near Native Hawaiian ancestral lands and territories, (2) consider suspension of the TMT project, (3) concrete measures to protect sacred sites including reviewing emergency rules that undermine rights to peaceful assembly and religious freedoms.<sup>13</sup> The petitioners could not find evidence of US reply to CERD’s requests.

## **B) Background on Canada’s role in the TMT project**

The Association of Canadian Universities for Research in Astronomy (ACURA) is a direct founding partner of the TMT Project. Aside from US and Canadian entities, scientific authorities from Japan, India, and China are also founding partners. Canada and the US have been studying the feasibility of building extremely large optical telescopes since the early 2000s.<sup>14</sup>

In 2010, the Canadian Astronomical Society (CASCA)’s 10-year Long Range Plan for Astronomy and Astrophysics—a document which heavily influences government funding decisions in astronomy—identified the TMT project as its top investment priority.<sup>15</sup> On 26 July 2013, all TMT partners signed the “TMT Master Agreement” which defined project goals, established a governance structure, and defined member party rights, obligations and benefits.<sup>16</sup>

On 6 April 2015, the Canadian federal government committed to directly funding the TMT project for C\$243.5 million over a 10-year period in addition to the C\$30 million previously committed through two Canadian state agencies: the National Research Council (NRC) and the Canada Foundation for Innovation (CFI).<sup>17</sup> As part of the TMT project, the Canadian government

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<sup>11</sup> CERD Letter to US, *supra* note 4 at 1.

<sup>12</sup> *Ibid* at 1-2.

<sup>13</sup> *Ibid* at 2.

<sup>14</sup> Sue Hodgson, “Can We Talk: Publisher Sue Hodgson talks with TMT Engineering Group Leader Scott Roberts” (30 October 2014), Seaside Magazine, online:

<https://seasidemagazine.ca/can-talk-publisher-sue-hodgson-talks-tmt-engineering-group-leader-scott-roberts/>.

<sup>15</sup> Canadian Astronomical Society, “Unveiling the Cosmos A Vision for Canadian Astronomy: Report of the Long Range Plan 2010 Panel” (2011), online:

[https://casca.ca/wp-content/uploads/2012/12/11093\\_AstronomyLRP\\_V16web.pdf](https://casca.ca/wp-content/uploads/2012/12/11093_AstronomyLRP_V16web.pdf) at 51-55.

<sup>16</sup> TMT International Observatory, “Scientific Authorities Sign the TMT Master Agreement” (26 July 2013), online:

<https://www.tmt.org/news/tmt20130726>.

<sup>17</sup> Government of Canada, “Thirty Meter Telescope: Background” (6 April 2015), online:

<https://www.canada.ca/en/news/archive/2015/04/thirty-meter-telescope.html>.

works with “dozens of Canadian businesses” to “develop advanced industrial capabilities and products transferable to future applications in the health, defence and telecommunications sectors”.<sup>18</sup> Thus, Canada continues to play an essential role in the TMT project through direct funding, state research agencies, professional and academic astronomical associations, and private Canadian corporations.

### **C) Ongoing rights violations at TMT since 22 March 2019**

The March 2019 EWUAP request was issued in the midst of an acute escalation of tensions between Native Hawaiians, supporters of the TMT project, and the Hawai‘i state government. On 30 October 2018, the Supreme Court of Hawai‘i ruled in favour of allowing a Conservation District Use Permit for the TMT, allowing for construction to proceed (scheduled to start mid-July 2019).<sup>19</sup> On 15 July 2019, land defenders began a blockade of the access road to the mountain, citing environmental and spiritual concerns, alongside lack of free, prior, and informed consent. On 17 July 2019, Governor of Hawai‘i David Ige announced a state of emergency, giving police greater powers to make arrests of demonstrators and infringing on the rights to peaceful protest, freedom of assembly, and expression.<sup>20</sup> That day, militarized riot police descended upon the blockade site with the threat of chemical dispersants and a Long Range Acoustic Device (LRAD)—a military grade sonic weapon used to disperse crowds. Thirty-eight kūpuna and their kāko‘o, or Native Hawaiian elders and their caregivers, were arrested during that action.<sup>21</sup> The emergency law and associated arrests further galvanized public support for land defenders and sparked a long-term blockade and protest camp called Pu‘uhonua o Pu‘uhuluhulu to halt further construction efforts.

On 26 July 2019, Amnesty International sent a letter to Governor Ige expressing concern over breaches of Indigenous rights and civil and political rights.<sup>22</sup> On 14 September 2019, Tarcila Rivera Zea, a member of the UN Permanent Forum on Indigenous Issues, issued a letter to Governor Ige asserting that the TMT development “goes against the territorial, cultural and spiritual rights of the indigenous peoples of Hawaii”.<sup>23</sup> Zea specifically cited violations of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) article 12 on preserving the religious

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<sup>18</sup> *Ibid.*

<sup>19</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), online: <https://law.justia.com/cases/hawaii/supreme-court/2018/scot-17-0000777.html>.

<sup>20</sup> Kevin Dayton, “Gov. David Ige issues emergency proclamation over ongoing TMT protests atop Mauna Kea” (17 July 2019), Honolulu Star Advertiser, online: <https://www.staradvertiser.com/2019/07/17/breaking-news/thirty-meter-telescope-protesters-brace-for-arrests-at-mauna-kea/>.

<sup>21</sup> Frances Nguyen, “The pandemic hasn’t stopped Native Hawaiians’ fight to protect Maunakea” (7 August 2020), Vox, online: <https://www.vox.com/2020/8/7/21354619/mauna-kea-tmt-telescope-native-hawaiians>.

<sup>22</sup> Margaret Huang, *Letter to The Honorable David Y. Ige* (26 July 2019), Amnesty International USA, online: <https://www.amnestyusa.org/wp-content/uploads/2019/07/Letter-to-Governor-Ige-July-26.pdf>.

<sup>23</sup> Big Island Video News, “United Nations Indigenous Issues Expert Pens Letter To Governor About Mauna Kea” (17 September 2019), online: <https://www.bigislandvideonews.com/2019/09/17/united-nations-indigenous-issues-expert-pens-public-letter-to-governor-about-mauna-kea/>.

and cultural connection of Indigenous peoples to Mauna Kea as well as article 26's right "to own, use, develop and control" their traditional lands.<sup>24</sup> By November 2019, the State of Hawai'i and local counties had spent more than \$11 million on law enforcement to facilitate the construction of TMT.<sup>25</sup>

On 19 December 2019, in the face of continued resistance, Governor Ige announced that law enforcement would be pulled off Mauna Kea and in late December 2019, a temporary agreement was reached between kia'i (protectors) and the government that the access road would be cleared under the assurances that construction would not restart.<sup>26</sup> March 2020 marked the closure of Pu'uuhonua o Pu'uuhuluhulu in the face of the burgeoning COVID-19 pandemic.<sup>27</sup> Native Hawaiians have continued to voice their opposition and non-consent to TMT in myriad ways, yet the project continues on as the TIO awaits an opportune time to restart construction.

### **3. CANADA'S OBLIGATIONS UNDER ICERD AND UNDRIP**

#### **A) Canada has obligations to respect, protect, and fulfill human rights in other jurisdictions in which it is operating**

Like all States Parties to international human rights treaties, Canada has obligations to respect, protect, and fulfill human rights in other jurisdictions in which it is operating, not merely within its own political borders. The *Maastricht Principles* further clarify the extraterritorial human rights obligations of states under international law "relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory".<sup>28</sup> These human rights obligations apply even when the State is acting jointly with other States or entities<sup>29</sup> and as a State remains responsible for its own conduct when a member of an international organization<sup>30</sup>—as is the case for Canada as a member of the TIO conglomerate.

The *Maastricht Principles* state that attribution of State responsibility to non-State actors applies where they are "acting on the instructions or under the direction or control of the State".<sup>31</sup> Additionally, States are obligated to adopt and enforce measures to protect human rights "where the

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<sup>24</sup> *Ibid.*

<sup>25</sup> Kevin Dayton, "TMT law enforcement costs jump to \$11M, almost half spent by Hawaii County" (15 Nov 2019), Honolulu Star Advertiser, online:

<https://www.staradvertiser.com/2019/11/05/hawaii-news/hawaii-county-costs-for-protests-approach-5m/>

<sup>26</sup> Hawaii News Now, "In major deal, TMT protesters agree to temporarily clear Mauna Kea Access Road" (26 December 2019), online:

<https://www.hawaiinewsnow.com/2019/12/26/tmt-protesters-move-kupuna-tent-thats-blocking-road-mauna-kea-summit/>

<sup>27</sup> Pu'uuhonua O Pu'uuhuluhulu, "For the safety of our kupuna and camp kia'i" (14 March 2020), online: <https://puuhuluhulu.com/>.

<sup>28</sup> *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights* (2013), online:

[https://www.etoconsortium.org/wp-content/uploads/2023/01/EN\\_MaastrichtPrinciplesETOs.pdf?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](https://www.etoconsortium.org/wp-content/uploads/2023/01/EN_MaastrichtPrinciplesETOs.pdf?tx_drblob_pi1%5BdownloadUid%5D=23) at s 8(a) [*Maastricht Principles*].

<sup>29</sup> *Ibid* at s 11.

<sup>30</sup> *Ibid* at s 15.

<sup>31</sup> *Ibid* at s 12(a).

corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned”.<sup>32</sup> Finally, “States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially” where that risk is reasonably foreseeable.<sup>33</sup>

Notably, these principles align with CERD’s own Concluding Observations for Canada in 2017 in respect to the Canadian state’s obligations for the human rights violations of Canadian corporations operating abroad as well as “environmentally destructive decisions for resource development which affect [Indigenous] lives and territories” that “continue to be undertaken without the free, prior and informed consent of the indigenous peoples.”<sup>34</sup>

### **B) Role of Canada as a direct party in the TMT project**

Canada as a State party to ICERD has distinct obligations as a direct party in the TMT project through its executive decisions to fund the project for C\$243.5 million over a 10-year period—continued funding which will be up for renewal consideration in 2024. The National Research Council (NRC), on behalf of Canada, provides both financial and in-kind contributions to TMT.<sup>35</sup> As noted earlier, the NRC is one of the parties subject to the TMT Master Agreement.

The NRC is also directly involved in development and construction of TMT through its NRC Herzberg Astronomy and Astrophysics Research Centre (“Herzberg Centre”) in Victoria, British Columbia. The Herzberg Centre was assigned approximately \$50 million from the Canadian government to develop a Narrow-Field Infrared Adaptive Optics System (NFIRAOS) for the telescope.<sup>36</sup> The Herzberg Centre “leads Canada’s participation in TMT” and the Centre’s Director General, Luc Simard, is also a standing Board Member of the TIO, evidencing the direct influence of Canadian state agencies in the project.<sup>37</sup>

### **C) Role of Canadian astronomical bodies in the TMT project**

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<sup>32</sup> *Ibid* at s 25(c).

<sup>33</sup> *Ibid* at s 13.

<sup>34</sup> UNCERD, *Concluding observations on the combined 21st to 23rd periodic reports of Canada : Committee on the Elimination of Racial Discrimination* 93d Sess, CERD/C/CAN/CO21-23 (13 September 2017), online: <https://digitallibrary.un.org/record/1311173?ln=en> at para 19(a).

<sup>35</sup> National Research Council Canada, “Details on transfer payment programs of \$5 million or more” (11 April 2019), online: <https://nrc.canada.ca/en/corporate/planning-reporting/details-transfer-payment-programs-5-million-more>.

<sup>36</sup> Mark Henderson, “NRC to play central role in Canada’s \$243.5-million commitment to Thirty Meter Telescope” (16 April 2015), Research Money Inc, online: <https://researchmoneyinc.com/article/nrc-to-play-central-role-in-canadas-243-5-million-commitment-to-thirty-meter-telescope-2/>.

<sup>37</sup> National Research Council Canada, “Evaluation of the Herzberg Astronomy and Astrophysics Research Centre” (29 November 2021), online: <https://nrc.canada.ca/en/corporate/planning-reporting/evaluation-herzberg-astronomy-astrophysics-research-centre>.

Canadian astronomical societies also have a very important role in the TMT project, with two in leadership roles. The first is the Canadian Astronomical Society (CASCA), which is the primary society of *professional* astronomers in Canada.<sup>38</sup> The second is the Association of Canadian Universities for Research in Astronomy (ACURA), which is an *academic* astronomical society of primarily publicly-funded universities, which serves as a liaison between member universities and observatories around the world.<sup>39</sup>

With respect to the TMT project, the two astronomical societies created a joint committee in 2016 called the CASCA/ACURA TMT Advisory Committee (CATAC) to coordinate Canadian governance of the TMT project. Alongside ACURA and CASCA appointed members, CATAC includes two ex-officio members from the NRC.<sup>40</sup> CASCA, in close collaboration with other Canadian astronomical bodies, prepares 10-year “Long-Range Plans” (LRP) that delineate strategy and funding priorities which heavily influence Canadian government decisions, including on the TMT. The most recent report is the LRP2020, which gave the TMT project at Mauna Kea the *highest priority* in terms of large (>C\$30M) investments in ground-based facilities for near-term projects.<sup>41</sup> Thus, the internal decisions and policies of Canadian astronomical bodies such as ACURA and CASCA have direct and outsized influence on the direction of Canadian government policy on TMT and astronomical investments broadly.

#### **D) Role of Canadian corporations in the TMT project**

In addition, Canadian for-profit corporations are directly involved in key aspects of the TMT project. Most prominently, Dynamic Structures, a manufacturing and engineering firm headquartered in British Columbia, was reportedly granted the bulk of the funding issued by the Canadian government (nearly C\$200 million) for the TMT’s massive domed enclosure.<sup>42</sup> The enclosure project was developed as a Canadian in-kind contribution to the TMT through a contract between Dynamic Structures and the Canadian Commercial Corporation (a Canadian government procurement agency) on behalf of the NRC.<sup>43</sup>

Another Canadian corporation working on the TMT project is Montreal-based ABB Canada, whose Space and Defense Systems section is the main industrial sub-contractor for optical systems

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<sup>38</sup> Canadian Astronomical Society, “Mission Statement” (last retrieved 22 June 2023), online: [https://casca.ca/?page\\_id=51](https://casca.ca/?page_id=51).

<sup>39</sup> Association of Canadian Universities for Research in Astronomy, “About” (last retrieved 22 June 2023), online: <https://www.astro-acura.ca/en/about>.

<sup>40</sup> CATAC, “CATAC report to CASCA Board” (5 June 2023), online: <https://casca.ca/wp-content/uploads/2023/06/CATAC-report-to-CASCA-May-2023.pdf> at 3.

<sup>41</sup> Canadian Astronomical Society, “Discovery at the Cosmic Frontier: Canadian Astronomy Long Range Plan 2020-2030” (2021), online: [https://casca.ca/wp-content/uploads/2021/04/20UOT001\\_CASCA\\_LRP\\_EN\\_vFA2.0.pdf](https://casca.ca/wp-content/uploads/2021/04/20UOT001_CASCA_LRP_EN_vFA2.0.pdf) at 56 [LRP2020].

<sup>42</sup> Henderson, *supra* note 36.

<sup>43</sup> TMT International Observatory, “TMT Telescope Enclosure Ready for Production” (23 April 2020), online: <https://www.tmt.org/news/461>.

associated with TMT.<sup>44</sup> Specifically, ABB Canada is responsible for critical Narrow Field InfraRed Adaptive Optics System (NFIRAOS) subsystems.<sup>45</sup>

#### 4. SUBSTANTIVE VIOLATIONS OF ICERD AND UNDRIP PROVISIONS

##### A) Relationship between ICERD and UNDRIP

Since the beginning of the Committee's work, CERD has consistently affirmed that discrimination against Indigenous peoples falls under the scope of ICERD. In particular, CERD's General Recommendation No. 23 (1997) notes that Indigenous peoples have lost, and continue to lose, much of "their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized."<sup>46</sup> General Recommendation No. 23 subsequently calls on ICERD States Parties to, *inter alia*: "recognize and respect indigenous distinct culture, history, language and way of life", ensure non-discrimination and equal protection of rights, ensure that "no decisions directly relating to their rights and interests are taken without their informed consent", and to:

[r]ecognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.<sup>47</sup>

In respect to UNDRIP, UN Treaty Bodies, including CERD, have increasingly used the Declaration as a highly important set of legal guidelines to interpret Indigenous rights and State obligations in existing human rights treaties.<sup>48</sup> The now unanimously unopposed support of UNDRIP by UN Member States indicates a global consensus that reinforces its weight as a universal human rights instrument. As a result, potential UNDRIP violations ought to be read alongside potential ICERD violations in a harmonious fashion.

This is taken a step further in the context of Canada, which in June 2021 passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, the purposes of which are to "affirm the Declaration as a universal international human rights instrument with application in Canadian law" and "provide a framework for the Government of Canada's implementation of the

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<sup>44</sup> LRP2020, *supra* note 41 at 42.

<sup>45</sup> Frederic Grandmont, "Working with/within an Optical System Integrator in Astronomy Projects" (15 December 2017), NTCO AGM, online: <https://www.uvic.ca/research/centres/arc/assets/docs/frederic-grandmont-ntco-agm-2017.pdf>.

<sup>46</sup> UNCERD, *General Recommendation No. 23: Indigenous Peoples*, 55th Sess, 18 August 1997 at para 3.

<sup>47</sup> *Ibid* at paras 4(a), (b), and (d).

<sup>48</sup> For recent examples, see *Yaku Pérez Guartambel v Ecuador*, CERD/C/106/D/61/2017, (26 July 2022) at para 4.5; *Anne Nourgam v Finland*, CERD/C/106/D/59/2016 (2 June 2022) at para 9.10-9.12; *Lars-Anders Ågren et al v Sweden*, CERD/C/102/D/54/2013 (18 December 2020) at para 1.5, 6.5; *Matson et al v Canada*, CEDAW/C/81/D/68/2014 (11 March 2022) at para 18.4; *Campo Agua'ẽ, of the Ava Guaraní People v Paraguay*, CCPR/C/132/D/2552/2015 (12 October 2021) at para 8.3, 8.6.



Declaration” [emphasis added].<sup>49</sup> In other words, the Act converts UNDRIP into a standalone source of substantive rights in Canadian domestic law. This understanding has influenced even CATAC internal policies. In November 2021, CATAC released a statement indicating that “[u]nless the TMT project has consent from the Native Hawaiians, Canada’s astronomical community cannot support its construction on Maunakea.”<sup>50</sup> Yet in spite of these developments, neither Canada nor CATAC have withdrawn their funding or support for TMT.

## **B) Violations of political self-determination, including misrepresenting consent**

The TMT project on Mauna Kea has proceeded for many years in the absence of free, prior, and informed consent from Native Hawaiians (Kānaka Maoli), in direct violation of their Indigenous rights to political self-determination. As CERD has previously stated in the context of Canada, the free, prior, and informed consent is not simply a duty to engage in a process of good faith dialogue with Indigenous peoples, it is “to ensure that no decisions directly relating to the rights or interests of indigenous peoples is taken without their informed consent.”<sup>51</sup> Of particular concern in this case is evidence that Canadian astronomical societies attempted to misrepresent Native Hawaiian consent for the TMT project to their membership in order to bolster support for continuing the project.

Native Hawaiians have over 50 years of history in protecting the sacred landscape of Mauna Kea from astronomy development, with varying degrees of success.<sup>52</sup> As mentioned earlier, international law requires that free, prior, and informed consent be given on an ongoing basis for any development on Indigenous peoples’ traditional territories. The initial 2011 building permit, which was issued to the University of Hawai‘i on behalf of TMT by the Hawai‘i Board of Land and Natural Resources, was issued without consent from Native Hawaiians and has been strenuously opposed, including through direct action, community testimony, blockades, and legal challenges.<sup>53</sup>

In terms of consent, TMT project supporters most frequently point to a July 2009 motion adopted by the Board of Trustees of the Office of Hawaiian Affairs (OHA) supporting the selection of Mauna Kea as the site for the TMT.<sup>54</sup> Putting aside the fact that entities and offices which now represent Native Hawaiians (such as OHA) do not amount to proper nation-to-nation relationships

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<sup>49</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14, online: <https://laws-lois.justice.gc.ca/eng/acts/U-2.2/FullText.html> at s 4.

<sup>50</sup> Kanaeokana, “COMMENDING CASCA’S DECISION NOT TO SUPPORT TMT WITHOUT NATIVE HAWAIIAN CONSENT” (last retrieved 24 June 2023), online: <https://kanaeokana.net/noconsent#:~:text=One%20of%20the%20TMT%20project's,support%20its%20construction%20on%20Maunakea.%E2%80%9D>.

<sup>51</sup> UNCERD, 102<sup>nd</sup> Sess, CERD/EWUAP/102<sup>nd</sup> session/2020/MJ/CS/ks (24 November 2020), online: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=Rs+1G+n2INOrKy0TJfbs8jlW58f99fvvMOKdft8DPczXcyM7jlRu0a1TnJSW7KeER/cSmxV3aWbBOuRRRvJlhw==](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=Rs+1G+n2INOrKy0TJfbs8jlW58f99fvvMOKdft8DPczXcyM7jlRu0a1TnJSW7KeER/cSmxV3aWbBOuRRRvJlhw==) [CERD Secwepemc and Wet’suwet’en Letter].

<sup>52</sup> Isaki, Muneoka, & Kanahale, *supra* note 2 at 2-9.

<sup>53</sup> *Ibid.*

<sup>54</sup> Letter from Chair of OHA Board of Trustees to the TMT Observatory Corporation (2 July 2009), online: <https://casca.ca/wp-content/uploads/2019/10/OHA-letter.pdf>.



vis-a-vis the US government, the OHA itself has since reversed course on TMT. Specifically, in 2015, the OHA Board of Trustees voted 6-1 to rescind its support for the TMT project, after sustained demonstrations, walkouts, and arrests of land defenders.<sup>55</sup>

Read together, the 2015 OHA withdrawal of support, the consistent opposition in community consultations, numerous legal challenges raised by Native Hawaiians and their allies, the thousands of Kānaka Maoli who have taken part in mass demonstrations and blockades, the dozens of arrests in 2015 and 2019, a 2019 Native Hawaiian survey indicating 88% opposition to TMT,<sup>56</sup> and a broader petition of nearly half a million people opposing TMT construction,<sup>57</sup> all indicate that the TMT project does not have ongoing free, prior, and informed consent from Native Hawaiians. Indeed, it is not the case that consent remains “unresolved” or “complex”, but rather that non-consent has clearly been communicated and established over many years.

In spite of this, there is evidence that Canadian astronomical societies have *knowingly* misrepresented the issue of Native Hawaiian consent to their constituencies. For example, in October 2019, CATAC claimed that the OHA supported the TMT project by making detailed reference to the 2009 OHA motion, which it characterized as “the key endorsement, the indications that consent from Native Hawaiians had been obtained.”<sup>58</sup> Simultaneously, CATAC’s report omitted OHA’s 2015 rescission of motion of support, instead closing up the discussion on consent and proceeding to the next section on “Giving back to the community”. CATAC and the LRP2020 Panel continued to misrepresent Native Hawaiian consent in this way until it was confronted by a 12 October 2020 letter from the OHA urging them to take note that the “OHA and its Board of Trustees no longer support the siting of TMT on Maunakea, having withdrawn its previous 2009 statement of support on April 30, 2015.”<sup>59</sup> The OHA also urged CATAC and the LRP2020 Panel to note that it “is presently in litigation with both the State and [the University of Hawai‘i] regarding their control and decades-long mismanagement of Maunakea.”<sup>60</sup>

In a stunning admission, CATAC confirmed in its December 2020 report that it was actually *aware* of OHA’s 2015 withdrawal of support for the TMT project, but did “not believe that its omission compromises the integrity of [the] report, which was limited in scope.”<sup>61</sup> Given that the TMT project rests on the free, prior, and informed consent of Native Hawaiians in their traditional

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<sup>55</sup> Wendy Osher, “OHA Rescinds Support of “TMT” at Mauna Kea” (30 April 2015), Maui Now, online: <https://mauinow.com/2015/04/30/oha-rescinds-support-of-tmt-at-mauna-kea/>.

<sup>56</sup> Ngoc T Phan, “Survey Science on Support for TMT” (2020), Native Hawaiian Survey, online: [https://www.nhsurvey.org/uploads/1/0/2/7/10271693/phan\\_nhs\\_tmt\\_whitepaper.pdf](https://www.nhsurvey.org/uploads/1/0/2/7/10271693/phan_nhs_tmt_whitepaper.pdf).

<sup>57</sup> Mauna Kea Education and Awareness, “No Construction of the TMT Telescope on Mauna Kea” (14 July 2019), Change.org, online: <https://www.change.org/p/gordon-and-betty-moore-foundation-no-construction-of-the-tmt-telescope-on-mauna-kea>.

<sup>58</sup> CATAC, “Resources and information on TMT and Maunakea” (11 October 2019), online: <https://casca.ca/wp-content/uploads/2019/10/Resources-and-information-on-TMT-and-Maunakea-FINAL-3.pdf> at 6.

<sup>59</sup> Office of Hawaiian Affairs, “Re: Correcting the Office of Hawaiian Affairs’ Position on the Siting of the Thirty-Meter Telescope on Maunakea” (12 October 2020), online: <https://www.oha.org/wp-content/uploads/201012-CASCA-OHA-Letter-FINAL.pdf>.

<sup>60</sup> *Ibid* at 3.

<sup>61</sup> CATAC, “CATAC report to CASCA Board” (7 December 2020), online: <https://casca.ca/wp-content/uploads/2020/12/CATAC-report-to-CASCA-Dec-2020-1.pdf> at 1.

lands, it is altogether disingenuous for CATAC to claim that a clear rescission of support for TMT by OHA (which CATAC itself relied upon as “the key endorsement” that indicates consent) would not fundamentally compromise the integrity of the report.

Indeed, the following page of the CATAC report provides notice that both the Canadian LRP2020 and CATAC “reaffirm[s] our position that the decision about whether or not TMT is built in Hawaii should be entirely in the hands of the Hawaiian community, and that they are the only ones who should be responsible for defining what consent means within their own constituency. We hope that any Canadian guidelines will respect that.”<sup>62</sup> In 2021, CATAC itself issued a policy position that “[u]nless the TMT project has consent from Native Hawaiians, Canada’s astronomical community cannot support its construction on Maunakea.”<sup>63</sup> Yet despite this unambiguous internal policy statement, CATAC has to date not withdrawn its support for the TMT project, in spite of ongoing lack of free, prior, and informed consent.

By proceeding with the TMT project on one of the most sacred traditional sites of Native Hawaiians in the absence of free, prior, and informed consent (and indeed the clear communication of *non-consent*), the Canadian government, Canadian astronomical entities, and Canadian corporations are in violation of CERD General Recommendation No. 23, and the following ICERD and UNDRIP provisions:

- ICERD Art 2(1)(a), (b), requiring that Canada, including all public authorities and public institutions, not engage in, sponsor, defend, or support (in this case through funding and in-kind support) any act or practice of racial discrimination against persons, groups of persons or institutions;
- ICERD Art 4 and UNDRIP Art 8(2)(e), requiring Canada to condemn, prevent, and provide redress for propaganda (that is, misleading information used to promote a particularly political agenda) which attempts to justify or promote racial discrimination (in this case by misleading the public on consent where it clearly does not exist);
- ICERD General Recommendation No. 23 Para 4(d) and UNDRIP Arts 19 and 32(2) requiring Canada to take no decisions directly relating to Indigenous peoples’ rights and interests without their ongoing free, prior, and informed consent; and
- UNDRIP Arts 3, 18, and 32, requiring Canada to respect, protect, and fulfill the rights of Indigenous peoples to political self-determination, to meaningfully participate in decision-making through their procedures and Indigenous decision-making institutions, and to determine and develop priorities and strategies for development or use of their lands, territories, and resources.

### **C) Violations of collective land, spiritual, and cultural rights**

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<sup>62</sup> *Ibid* at 2.

<sup>63</sup> Michael Balogh, “Thirty Meter Telescope – status and update” (May 2022), online: <https://casca.ca/wp-content/uploads/2022/05/TMASCA-2022.pdf> at slide 2.

Canadian support for the TMT project on Mauna Kea in the face of non-consent represents a set of severe violations of collective land, spiritual, and cultural rights held by Native Hawaiians under international law. According to Native Hawaiians, Mauna Kea is the child of Wākea, the sky himself, and Papa, the earth herself, who birthed the islands, both from whom Kanaka Maoli descend. The sacred landscape of Mauna Kea is home to numerous trails, ahu (shrines), heiau (temples), cinder cone pu‘u (hills), burials, and is a center for Hawaiian navigational, astronomical and meteorological knowledge. Specifically, Mauna Kea’s summit is ringed with key sites of spiritual and religious ceremony, including making prayers and giving sacred offerings.<sup>64</sup>

The sacred summit remains a wao akua (area where elemental gods dwell, in contrast with the wao kanaka where humans dwell) of Wākea and other deities and the piko (umbilical cord) of the island-child, Hawai‘i, connecting the land to the heavens on the highest point in the Pacific. Mauna Kea is considered one of the most sacred sites of the Native Hawaiian people as home to numerous akua (elemental gods). As such, Mauna Kea has long been considered a place inappropriate for construction of edifices for human use and permanent residence. There is a fundamental interconnection and indivisibility in the relationship between the land of Mauna Kea and Native Hawaiian cultural heritage and identity, spiritual practices, and religious traditions.<sup>65</sup>

The physical landscape of Mauna Kea is inseparable from the cultural and spiritual significance it holds for Kānaka Maoli. Pu‘u (cinder cones), considered to be physical embodiments of gods, have been desecrated through detonation, grading, and excavation performed for astronomy development. The altered landscape and resulting telescopes impede important view-planes, including those used for celestial observations and alignments.

Previous environmental impact assessments have acknowledged these harms. For instance, a 2005 Federal Environmental Impact Statement prepared by NASA for the proposed Keck Outrigger project on Mauna Kea states, “[f]rom a cumulative perspective, the impact of past, present and reasonably foreseeable future activities on cultural resources on Mauna Kea is substantial and adverse.”<sup>66</sup> It goes on to say, “[i]n particular, projects proposed for previously undisturbed areas [such as TMT] have greater potential for altering topographical contours and disturbing archaeological sites and human burials.”<sup>67</sup> Gathering medicines on Mauna Kea is contingent on the belief that the area is clean and safe.<sup>68</sup> Similarly, burial practices require the belief that the area will not be disturbed in the future. The knowledge of past harms and the potential for future harms introduces doubt that can dissuade cultural practitioners from continuing to practice. Other harms

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<sup>64</sup> Isaki, Muneoka & Kanahele, *supra* note 2 at 1-2.

<sup>65</sup> *Ibid.*

<sup>66</sup> NASA, “Final Environmental Impact Statement for the Outrigger Telescopes Project” (2005), online: <https://dlnr.hawaii.gov/mk/files/2016/10/FEIS-Outrigger-Telescopes-VOL-1.pdf> at xix.

<sup>67</sup> *Ibid* at 4-73.

<sup>68</sup> Petition of Hui Wai Ola to the Hawai‘i Department of Health, In the Matter of the Application of the TMT International Observatory, LLC, Permit No. HIS000431, filed May 4, 2021, online: <https://www.dropbox.com/s/s8jagt5ofb9ao55/2021.05.04%20Hui%20Wai%20Ola%20DOH%20complaint%20fs.pdf?dl=0>.

have been more overt, like the destruction of ahu (shrines) in preparation for the building of the TMT in 2015 and again in 2019.<sup>69</sup>

Thus, by proceeding with the TMT project on Mauna Kea in the absence of free, prior, and informed consent, the Canadian government, astronomical societies, and corporations are in violation of the following provisions on collective land, spiritual, and cultural rights:

- ICERD Art 2(2), requiring that Canada, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the development and protection of Indigenous peoples for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms;
- ICERD Arts 5(d)(vii) and 5(e)(vi), requiring that Canada prohibit and eliminate racial discrimination in the right of Indigenous peoples to freedom of thought, conscience and religion and in equal participation in cultural activities;
- ICERD General Recommendation No. 23 Paras 4(a), (e) and UNDRIP Arts 8(1) and 2(a)-(b), requiring Canada to respect and promote preservation of Indigenous culture, history, language and way of life; ensuring that Indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs; and protecting their right to maintain, protect, and have access in privacy to religious and cultural sites.
- ICERD General Recommendation No. 23 Para 5 and UNDRIP Arts 25, 26, and 32, requiring Canada to recognize and protect the rights of Indigenous peoples to own, develop, control and use their traditional communal lands, territories and resources and the right to maintain and strengthen their distinctive spiritual relationship with the lands.

#### **D) Violations of civil and political rights**

As mentioned earlier, discriminatory violations of civil and political rights related to TMT development accelerated after the Governor of Hawai'i issued a "notice to proceed" with TMT construction on Mauna Kea on 20 June 2019 in spite of ongoing protests and continued lack of consent from Native Hawaiians. In the lead up to the beginning of construction on 15 July 2019, the government destroyed a number of religious structures, announced it would be closing the mountain to the general public, including Native Hawaiians, and that those obstructing access to the construction site would be arrested. Military personnel were brought in to escort construction equipment. These decisions led to the criminalization of land defenders on Mauna Kea and unjustified limitations on rights of assembly, peaceful protest, and freedom of expression.<sup>70</sup> This

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<sup>69</sup> Mileka Lincoln, "TMT protesters distraught after Mauna Kea altar bulldozed" (15 Sept 2015), Hawaii News Now, online: <https://www.hawaiinewsnow.com/story/30031692/tmt-protesters-distraught-after-mauna-kea-altar-bulldozed/>; "VIDEO: Kanuha Arrested On Mauna Kea As Police Dismantle Ahu" (20 Jun 2019), Big Island Video News, online: <https://www.bigislandvideonews.com/2019/06/20/video-kanuha-arrested-on-mauna-kea-as-police-dismantle-ahu/>

<sup>70</sup> Cultural Survival CERD update, *supra* note 9.

criminalization included the arrest of 38 kūpuna and their kāko‘o, or Native Hawaiian elders and their caregivers—some over 90 years old and in wheelchairs.<sup>71</sup>

Although the state of emergency was eventually lifted on 30 July 2019, Native Hawaiian land defenders were dragged through years-long and arduous criminal cases by state prosecutors. In the end, one of the kūpuna pled guilty, three others were found guilty, while the rest of the cases were withdrawn or dismissed by the court over procedural irregularities.<sup>72</sup>

In addition, Native Hawaiian land defenders continued to be targeted by the state for surveillance and harassment. For instance, the Attorney General of Hawai‘i issued three different subpoenas targeting Hawaiian Airlines, OHA, and the non-profit KAHEA to investigate each institution’s support of the kia‘i (protectors)—demanding everything from the names of people who had donated airline miles to bank records and ATM surveillance footage.<sup>73</sup> These abuses of power ultimately resulted in no legal disciplinary actions, but served to intimidate and create a chilling effect on donations and other support for the kia‘i.<sup>74</sup>

By continuing to support the TMT project in light of these ongoing violations of civil and political rights, the Canadian government, Canadian astronomical societies, and Canadian corporations are in violation of the following ICERD provisions:

- ICERD Arts 5(d)(vii)-(ix) requiring that Canada prohibit and eliminate racial discrimination and guarantee equal protection in the right of Indigenous peoples to freedom of thought, conscience and religion; freedom of opinion and expression; and freedom of peaceful assembly and association.

### **E) Failure to provide effective remedies, including legal compliance**

As detailed in this section on substantive rights violations, in the context of the TMT project on Mauna Kea, there are plethora of international, domestic, and internal legal and policy provisions that have been breached by Canada’s continued support for TMT in face of Indigenous non-consent. The issues in this case thus are not merely issues of substantive law, but also the dearth of effective

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<sup>71</sup> Frances Nguyen, “The pandemic hasn’t stopped Native Hawaiians’ fight to protect Maunakea” (7 August 2020), Vox, online: <https://www.vox.com/2020/8/7/21354619/mauna-kea-tmt-telescope-native-hawaiians>.

<sup>72</sup> Mahealani Richardson, “‘A great day’: Judge dismisses remaining cases involving kupuna arrested during TMT protests” (1 April 2022), Hawaii News Now, online: <https://www.hawaiinewsnow.com/2022/04/01/great-day-judge-dismisses-remaining-cases-involving-kupuna-arrested-at-op-mauna-kea/>.

<sup>73</sup> Dayton, Kevin, “Hawaii attorney general subpoenas Hawaiian Airlines for names of people who donated their miles to TMT protest” (5 October 2019), Star-Advertiser, online: <https://www.staradvertiser.com/2019/10/05/hawaii-news/attorney-general-subpoenas-hawaiian-airlines-for-names-of-donors-to-protests/>.

<sup>74</sup> Lisa Maruyama, “Hawaii AG Wrong To Subpoena Protest Group’s Records” (28 January 2020), Honolulu Civil Beat, online: <https://www.civilbeat.org/2020/01/hawaii-ag-wrong-to-subpoena-protest-groups-records/>; <https://www.acluhi.org/en/press-releases/aclu-hawaii-expresses-first-amendment-concerns-over-subpoenas-against-kahe-a>

mechanisms to provide for remedies, including comprehensive legal compliance and redress for harms caused by violations.

Articles 2(1)(c) and (d) of the ICERD obligates all States Parties to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists” and “prohibit and bring to an end, by all appropriate means [...] racial discrimination by any persons, group or organization”.

These obligations point to the need for the Canadian government, astronomical bodies, and corporations to comprehensively review and amend both their policies *and* practices to ensure legal compliance. However, since the TMT project is multilateral in nature, it follows that proper legal compliance must itself be multilateral. In the face of Native Hawaiian non-consent, *all* ICERD States Parties subject to the TMT Master Agreement (US, Canada, China, Japan, India) must review their policies and practices to ensure legal compliance. Further, given that the TMT Master Agreement provides for financial penalties if a party withdraws from the Agreement and can only be changed or dissolved with unanimous approval, States Parties ought to *collectively* revisit these provisions to comply with their legal obligations.<sup>75</sup>

In creating effective measures for review, compliance, and redress, Canada should be guided by international law and UNDRIP in respect to its interpretation of the principle of free, prior, and informed consent of Indigenous peoples. Specifically, Canada should follow specific CERD jurisprudence on consent, which was articulated in CERD’s 24 November 2020 letter to Canada in regards to violation of the rights of the Secwepemc and Wet’suwet’en:

The Committee regrets the State party interprets the free, prior and informed consent principle as well as the duty to consult as a duty to engage in a meaningful and good faith dialogue with indigenous peoples and to guarantee a process, but not a particular result. In this regard, the Committee would like to draw its attention on the Committee’s general recommendation No. 23 (1997) on the rights of indigenous peoples, in which it calls upon States parties to ensure that no decisions directly relating to the rights or interests of indigenous peoples is taken without their informed consent.<sup>76</sup>

Hence, Canada may not simply point to the *mere existence of a consultation process* and the participation of some Native Hawaiians within the process as a substitute for free, prior, and informed consent. Rather, consent is an inherent and indispensable part of the right of Indigenous peoples to collective political self-determination. This is particularly salient in the context of an ongoing TMT environmental assessment and consultation process by the US National Science Foundation to determine whether an additional US\$800 million will be granted to the project.<sup>77</sup>

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<sup>75</sup> Balogh, *supra* note 63 at slide 9.

<sup>76</sup> CERD Secwepemc and Wet’suwet’en Letter, *supra* note 51 at 1.

<sup>77</sup> ‘A’ali’i Dukelow, “Deadline to submit comment on proposed investment in TMT near” (16 September 2022), KITV Island News, online: [https://www.kitv.com/news/local/deadline-to-submit-comment-on-proposed-investment-in-tmt-near/article\\_d787f10c-362d-11ed-b0d3-936ea8853553.html](https://www.kitv.com/news/local/deadline-to-submit-comment-on-proposed-investment-in-tmt-near/article_d787f10c-362d-11ed-b0d3-936ea8853553.html).



When Indigenous non-consent has long been issued for a particular development, as we argue is the case with TMT on Mauna Kea, Canada must (at the very minimum) divest from the project in order to comply with both its international human rights obligations and domestic obligations under its recently passed *United Nations Declaration on the Rights of Indigenous Peoples Act*. For CATAC, divestment should also be required as a matter of legal compliance with its November 2021 policy on Native Hawaiian consent for TMT.

## **5. RELIEF REQUESTED**

In light of the latent risk of construction of the TMT project on Mauna Kea and the irreparable and deleterious effects that the construction is likely to have on Native Hawaiians, the petitioners respectfully request that the Committee consider Canada's role in the situation unfolding on Hawai'i Island under its early warning and urgent action procedures. In particular, the petitioners request that the Committee adopt the following remedies:

### **a) Further information**

- Request that the Government of Canada, corporations, and astronomical associations submit information to CERD under the urgent action and early warning procedures regarding the TMT project as it relates to the rights of Native Hawaiians, in particular:
  - A copy of the TMT Master Agreement, of which NRC Canada is a member;
  - Updated information on Canadian government TMT-related funding, including amounts, terms, recipients, and unused amounts;
  - Updated information on the work that the Canadian government and astronomical associations are doing to ensure that it is meeting their legal obligations under ICERD and UNDRIP with respect to the TMT project on Mauna Kea, including LRP recommended guiding principles of free, prior, and informed consent;
  - Updated information on the work of the NRC Herzberg Astronomy and Astrophysics Research Centre on TMT-related development, particularly work on the NFIRAOS system;
  - Updated information on the work of ABB Canada on TMT-related development, particularly work on the NFIRAOS system
  - Updated information on the work of Dynamic Structures on TMT-related development, particularly work on the TMT enclosure structure.

### **b) Recognitions of violations and rectifying actions**

- Issue a statement of concern regarding discriminatory treatment of Native Hawaiians and violations of their civil, political, and social, economic, and cultural rights relating to the TMT project on Mauna Kea;
- Issue a statement of concern regarding Canada's role in proceeding with the large-scale development of the TMT project without the free, prior, and informed consent of Native Hawaiians;



- Recommend that the Canadian government, astronomical associations, and corporations, consistent with the commitments that it has made under CERD and UNDRIP, recognize the denial of rights to Kanaka Maoli as a human rights issue and begin to take action to rectify the above described human rights abuses;
  - Recommend that, in light of Indigenous non-consent, the Canadian government, astronomical associations, and corporations (including Dynamic Structures and ABB Canada) immediately cease funding and fully divest support from the TMT project on Mauna Kea;
  - In line with the 2019 CERD EWUAP petition of Cultural Survival, request that other States Parties (US, Japan, China, and India) and international organizations and corporations sponsoring or supporting the TMT project also withdraw their support, including revisiting the TMT Master Agreement to allow for parties to withdraw from the TMT project without incurring financial penalty.
- c) Visitation and expert assistance for legal compliance
- In line with the 2019 CERD EWUAP petition of Cultural Survival, recommend that the UN Special Rapporteur on Indigenous Peoples and members of CERD communicate with all States Parties involved in the TMT Master Agreement (Canada, US, Japan, China, India) regarding this situation, and consider visiting Hawai'i Island and preparing a report on the situation based on their findings;
  - Recommend Canada seek technical advice from the Expert Mechanism on the Rights of Indigenous People to comprehensively review and amend the policies and practices of the Canadian government, astronomical associations, and corporations to ensure legal compliance with ICERD and UNDRIP in respect to the TMT project as well as all existing infrastructure and planned future development on Mauna Kea;
  - Recommend Canada seek technical advice from the Expert Mechanism on the Rights of Indigenous People in establishing, in consultation with Indigenous peoples, effective compliance mechanisms to respect, protect, and fulfill the obligation to obtain the free, prior and informed consent for all development, law and policy affecting Indigenous peoples both domestically and transnationally;
  - Recommend Canadian astronomical associations seek technical advice from the Expert Mechanism on the Rights of Indigenous People to address the systematic undermining of Indigenous rights to land and culture, and to assist with the creation of LRP recommended guiding principles of free, prior and informed consent in all developments affecting Indigenous peoples and lands. These principles should be applied beyond the site of Mauna Kea, including to the alternative TMT project location of Observatorio del Roque de los Muchachos in the Canary Islands.